

The role of the clerk in Magistrates' Courts

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Abstract

This thesis aims to reveal the very considerable extent of the power and influence of the clerk to the justices and court clerks in magistrates' courts, and to assess the nature of the balance achieved by clerks between the demands of the organisation of the courts which they run and their role as the court's lawyer with responsibility for upholding, inter alia, due process norms.

The first section of the thesis examines the role of the clerk in the courtroom. After assessing the extent to which the clerk's behaviour is constrained by legal rules, the relationship between clerk and magistrates is examined and the impact of the clerk on the proceedings of the court and the decisions of the magistrates are considered. It is argued that the clerk has a significant effect on the experience of all of those who come into contact with the criminal justice system and to this end the relationship between the clerk and unrepresented defendants, the clerk and the legal profession, the clerk and the police, and the clerk and probation officers and social workers is assessed.

The second part of the thesis deals with the role of the clerk outside the courtroom. The influence of the clerk to the justices on the attitudes of magistrates through training is considered, and the impact of the clerk on policy decisions for the court is assessed. The quasi-judicial powers of the clerk are examined and the question of whether there is scope for future extension of the clerk's role is addressed.

It is concluded that the role of the clerk is one of the most significant factors in determining the nature of summary justice, that

the nature of the clerk's role is ready for re-assessment and that this may be most appropriately achieved by extension of the legal role of the clerk. The clerk does play a real part in protecting due process rights, but in relation to the protection of unrepresented defendants the clerk cannot be as effective as an advocate, and as a result represents a liberal compromise of 'good enough' justice.

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INTRODUCTION

The existing literature on the clerk

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INTRODUCTION

"We know that magistrates deal with some 97 or 98 per cent of all the crime in this country. What is sometimes forgotten is that over 80 per cent of indictable offences are dealt with by those magistrates. I venture to think that they simply could not function without the help of the justices' clerks. The justices' clerk is in many ways the most important person in the administration of justice."

Lord Parker of Waddington¹

The above quotation is one of the rare instances of a recognition of the importance of the role played in the administration of justice by the clerk to the justices and her/his staff. As Lord Parker indicated, magistrates deal with the vast majority of criminal cases in this country, including a very large proportion of those cases which involve what are regarded as more serious offences. Even cases which are ultimately to be dealt with by the Crown Court are initially processed and sifted in the magistrates' courts by way of committal proceedings.

An illustration of the amount and nature of the work done in magistrates' courts is provided by one large city court which was observed on one Monday to deal (in one way or another) with three hundred and eleven charges and summonses. These cases included one hundred and ninety nine traffic cases, and one hundred and twelve other offences. There were thirty two cases of theft, ten cases of burglary, eight cases of criminal damage, ten drunks, three prostitutes, and one vagrant; there were two police constables allegedly assaulted, and two obstructed; one defendant was alleged to have criminally damaged a police car, and seven others to have criminally damaged other property. The court dealt with five cases of malicious wounding, two of possessing offensive weapons, and a

1. In the debate in the House of Lords on the Justices of the Peace Bill 1968. Hansard H. of L. Vol. 292, Col. 102.

total of eight cases of alleged obscene language, or threatening or insulting words or behaviour. There were over twenty four different types of criminal offence dealt with, excluding the traffic offences. Besides these matters a juvenile court heard four applications for care orders and two applications to discharge care orders.

The magistrates were the ones who took the decisions in all of these cases - they determined guilt or innocence, the appropriate sentence, bail or custody. However these magistrates, like their colleagues throughout the country are lay people. Qualified stipendiary magistrates are comparatively rare and are to be found in Central London and in a few large cities. The vast majority of magistrates have no legal qualification at all, and undergo very little training. Yet the body of legal and procedural rules which they must apply and with which they must comply is formidable. Lay magistrates need to be closely guided to ensure that their actions and decisions are within these rules, and this guidance is provided by the clerk to the justices and the court clerks at each court.

Each magistrates' court is served by a clerk who sits close to the magistrates, guides the proceedings of the court, advises the magistrates on law, evidence and procedural rules, and who may retire with the magistrates when they deliberate in private. This clerk is not part of the tribunal of fact, or, in theory, the tribunal of law. However the dependence of a lay bench on the clerk's expertise is very considerable indeed.

Most lay magistrates spend half a day, or a day, in court once a week or once a fortnight. They are, in a sense, regular visitors to a complex organisation which they play little part in running. It is the clerk to the justices and the clerk's staff, who control this

organisation and who ensure that the hundreds of cases scheduled to be dealt with each day are properly processed. The clerk must organise the lists so that cases are heard without unacceptable delay, and ensure that there are sufficient resources to process the cases which are to be heard on any one day. The clerk must organise enough magistrates to attend the court and ensure that they are given cases which they are qualified and able to deal with. The clerk must ensure that cases where security is important are put in the right courts, that short cases are identified and dealt with early so as to release the maximum number of people from court, that prosecutors and defence advocates are not needed in two courts at the same time. The considerable amount of paperwork which attends criminal prosecutions is dealt with by the clerk's staff - committal papers, driving licences, legal aid orders, witness statements, fine money and fees, documentary evidence et. al. must all be correctly processed. One large city court for instance (not the one described above) collected one million pounds in fines in 1980.² The way in which the court organisation is run profoundly affects all those who come into contact with it. The jobs of the police, the legal profession, the probation service, social workers and the experience of justice of defendants and witnesses are influenced by the policies, the efficiency, the sympathy of the court organisation.

What we have said so far applies only to the criminal jurisdiction of magistrates' courts. They also have a domestic jurisdiction, and they deal with liquor licensing and betting and gaming licences. Additionally their criminal work includes jurisdiction to deal with juveniles, in relation to whom there are

2. See the Annual Report for Bristol Magistrates' Court for 1980.

many special provisions and requirements. The clerk's role in relation to the court hearings which deal with domestic and juvenile matters is in some respects even more extensive than her/his role in relation to ordinary adult criminal jurisdiction.

Besides advising the magistrates and running the court organisation clerks to the justices are also responsible for training magistrates. It is clerks, for the most part, who teach magistrates their jobs, and by doing so influence the attitudes that those magistrates bring to their duties.

The clerk therefore runs the court organisation, trains the magistrates and guides and advises them whenever they sit. All of these things add up to a very considerable degree of influence, and not a little power. The role of the clerk is such a pervasive one, that accounts of magistrates' justice can scarcely be complete without taking account of the clerk.

However very little has in fact been written about the clerk, and in particular no extensive study has been done to show what powers the clerk wields as a result of her/his not inconsiderable role in running magistrates' courts. Also there has been very little written which helps to theorise the clerk's role, to explain the clerk's role as part of the criminal justice process.

It is the aim of this thesis to examine the extent of the clerk's power and influence in detail, to analyse the factors which impinge upon the way in which clerks exercise their power and indicate the possibilities for the future development of the job. (An outline of the job of justices' clerks and court clerks can be found at Appendix Seven.)

The existing literature on the clerk.

There has been, in recent years a considerable amount of

attention paid to magistrates' courts by academic researchers. Unfortunately, despite the numbers of studies which have been made, comparatively little attention has been paid to the role of the clerk. This is perhaps particularly strange, in that many of the studies were directed at the problems faced by the unrepresented defendant when appearing before the magistrates' court, and the results obtained emphasised the bewilderment, lack of comprehension and alienation experienced by such defendants. In the magistrates' courts it is, of course, the clerk who should be the main source of help and explanation for the unrepresented defendant. (The magistrates are another source of help, but they are by no means as effective as the clerk because they do not have legal expertise, and because they must also be careful not to 'descend into the arena' of an adversary struggle of which they are the judges). If many unrepresented defendants come away from courts not even having understood what happened to them, then the clerks in those courts cannot be doing their job properly. However despite this, few studies have commented on the role of the clerk and none has examined the clerk's role in detail. Some studies simply do not seem to have perceived the clerk's presence or its significance.

Pat Carlen's challenging and controversial work on magistrates' courts³ mentions the clerk only in passing. This is on the face of it surprising since her work emphasises both the problems of the defendant and the 'staging' of magistrates justice, and the clerk plays a key role in these things. The explanation for this omission lies in the fact that Carlen's work was undertaken in central London courts which are served largely by stipendiary magistrates. The role

3. Magistrates' Justice. Martin Robertson 1976.

of the clerk when sitting with a qualified and experienced lawyer is very different to the clerk's role when sitting with a bench of lay magistrates. There are only about 50-60 stipendiary magistrates in England and Wales serving very few courts. There are something like 15,000 lay magistrates who sit in most of the country's magistrates' courts. Also, in central London courts the police have a very high profile and they do 'stage manage' the court, controlling the list and the order of cases and the movement of persons about the court. But this is also an atypical arrangement. In very many magistrates' courts, listing, determining the order of cases, and the job of usher are in the hands of the clerk and civilian staff.

Susanne Dell's study of female offenders⁴ portrays very vividly the total lack of comprehension of many women about what had happened to them during their appearance before the magistrates, but does not point a finger at the person who should have been helping these women - the clerk of the court in which they appeared. The Justice Report on "Unrepresented defendants in Magistrates' Courts"⁵ shows an awareness of the clerk's role in relation to legal aid, and in relation to the defendant in court - it should have done since there was a Justices' Clerk and a lay magistrate on the Committee which prepared the report - but gives no systematic analysis of the role that the clerk plays in relation to those who are unrepresented. Michael King's work on bail decisions⁶ and on Duty Solicitor schemes⁷ again shows an awareness of the clerk's presence, but not of her/his

4. Silent in Court. Bell, 1971.

5. Stevens 1971.

6. 'Bail or Custody.' Cobden Trust, 1971.

7. 'Duty Solicitor Schemes, an assessment of their impact on magistrates' courts.' Cobden Trust, 1976.

significance or importance.

The works cited above are of course not an exhaustive listing of the many studies which have been done on magistrates' courts; they are simply some examples of the type of study where one might have expected that the significance of the clerk's role might have been more fully explored than it was.

However the role of the clerk has not been completely ignored by academic researchers. Michael King examined the assistance offered to unrepresented defendants by clerks and magistrates in a study published in the journal "Rights"⁸. This study was conducted by law students who did not reveal their presence to the courts which they observed. The study showed that out of 410 unrepresented defendants, only 100 were given help by the clerk. The report of the research was however, a very brief one, and the analysis of the deficiencies of the clerk in relation to unrepresented defendants was not significantly developed.

Elizabeth Burney's perspicacious and illuminating book, 'J.P. - Magistrates, Court and Community'⁹, however does develop and explore the role of the clerk. In the one chapter of her work which she devotes to the clerk she identifies many of the areas where the clerk is influential¹⁰. Perhaps it is interesting that it was a journalist who first devoted more than a passing mention to the activities of the clerk in magistrates' courts.

The only extensive work on the role of the clerk is an

8. 'Magistrates' Courts Surveyed'. Rights. Vol. 1, No.2

9. Hutchinson. 1979

10. See Chapter 9.

unpublished Ph.D. thesis by Penny Darbyshire¹¹. This is really the first study from the academic community which is a serious recognition of the importance of the clerk in magistrates' courts.

Darbyshire's work examines the history of the clerk's role, the function of the clerk in the present day court system, and the possible future of the job. This thesis is a valuable introduction to research on the role of the clerk and contains a fund of useful information which had not previously been assembled. However it provides only a beginning to the research which is needed. It is basically descriptive of the activities of the clerk, and does not attempt systematically to analyse the power which is exercised by the clerk, or to theorise about the nature of his role.

Theoretical Perspectives.

One attempt however has already been made in the existing literature to theorise the role of the clerk. Although this was an analysis made almost in passing, it provides a valuable starting point for an explanation of the clerk's role.

Bottoms and McClean in 'Defendants in the Criminal Process'¹² examine the defendant's perspective on the criminal court system, looking in particular at five key areas where the defendant has to make a decision - as to plea, venue, representation, bail and appeal. The results of the research emphasise the bewilderment, lack of understanding and feeling of helplessness and intimidation experienced by many defendants. The impact which the clerk may have on the defendant's ability to understand what is happening and make effective

11. Penny Darbyshire. 'The role of the justices' clerk and the court clerk.' PhD. thesis. Institute of Judicial Administration, Birmingham. 1978

12. R. and K. Paul. 1976.

decisions about plea, venue etc. is touched upon in the research, although not systematically examined. However when Bottoms and McClean come to discuss their results, the role of the clerk is assessed.

In order to explain their results Bottoms and McClean began by examining Packer's analysis of the criminal process which describes the process as a struggle from start to finish for the defendant¹³. However when Bottoms and McClean analysed the reactions of their defendants to the criminal process they showed that in fact very few defendants struggled to assert or claim their rights within the system. Defendant's reactions to the situation were very often those of helplessness, passivity, confusion or resignation. Bottoms and McClean therefore sought to discover why this should be so.

Packer's analysis developed two ideal typical concepts of the criminal process - the due process model and the crime control model. The due process model stresses the possibility of errors in the criminal process. Because of the possibility of error an obstacle course must be erected of formal adjudicative, adversary processes designed to filter out these errors. Because of the potency of the criminal process in subjecting the individual to the coercive power of the state it must be subject to controls which place the accused in a position of equality in the adversary process. Those operating according to a due process model would stress adherence to rules designed to give the defendant a formal equality with the state as represented by the prosecution in a criminal case. Packer makes it clear that, whilst no-one would be likely to fit all the

13. Herbert L. Packer. 'The Limits of the Criminal Sanction.' Stanford University Press 1969.

characteristics of one model (and none of the others) perhaps the best example of someone operating a due process model would be a defending lawyer.

Packer's second model was the crime control model. This model stresses the importance of the repression of criminal conduct, and hence the maintenance of social order. In this model there is a premium on efficiency, speed and finality. One of the tenets of someone operating a crime control model would be that the system should not be cluttered up with time wasting ritual - the establishing of a plea of guilty before the defendant gets to the ritual of court proceedings is the preferred course. The criminal process for the crime controller should ideally be like an assembly line of routine stereotyped procedures, those who are innocent being effectively screened out, those who are guilty being passed quickly through the remaining stages of the process. Possibly the best example of someone operating according to a crime control model would be the police.

Packer believed that the criminal process in a large number of cases approximated fairly closely to the dictates of the crime control model - the criminal process tending to be far more administrative and managerial than adversary and judicial. However he felt that the criminal process was moving towards a due process model, - that the dominant trend was towards "judicialising" the criminal process and enhancing the effectiveness of the defendant in the process, and defendants were struggling to assert these rights.

The system which Bottoms and McClean saw in operation in their study was however very different from the one described by Packer. They felt that in order to understand the system that they saw in operation, a third model of the process had to be introduced. This third model, the values of which they found everywhere in the actual

operation of the criminal process, and even in the formal rules of the English court, they called the Liberal Bureaucratic model. The Liberal Bureaucrat does not see crime control as the most important function to be performed by the criminal process. He holds rather that the protection of individual liberty and the need for justice to be done and be seen to be done must ultimately override the importance of the repression of criminal conduct. The Liberal Bureaucrat accords with the due process advocate in agreeing that formal adjudicative processes are very important - that it is better that 10 guilty men go free than that 1 innocent man be convicted. But the Liberal Bureaucratic model differs from the Due Process model in that the Due Process model emphasises quality checks at all stages of the process to ensure that the outcome is the right one. The Liberal Bureaucrat, however, is a practical man who also realises that things have got to be done, that the system has to operate as efficiently as possible. Therefore the protections so dear to the Due Processer have a limit - the system must not become so bogged down that it does not operate. So it is right that the protections afforded to the defendant should have a limit. Otherwise the system of criminal justice, with all its value to the community in the form of liberal and humane crime control would collapse. It is also right that there should be sanctions to deter those who might use their due process rights frivolously or "try it on". Time wasting in an administration run at state expense should not be tolerated.

This model of the criminal justice process, Bottoms and McClean argue, is the one typically held by humane and enlightened clerks to the justices - as well as by Crown Court administrators and many others.

Bottoms and McClean see Packer's crime control model as dominant before the defendant comes to court, but when the defendant comes into the court setting, the values of the Liberal Bureaucrat become powerful.

They illustrate this point by referring to their research results which show that there are pressures on defendants to opt for choices which are administratively simpler for the court. They show that there are pressures on the defendant to chose summary trial, to plead guilty, and not to appeal. Even the typical due process advocate - the defence lawyer - is constrained by the fact that he is working in a Liberal Bureaucrat dominated system. So he may for instance advise his client to plead guilty because the system offers advantages to guilty pleaders. The values of the Liberal Bureaucrat thus dominate the court system.

Bottoms and McClean also argue that despite its superficially similar value system to the Due Process model, the Liberal Bureaucratic model basically supports the crime control model, because of its emphasis on the plea of guilty.

The clerk to the justices would, according to Bottoms and McClean, be a typical Liberal Bureaucrat.

Many of those who have experience of magistrates' courts would find that Bottoms and McClean's description of the Liberal Bureaucrat strikes many chords with them. Their argument that the Liberal Bureaucrat's values are dominant in the court setting also accords with experience and the results of the present research. It may thus be a useful tool to use to explain the role of the clerk.

However Bottoms and McClean's analysis of the model in operation is not developed in detail, and contains some problems. It needs some development if we are to be able to use it as an adequate and

appropriate tool to analyse the activities of clerks and others.

Bottoms and McClean's study is one which emphasises the situation and problems of defendants in the criminal process. It is therefore perhaps not surprising that their examination of the Liberal Bureaucratic model in operation emphasises the bureaucratic aspects of the model, and the problems for the defendant created thereby. There is however in their study, very little development of the way in which the Liberal aspects of the model manifest themselves in practice. Also Bottoms and McClean examine the 'bureaucratic' elements of the model from the point of view of the pressures on the defendant - pressures to opt for summary trial because of fear of delay, heavier sentence or costs, pressures to plead guilty because of fear of delay and heavier sentence, pressures not to appeal because of fear of lost waiting time.

If however we are to use the model to explain how the clerk as a Liberal Bureaucrat behaves, we need to know what makes a clerk favour the 'bureaucratic' aspects of her/his role, and what makes the clerk favour 'Liberal' aspects of her/his role. Bottoms and McClean do mention the Liberal aspects of the clerk's role when they relate that clerks can be observed from time to time to persuade defendants that they must plead not guilty. Bottoms and McClean say that this is an example of the Liberal aspects of the clerk's role becoming dominant. If the Liberal Bureaucrat model represents a compromise between two elements, when will the liberal due process linked aspects of the clerk predominate, and when will the bureaucratic, crime control linked aspects of administrative efficiency predominate?

The pressures on the Liberal Bureaucrat which push her/him in the direction of bureaucratic measures are the pressures of organisational

maintenance. Failure to take organisational maintenance into account was the subject of Abraham Blumberg's criticism of Packer's crime control and due process models.¹⁴ Bottoms and McClean do take organisational maintenance into account, in that they identify the demands of speedy and efficient administration as one of the most important factors of the criminal justice system. However they do not develop this in any detail because of their focus on the defendant and the defendant's key decisions. But if we are to develop the model of the Liberal Bureaucrat so that it becomes a useful tool to analyse the operation of the criminal justice system, the question of organisational maintenance needs to be considered in more detail.

Organisational Maintenance

Blumberg criticises Packer's crime control and due process models on two grounds. First he criticises them on the basis that they do not reflect reality. He alleges that Packer's models are ideal types which may help us to learn about reality but are not reality itself.¹⁵ As a criticism of Packer this is not very telling, since Packer set out to do just what Blumberg is criticising him for, i.e., to build normative models which would be a tool in analysing reality. Packer did not set out to describe fully the reality of the criminal process.

However Blumberg's second criticism of Packer lies in his argument that the nature of the criminal process is not determined by Due Process norms or Crime Control norms, but by the pressures of organisational maintenance.

Blumberg does not share Packer's optimism that the criminal justice process is tending towards a due process model. He says

14. Abraham Blumberg. "Criminal Justice" Chicago Quadrangle. 1976

15. Criminal Justice. Chapter One.

"We may be suprised to find that formal legal structures, procedures and rules are not ultimately significant in discerning the nature of the criminal court. Instead the complex of organisational variables which defines the criminal court's social system and its interrelated occupational and bureaucratic networks is the key to its apprehension."¹⁶

Blumberg analyses this "complex of organisational variables" in some detail. Most important in the British context is the factor of workload. Most courts, Blumberg points out, are striving to deal with a very large case load with limited resources, and the necessity of meeting their "production goals" - getting through their list of cases - is an overwhelming priority.

"A criminal court's stated organisational goals may be couched in terms of 'justice' or 'the rule of law' but its organisation, instruments and resources are committed to priorities of efficiency and production."¹⁷

Factors such as the predominance of pleas of guilty become all important, and collusion between all those involved in the process - including those who are supposed to be the guardians of due process norms - takes place to ensure that defendants do plead guilty. A further consequence of heavy workload is that rules are broken and shortcuts are taken to meet production goals. Blumberg argues that

"... there is an almost irreconcilable conflict; intense pressure to process large numbers of cases on one hand, and the stringent ideological and legal requirements of 'due process of law' on the other. The dilemma is frequently resolved through bureaucratically ordained shortcuts, deviations and outright rule violations by members of the court from judges to stenographers in order to meet production norms."¹⁸

Blumberg's description of individuals in the criminal justice system attempting to resolve conflicting pressures on them from due

16. Ibid. Page ix.

17. Ibid P.74.

18. Ibid. P. xi.

process norms on the one hand and the pressures of organisational maintenance on the other is an excellent description of Bottoms and McClean's Liberal Bureaucrat. It is an excellent description of many clerks to the justices and court clerks who feel every day the pressure to 'get through the list' of cases before the court and also to ensure that the proceedings are legal and fair. And of course it is true that when the pressure of business becomes great, it will be the defendant - the only player who does not know the rules, but whose stake in the game is the highest - who suffers. What is implicit in Bottoms and McClean's analysis of the problems of the defendant in the criminal process is developed by Blumberg's analysis of organisational maintenance.

What now becomes very clear in our model of the Liberal Bureaucrat, however, is that it contains within it a sharp conflict, a conflict between its due process ideology and the need to maintain the organisation of the court. In the ensuing chapters an attempt will be made to demonstrate these conflicts in the role of one particular Liberal Bureaucrat, and to examine the way in which they are worked out in practice.

However a number of important general questions remain unanswered by the above analysis. The Liberal Bureaucratic model contains within it a conflict which must be resolved. The requirements of due process pull the Liberal Bureaucrat in one direction, and the demands of organisational maintenance pull her or him in the other direction. The reality of what happens in the courtroom must reflect the compromise made by the Liberal Bureaucrat between these conflicting demands. But what determines where this compromise is made? Is it possible that the system can be totally determined by the imperatives

of organisational maintenance, and for the values of due process to be ignored completely?

Packer's analysis is optimistic about due process. He postulates that the system is developing further and further towards a due process ideal - that more protections for the individual against the state are being built into the system.

Blumberg is not so optimistic. He believes that we have a constitutional model of the criminal justice system embodying due process and the rule of law, but in reality we have an administrative bureaucratic system which is perfunctory but efficacious. He sees the system moving in the opposite direction - the ideological qualities of due process concealing a drift towards assembly line justice. However Blumberg does not see the system as totally determined by the priorities of organisational maintenance.

Neither theorist explains what mechanisms operate to regulate or determine what the relationship between due process and organisational maintenance is in practice. The relationship is however to some extent explained and analysed by Isaac Balbus¹⁹.

Balbus, relying on the work of Blumberg and Michels also emphasises the pressures of organisational maintenance and their ability to deflect any organisation - including the courts - from the pursuit of their original professed goals. Like Blumberg, Balbus also sees an ideological role for due process as the rhetoric which conceals the realities of the deviations from due process norms which take place in the criminal justice system.

Balbus however points to the crucial role of due process norms in preserving the legitimacy of the liberal state. On his analysis it

19. Isaac D. Balbus. 'The Dialectics of Legal Repression.' Russell Sage Foundation 1973.

is necessary for the state to maintain law and order, but the legitimacy of the liberal capitalist state resides in its ability to do so according to the rule of law, and by the norms of due process which provide for the equality of all individuals before the law. Law and order must be enforced legitimately according to the rules which in theory protect each individual from the might of the state. This does not mean that the rules of due process cannot be ignored - rather it means that they cannot be ignored with impunity.

The operation of the criminal justice system is therefore governed by a balance struck between competing interests - the need to preserve law and order, the need to preserve legitimacy by doing so according to the rules of legality and due process, and the needs of organisational maintenance in the courts.

Balbus' work analysed the response of the courts in three U.S. cities at the time of serious riots in those cities. There was then a real threat to the ability of the state to maintain law and order and a very considerable strain on the court organisation. The effects of these factors on due process norms was extremely interesting, if deleterious.²⁰

However the day to day operations of most courts are not strained by the results of riots, and the ability of the state to maintain law and order is not called into question - although magistrates' courts do, of course play a vital part in the maintenance of law and order by virtue of the fact that they deal with or process almost all criminal

20. It appears that similar pressures may have similar effects upon courts in this country. The L.A.G. Bulletin for August 1981 contained protests against erosion of due process rights by magistrates' courts dealing with riot cases. Similarly the fragility of due process norms is clearly seen in Northern Ireland.

cases.²¹ For the most part, however, little emphasis needs to be placed on the need to maintain law and order.

So far as the day to day running of the courts is concerned, it is the other two factors which play a large part in the routine operation of the court - the norms of due process and the demands of organisational maintenance. And our analysis so far has not told us very much about the factors which regulate the relationship between these two elements. We know that due process cannot be ignored altogether, at least it cannot be ignored without a threat to the legitimacy of the state. We know also that due process rules suffer when demands are placed on the court organisation. There must however be a day to day balancing of due process requirements and the demands of the organisation which determines the everyday face of criminal justice. In the case of magistrates' justice it is the clerk who is responsible to a very great extent for this balancing act.

Michael King, in "The Framework of Criminal Justice"²² acknowledges this when he designates the clerk as adopting the approach of the liberal bureaucrat, 'to a greater or lesser degree'. Throughout the book, where he discusses the role of the clerk he shows, with the eye of one who has considerable experience of magistrates' courts in practice, the sort of impact that the clerk can

21. Interestingly, however, when this argument was used by clerks attempting to persuade the government to increase their salaries, the government used the economically expedient argument that it did not regard magistrates' courts' staff as part of the process of maintaining law and order. So far there has been no attempt to challenge this view, although one clerk closed his court for two weeks in 1974 because of overwork, and there have been some threats of strike action by clerks.

22. Croom Helm. 1981.

have on the availability of due process rights.²³ The phrase 'to a greater or lesser degree' is an implicit recognition that the compromise that clerks make between the 'liberalism' inherent in their roles, and the demands placed upon them as managers of the bureaucratic machinery is not always made in the same place.

The present research

This thesis seeks to fill what, it is argued, is a serious gap in our understanding of magistrates' justice. In part it is an examination of the extent of the clerk's power. Thus it has been necessary to show how the clerk's role has developed to its present day state, and also to analyse the legal rules which determine the clerk's activities. These rules are, however, not particularly restrictive, and leave room for very considerable influence by clerks over the decisions of magistrates.

The clerk in court does not only influence the bench, however, but all of those who are involved - in whatever capacity - in magistrates' courts. Out of court the clerk is responsible for managing the court organisation, and for training staff and justices.

Besides analysing the clerk's impact on all of these factors we will seek to show how the pressures on the clerk to maintain the court organisation and to uphold due process norms are responded to in practice. It will be argued that the way in which the clerk experiences and responds to these pressures has a very considerable effect on the criminal justice process.

Methodology

The aim of the study was to examine the work and attitudes of a group of people fulfilling a complex role in a particular

23. See for example at page 44, where he acknowledges the role of the clerk in the grant of legal aid.

organisation. This focus dictated the nature of the methods employed to collect data. Although there are those who would argue for the inherent superiority of one method of research over another, such methodological debates are essentially sterile and unproductive. Many have argued that the research problem under investigation should properly determine the methods used to investigate it. In 1957 Trow²⁴ argued against debates about the superiority of quantitative over qualitative methods, survey research over participant observation and encouraged researchers to

"... get on with the business of attacking our problems with the widest array of conceptual and methodological tools that we possess and they demand."²⁵

His recommendation has been echoed by others including Glaser and Strauss²⁶, who, in their exposition of grounded theory, argue for the use of data collection techniques which best obtain the information desired.²⁷

The nature of the problem posed for this research was one which dictated a qualitative approach. A study of the attitudes and practices of a particular group and its influence on a complex organisation demands techniques which provide for access to the day to

24. Martin Trow. 'Comment on "Participant Observation and Interviewing" by Becker and Geer'. Human Organisation 16. pp.33-5. Cited in Martin Bulmer ed. 'Sociological Research Methods' Macmillan 1977.

25. Bulmer. p. 15.

26. B. Glaser and A. Strauss, 'The Discovery of Grounded Theory.' Weidenfeld and Nicolson, 1967.

27. See also S.D. Sieber. 'The Integration of Fieldwork and Survey Methods.' (1973). 78. American Journal of Sociology. pp. 1135-59 who supports Trow and argues for a combination of research techniques. Colin Bell and Howard Newby argue for a methodological pluralism in 'Doing Sociological Research'. Allen & Unwin 1977.

day behaviour of the group and to the opinions of its members about their activities. By its nature therefore, the research did not collect a vast amount of quantitative data.

The research strategy adopted was essentially one of participant observation. However although the initial idea for the research was formulated at a time when the researcher was a complete participant, doing the job which was the subject of the investigation, the research proper was carried out using a strategy which has been described as 'the participant as observer'²⁸ where, in other words, the presence of the investigator was known to those under investigation.

Data for the present research was collected principally by two methods - court observation and interviews. The activities of clerks were observed, and they were interviewed about their jobs and their attitudes to their work.

However, previous experience as a 'complete participant' did have an effect on the research. Participant observers have noted that there may be several phases in the role of the observer.²⁹ Initial hostility is often overcome in favour of provisional acceptance by the group surveyed, and a period of discussion about the nature of the observer-observed relationship ensues before the observer is completely accepted. The fact that I had been employed as a clerk meant that the progression through these stages was very rapid. Clerks appeared to find it easy to accept my presence, any hostility being overcome when they discovered that I had done their job.

It was, however, necessary to be aware of the temptations and pressures that past membership of the group under investigation

28. Norman Denzin. 'The Research Act in Sociology.' London. Butterworths. 1970.

29. See Denzin. p.191-2.

created towards identification within the group and co-option of the researcher to their views.

Besides examining the nature of the clerk's role and the extent of the clerk's influence on the criminal justice process, the research aimed to relate what was observed to both legal and sociological theory. We have discussed the theoretical work which has had anything to say about the clerk's role. It was aimed to consider the adequacy of those theories, and to develop them.

The period covered by the research

The research began in 1978, and writing up was completed in the summer of 1983. Preliminary court observation at Court B was carried out in the summer of 1978, together with discussions with clerks and court staff. The bulk of the field work - the other court observations and interviews was done during a sabbatical year in 1980/81.

The court observations

The courts in which clerks are employed are not uniform organisations, and the variations between them can affect the jobs that clerks do. It was therefore important to establish the nature of the differences which affect clerks, and to observe clerks at work in all of the different types of courts.

Experience of the job, preliminary discussions with clerks, and preliminary court observation suggested that the important factors which should determine the choice of courts observed were

(i) The nature of the division served by the court. Some courts serve sparsely populated rural areas, some serve small or large towns, others serve cities of various sizes. In addition London is exceptional in that it is divided up into several Petty Sessional

Divisions and there is a further division between the Inner London courts and the Outer London courts.

The nature of the Petty Sessional Division has an impact on a number of areas discussed below.

(ii) The workload of the court is affected by the nature of the division. A magistrates' court which serves a city which is also a port and has a University will process very many more cases than a court serving a small market town, and such a court will have a different workload again from a court serving a rural area. Courts with a high workload will have more magistrates and employ more court clerks. There may well be more pressure on court time. The managerial role of the clerk to the justices will be more onerous, and the degree of specialisation of court clerks is likely to be higher. Promotion prospects within the division for clerks may be higher.

(iii) The nature of the division will affect the nature of the work. For example courts serving large cities deal with many cases involving prostitution; those with air or sea ports see customs cases. Both of these types of cases would be virtually unknown in a rural area. However the types of cases dealt with probably influence clerks very little. They quickly acquire the necessary expertise to deal with particular offences by learning the law and range of penalties. However there may be some differences - a petty sessional division in a city may offer greater experience with juvenile work, for instance, or clerks in a smaller division may acquire a very broad range of experience very quickly.

(iv) Geography. Several clerks suggested that there were noticeable differences in the way in which clerks behaved, particularly towards their magistrates, between the South of England and the North. It was suggested that in the North clerks were much

more dominant than they were in the South.

Taking into account all of these factors it was therefore considered important to obtain as wide a geographical spread of courts as possible, and for those courts to serve as many different types of divisions as possible. In approaching the courts I wished to observe I was assisted by Mr. Lawrence Crossley who was, at the time, the clerk to the justices at Uxbridge Magistrates' Court, where I had previously been employed. Bearing in mind all of the requirements explained above an appropriate range of courts was selected and an initial approach was made to the clerks to the justices at those courts by Mr. Crossley.

All courts approached agreed to allow me to observe and interview, with the exception of one court. This court served a large city in the North of England. The reason given for refusal was that the court had been the subject of very numerous pieces of research by staff and students from the city's university. The clerk felt rather jaded and unenthusiastic about another research project at his court. It was therefore decided not to press the matter and another court was selected of the same type. After initial agreement to participate had been given, the clerk to the justices at each court was contacted and the research explained in more detail, and a time for the observations and interviews was booked. All of the clerks surveyed were extremely helpful and welcoming. It is almost certainly fair to say that their willingness to agree to be part of the project was influenced by the fact that the initial approach came from a clerk who would have been known to them, and that they were told that the researcher had worked as a court clerk in the past. However neither Mr. Crossley nor any other clerk ever sought to place

any limitations on what I might observe, ask questions about or report.

The courts observed were as follows.

Court A Medium sized court serving a London satellite town.

Court B A busy Outer London court.

Court C A medium sized court serving a declining Northern industrial town.

Court D Served two divisions in the North of England
Division 1 was a medium sized court serving two small towns and several country villages.
Division 2 was a very small court serving a small market town.

Court E A very busy court serving a large city in the West of England

Court F A medium sized court serving a Midlands manufacturing town.

Court G A busy court serving a city in Wales.

Courts A and B were observed for a period of one month each. The other courts were observed for two weeks each.

In addition two Inner London courts (Courts H and I) were observed for short periods to acquire greater experience of clerks sitting with stipendiary magistrates.

A more detailed description of the courts can be found at Appendix Eight.

During the periods of observation a range of court proceedings was observed, including juvenile and domestic courts. Whilst it was usually possible to see a range of court proceedings, some courts only held juvenile and domestic hearings once or twice a week, so that experience of these courts was much less than experience of adult criminal courts. All other things being equal particular attention was paid to courtrooms where there were unrepresented defendants in contested cases, to see how much assistance such defendants received from the clerk.

During the court observations the researcher was usually seated to one side of the court with press or probation officers, or in the body of the court with the advocates. Either position gave a clear view of everything that happened in court, and in most courts enabled the proceedings to be clearly heard. In some courts, however, acoustics are extremely bad. In one court in particular the researcher could sometimes not hear either the clerk or the magistrate from a position closer to them than that of the defendant! At one court the clerk to the justices insisted that the researcher sit next to the clerk in court. This afforded a good opportunity to hear interaction between clerk and bench which was occasionally inaudible at some courts. However it had its problems, in that the clerks knew that the researcher had been employed as a clerk and sometimes they asked for advice, when it became necessary to avoid altering the course of events being observed. On one particularly difficult day the clerk to the justices asked the researcher to go into court with a trainee clerk and to "look after her".

Whilst in court verbatim records were kept as far as possible, with particular attention to the part played by the clerk. The retirement of the clerk with the bench was noted to determine any pattern of retiring practices.

Clerks and court staff at all the courts were extremely accommodating. They offered help and advice, included the researcher in their day to day activities and gave generously of their time.

The Interviews:- A total of fifty court clerks was interviewed. The aim was to interview enough clerks to enable valid assessments of clerk's attitudes to be made regarding their jobs, the people they work with and who use the court, and the future of the clerk's role.

The priority in the selection of clerks for interview was to ensure that clerks of all levels of experience, qualifications and seniority were interviewed. It was particularly important to ensure that the sample included sufficient clerks to the justices, because of the importance of their role in managing the court organisation, training the justices and influencing policy decisions at their courts.

Achieving such a spread of seniority, qualification and experience so that the views of all types of clerks were represented was considered to be more important than securing that every clerk was interviewed at each court surveyed or that the interviews be limited to the courts observed. In the event all, or the great majority of clerks at each court were interviewed. It was sometimes not possible to secure interviews with all clerks, since some clerks were away because of illness, on training courses or for other reasons. At Court E, for instance, it was not possible to do more than have a brief discussion with the clerk to the justices, since on my arrival at the court he had been required to go to London on work connected with the courts, and had thus no time during the period of court observation to allow an interview to take place. When the majority of observations and interviews had been completed the interview sample was rather short of clerks to the justices and senior clerks. Interviews were therefore included at Courts K and L - not to achieve a neatly rounded number of fifty clerks interviewed but to balance the sample more adequately. Interviews at Court H (which was observed for a short period) were included so that there were, in the sample, more clerks who had experience of working with stipendiary as well as lay magistrates.

The interviewees were:

Clerks to the Justices	8
Deputies	9
Principal Assistants	4
Senior Court Clerks	10
Court Clerks	16
Trainees	3
	—
Total	50
	—

Full details of the qualifications, training and experience of the interviewees are included in the Table at Appendix Nine.

The essential focus of the research was on clerks, their practices and attitudes. The interview schedule examined their opinions on their relationship with magistrates, with defendants, the police, the legal profession, probation and social services. At all courts observed discussions with as many as possible of these court users were undertaken. It would have been most attractive to have been able to conduct formal interviews with magistrates, police officers, defendants, lawyers, social services and probation workers on their views of clerks. However to have done this would have multiplied the number of interviews needed by at least five and would have required a much more extensive project. The views of these other groups were canvassed and have been included in the research, but it was not possible to interview them in a systematic and structured way. Inevitably this means that the project is about the clerks and reflects their view of their world of work. But this was in essence what the research set out to do, to examine what clerks do, the extent of their power and influence and the enormous impact that their behaviour has on all other court users.

The interview schedule is at Appendix A. The interviews

themselves were structured, and covered a great deal of material on the relationship of the clerk to other groups in the court, and the nature and possible future developments of the clerk's role. The interviews took between 30-60 minutes or in some cases more. Very few clerks refused to be interviewed, and most were enthusiastic. The interviews were taped, with the exception of two where the clerks refused to be taped. Very many clerks found the tape recorder initially intimidating, but reported that they soon forgot that they were being recorded. However several asked at some point in the interview that the tape be turned off because they wished to say things which they did not want on tape. This was so even though they were all assured of confidentiality. At the time of the interview, interviewees were given a number, which was the only identification which appeared on the tape, on the transcript and on any other documentation. This was explained to all clerks at the beginning of the interview. They were also assured that they would not be identified in anything which was written.

All interviewees were told that the researcher had worked as a clerk. This had two effects. It reduced the amount of simple explanation which had to be included in the interview. It also induced greater openness, in that clerks appeared to feel that it would be futile to be less than frank about their role since the interviewer anyway knew the difficulties involved. Thus clerks would preface remarks by saying "Well you must know ..." (that, for instance, magistrates ask clerks for their opinion on fact).

Clerks are somewhat cynical about researchers. Clerks to the justices have, in recent years, become used to requests arriving through the post for them to give information which would take hours or even days to collect. They have also become used to researchers

spending time at their courts only to go away and write disparaging things about "their magistrates". This researcher was treated to a number of lectures from clerks about the inconsiderate and ignorant habits of other research workers, and at least some of the criticisms were justified. Despite this, clerks gave a great deal of their time and effort to ensure that I was enabled to do what I wanted at their courts, and many went considerably out of their way to be helpful. I am very grateful to them for their co-operation.

The significance of the factors affecting data collection

The main factor, which we have discussed, which affected the selection of clerks for interview was the need to obtain interviews with clerks at all levels of seniority, having a range of qualifications and experience. It proved easy to ensure this, since it was possible, at the end of collecting the interview sample, to include more senior clerks to balance the sample. The attitudes of the clerks discussed throughout the thesis are thus those of clerks of all types. Where the seniority, experience or qualifications of clerks are relevant this is explained in the text. The particular significance of the role of the clerk to the justices is discussed in Chapters Eight, Nine and Ten.

The factors affecting the selection of courts were the nature of the division, the workload of the division, the nature of the work, and the geographical location of the court. In the event the factor of the workload of the court proved to be the most important, since the pressures on the court organisation created by a high workload affect the willingness and ability of clerks to help unrepresented defendants (discussed in Chapter four) and to a certain extent affect the clerks' relationship with police (discussed in Chapter Five) and

the legal profession (discussed in Chapter Six). The nature of the division also influenced these things, and it affected the managerial role of the clerk to the justices (discussed in Chapter Nine) and the likelihood that the clerk to the justices would or would not spend time in court. As was anticipated, the nature of the work at each court affected clerks very little except where they changed jobs and had to familiarise themselves with new areas of law.

What the field work did reveal was that although there were great differences in the size and nature of different courts, clerks to the justices have a very high degree of autonomy in the running of the court, and variations in practice depend much more significantly on the role of the clerk, the extent to which the clerk is innovative, the extent to which the clerk makes policy decisions and the way the clerk trains magistrates and court staff.

The final factor taken into account in selecting courts was that of geographical location. This factor was important only to a very limited extent, in that it did affect the way in which clerk and magistrates related to each other. We show in Chapter Three that at courts C and D the magistrates were comparatively silent in court, often appearing unable to announce even their own decisions. Courts C and D were both in the North of England, and in this respect clerks' opinions that their colleagues in the North of England were more prominent in court was borne out by this survey.

However, there are other factors which are examined in detail in the text which are much more important in influencing the behaviour of clerks in court, and many of these created differences not from court to court but from clerk to clerk. To stay with the example of the balance between clerk and bench, it was possible anywhere in the country to find an inexperienced bench of magistrates headed by an

inarticulate chairperson being clerked by an experienced and confident clerk, and in the next courtroom the chair of the whole bench with an inexperienced clerk. The balance between clerk and bench would be very different in these two courts - as different as that between clerk and bench in the North compared with the South.

The North/South divide was therefore important to a limited extent, but it was of little significance compared to other factors influencing the behaviour of the clerk which are analysed throughout the thesis.

CHAPTER ONE

THE HISTORICAL DEVELOPMENT OF THE ROLE OF THE CLERK

The historical origins of the clerk to the justices

Nineteenth Century changes - the beginning of professionalisation
and the problem of low pay

Reform - salaries and professionalisation

The legacy of the nineteenth century

The twentieth century

The results of the Departmental Committee's report

The Historical development of the Role of the Clerk

The history of justices' clerks is a somewhat esoteric interest and therefore it is not surprising that comparatively few researchers have delved into it. Probably the most notable of the few are Stanley French, Keith Clarke and the Rev. Dr. W.J. Bolt. From their writings and the few other relevant sources, it is possible to build up a rather incomplete picture of the developments which have taken place in the role of the clerk.

The available sources do not allow a great deal to be done in the way of relating the changes which took place in the role of the clerk to changes in society in any systematic way. Further research is needed on the subject.

However, although what follows is little more than an outline with a few areas more fully drawn it is important to attempt an account of the history of the clerk's role because the clerk's present role has been shaped by its slow and uneven development over the centuries. There have been no revolutions in the history of justices' clerks, but since the job first came into being there has been an almost complete change in the relationship between clerk and magistrates. The relationship between clerk and bench is still a live and problematic issue today, and the reason for this lies very much in the past history of the clerk. If we are to understand the present role of the clerk, we need to understand the historical development of the clerk's role.

The Historical origins of the clerk to justices.

For the origins of the clerk we must look to the origins of the office of justice of the peace which lie in the breakdown of feudal society and the beginnings of waged labour.

A statute of 1361¹ is usually cited as being the origin of the justice of the peace. However it seems that there were several statutory provisions, prior to 1361 which appointed 'keepers of the peace'. In 1195 Richard I issued commissions to various of his knights to preserve the peace in unruly areas of his kingdom.² In 1285 the Statute of Winchester appointed keepers of the peace whose task was to arrest wrongdoers and preserve the peace. In 1328³ these keepers were given the power to punish offenders. Such early moves towards the appointment of Justices of the Peace have been seen by Holdsworth⁴ as the measures by the Crown to curb the power of the sherrifs in the counties, and to oust the jurisdiction of the old manorial courts.

The statute of 1361 certainly seems to have been part of an attempt to control labour and maintain the peace in an era of social unrest. At the time labour was very scarce as a result of the Black Death which had killed something like one third of the population. Also the army had returned from France after the Treaty of Bretigny of 1361, and was roaming the country in marauding bands. Those

1. 34 Ed. III C.1.

2. Cited in 'Justices of the Peace through 600 Years' (author unidentified) P.7.

3.. 2 Ed.III C.6.

4. Holdsworth. A History of English Law. Vol. 1. P 285.

labourers who had survived both the plague and the war into an era of scarce labour were asserting a right to sell their labour to the highest bidder.

The old feudal manorial courts could not deal adequately with this situation. Esther Moir asserts that in medieval England the general likelihood of riot and rebellion was never far distant⁵. The preservation of order depended upon a strong monarch controlling some sort of effective peace keeping force. The House of Commons, which represented the interests of the gentry urged the extension of the powers of the keepers of the peace.⁶ This was achieved in 1361, when the keepers of the peace became Justices of the Peace. The role of the new justices was described by the statute. They were to

"...inform them and inquire of all those that have been Pillors and robbers in the parts beyond the seas, and be now come again, and go wandering and will not labour as they were wont to do in times past; and to take and arrest all those that they may find by indictment, or by suspicion, and to put them into prison..."⁷

That the statute was a move in the direction of centralised justice is also plain from the provisions of the statute itself, which provides

"First that in every county of England shall be assigned for the keeping of the peace, one lord, and with him 3 or 4 of the most worthy in the county, with some learned in the law..."⁸

The new justices were thus to include a lawyer i.e. they were applying the law of the crown, rather than their own individualised conceptions of justice which had prevailed in the old manorial courts.

5. E. Moir. 'The Justice of the Peace.' Penguin 1969. P.16

6. Moir 1969. P.17

7. 34 Ed III C.1.

8. Ibid

It is important to note that this lawyer was one of the justices themselves. This provision is not the beginning of the system we have now with the clerk as legal adviser to the justices. It would seem that many justices acted alone and did not even have any clerical help in their duties.⁹

From the point of view of the origins of the clerk, it was a statute of 1362 which was more significant. 36 Ed. III C.12 provided for the newly created justices to come together to hold Sessions four times a year. It seems likely that whilst individual justices sitting alone could and did perform the not very onerous clerical duties themselves, when several justices sat together at Quarter Sessions, some clerical assistance became desirable. In theory the clerical duties of preparing writs, precepts, processes and indictments were given to one of the justices named in the Commission as custos rotulorum. In practice these duties were not necessarily performed by that person, but could be delegated to a clerk.¹⁰

This clerk acting for the Justices at Quarter Sessions is still not the direct ancestor of the clerk to the justices, but the ancestor of the Clerk of the Peace. However the same clerk would sometimes act as clerk to an individual justice.¹¹

Alternatively an individual Justice would sometimes use one of his own employees to perform clerical duties for him. This could be

9. The Report of the Departmental Committee on Justices Clerks 1944 Cmnd 6507 asserts that in some cases the fees which were chargeable for certain of the justices' functions were claimed by the justices, but where the justice had a clerk it was customary for the fees to be handed over to the clerk. Para. 5.

10. Ibid

11. Stanley French. 'The Evolution of the Justices' Clerk.' [1961] Crim. L.R. 688

his steward, bailiff, estate clerk or indeed any of his servants who had the distinction of being able to write. If an individual justice did employ a clerk he would almost certainly have employed him to perform other clerical duties besides those pertaining to his job as a Justice.

The evidence for the existence of persons undertaking such clerical work for Justices comes from financial records. Fees for clerks were occasionally laid down by statute. A statute of 1388¹² provides for two shillings a day for Quarter Sessions work by a clerk. In 1390¹³ a statute directs the justices to include the name of their clerk in the particulars they send to the sherrif. In 1542 an Act of Parliament dealing with justices in Wales provided that no Justice of the Peace, clerk of the peace, or "any other clerk of any justice of the peace" should take more than six pence for writing a warrant, or twelve pence for a recognisance.¹⁴ Much later provisions (of 1753)¹⁵ place the responsibility for fixing the clerk's fees on the Justices at Quarter Sessions, and interestingly seem to have been designed to prevent excessive fees being charged, since the statute contains a provision for a fine of £20 for a clerk who took an excessive or unauthorised fee.¹⁶

The remuneration of the clerk by way of fees is important, because it led to the existence of a different type of clerk than the one who was the employee of the individual justice. By the beginning

12. 12. Ric.2, c.10.

13. 14. Ric.2, c.11.

14. 34. Hen.8, c.26

15. 26. Geo 2, c.14.

16. French (1961) op.cit.

of the seventeenth century there had been a considerable increase in the work of the justices and such persons as school masters, parish clerks, sherrif's officers and even innkeepers, were taking on the duties of the clerk for the fees involved.¹⁷

By the seventeenth century then there were three types of clerks to the justices. There was the Clerk of the Peace who would occasionally also act as clerk to an individual Justice. There were clerks who were employed by individual Justices, and there were "freelance" clerks who did the job for the fees involved.

These clerks were not legal advisers to magistrates. They were simply literate persons doing clerical duties.

However the number and complexity of the legal provisions that Justices had to deal with increased, and the need for some expertise on the part of the clerks increased. In 1591 Lombard's 'Eirenarcha' was published, which was a manual for Justices and contained forms and precedents. In 1641 Shepherd's 'Cabinet of the Clerk of the Justice of the Peace' was published, and was the first textbook for clerks themselves. A certain amount of legal expertise would be also acquired by clerks by experience.

There was therefore, it seems, a gradual transition from a situation where clerks were not expected to know any law at all, through a development of expertise motivated by increasing legal complexity, to the expectation that the clerk would have a knowledge of the law, and would advise the justices.

The available information as to how this transition took place is, however, very scant until the nineteenth century. Here the sources become fuller and more research has been done on them. It is

17. French (1961) p.691.

therefore possible to look backwards to some of the changes which took place and to trace the reasons for them.

Nineteenth Century Changes - the beginning of professionalisation and the problem of Low Pay.

A major change in the job of the clerk must have been prompted by the vast increase in the workload of the Justices. Their jurisdiction had steadily increased over the centuries. They were given many of the duties which are now undertaken by local authorities, for instance the upkeep of bridges and highways, the levying of poor law rates, the apprenticeship of pauper children. They were responsible for the regulation of prices and labourers, and the licencing and regulation of almshouses as well as many other tasks.

The nineteenth century, however saw a comparatively big increase in workload. The growth of the bourgeoisie, the necessity for trade to be regulated, the process of industrialisation and the necessity for growing cities, transport systems etc. to be regulated all meant increased work for the Justices. It was not until the end of the nineteenth century that the duties of the Justices and those of the County and Borough authorities were disentangled, and duties concerned with the administration of local areas given to the local authorities.¹⁸ By the end of the century, however, the criminal jurisdiction of the Justices had increased in volume and new duties, such as domestic jurisdiction, had been given to them.

The Justices themselves had also changed. By the 19th century, the pattern of having a few local landowners acting as justices for

18. It would perhaps be more accurate to say that they were only partly disentangled since the Justices still, somewhat anomalously, retain responsibility for liquor licensing and betting and gaming and latterly for the licensing of sex shops.

each county was inadequate in the face of industrialisation and urbanisation. The number of justices had increased as well as their jurisdiction, and there had been a change in the type of person appointed. The changing social structure and the party warfare of the eighteenth and nineteenth centuries resulted in the appointment of Justices who were not from the traditional landed gentry. These Justices came in for a great deal of criticism and class antagonisms are apparent. In 1833, for instance, the Justices of Merioneth went on strike because the local squirearchy on the bench objected to the appointment to the bench of a man who "was a dissenter and had been a grocer... and was not entitled to be the familiar associate of gentlemen".¹⁹ There was also a great deal of corruption.²⁰

The Justices, whatever their class background or honesty, needed both clerical assistance and legal advice. Milton remarks that

"The trouble was that even when the Justices were honest (and, outside Middlesex, most of them were), they knew so much less about law and procedure than they did about dogs and horses."²¹

The justices received their assistance from a variety of sources. There were, by the nineteenth century, still the same three types of clerk. However the days of the Clerk of the Peace acting as a clerk to the justices were numbered. By 1834 the Clerk of the Peace was prohibited from acting as clerk to the justices in the boroughs, and by 1857 was also prohibited from acting as clerk to the justices in the counties.²² One of the three types of clerk therefore

19. F. Milton. 'The English Magistracy.' O.U.P. 1967 Page 14.

20. See for instance the records cited in 'Justices of the Peace Through 600 Years' at page 25 and in Milton (1967)

21. Milton (1967) page 45.

22. French (1961) p689 The article does not specify by what provisions these prohibitions were made.

practically disappeared, although French (1961) tells us that as late as 1938 there were still four Clerks of the Peace acting as clerks to the justices in boroughs having a separate Commission.²³

The private clerk to the justices did not disappear so easily. We know that in 1838 many justices were still using their own private clerks because a correspondent to the Justice of the Peace Newspaper sought the opinion of the editor as to whether it was proper for defendants to retain the private services of clerks who were advising the justices to plead their case for them!²⁴

The clerks who did the job for the fees were also present in the nineteenth century and many had as few qualifications as their predecessors. However the job of clerk was also being taken on by solicitors - by men who did have a legal qualification.

There was a desire in the nineteenth century that clerks advising lay magistrates should have some qualification.²⁵ Criticisms made of clerks referred to them as "hedge-lawyers" and "broken attorneys"²⁶ disparaging their lack of legal skills. However any moves to professionalise the job of the clerk were bedevilled by two things - the low pay of the clerks and the low status of magistrates' courts. Solicitors were unwilling to take on the job for these reasons.²⁷

The Rev. Dr. W.J. Bolt's researches into the early issues of the Justice of the Peace reveal constant complaints about the low

23. Ibid p.689.

24. 2. JPN (1838) 107. Cited by Keith Clarke in 'The nineteenth century justices' clerk and his critics' 132 J.P.N. 728. (1968)

25. See Clarke (1968) at p.729.

26. Milton (1967).

27. Clarke (1968) at p.729.

remuneration of clerks. The Justice of the Peace was first published in 1837 (it was then called the Justice of the Peace and County Borough and Parish Law Recorder.) The correspondence in the first years issues complains of statutory rates of only one and a half pence for every folio of 90 words for certain documents.²⁸ Also certain statutes did not prescribe fees to be charged and clerks were at a loss as to how to charge for their work. More than half the letters to the editor of the J.P. in the years 1937-9 concern the clerks' grievances over fees.²⁹ Keith Clarke cites one case of the clerk at Market Weighton in Yorkshire which illustrates the problem of low fees - as well as other problems - very well. Before 1831 there was no official clerk to the Petty Session, and one John Wake, a local farmer and the steward to one of the divisional justices had assisted in the clerical work. In 1831 Wake was appointed clerk. His annual fees totalled no more than £20, and from this he had to buy law books and rent the room used for the sitting of the bench.³⁰

Such low remuneration meant that many clerks held more than one post. Sometimes these were posts which we would now regard as being highly incompatible. In Yorkshire one Mr. Wildman was a private clerk to two magistrates, surveyor of weights and measures, and Chief Constable of Stancliffe East, as well as being steward to one of the Justices.³¹

The low fees meant that if a solicitor did take on the job of

28. Bolt, The Rev. R.W.J., 'Complaining Clerks'. (1962) 126 J.P.N. 205.

29. Ibid. p. 253.

30. Clarke (1968) at p.729

31. Ibid.

clerk he usually did another job as well. We have mentioned that Clerks of the Peace acted as clerks to the justices. However another combination of jobs, which again we would now view as quite wrong but which was then common, was for the clerk to act also as prosecutor of cases which had come before the Justices and which were sent to the Assizes. Clarke sites the case of the Warwick County Magistrates in 1820 where magistrates employed three local solicitors as their clerks. These solicitors made an annual joint income of £3,000 because they undertook the work involved in the prosecution of cases committed from the magistrates court to Warwick Assize. What was even more disturbing was that four fifths of the work of the Assize came from the same magistrates' court, and that the Assize had to discharge a large proportion of those committed for trial!³²

Clarke's researches show that some clerks refused to undertake such work on principle, but many others were quite happy to do it, and indeed when criticised for doing it defended their actions vehemently. In the Justice of the Peace clerks pointed out that the inducement for them to take the office was the business arising from the practice at the Petty Sessions, and not the job of clerk to the justices. The opinion of the editor of the J.P. was against the practice but many of his contributors defended it.³³

The practice was curtailed by section 102 of the Municipal Corporations Act of 1835,³⁴ which provided that a borough justices clerk or his partner should not be directly or indirectly interested or employed in the prosecution of offenders committed for trial by

32. Ibid. p.714

33. Clarke (1968) at p. 714, 725 and 728.

34. 5 & 6 Will. IV. C 76.

borough justices. Such a provision was workable in the boroughs where enough fees were paid to remunerate the clerk above poverty level. However no similiar provision could be introduced in the counties because the fees were too meagre. In fact it was even debated whether or not the two jobs could be combined, because it was feared that otherwise the remuneration would be too low to attract the right calibre of persons.³⁵ This idea was opposed - for instance by the Attorney General in his evidence to a Select Committee on Public Prosecutors³⁶ - on the obvious ground of bias. However clerks were never forbidden to perform both roles in the counties. The Roche Report of 1944³⁷ again condemned the practice and recommended that the prohibition should be extended to the counties. It never was, and surprisingly as late as 1968 according to Clarke, in a small number of county areas which still retained part time solicitor clerks the clerks still continued to act for the prosecution!³⁸ This is almost incredible, particularly in view of the series of cases which began in 1924 which lay down very firm principles against the clerk having any interest - particularly a financial one - in the proceedings before the magistrates.³⁹

The problem of low pay, and the consequent unwillingness of the legal profession to move into clerks' jobs meant, of course, that there were a large number of unqualified clerks doing the job who were

35. Clarke (1968) at p. 728.

36. Ibid.

37. Report of the Departmental Committee on Justices' Clerks 1944. Cmnd. 6507.

38. Clarke (1968) at p.728.

39. Commencing with R. v Sussex Justices Ex parte McCarthy [1924] 1 K.B. 256. For a full discussion of these cases, see Chapter Two.

often unsuitable, and unable to deal with the growing legal complexities of the magistrates' courts.⁴⁰ This led to a growing number of complaints about the standard of clerking. For instance in 1836 the report of the County Rate Commissioners had some criticisms to make of the standard of the petty sessional courts, and their clerks

"...complaints are made of the slovenly manner in which the business is transacted by the clerks from their education and situation in life ill qualified for their duties..."

Many remonstrances are made against the sittings being held at public houses and the want of regularity in the proceedings."⁴¹

However a quite different type of complaint was also being made about clerks. There were those who were beginning to complain about clerks who did have a professional qualification - not on the ground of their incompetence but on the ground of their dominance of the bench. The solicitors of the 19th century were often quite powerful and influential members of middle class society. Their class position and their legal expertise must have put them in a position of some influence over their benches. A writer in the Westminster Review of 1825 was of the opinion that magistrates were appointed from those members of the bourgeoisie sufficiently wealthy to be on terms of equality with the landed gentry, that they were too idle to learn any law, and that they thus relied on having the advice of an attorney who led them by the nose.⁴² Complaints - ever more familiar to the 20th century - were made that the clerk dictated policy to the bench.

40. Clarke 1968. p. 729.

41. Report of the County Rate Commissioners.p. 32. Cited by Clarke p.729.

42. Cited by Clarke at p.713.

Certain of the irregularities in the petty sessional sittings were improved by the Summary Jurisdiction Act 1848⁴³ - for instance the magistrates could no longer hold their courts at the local public house as some had done - but there was, perhaps inevitably in an era of rising professionalism, pressure towards requiring some sort of qualification for clerks.

The middle of the 19th century thus was a time of confusion for magistrates' clerks. The fact of the low pay of clerks together with low status of magistrates' courts meant that the legal profession was seldom interested in taking on the task of advising the magistrates. Where legally qualified persons did take on the task, it was sometimes only with a view to acquiring other more lucrative work. Many magistrates were thus advised by persons with no legal qualification, and the quality of advice which they received must have been variable. Although it seems that clerks who were qualified attracted a certain amount of criticism on the ground of their tendency to dominate the bench,⁴⁴ there was still a pressure towards requiring some sort of qualification for clerks.

Reform - Salaries and professionalisation

A significant pressure group pressing for the improvement of the remuneration of clerks was the Justices' Clerks' Society. The Society was formed in 1839 at the suggestion of one Charles Augustin Smith, Clerk to the Greenwich Justices.⁴⁵ Smith felt that a society

43. 11 & 12 Vict. c.43.

44. For numerous examples see Clarke (1968).

45. The letter to the J.P. which calls for the establishment of the Society was signed by Smith and Ffinch. However Mr. Ffinch appears to have taken no part in the Society. His name appears because Smith signed the letter in the name of his firm. See James Whiteside, 'The Justices' Clerks' Society'. Pindar and Son. 1964. p.8.

was needed because of the increasing jurisdiction of the Justices, and also because the problem of the remuneration of their clerks was being overlooked.

Strangely it seems that the Society was initially opposed to the payment of salaries, rather than fees, to the clerks.⁴⁶ However the Society eventually changed its views, and became strongly in favour of salaries. It acted as a pressure group for the introduction of salaries and lobbied M.P.'s and the Home Secretary. The pressure from the Society, and the criticisms made of the inadequacy of many clerks did have its effect. An Act of 1851⁴⁷ made it possible for clerks to be paid a salary.

However the most significant change did not come until 1877, with the Justices' Clerks' Act⁴⁸ of that year which made it a requirement that clerks be paid a salary.⁴⁹ The Act also contained provisions relating to the professional qualification of clerks. Section 7 of the Act required clerks to be qualified in one of four ways. The clerk could be a barrister of 14 years standing, he could be a solicitor, he could be qualified by having worked as a clerk for 7 years, or exceptionally by having been an assistant to a clerk for 14 years.

These developments did not, however, solve the problems. One might have expected that these provisions would have attracted

46. See the response of the society to the proposed Summary Jurisdiction of the Justices of the Peace Bill, quoted by Whiteside at p.9.

47. 14 & 15 Vict. c.55. Section 9.

48. 40 & 41 Vict. c.43.

49. Sections two, three and four.

professional men to the job, and that good salaries would have been

demanded. This did not happen. The salaries paid to clerks remained low, particularly in country areas, where court sittings would be infrequent and the full time services of a clerk were not necessarily needed. In towns and cities with a larger population there would be sufficient business for a full time, or at least a part time professional clerk.

Another problem with the salary system was that the clerk was paid a sum as a salary, from which he had to pay any assistants he might need, and all other expenses of the job, including the expenses of running the court, paperwork, postage etc.⁵⁰ The regrettable situation arose therefore that the fewer papers he issued the fewer stamps he used, the less work he did, the more his salary could be dedicated to his own personal remuneration! Also in some areas, over the years inflation devalued the clerk's salary and that salary was not increased. Many clerks continued to work conscientiously on the pittance they were paid. When the Departmental Committee on Justices Clerks began to collect evidence in the 1930's it noted that there were cases where clerks received little or nothing for themselves after paying necessary expenses.⁵¹

This situation did not encourage qualified people to take on the job of clerk to the justices, and many of the clerks who had been doing the job for over seven years and were thus qualified by experience remained in office. Barristers were unlikely to be attracted to clerk's posts, given the requirement of fourteen years standing. However, since no requirement of service was made of

50. Justices' Clerks' Act 1877. Section 3.

51. Report. Cmnd. 6507. para. 155.

solicitors they were the obvious candidates for clerkships. We do

not know how many members of the Justices' Clerks' Society were qualified, but the prospectus of the Society proposed that it consist of "...the holders of all public appointments in England and Wales usually filled by attorneys and solicitors and their deputies..."⁵²

The Society therefore had an expectation - or wished to create one - that clerks would usually be qualified. However the low pay of clerks, and the low workload in some divisions often meant that solicitors took clerkships on a part-time basis, combining clerking with private practice.

The pattern at the end of the nineteenth century therefore was that there were still many unqualified clerks and an increasing number of qualified but part-time clerks. Some busy courts would have a full time professional clerk to the justices.

Even after the Act of 1877 it seems that old habits died hard. A contributor to the Justice of the Peace⁵³ in 1938 cited his father's recollection that even after the passing of the Act several old men who had been clerks to individual justices were still to be seen attending a Lancashire court, each sitting below and advising his own Justice! The result of this was, of course, confusion and occasionally deadlock when the various clerks could not agree! But whether they were creatures of habit or statute, clerks did not go forward into the 20th century in a very healthy state.

The legacy of the 19th century

The legacy of the 19th century was predominantly an unhealthy one for clerks, and it is a legacy with which, in part, they are still struggling today.

52. Whiteside, (1964)

53. Ernest W. Pettifer. 'The Future of the Justices' Clerk' 102 J.P.N. 294.

As we have said, not all clerkships by any means were taken over by professionally qualified men. The clause in the 1877 Act which permitted those with service in the job or with long service as assistants to qualify as clerks did not simply create a transitional period allowing those already in the job to retire and their places to be taken by those who were professionally qualified. It allowed the unqualified clerk to the justices to become a fixture. Clerks qualified by experience were replaced in their job by assistants who had qualified by serving under them. There are in fact now, in the 1980's still clerks to the justices who are not professionally qualified, but who are qualified under these rules.⁵⁴ This is not to say, of course, that a professional qualification provides the only guarantee of a person's ability to be a good clerk to the justices. There are, and always have been, unqualified clerks who are very good at their jobs. The problem with professionalisation of the service was - and is - the problem of status. After the 1877 Act the job of clerk to the justices was only incompletely identified with that all important badge of the professional which brings with it status and the vital power to be the definer and judge of standards. A court of lay persons advised by an unqualified clerk looked unimpressive, particularly when the 20th century heralded an increasing workload, including motor traffic offences, which brought all classes of society into contact with magistrates' justice.

Solicitors who did take on the job of clerk to the justices often did so on a part-time basis, since except in the larger boroughs there

54. Michael King, in 'The Framework of Criminal Justice', (Croom Helm 1981) asserts that 20 per cent of clerks to the justices are qualified by experience, on the basis of a letter to King from the Home Office.

was often not enough work to justify the full time services of a clerk. The Act of 1877 made no provision to alter any of the petty sessional boundaries to rationalise the workload of the various courts, so that it was inevitable that in the counties and smaller boroughs there would be insufficient work for a full time appointment. The pattern was therefore, for local solicitors in private practice to take on the job of clerk to the justices, advising the justices on one or two days of the week and attending to their own private clients for the rest of the week. This was a pattern which was to continue for some time, and it was a pattern which was not without its problems. One of the main of these was that the interests of the court and the interests of private practice could come into conflict in several ways. It might be for instance that the solicitor's private practice occupied too much of his time and attention, so that the court was again left to be run by the clerk's unqualified assistants. Another problem was that of bias, when persons connected with the solicitor's clerk or his firm appeared in one guise or another before the court. There was a series of cases in the 20th century which dealt with this problem.⁵⁵

Many of the solicitors who were appointed clerks to the justices were paid a very small salary indeed - in fact some of the salaries paid to them can only be described as pitiful.⁵⁶ Salaries were not revised as the years passed, and when the Departmental Committee on Justices' Clerks began its investigations in the 1930's it was discovered that some solicitors were continuing to do the job simply

55. For full discussion see Chapter Two.

56. See the report of the Departmental Committee on Justices' Clerks Cmnd 6507 paras.150-1711 and the evidence to that committee.

because their firm had done it for many years and they regarded it as their public duty.⁵⁷ Although many solicitor-clerks obviously did a good job for practically no reward, such a situation provided no guarantees that the solicitors involved would devote a great deal of time or energy to their work. Also since the post of clerk to the justices was often handed down by custom within a firm of solicitors there was no guarantee that the person who got the appointment would always be suitable to fulfil it.

Increasing workload brought problems for the part time professional clerk, as well as for his unqualified colleagues. A solicitor clerk who was dependant on his private practice for the large part of his income would inevitably feel constrained to give a great deal of the increasing workload in the magistrates court to his unqualified assistants. Given that the clerk was usually paid an inclusive salary he would have had to pay his assistants from his salary. Since the pay of many clerks was abysmal it is unlikely that the standard of assistance would have been ideal.

The reforms of the 1877 Act were quite inadequate to meet the needs of the situation. The fact that the job was incompletely professionalised, that salaries were paid on an inclusive basis, that no provision was made for pay or qualification of the clerk's assistants, that no provision was made for the rapidly increasing workload of the magistrates courts all meant that magistrate's clerks went forward into the 20th century very ill prepared. So ill prepared were the magistrates' courts to deal with the problems which faced them that by the 1930's it was necessary to set up a Departmental Committee to completely overhaul the system.

57. Ibid.

The 20th Century

The Departmental Committee on Justices' Clerks was set up in 1938. It reported in 1944⁵⁸ and one consequence of its report is that we know much more about the clerk as he was during the first three decades of the twentieth century than at any other time. A great deal of information was collected by clerks and others about clerks' conditions, salaries, workload etc.

The Departmental Committee seems to have been welcomed on the whole by clerks. It certainly gave them an opportunity to express their grievances and explain their problems - of which they had many. Not the least of their troubles was the question of pay.

The Incorporated Justices' Clerks' Society in its evidence to the Committee was strongly in favour of stopping the practice of clerks being paid an inclusive salary from which they had to meet all their expenses. The Society was in favour of the clerk being paid a net personal salary and of a separate fund for payment of office expenses and assistants salaries. A questionnaire sent by the Departmental Committee to clerks asked for information about the size of their division, the amount of the clerk's salary and the amount of the expenses covered from that salary. The questionnaire produced some remarkable results. It revealed that well over one third of part-time clerks received a net salary of less than £100 per annum. Only five part time clerks were paid over £1,000 per annum.⁵⁹ The Incorporated Justices' Clerk's Society commented that some of the inclusive salaries paid to clerks were clearly inadequate and not

58. Cmnd. 6507.

59. Report of the Departmental Committee. para.152.

calculated to promote efficiency.⁶⁰ The Society reminded the Committee that the more zealously the clerk carried out his duties, the less he was paid, and commented only that

"...some of these salaries appear to us to have been fixed in the days when a man was passing rich on £40 a year."⁶¹

The Society requested frequent review of clerk's salaries.

The National Association of Justices' Clerks' Assistants was formed (on 13.1.39.) after encouragement from the Departmental Committee which wanted a body to express the views of justices' clerks' assistants. The Association expressed the view that the salaries of assistants in many boroughs were completely inadequate.⁶²

The Departmental Committee, whilst acknowledging the problem that in some areas the workload was so low that a high salary could not be justified, was nevertheless extremely critical of the inadequate pay received by many clerks, and of the consequently inadequate pay received by their assistants.

The Committee, in its report made no direct recommendations as to the level of salaries, contenting itself with making the point that salaries should be sufficient to attract the right quality of persons to posts as clerks and their assistants. It did however recommend that the clerk receive a personal salary, and that expenses and assistants salaries be met from a separate fund. But perhaps the most important recommendation of the Committee and the one which had

60. Evidence of the I.J.C.S. to the Departmental Committee on Justices' Clerks. Access to the documentary evidence submitted to the Committee was provided by Mr. Gerard Sullivan, clerk to the justices at Bristol magistrates court, to whom I am most grateful.

61. Supplementary Evidence of the I.J.C.S. to the Departmental Committee.

62. Evidence of the National Association of Justices' Clerks' Assistants to the Departmental Committee.

the greatest effect on the job of clerking, as well as on the pay of clerks, was to the effect that the petty sessional divisions should be reformed so that divisions could be amalgamated under a full time clerk.⁶³ This recommendation spelled the beginning of the end of the part time solicitor clerk. The Committee also recommended the establishment of Magistrates' Courts' Committees to appoint clerks, fix their salaries, review the boundaries of certain divisions and propose schemes for the grouping of divisions and boroughs.⁶⁴

On the other all important question of professionalisation, the clerks themselves were divided in the evidence they gave to the Committee. The majority of the members of the I.J.C.S. were in favour of a mandatory professional qualification for clerks. They felt that a professional qualification was preferred by lay magistrates, and by solicitor advocates, that a professional qualification inspired greater confidence in general because the prestige of the qualification engendered respect, and also that the training of admitted persons better enabled them to deal with the now complex magisterial law.⁶⁵

A minority of members took a different view. They felt that long experience gave the clerk a better knowledge of magisterial law and procedure than that of someone with a broader legal qualification without such experience. They believed that unqualified clerks were trusted specialists who had the confidence of their benches and had no other interests to distract them. These unadmitted clerks set up their own society, the Associated Justices' Clerks' Society, in order

63. Report of the Departmental Committee. para 79.

64. Report of the Departmental Committee. paras. 99-102.

65. Evidence of the I.J.C.S. to the Departmental Committee

to express their views to the Departmental Committee. Members of the A.J.C.S. included the clerks to some large divisions.⁶⁶ In their evidence to the Departmental Committee they cited some regrettable abuses of the system perpetrated to allow professionally qualified clerks to take posts. In one case a post was left vacant for a year to allow a law student to qualify as a solicitor and take the job.⁶⁷

The members of the A.J.C.S. were however, a minority of clerks. The Departmental Committee "after careful deliberation" decided that it could not accept their views, and concluded that "nothing but a professional qualification will meet the circumstances".⁶⁸ In taking this view the Committee was very aware of the predominance of the professions in other areas of public service, and of the very great reliance placed on their clerks by lay justices. The Committee therefore rejected the idea that specialist qualifications for clerks and the idea that qualification by experience was a better qualification, in favour of compulsory legal qualification for clerks to the justices.

The rejection of special qualification or qualification by experience was something of a blow to the N.A.J.C.A., whose members, whilst prepared to submit to an examination in magisterial law, were, many of them, unable or unwilling to take a professional qualification. The N.A.J.C.A. in its evidence to the Committee had expressed the opinion that the tendency for clerks to be appointed

66. Manchester, Hull, Leeds, Bradford, Portsmouth, Leicester and others. See E. Pettifer 102 J.P.N. 825. Mr. Pettifer was clerk to the West Riding Justices and gave personal evidence to the Committee in support of the A.J.C.S. position.

67. Evidence of the A.J.C.S to the Departmental Committee.

68. Report of the Departmental Committee. para 116.

from amongst qualified persons and not from unqualified but experienced assistants was becoming too prevalent.⁶⁹ The Committee's recommendations put a stop to the career prospects of many assistants in service.

The Committee in fact expressed the view that it was unsatisfactory for assistants who had no legal qualification to sit in court as advisers to lay justices, and that especially in large offices principal assistants as well as the Deputy clerk to the justices should be qualified. The Committee felt that if assistants were not professionally qualified they should not sit in court if they were under the age of 30 or did not have 5 years experience as an assistant.⁷⁰

Although the recommendation that clerks to the justices should be professionally qualified was put into effect,⁷¹ these recommendations about their assistants were not. The effect of this was to transfer the debate about professional qualifications from justices' clerks to justices' clerks' assistants.

The results of the Departmental Committee's Report

Although the Departmental Committee was set up in 1938 its deliberations were interrupted by the war, and it did not report until 1944. Its main recommendations were brought into force by the Justices of the Peace Act 1949.⁷²

Magistrates' Courts' Committees were set up (under Section 16 of the 1949 Act) and the amalgamation of divisions proceeded apace.

69. Evidence of the N.A.J.C.A. to the Departmental Committee.

70. Report of the Departmental Committee. para.126.

71. Justices of the Peace Act 1949, s.20.

72. 13, 14 and 15 Geo.6 c.101.

Amalgamation was not always without its problems, it seems, especially in rural areas where amalgamation resulted in a less accessible, if full time, clerk.⁷³ However the Act did eventually result in divisions viable for the appointment of full time clerks, and with the ever increasing workload, usually a number of full time assistants also.

In fact these developments, (perhaps ironically in view of the concern of the Committee to provide magistrates with full time professional advice) meant that the role of the clerk began to change quite considerably. Amalgamated divisions and the increase in workload meant that the days when the clerk to the justices could attend almost every sitting of the magistrates were numbered. Increasingly the job of advising the magistrates in court became one for justices' clerks' assistants, and the clerk has had to take on, perforce, a policy making, managerial and administrative role which effectively keeps the clerks of at least the busier divisions out of court almost altogether. These factors also ensured that the question of the legal qualification of the clerk's assistants would become one of pressing concern. As we said above, the 19th century dispute over the qualification of the clerk became the 20th century dispute over the legal qualification of the clerk's assistants.

The fact that clerks became full time professionals opened the door for other changes which increased the power and influence of the clerk. We have mentioned the increase in the workload of magistrates' courts, and the consequent increase in administrative work. Magistrates became required to do a great deal of work outside

73. See for instance the contributed article 'Where Torridge joins her sister Taw.' 120 J.P.N. 4 (1956) which discusses these problems in relation to one rural group of divisions faced with amalgamation.

outside their adjudicatory tasks in the court room. The issuing of process is an obvious (if currently controversial) example of a task which has increased enormously over the years. Other examples of increase in workload are the advent of legal aid, and the collection of fines by attachment of earnings orders.

Three factors pointed in the direction of the clerk taking responsibility for some of this work. First there was the fact that the increasing amount of work placed heavy burdens on lay magistrates who are essentially a body of unpaid volunteers. Secondly the clerk was now a full time professional constantly on hand to deal with such matters. Thirdly, the increasing workload meant increased legal complexity so that in fact lay magistrates relied heavily on the clerk to advise them as to the proper way to deal with their many new burdens. Inevitably the powers of the clerk were increased to give him - or her - the power to make certain judicial or quasi-judicial decisions.⁷⁴

The ever growing complexity of magisterial law, amongst other things, produced a concern about the abilities of lay justices. The compulsory training of magistrates was introduced.⁷⁵ The clerk, now a full time expert was the obvious person to undertake this responsibility and thus increase his/her influence.

The professionalisation of the clerk's job and her/his increased

74. See inter alia the Justices' Clerks' Rules 1970. SI 1970.No.231.

75. The Training of Justices of the Peace in England and Wales. Cmnd. 2856 announced the introduction of compulsory training for new magistrates who must now undertake to be trained when they are appointed. The issue of training is examined in detail in chapter eight.

influence was not without its consequences. We saw that when, in the nineteenth century, solicitors began to take on the job of advising the magistrates they were criticised for dominating their bench. In the present century the same concern has been expressed, and found its way to the Divisional Court in the case of R v. East Kerrier Justices ex parte Mundy in 1952.⁷⁶ In this case and others which followed it the courts attempted to restrict the clerk retiring with the magistrates, and to define the limits of acceptable conduct for the clerk in court.

This section has attempted to show how the historical development of the clerks role has created the role that the clerk has today, and dictated the problems which clerks currently have to face. Most of the concerns of this thesis have already been revealed in which was of necessity a very brief and sometimes incomplete survey of the history of the clerk.

The problems of qualification of assistants, of the professionalisation of the job, of pay, of the relationship of the clerk to the bench, the training of the bench, and the clerk's influence over his staff and the general running of the court are all issues covered by the research. These issues arise or arise in a particular form because of the historical development of the clerks role.

76. [1952] 2 Q.B. 719.

SECTION ONE - THE CLERK IN COURT

CHAPTER TWO

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Introduction

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THE LEGAL RULES RELATING TO THE ROLE OF THE CLERK IN COURT

Introduction

The purpose of this section is to examine those legal rules which define how and when the clerk can carry out her/his job in court.

The number of legal rules applied by clerks is very great. The sheer growth in size of Stones Justices Manual, the clerk's bible, has an Alice in Wonderland quality about it. However, the amount of law which influences the way clerks carry out their role is relatively small.

For the purposes of the present work the body of law which does apply directly to clerks can be divided into two parts. The first part consists of those provisions (mainly contained in the Justices' Clerk's Rules 1970) which have developed the administrative role of the clerk into a quasi-judicial one, by empowering the clerk to do certain things which had previously been the province of the magistrates. These Rules and other statutory provisions will be examined more conveniently when we come to look at the power wielded by the clerk out of court. They are, of course, extremely important, particularly in relation to the question of the ways in which the role of the clerk might develop in the future.

The second part consists of those rules which define when and how the clerk can carry out her/his job in court. It is this area of law with which we are now concerned.

One of the aims of this thesis is to demonstrate the extent of the clerk's power. Obviously legal rules which delineate the ways in which it is possible for the clerk to behave limit that power or prescribe the ways in which it can be exercised, and it is therefore most important to examine them in some detail.

However we are here not simply attempting a view of the law on the clerk in court. That has been done elsewhere¹ and it would be tedious to recapitulate it. We aim to take the analysis somewhat further in a number of ways.

First, we wish to demonstrate the historical sense of the legal rules. The rules relating to clerks developed in the way that they did because of their social context and the processes of social change which operated in relation to them. Lawyers tend to analyse the development of a line of cases over time in terms of the legal principles arising from them - not surprisingly since the lawyer's job is to extract those principles favourable to their client's case and argue them convincingly according to the doctrine of precedent. However an additional and instructive way of looking at the case law is to examine the reasons why the principles became necessary, or had to change, or lapsed into disuse. This is what we aim to do in relation to the law on the behaviour of the clerk in court.

An important part of such a historically conscious approach is to look at the impact of the rules upon those affected by them, and also at the impact of those subject to the rules on the development of those rules. We shall be examining therefore, the reaction of clerks to the cases that applied to them, their opinions of those cases, and their attempts to influence changes in the law.

We shall also attempt to assess clerks' opinions of the present state of the law relating to their behaviour in court, examining their

1. Most of the cases can be found in 'Stones Justices Manual', in Brian Harris, 'The Criminal Jurisdiction of Magistrates', Barry Rose, in numerous articles in the Justice of the Peace, and in P. Darbyshire, 'The Role of the Justices Clerk and the court clerk'. Unpublished Ph.D. Thesis. Inst. Judicial Admin. Birmingham.

objections to it and the changes they would like to see. These opinions give useful indicators of the ways in which clerks perceive their role and the future of it.

Additionally we shall look at the effect of some of the rules on the way in which clerks actually behave, to discover whether they in fact follow the rules in practice.

The examination of the legal rules is divided into three sections. First we look at the question of bias - the rules which determine when it is proper for the clerk to act as a clerk in court. Secondly we examine the most extensive area of case law on clerks - the cases which define when it is proper for the clerk to retire with the bench. Thirdly we examine other rules which relate to the way in which the clerk should conduct her/himself in court. Finally we examine clerks' views on the law and look at the way in which they operate the law in court.

BIAS

Introduction

The problem of bias is, of course, a general one, not one peculiar to clerks. It involves defining when a member of a tribunal has a sufficient interest in the subject matter of the proceedings before the tribunal to disqualify her/him from acting.

For the purposes of the decisions on bias the clerk has been regarded as a member of the tribunal. The clerk is not part of the tribunal of fact. S/he does not take part in decisions on guilt or innocence. Nevertheless the clerk does advise on the law and may well retire with the bench when they are deliberating. The relationship of clerk and bench is a close one, and therefore the rules on bias have been applied equally to clerk and bench.

In fact many of the leading cases on bias are concerned with allegations of bias on the part of the clerk. This has not been because clerks as a breed have a low regard for the principles of natural justice, but because of a particular historical phenomenon - the part-time clerk. Until quite recently very many clerks acted as clerk to the justices and were also in practice as solicitors, and their associations as practising solicitors with parties who came before the court led to allegations that clerks were biased. This particular problem is much less likely to arise now, but there are still problems of bias which beset full time clerks.

The aim of this section is first to look at the development of the law on bias, examining the complications and contradictions of legal principle involved. We also seek to explain the cases in their historical context showing how the position of the part-time clerk

created particular difficulties in relation to bias. Finally we examine the problems of bias which still affect the contemporary clerk.

Bias - the legal principles

Perhaps the most notorious case on the question of bias concerned a clerk. R v. Sussex Justices Ex parte McCarthy¹ in 1924 laid down the general principles according to which courts should decide the question of whether or not bias was present. The case concerned a motor vehicle accident between McCarthy and one John Whitworth. Whitworth's solicitors were Langham, Son, and Douglas. The clerk to the Justices was Col. F.G. Langham, and a member of the firm Langham, Son and Douglas. However Col. Langham had appointed a deputy for the day on which the case was to be heard. McCarthy's solicitor did not discover until that deputy had retired with the magistrates that he was Major Langham, the clerk's brother and a member of the same firm! When the justices returned to the court and convicted McCarthy his solicitor objected to the position of Major Langham on the ground that Langham's firm were acting for Whitworth to recover damages as a result of the accident. There was an application for certiorari to quash the conviction.

In their affidavit the justices stated that when they retired, their clerk retired with them in case they needed his notes of evidence or advice on the law, but they did not need him and he refrained from referring to the case. Nevertheless the application for certiorari was granted and the conviction was quashed.

1. [1924] 1 K.B.256. This is still a leading case, but not the first case in which the courts considered the issue of bias.

The basis for the decision and for a large number of decisions on bias which follow it was that

"...it is not merely of some importance, but of fundamental importance, that justice should both be done and be manifestly seen to be done."²

Which in this particular case meant that it did not matter whether or not the clerk in fact said anything to influence the bench when he retired with them, but that because of his relationship to the case he was unfit to advise the justices. The important factor was not what actually happened but what might appear to have happened. It was held (by Hewart C.J.) that

"Nothing is to be done which creates even a suspicion that there has been improper interference with the course of justice."

This dictum in R v. Sussex Justices was developed in a case decided three years later - R v. Essex Justices Ex Parte Perkins.³

The case again involved a clerk to the justices who attended the justices in a case in which his firm had acted for one of the parties. The clerk himself had had no contact with the party concerned, but he had seen the notes taken by the managing clerk who had interviewed her. Again an application for certiorari was granted on the ground that it might reasonably appear that the tribunal was not impartial. R v. Sussex Justices Ex Parte McCarthy was cited by both judges in the case.

Avory J., (having quoted the relevant parts of the judgment of Lord Hewart in R v. Sussex Justices) said

"We have here to determine...whether or not there might appear to be a reasonable likelihood of his being biased."

2. Ibid p. 259.

3. [1927] 2 K.B. 475.

And further

"If there might, then justice would not seem, to the applicant, to be done, and he would have a right to object to the clerk acting as such."⁴

Swift J. began by directly quoting Lord Hewart

"Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice.' Might a reasonable man suppose that there had been such an interference with the course of justice?"⁵

These two cases might be described as notorious. They are certainly very often cited. The principle embodied in them has been used to decide the validity of decisions made by many other tribunals where the question of alleged bias by a member of the tribunal has been at issue. The alleged bias of a clerk to a local rating assessment committee⁶, of magistrates⁷, of a watch committee⁸, of a professional appeal body⁹, of a government minister¹⁰, have all been scrutinised according to the precepts laid down in these cases. In fact the dictum of Lord Hewart in R v. Sussex Justices must be highly placed in any contest for the most quoted - or perhaps the most misquoted - dictum in history. It did not reign alone as the

4. Ibid at p. 489.

5. Ibid at p. 490.

6. R. v. Salford Assessment Committee Ex parte Ogden [1937] 2 K.B.1.

7. R. v. Caernarvon Licensing Justices Ex parte Benson and another (1949) 113 J.P.23 and Cottle v. Cottle [1939] 2 All E.R. 535.

8. Cooper v. Wilson [1937] 2 All E.R. 726.

9. R. v. Architects Registration Tribunal Ex parte Jagger [1954] 2 All E.R. 131.

10. Franklin and others v. Min. of Town and Country Planning [1947] 2 All E.R. 289.

yardstick for deciding questions of bias, however. There was another, and still more stringent, test competing for this honour.

This more stringent test is often characterised as the 'real likelihood' test. It originated with the case of R v. Rand and others¹¹ in 1866. That case involved two Justices of the Peace who were trustees of a Friendly Society and a Hospital Board. These organisations had invested money with Bradford corporation. The corporation wished to take water from certain streams, but before they could do so they had to acquire a certificate from the justices to say that they had completed the construction of a reservoir. (This case of course takes place at a period of history when the relationship between the justices and the precursors of our modern local authorities was very different to that of today.) The corporation obtained their certificate, but the two justices we have mentioned sat on the bench which awarded it. The connection between the justices and the corporation was extremely tenuous, and not surprisingly the application for certiorari was not granted. The Divisional Court pointed out that any pecuniary interest, however small, in the subject matter of the proceedings would disqualify a justice from sitting in such proceedings. There was no pecuniary interest here. But

"Wherever there is a real likelihood (my emphasis) that the judge would, from kindred or any other cause, have bias in favour of one of the parties it would be very wrong in him to act..."¹²

However there was no real likelihood of bias in this case.

11. [1866] L.R. 1QB 230.

12. Per Blackburn J. *ibid* at p.232-233

The 'real likelihood' test was applied in R v. Meyer 1874¹³ where the chairman of a local Board of Health sat on a bench of magistrates which heard a prosecution of the Board. The magistrate in this case had been intimately involved in his capacity as chairman of the Board in the circumstances of the case and the Divisional Court, applying the test of R v. Rand found that there was a real likelihood of bias.

The 'real likelihood' test has been applied in other subsequent cases.¹⁴ Whether on the authorities there is really any substantial difference between the two tests is questionable. The dicta are not altogether clear. The two tests are usually characterised as 'the reasonable suspicion' test and 'the real likelihood' test, but such a characterisation is inevitably something of a simplification although an understandable and probably necessary one. The reality is somewhat more confused.

The criterion of reasonableness was not in fact used in R v. Sussex Justices Ex parte McCarthy. As we have seen, it was said in that case that nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice. The reasonable man was not imported until R v. Essex Justices Ex parte Perkins, with 'Might a reasonable man suppose that there had been such an interference with the course of justice?'¹⁵ The reasonable man, as is his wont, stayed on the scene

13. [1875] 1 Q.B. 173.

14. For example R. v. Sunderland Justices [1901] 2 K.B. 357. and Frome United Breweries Co. v. Bath Justices. [1926] A.C. 386.

15. [1927] 2 K.B. 475 per Swift J. at p. 490.

and was used in succeeding cases as a notional observer seeing that justice was done.

There is in fact an authority which suggests that an unreasonable man might do. Lord Esher in Eckersley v. Mersey Docks and Harbour Board in 1894 said that persons ought not to act as judges 'in a matter where the circumstances are such that people, not necessarily reasonable people, but many people - would suspect them of being biased'. However this view has been roundly attacked and condemned (by Lord O'Brien in R (Donoghue) v. County Cork Justices (1910 2 I.R. 271) and has not been adopted in subsequent cases.

The 'real likelihood' test is also not without its problems. For instance in R v. Justices of Sutherland¹⁷ Vaughan Williams L.J. supported the principle in R v. Rand, saying

'It appears to me that the whole law on the subject may really be found laid down in the cases of R v. Rand and R v. Meyer.'¹⁸

But later he goes on to say

'We must judge of this matter as a reasonable man would judge of any matter in the conduct of his own business. Can one doubt that a reasonable man as a matter of business would, under the circumstances of the case, infallibly draw the inference that the justices who had negotiated and brought about this agreement would have a real bias in favour of granting a licence to Duncan and Dalgleish Ltd. the parties to it?'¹⁹

This sounds remarkably like the dictum of Swift J. in the Essex Justices case cited above, and suggests that there is possibly not a

16. [1894] 2 Q.B. 667.

17. [1901] 2 K.B. 357.

18. Ibid at p.371.

19. Ibid at p.373.

great deal of difference between the two tests. Indeed this is the opinion of Professor S.A. de Smith who says, in the fourth edition of his book 'Judicial Review of Administrative Action'

"'Reasonable suspicion' tests look mainly to outward appearances, 'real likelihood' tests focus on the courts own evaluation of the probabilities; but in practice the tests have much in common with one another and in the vast majority of cases they will lead to the same result."²⁰

Despite such arguments, however, the Divisional Court took the view in R v. Camborne Justices Ex parte Pearce,²¹ in 1954 that there was a difference between the two tests, and that they were capable of producing different results.

It would seem that the number of cases on bias coming before the Divisional Court had begun to irritate it over the years. This irritation was expressed, and a preference for the real likelihood test established in the Camborne Justices case.

The nature of the bias alleged in the case was dissimilar from the others so far examined in that it did not concern the problems of the part-time clerk, but rather a clerk who was a member of a County Council and who advised the Justices in a case where a department of the council was prosecuting for a food and drugs offence. The clerk concerned had never been a member of any council body involved with food and drugs administration. Nevertheless it was alleged that he was biased and should not have advised the justices in the case. An application for certiorari was, however, refused. The court indulged in a critical review of the authorities and decided firmly in favour of the real likelihood test. The mood of the decision is perhaps

20. Stevens 1980 p. 264

21. [1955] 1 Q.B.41.

best expressed in the following extract from Slade J. who delivered the judgment of the court.

"The frequency with which allegations of bias have come before the courts in recent times seems to indicate that Lord Hewart's reminder in the Sussex Justices case that it 'is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done' is being urged as a warrant for quashing convictions or invalidating orders upon quite unsubstantial grounds, and, indeed in some cases upon the flimsiest pretexts of bias. Whilst endorsing and maintaining the integrity of the principle re-asserted by Lord Hewart this court feels that the continued citation of it in cases to which it is not applicable may lead to the erroneous impression that it is more important that justice should appear to be done than that it should in fact be done."²²

The Camborne Justices case therefore emphasised heavily the primacy of the court's own evaluation of the facts, rather than the outward appearance of the facts. The 'real likelihood' test was preferred.

It is perhaps rather ironical that in the Camborne Justices case the court rejected the allegation that there had been bias, and criticised the tendency of courts to find bias much too easily but during the application for costs at the end of the case Lord Goddard said

'If the court were asked to express an opinion they would say it were better if Mr. Thomas (the clerk) were not to sit when prosecutions were conducted on behalf of the council of which he was a member!'²³

The preference for the 'real likelihood' test did not have a very long history however. Fourteen years later 'reasonable suspicions' returned to fashion in Metropolitan Properties Co.(F.G.C.) Ltd. v.

22. [1954] 2 All E.R. 850.

23. Ibid. p. 851. This comment is not reported in the Law Reports reference at [1955] 1 Q.B. 41.

Lannon (1969).²⁴ This case involved a solicitor who chaired a rent tribunal when it fixed a low fair rent on a flat comparable to a flat owned by the solicitor's father. The solicitor's father was in dispute with the same owners over rent. Denning M.R. and Edmund-Davies L.J. reasserted the principle of R v. Sussex Justices Ex parte McCarthy, and favoured the reasonable suspicion test.

Once more, however, the differences between the two tests are not crystal clear. Denning M.R. states a clear preference for Hewart's dictum in the Sussex Justices case but also says

'...in considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself, or at the mind of the chairman of the tribunal or whoever it may be who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would or did in fact favour one side or the other. The court looks at the impression which would be given to other people. Even if he was as impartial as he could be, nevertheless if right minded persons would think that, in the circumstances, there was a real likelihood of bias on his part then he should not sit.'²⁵

This is an extremely confusing use of the phrase 'real likelihood'. However it is clear from the passage that the criterion of the reasonable man is the yardstick for deciding bias once again. And later in the same paragraph (despite other confusing phrases such as 'Nevertheless there must appear to be a real likelihood of bias') the basis of the decision is made very clear

'Justice must be rooted in confidence; and confidence is destroyed when right minded people go away thinking "The judge was biased"'.²⁶

24. [1969] 1 Q.B. 577.

25. Ibid p.599

26. Ibid.

Very similar sentiments are expressed in the judgment of Edmund-Davies L.J. Referring to the arguments of the respondents in the case that the real likelihood test was the correct test, he protested

'But if Mr. Slynn (Counsel for the Rent Assessment Committee) be right, what becomes of the principle which remains transcendent despite its enshrinement in the excessively quoted words of Lord Hewart in *R. v. Sussex Justices* that...' (We will not add to the already excessive quotation.)²⁷

Edmund-Davies then took up the cudgels with Professor de Smith, who, in an earlier edition of his book had expressed a tentative preference for the real likelihood test. Edmund-Davies said

'With profound respect to those who have propounded the real likelihood test, I take the view that the requirement that justice must manifestly be done operates with undiminished force in cases where bias is alleged, and that any development of the law which appears to emasculate that requirement should be strongly resisted.'²⁸

We seem to be back then, with the reasonable suspicion test. The question which must be asked is whether a reasonable man, appraised of the material facts would reasonably suspect that the tribunal was biased.

This preference for the reasonable suspicion test has also been of short duration, and indeed the conclusion which we have just drawn that Metropolitan Properties v. Lannon favoured the reasonable suspicion test was rejected by Lord Widgery in R v. Altrincham Justices Ex parte Pennington.²⁹ In that case Lord Widgery said that the Metropolitan Properties case applied both of the two tests and that it was not clear which of the two tests was the correct one.

27. Ibid. p. 604.

28. Ibid. p. 606.

29. [1975] 1 Q.B. 549.

Lord Widgery had himself declined to express a preference between the two tests in a previous case³⁰, and he declined to express a view in the Altrincham Justices case. He said that the two tests overlap and that one may be appropriate to one situation and one to another situation. He contented himself with laying down a simple rule for magistrates to follow.

The Altrincham Justices case had concerned a Chairwoman of the bench who was also on the Education Committee of the local authority, and who sat on a case where the defendants were being prosecuted for delivering short weight of vegetables to local schools. Lord Widgery said that where magistrates had a multiplicity of interests they should apply a simple rule when deciding whether or not they should sit on the case. This simple rule was in fact taken from Lord Denning's judgment in the Metropolitan Properties case, and it prescribed that magistrates should look at the day's list to see if any case involved an organisation in which they were actively involved. If such a situation arose they should disqualify themselves from sitting. If they were in any doubt they should (literally or figuratively) ask a friend if, in the circumstances, the friend thought they should sit. If that friend (real or notional) said that they should not sit, then they should avoid that case.

If we make the assumption that magistrate's friends are reasonable people, it may well be that this in effect amounts to the reasonable suspicion test. However, since Lord Widgery specifically declined to choose between the two tests, we are hardly entitled to make such an assumption.

30. R. v. Eastern Traffic Area Licensing Authority Ex Parte J. Wyatt Jnr. (Haulage) Ltd. [1974] R.T.R. 480.

The Altrincham Justices case may provide a working rule for magistrates who have a multiplicity of interests. It hardly provides a clear rule which can be applied to any situation of alleged bias. Indeed, Bridge J. in the same case supporting the general approach of Lord Widgery and Lord Denning was clear that the formula 'suggested a useful approach' but was not 'a clearly articulated test'.³¹

We shall see when we come to look at practical problems of bias faced by clerks that failure to provide a clearly articulated test causes problems in practice.

BIAS AND THE PART-TIME CLERK

As already indicated one of the situations which has repeatedly lead to allegations of bias on the part of the clerk has been that of the part-time clerk, acting not only as clerk to the justices, but also as a local solicitor or possibly holding some other public office in addition to the clerkship.

To those more recently involved with magistrates courts the part time clerk will not be a familiar figure. Those now coming into contact with magistrates' courts are used to full time clerks to the justices, usually operating with a number of assistants. However, as we saw when examining the history of clerks, there used to be many more clerks who acted only part-time than there were full-timers. The Departmental Committee on Justices' Clerks made a valuable assessment of the situation. It surveyed the clerks serving in 1939 and found that there were then 1037 divisions in England and Wales served by a total of 822 clerks. Of these clerks, 90 were full-time and served 104 divisions, and 732 were part-time and served 933

31. [1975] 1 Q.B. 549, at p.555.

divisions.³² Patently therefore there were some part-time clerks who were not only part-time but who served more than one division - 143 served two divisions, 27 served three divisions, and 4 served four or more divisions.

The distinction between part and full-time clerks was not crystal clear, however. Some were described as full-time because they had no other employment but they were required to do very little work as clerk. Some were described as part-time because they did have other employment, but were paid substantial salaries for doing the job of clerk to the justices and in fact devoted most of their time to the clerkship.

The great majority of part-time clerks were solicitors, but as well as the combination of private practice with clerkships, many combined advising the justices with other public offices, for instance 197 were clerks to the Commissioners of Income Tax, 139 were clerks to Local Authorities, 72 were County Court Registrars, and 91 were Coroners. A variety of other appointments were held, such as appointments to Burial or Pension Committees or Hospital Boards. 16 clerks held five or more public appointments.³³

The Departmental Committee reported a wide divergence of views amongst those who reported to it as to the desirability of this situation. The Committee's conclusion, as we have seen, was that the situation was ripe for an extension of the full-time system, to be achieved by amalgamation of divisions where necessary to create sufficient business to justify the appointment of a full-time clerk.

32. Report of the Departmental Committee on Justices' Clerks. Cmd. 6507 para.69.

33. Ibid. para.74.

The desirability of extending the full-time system was partly motivated by an increase in the amount of business dealt with by many - if not all - magistrates' courts, and by an increase in the number of, and complexity of, the legal provisions which applied to magistrates' courts. The question of conflicts between the office of clerk to the justices and other public offices or private practice was, however, also an issue which exercised the minds of the Committee, and helped to persuade them that the full-time system needed extending. The Committee recognised that conflicts between the duties of clerkship and private practice did arise. It said

'It may be rare for such conflicts to affect the course of justice, but their existence may lead to a belief amongst members of the public that the court is not advised impartially.'³⁴

Therefore although the Committee felt that it would create too many complications to ban the combination of clerkship and private practice it did recommend that it would be better if clerkship could be combined with some compatible public office.

The Committee set it down as a general principle that '...neither the clerk nor his assistant should act in cases where any client of his is an interested party'.³⁵

Despite the fact that the combination of clerkship and other public office was preferred by the Committee, such combination also carried its own problems. Particularly, the combination of clerkship with employment by the local authority caused problems where the local authority appeared as a party to the proceedings before the magistrates' court. Although the Committee claimed to have no

34. Ibid. Para. 81.

35. Ibid. Para. 87.

evidence of clerks abusing this type of position it nevertheless felt that there was 'at any rate an apparent conflict of duties which cannot but give rise in the minds of the public to suspicions which are no less desirable because they are founded on possibilities rather than actual facts.'³⁶ The recommendation therefore was that there should be limitations on the holding of local authority appointments and clerkships.

The Committee in its report of 1944 disclaimed any evidence of abuse of the system by clerks. However its deliberations did take place against a background of case law which indicated some problems. We have already seen that a number of the cases which troubled the Divisional Court concerned clerks who were also in private practice. There were other cases which were disturbing.

A case of 1884 reveals if not an actual abuse of the system, at least a very primitive understanding of the nature of bias. In R. v. Brackenridge³⁷ it appears that the clerk to the justices actually acted as solicitor for one of the parties before his own bench of magistrates. Even if the resounding tones of R. v. Sussex Justices had not been sounded in 1844 at least the cautionary notes of R. v. Rand and R. v. Meyer should have been heard!

Of course both R. v. Sussex Justices and R. v. Essex Justices involved part-time clerks who also practiced as local solicitors. In fact the clerk in R. v. Essex Justices is a splendid example of a man holding a multiplicity of positions. He was in private practice, operating a total of three offices, he was clerk to the justices, and

36. Ibid. para 88.

37. (1884) 48 J.P. Rep. 293.

he was a County Court Registrar. A closer examination of the facts of R. v. Essex Justices will give a clearer picture of the problems faced by a part-time clerk also in practice in the area as a solicitor.

What happened was that one of the parties in domestic proceedings before the magistrates had gone to the clerk's firm of solicitors for advice. She was seen by the managing clerk. The clerk to the justices saw a brief reference to the interview in the notes of the managing clerk, but he never saw the applicant in the case, and was unaware when the case came to be heard by his magistrates that his firm had acted for the applicant, since his only contact with the case had been the name in the list of business dealt with by the managing clerk. The only action his firm had taken was to enter into a correspondence with the respondent, and this had been handled by another solicitor. It must nevertheless have seemed most unjust to the husband respondent when he had been engaged in correspondence with Messrs. Jones and Sons Solicitors, to find Mr. Jones advising the bench and retiring with them when they went to make their decision. Not only this, but the husband was unrepresented in court and appears to have made typically heavy weather of cross-examining, because he complained in his affidavit to the Divisional Court that he was much confused and embarrassed by the clerk telling him not to make statements but only to ask questions, and by the clerk's taking over the questioning.

The clerk did only what any other clerk would have done in the situation. He had no knowledge of any connection between his firm and the parties to the proceedings, and he carried out his usual job

of eliciting the necessary evidence for the court, helping an unrepresented defendant, and advising the magistrates on the law. He was placed in an invidious position which arose purely by virtue of the facts of the situation - that he was playing the dual role of clerk and local solicitor. The divisional court pointed out that no moral blame attached to the clerk or the bench. The situation was one which was bound to arise from time to time.

In this case the connection between the clerk and the case which was before the court was a direct one - the firm that the clerk belonged to was acting in the matter before the court for one of the parties. However in R. v. Lower Munslow Justices Ex parte Pudge 1950³⁸ (a case which almost deserves notoriety solely because of its name) a challenge was made to the clerk on the basis of a much more tenuous link with the proceedings before the court. If the objection had been upheld, it would have made life very difficult indeed for the part time clerk.

The case concerned a dispute under the Small Tenements Recovery Act 1838 as to whether a tenancy was a weekly or a yearly tenancy. There were two challenges to the clerk. The first alleged that the clerk had given evidence on the matter before the court to the bench during the case. This was a very serious allegation indeed - Lord Goddard pointed out in his judgment that if it were true it would not only be ground for certiorari, but it might be ground for putting forward strong recommendations to the bench that they had better get rid of their clerk.³⁹ Fortunately this allegation was contradicted

38. [1950] 2 K.B. 756.

39. Ibid p. 757.

in the affidavits of both the clerk and the bench. It was admitted that after the justices had come to their decision, the clerk had commented that four years previously when he had been concerned with the property it had been - as the justices had just found - a yearly tenancy. However by this stage of the case the court was functus officio and it was adjudged quite proper for the clerk to have said what he did.

The second challenge to the clerk was on the basis that he was connected with the case. The connection was that three years previously the clerk had acted for the vendors when the property in question was sold to the applicant. Again the clerk was exonerated. It was held that his connection with the subject matter of the proceedings was too tenuous to constitute bias. If the clerk had acted for one of the parties in the case then the decision would have been different - but to act for the vendor of the property three years previously was insufficient connection to constitute bias.

It was very fortunate for part-time clerks that this decision went the way it did. Life would have been very difficult for them if any connection with a case at whatever distance had been adjudged sufficient to make them biased and thus unable to advise the justices. Fortunately Lord Goddard was well aware of the problems caused by the local links of clerks - part-time and full-time - and his judgment was very direct and practical on this issue. He pointed out that everyone knows "that clerks to the justices in the country are normally leading solicitors in the district" and that they probably know "a great deal about everybody's affairs in the

neighbourhood".⁴⁰ He held that a previous connection with the subject matter of the proceedings, or a degree of local knowledge relevant to the case is not enough to disqualify the clerk on the ground of bias.⁴¹

In 1950 when the Lower Munslow Justices case was decided the recommendations of the Roche Committee were being put into operation, and the number of part time clerks was steadily decreasing. As we have said, the part-time clerk is not now a familiar figure. It is perhaps more likely that we will find that the contemporary clerk to the justices, far from having time to pursue a private practice, is so busy that he does not even see the inside of the courtroom very often, so great is the burden of the many other duties which s/he is called upon to perform in a busy court. However there are still a very few part-time clerks. The principles which arise from these cases are still important for them. They also form a backdrop to the problems of bias which are faced by the full-time clerk.

BIAS AND THE FULL TIME CLERK

Two situations can pose problems of bias for the full-time clerk. One occurs where the clerk has local connections or associations which may lead to allegations that s/he is biased towards one of the parties because of these connections. The second arises because

40. Ibid. P. 758. It was certainly true when the case was decided, in 1950, that many clerks were leading local solicitors.

41. The question of these local links will be examined in detail later in this section.

clerks often have a very extensive local knowledge, which can include information about defendants or the circumstances of the cases before the court which it would be quite wrong for the bench to have.

The clerk with local connections

Looking first at the problem of local connections, perhaps the most obvious example of this is the situation which arose in R. v. Camborne Justices Ex parte Pearce.⁴² This case, which we have already referred to in the previous section, concerned a prosecution by a food and drugs inspector who was employed by the local county council. The prosecution was for an offence of selling watered milk. The clerk who sat in the case was a Mr. Donald Woodroffe Thomas, and he was an elected member of the County Council. The clerk did not retire with the bench when they went out, but he was later sent for by them to advise on a point of law. Mr. Thomas was never a member of any council body involved in food and drugs administration.

We have already observed that the test which was applied in this case was the 'real likelihood' test and that it was held that there was no bias in this case. We have also noted that Lord Goddard remarked during the application for costs in the case that it would be better if the clerk did not sit when prosecutions were being conducted on behalf of the council.

To say that whilst there was no real likelihood of bias it would be better if the situation did not arise again sounds suspiciously like an 11th hour conversion to the reasonable suspicion test. However Lord Goddard's concern that it would be better if the clerk refrained from sitting when prosecutions were being conducted by the

42. [1955] 1 Q.B. 41.

council is perhaps not surprising when it is viewed in the light of the law relating to the conduct of magistrates in similar situations.

Section 3 of the Justices of the Peace Act 1949 provides that a magistrate who is also a local councillor shall not sit when her/his local authority is a party to a case. This point was actually taken in the Camborne Justices case, the applicant arguing that since Section 3 disqualified magistrates when they were members of the local council it ought, by analogy, to disqualify the clerk since the clerk was a member of the tribunal. The Solicitor General, who had been asked to intervene as amicus curiae used the argument against this - that the section did not apply by analogy to clerks because clerks perform a function different from magistrates and it is therefore unnecessary to disqualify them. The Solicitor-General's argument was perhaps not very strong since, as a general practice, the cases have applied the same principles about bias to clerks as they have applied to the bench. Whilst it is true that the clerk does not make decisions about the guilt or innocence of the defendant, the relationship of the clerk to the bench is so close that it would be difficult to justify the application of different rules to the clerk. We shall show, in Chapter Three, how closely involved the clerk can be in the decision making process of the magistrates.

In the event, the "real likelihood" test was applied, and it was held that the clerk was not biased. The Solicitor-General's argument about the applicability of the various provisions of the Justice of the Peace Act 1949 to clerks was not taken up in the judgment. This is perhaps regrettable, since judicial pronouncements on the role of the clerk are few and far between. However, a proper examination of the issue would have involved a

considerable examination of the roles of clerk and bench, and this was perhaps an issue too extensive for the Divisional Court to take up in the Camborne Justices case.

The Divisional Court has fortunately not been troubled on very many occasions by applications for certiorari based on the bias of the clerk arising out of a clerk's local connections. However problems do arise frequently in practice. A perusal of the Justice of the Peace Journal reveals requests for advice on such points at regular intervals.

For instance, in 1924 a solicitor consulted the journal's Practical Points column with a complex problem.⁴³ The solicitor's managing clerk had been appointed Chairman of the local council. This entitled the managing clerk to sit as a magistrate. Not only did members of the firm appear as advocates before the court where their managing clerk would be sitting on the bench, but members of the firm acted as deputies when the clerk to the justices was absent. Fortunately such a situation would no longer arise,⁴⁴ but the potential was there for the court to seem not only biased but positively incestuous! The advice of the Journal was that the managing clerk should not sit if a member of his firm were acting as advocate, and it would be better if he could avoid sitting when a member of the firm was acting as clerk.

A more modern example from the many requests for advice on such problems can be seen in a letter to the journal in 1970.⁴⁵ A clerk

43. 88 J.P.N. 306.

44. Chairman of local councils are no longer ex officio justices since the Justices of the Peace Act 1968 S.1.

45. 134 J.P.N. 633.

to the justices had a son who was just about to graduate in law. The clerk wished him to be articled to a local firm of solicitors for whom the clerk had a high regard. Unfortunately it was not possible for the clerk to arrange for a deputy to sit every time the solicitor made one of his regular court appearances. The clerk wished to know what he should do. The Journal replied that the principle of R. v. Sussex Justices applied, that it would probably not be a problem when the solicitor to whom the son was articled appeared in court, but that when the son himself began to appear with his principal, or with counsel the situation would be more serious. Unfortunately the journal was unable to offer any concrete advice as to what the clerk should do in these circumstances, except to say that he should consult his bench.

Such advice cannot have been particularly helpful - especially since in 1866 it was held in the case of R. v. Rand that

'Wherever there is a real likelihood that the judge would from kindred or any other cause have bias in favour of one of the parties it would be very wrong in him to act.' ⁴⁶

There is therefore in the case law a direct reference to bias caused by a family relationship. Certainly when the clerk's son began to appear in court one can envisage a situation where the bench might hear a case, the clerk advise them when they retire to consider the guilt or innocence of the defendant, and the bench find in favour of the clerk's son's client. In such circumstances it may well be that a reasonable suspicion of bias might arise, if not a real likelihood. These issues were not discussed in the journal, however.

46. [1866] L.R. 1 Q.B. 230 at p.233.

The frequency with which problems of bias of this type arise in the columns of the Justice of the Peace suggest that the case law does not go very far towards solving the practical dilemmas of clerks.

In recent years the problem of bias has become entangled with the problem of the status and remuneration of clerks. Clerks have felt for a very long time that they are not adequately remunerated for the work that they do. Discussion of salary problems in the Justice of the Peace takes up a great many column inches, and the majority of the clerks who were interviewed for the present study felt that they were not properly paid. As a result of this feeling, many clerks have left their jobs to take up others which are more lucrative. This has led to problems of bias. For example in 1979 the head of a police prosecutor's office consulted the Justice of the Peace with the following problem. He had recently appointed a new prosecuting solicitor to his department who had been, until his new appointment a deputy magistrates' clerk in the area of the police authority. The prosecutor wished to know if any problem would arise as a result of the ex-deputy prosecuting before his former bench. He was advised that there were no regulations to cover the situation, that the cases were against the clerk holding two positions at once, but that there was nothing in law against a solicitor appearing after he had ceased to be a justices' clerk's assistant. The journal declined to lay down any guidelines since they felt that cases would vary so much on their facts.

This request for advice prompted a lively correspondence in the Journal. Shortly after the answer had appeared in the Practical Points column, a letter was printed from the Association of

Magisterial Officers.⁴⁷ The Association expressed concern that clerks should be taking jobs as prosecuting solicitors. They pointed out that there were also instances of prosecuting solicitors taking jobs as clerks, and of police officers taking jobs as clerks in the area where they had previously been prosecuting. In the view of the Association such situations were totally unacceptable, and represented a breach of the principles of natural justice. The Association felt

'That court staffs should be seen to be independent of any person or body appearing before the justices is of paramount importance.'

A later correspondent on the same issue took the problem to its extreme by contending that it would be difficult for any clerk to claim that he was independent as clerks are paid by the local authority. The Journal was not impressed. It pointed out that the Magistrates' Courts Committees administer and determine the clerks salary, and that the connection of the clerks with the local authority was extremely tenuous.⁴⁸

The week following this rather thin argument that clerks were always biased an attack was made on the Association of Magisterial Officers position by a clerk who said that the Association's views reflected 'a failure to comprehend that independence of mind which is the product of professional training and the very basis of the English Legal System.'⁴⁹ This clerk stated that he had prosecuted without embarrassment before a bench which he had previously advised as a clerk. He felt that the ability to keep an open mind on the part of

47. 143 J.P.N. 411.

48. 143 J.P.N. 411.

49. 143 J.P.N. 494.

the bench, clerks and the profession constituted sufficient protection against bias.

Such a position would seem to go a good deal beyond that of even the most enthusiastic proponents of the real likelihood test. One wonders why so much effort has been expended in developing tests concerning bias, if they are unnecessary because the "independence of mind" of those concerned is to be relied upon.

Apart from revealing some rather idiosyncratic views held by those associated with the magistrates' courts on the question of bias, these examples demonstrate that such problems arise with frequency, and that the cases which have so far been decided on the point do not always give the necessary assistance to those clerks who have to grapple with the real problems of bias as they arise in practice. The seeming inability of the Divisional Court to agree upon the correct test for bias does not help the situation, but even if one test were to be clearly preferred it would still be difficult to see how some of the problems raised by clerks in the columns of the Justice of the Peace would be answered.

We have considered the problems which arise in relation to clerks with what we have called 'local connections'. A further problem arises in relation to the local knowledge of clerks.

The local knowledge of clerks.

The duties of the clerk do not begin and end in the courtroom. The clerks in any court are concerned in the general management of the court's business, and clerks and their staff prepare all the paperwork which is ancillary to the court hearing. They may well see defendants, prosecutors, local solicitors, witnesses outside the courtroom when such people come looking for help and guidance.

The clerks may know many of these people very well. This applies not only to those whose jobs associate them with the court but also to defendants and their families. This issue was discussed by the Departmental Committee on Justices Clerks in 1944⁵⁰ and also in 1950 in R v. Lower Munslow Justices ex parte Pudge,⁵¹ where Lord Goddard said

'The clerk probably knows a great deal about everybody's affairs in the neighbourhood. He certainly knows a good deal about the defendants who appear before the justices occasionally - those we may call their regular customers...'

Magistrates, of course also get to know their regular customers quite well. An anecdote from the experience of the author illustrates the sort of situation which may occur. The author was clerk in a court when one of the court's regular customers pleaded guilty to the offence of drunkenness. A problem arose in that the defendant had accumulated a large debt in unpaid fines. The situation was such that the usual practice of the court would have been a committal to prison or at the very least a suspended committal. The court staff knew the defendant well enough to know that the fines would remain unpaid since he 'drank' all his available cash. The warrant officer, however, suggested that rather than commit the defendant to prison the defendant's brother might be willing to pay the fines. The brother was therefore contacted, whilst the defendant was taken to the cells and plied with cups of coffee to sober him up. Later in the day the brother arrived. He also was well known to the court staff. The brother paid the fines and took the defendant home

50. Cmnd. 6507 at paras. 51-54.

51. [1950] 2 K.B. at 758

with him, having been encouraged to dry him out. Thus by somewhat informal means the court avoided sending the defendant to prison, cleared a considerable amount in unpaid fines, and further kept the defendant off the streets for at least a short period of time.

Although magistrates may know quite a lot about their regulars, it will almost always be true that the clerk will know more. The clerks will sit in court almost every day, whilst a magistrate will sit once a week, or less. The clerk will often see a case through many bail applications, and over several weeks to a final hearing and sentence. During this time s/he will accumulate quite a lot of knowledge about a defendant. Clerks are frequently entertained by defendants who claim to have large liquid assets when they apply for bail which later mysteriously disappear when they make a plea in mitigation or make arrangements to pay their fine before a different bench.

Outside the courtroom clerks will be approached by confused defendants looking for advice, will be consulted by prosecutors and defence solicitors wishing to make arrangements about their cases, and by probation officers needing guidance. Much of the information which comes the clerk's way from such encounters will be of a purely functional nature - whether X is pleading guilty, or whether Y's plea of not guilty will take all morning to hear, or that constable Bloggins has been on night duty. However, some of it will be information of greater moment, information which the clerk may have been given but which it would be quite wrong for the bench to know. It may be, for instance, that a defendant aged 19 is pleading not guilty to an offence of burglary. The clerk may know that the defendant has three previous convictions for the same offence with the

same modus operandi in the Juvenile court. However it may well happen that no member of the bench dealing with the case is a juvenile magistrate. It would of course be highly improper for the clerk to tell the bench what s/he knows - although many defendants must wonder at what goes on in the retiring room if the bench call the clerk out to give them legal advice, and the defendant has seen the clerk many times before.

More than not telling the bench that the defendant is known to the court, the clerk must also be careful not to indicate by her or his behaviour that s/he knows the defendant. Otherwise any magistrate endowed with a modicum of intelligence will soon realise that the defendant has been there before. Lord Goddard in R. v. Barry (Glamorgan) Justices Ex parte Kashim⁵² was at pains to point out the dangers of this situation. That case concerned a clerk who retired with the bench when there was no question of law on which the bench needed his advice. Lord Goddard said

'One of the considerations which the court had in mind in the East Kerrier case was the very thing that has happened in this case. The applicant has previous convictions in courts in which this very clerk has sat as a clerk. I do not impute to the clerk any misconduct in the justices room, but it is important to bear in mind that justice must not only be done but must manifestly be seen to be done.'⁵³

R. v. Lower Munslow Justice Ex Parte Pudge⁵⁴ is quite clear on the question of how the clerk should behave if s/he has information about the circumstances of the parties or the case. It does not in itself constitute bias, for

52. [1953] 2 All E.R. 1005

53. Ibid p.1007

54. [1950] 2 K.B. 756.

'It would be an astonishing doctrine to lay down that because a justices clerk knows something about the matter before the court and his knowledge has been acquired owing to a transaction he has had with some previous person connected with the subject matter of the litigation he is thereby debarred from acting as clerk.'⁵⁵

However if the clerk has information pertinent to a case s/he must keep it to her/himself.

'Of course if he communicates his knowledge to the justices and tells them facts which would mean that he was giving evidence behind the backs of the parties and not being subject to cross examination he would be acting most improperly.'⁵⁶

If the clerk had information about a case and did surreptitiously give evidence by informing the justices of matters within his own personal knowledge this would be most improper.

'...it would be a matter of the gravest moment. It would certainly be a ground for certiorari, and it might be a ground for putting forward strong recommendations to the bench that they had better get rid of their clerk.'⁵⁷

If, therefore, the clerk has any information about the parties before the court, or the subject matter of the proceedings, s/he must keep such information strictly from the bench. This is of course a matter where it is necessary to rely on the integrity of the clerk, since there is often no way in which the defendant can know what has been said in the retiring room. Also it is a matter for the sensitivity of the clerk, since, as we have said, it is not always necessary for the clerk to speak to the bench in order for the clerk to communicate to them very effectively that s/he knows the defendant. If the clerk says, when the defendant comes into the dock, "Ah, its Mr. Fagin, isn't it? I see you are now living in Whitechapel, Mr.

55. Ibid p.758.

56. Ibid.

57. Ibid. p.757.

Fagin. Is that correct?" the magistrates will immediately know that the defendant has been there before several times, even if he is not known to them.

A more recent case on the question of bias challenged not the information which the clerk had about a defendant, but the attitudes of the clerk! R.v. Uxbridge Justices Ex parte Burbridge⁵⁸ concerned a defendant who was employed as a loader at Heathrow Airport. Mr. Burbridge was before the court in connection with alleged offences arising from an industrial dispute. His legal adviser, a Mr. Emonson, appears to have had a discussion with the clerk to the Justices concerning the hearing of his client's case which Mr. Emonson described as somewhat acrimonious. Mr. Emonson alleged that the clerk to the justices had said 'We know all about the loaders at the airport and their thieving.' When Mr. Burbridge's case came before the court on the following day Mr. Emonson reported the conversation of the previous day and requested that the court not try the case because it was biased. The clerk to the justices was not advising the bench on that day. The bench retired to consider the application, and came to the conclusion that there was no bias, that whatever the opinion of the clerk to the justices was, it could not extend to 60 or more Uxbridge magistrates. The bench had not spoken to the clerk to the justices and did not share what was reported as his opinion. They therefore proceeded to try the case.

There was an application for certiorari, (which was heard by Widgery LCJ, Willis J. and Bridge J.) Lord Widgery, adopting the reasonable suspicion test and accepting Mr. Emonson's version of

58. The Times, June 21st 1972.

events (i.e. being as generous to the applicant as possible) held that there was no bias. The case was decided entirely on its facts - their Lordships feeling that the case was so far from either definition of bias that it was unnecessary to decide which definition of bias applied.

It would have been an alarming extension of the doctrine of bias to have held that a remark made out of court by the clerk to a solicitor could influence the magistrates on the bench against a particular defendant or class of defendants, without the bench even having heard the remark.

It is true however that the opinions of clerks, and more particularly the opinions of the clerk to the justices, do have an effect upon magistrates to some extent. The clerk to the justices will probably have been responsible for all or part of the education of the bench in their duties as magistrates. The clerk also is responsible for the general running of the court, and will have an impact on the education and attitudes of her/his assistants. The opinions of the clerk to the justices are inevitably powerful. Whilst it might be suggesting too much to allege that a justices clerk could inculcate a bias against a whole class of defendants in all 60 magistrates in his division one should not underestimate the real influence that the clerk has. The influence of the clerk on the magistrates in court will be discussed in Chapter Three, and the influence of the clerk to the justices when training magistrates is developed in Chapter Eight.

THE RETIREMENT OF THE CLERK WITH THE BENCH

The decision in R v East Kerrier Justices Ex Parte Mundy, 1952¹

The aspect of the clerk's activities which has attracted the most judicial notice is the retirement of the clerk with the justices.

Prior to the very general provisions of the Justices of the Peace Act 1968, there was no statutory definition of the clerk's role. The behaviour of the clerk in court, the relationship of the clerk and bench, and the part the clerk should play in the proceedings was nowhere regulated.

The clerk did her/his job - however each clerk chose to define it - in a legal vacuum. When the recommendations of the Roche Report began to be implemented the problems of bias, which had been for the most part a problem of part-time solicitor clerks, began to fade into the background. In the place of the part-timers came full-time professionals and with them came a concern that clerks might be too dominant, or might even be usurping the functions of the bench. This concern has focussed, for many reasons (which we will examine), on the question of when it is proper for the clerk to retire with the justices. The first, and undoubtedly the most notorious of the cases was R v East Kerrier Justices Ex parte Mundy decided in 1952. The case concerned an application for certiorari by a Mr. Mundy who had been convicted by the justices for driving without due care and attention. Mr. Mundy had been fined £5 and disqualified from driving for 3 months. Mr. Mundy had contested the case before the magistrates, and when the bench had retired to consider their verdict their clerk had retired with them. The clerk had later returned into

1. [1952] 2 QB. 144.

court and spoken to a police officer from whom he had received a piece of paper. The clerk had taken the paper back into the retiring room. The justices had then returned to court and announced a conviction. They had asked for evidence of previous convictions, if any, and the police officer had given evidence of a previous conviction. The clerk had then told the bench what the maximum penalty was and the bench had announced their decision.

The piece of paper that the justices received contained information about the defendant's previous conviction. The justices affidavit showed that prior to receiving this information they had decided to convict. The Divisional Court accepted that there had been no impropriety in fact. However, it was felt that justice was not seen to be done, that there was an apparent if not a real impropriety and the defendant's conviction was quashed. It was the then Chief Justice, Lord Goddard who reviewed the authorities and gave the principal judgment in the case and concluded that the conviction should be quashed. Hilberry J. and Devlin, J. somewhat hesitantly² agreed.

However, it was not the substance of the decision in the case which gave rise to so much concern. It was certain remarks made obiter by Lord Goddard. Although he did not "comment strongly on the conduct of the justices in this case because ... they intended to act properly..."³ he did comment strongly on the conduct of the clerk. He said

2. See [1952] 2 QB 146 at B, and F.

3. Ibid. at 144.

"Another matter which I feel bound to mention is this. Although I cannot for the moment trace the authority, I think it has certainly been said more than once in this court that it is not right that the justices' clerk should retire with the justices. It has been said over and over again that the decision must be the decision of the justices, not the decision of the justices and their clerk, still less the decision of the clerk, and if the clerk retires with the justices, people will inevitably form the conclusion that the justices' clerk may influence the justices or may take some course which it is for the justices alone to take."

He continued

"The justices can always send for the clerk if they require advice on a point of law, because that is what the clerk is there for, but it is not desirable and it is not, I would say, regular, for a clerk to retire with the justices as a matter of course at the time they are considering the facts. He should remain in court until the justices either return into court or send for him."⁴

He pointed out that although it was not necessary to decide whether this conviction should be quashed on the grounds of the clerk's conduct he believed this to have been done in one case.

The effect of East Kerrier

The remarks of Lord Goddard had considerable impact on magistrates' clerks. One writer, Cecil Latham, assessed the dictum as follows

"This short, extempore, obiter dictum, uttered without any argument or submissions by counsel on the point made an immediate and lasting impact on the functioning of magistrates' courts. Unnecessary though the observation was for the decision in the East Kerrier case, it was a statement of fundamental importance for magistrates and their clerks."⁵

For all clerks, the decision in the East Kerrier case must rank as the most notorious decision ever taken by the Divisional Court - despite recent close competition.

4. Ibid. at page 146

5. 139 JPN 106 (1975)

At the time of the decision, however, the public reaction of clerks was extremely restrained. The Justice of the Peace first reported the decision without comment.⁶ It later cited the relevant passage from the report (that passage quoted above) with the comment

"We think it is important to give the Lord Chief Justice's own words on this very important matter so that all readers may be left in no doubt as to the position. Both justices and their clerks should take heed and act accordingly."⁷

A sensitive ear might suspect a heavy irony behind this seemingly formal statement.

Later commentators were more forthright. For instance, J.N.Martin, in an article written for the Justice of the Peace shortly after the decision, whilst saying that he was prepared to award the greatest respect to the Lord Chief Justice, nevertheless proceeded to be extremely critical both of the premises of his argument and of his reasoning.⁸ Mr. Martin was to be followed by many others over the years.

It is indisputable that the decision in East Kerrier caused a great deal of uncertainty and confusion in magistrates' courts. However, a number of questions need to be answered if an explanation is to be attempted as to why the problems were so great. First it is helpful to establish what, if any, were the rules on the clerk's retirement prior to the decision. Secondly we need to know what the existing practice was and thirdly, we must discover what the effect of East Kerrier was on the practice of clerks.

6. 116 JPN 392

7. 116 JPN 415

8. J.N. Martin, 'The retirement of the Justices' Clerk with his bench'. 116 JPN 450.

To deal first with the issue of the existing rules. It was asserted earlier that East Kerrier was decided on a legal lacuna. Lord Goddard however believed that there were existing decisions on the point albeit ones he could not trace at the time of the decision. Were the magistrates' courts then ignoring previous decisions of the Divisional Court?

It has been suggested that they were not, because previous decisions on the point did not in fact exist.

Certainly the cases on bias discussed earlier established the fundamental and relevant principle that justice must not only be done but must be seen to be done. However, those cases do not delineate the implications of that principle for the practice of the clerk retiring with the magistrates.

J.N. Martin, in the article cited above, claimed to have searched for relevant dicta which gave guidance to the clerk, but found none. One of the clerks interviewed for the present research, whose service extended back to 1952, also claimed that previous decisions did not exist. The reverberations of the decisions in East Kerrier have still not ceased, but no cases prior to that decision have yet been cited. It seems unlikely that they would have remained hidden for three decades.

However, whether or not reported cases existed there was at least one statement of some authority on the point, in the discussions and conclusions of the Roche Committee. A case had been raised by a question in Parliament in which inter alia it was complained that the clerk retired unnecessarily with the bench. The Secretary of State had referred this and the other issues arising from the case to the

Roche Committee,⁹ and the Committee had considered the issue - remarking that

"The retirement of the clerk with his justices at the end of a hearing is not infrequently made a matter of criticism."¹⁰

We do, therefore have some evidence of concern over the practice of clerks retiring with the bench. The Roche Committee's conclusion was that it was "entirely natural and proper that justices may wish their clerk to retire with them" but "this is a matter for the discretion of the justices, and it is only on their request that their clerk may accompany them."¹¹

J.N. Martin interprets this to mean only that the clerk may not insist on retiring with the bench if they do not want him. This does seem to be a rather liberal interpretation of the Committee's statement.

The Committee went on to say that if the relationship between clerk and bench had been properly regulated in court there would be no good grounds for criticising the clerk's retirement. The Committee envisaged the clerk advising both on available penalties and the practice of the bench in relation to penalties, and also providing the note of evidence. However, the Committee were conscious of the danger that where a clerk was dominant in court his retirement might be resented.

"There are few things more detrimental to justice than this, for the reason that it is universally and naturally regarded as an

9. See Report of the Departmental Committee on Justices' Clerks. Cmnd. 6507 at page 16.

10. Ibid p.20.

11. Ibid.

injustice by the parties concerned if their cases are determined by a person who has no right or duty to determine them."¹²

The Roche Committee was therefore not laying down any specific rules as to when the clerk should retire with the bench. It was concerned that the magistrates should control the court, and appear to control it, and it felt that, if this were achieved, the retirement of the clerk would not be resented. Control by the bench was to apply to retiring also - the clerk should only retire when the bench wanted her/him.

So much for the existing rules. What then was the existing practice?

Any attempt to generalise about magistrates' courts is doomed to failure at the outset. There are so many courts and so many more clerks that to say what their practice was is impossible. It would seem, however, that it was accepted in many courts that the clerk should retire with the bench as a matter of course. Evidence of this comes from several sources.

J.N. Martin's article says so directly. When justifying his attack on Lord Goddard's dictum, he says

"When however the opinion is directly contrary to a practice which, while perhaps not universal, prevails in a very substantial majority of magistrates courts and hasso prevailed for many years it is (it is submitted) right that it should receive close examination..."¹³

A correspondent of the Justice of the Peace shortly after the decision confides that his bench have dealt with East Kerrier by the expedient of having the clerk always retire with them after a short period.¹⁴

12. Report of the Departmental Committee. Cmnd. 6507 at para. 66.

13. 116 JPN 450.

14. 116 JPN 305.

Later a brave article by a solicitor supported the decision in East Kerrier, saying that there had been widespread and effective criticism of the automatic retirement of clerks by the legal profession and that the dictum in East Kerrier was probably the result of these criticisms. This solicitor pointed out that there were some courts where there was no practice of the clerk automatically retiring with the bench and that this did not appear to have lead to any awful errors in those courts.¹⁵

There is also an indication (it cannot be said to be anything else) that at least one previous Lord Chief Justice did expect the clerk to retire with the bench automatically.

In R v Sussex Justices ex parte McCarthy 1924¹⁶ the clerk retired with the justices when they considered their verdict in a case of dangerous driving. The objection in that case was not to the fact that the clerk retired, but that the clerk was biased by a connection with the victim of the action. In his judgment Lord Hewart says

"It is said that when that gentleman (i.e. the clerk) retired in the usual way taking with him notes of evidence in case the justices might desire to consult him, the justices came to their conclusion without consulting him and that he scrupulously abstained from referring to the case in any way."¹⁷

But with or without such tenuous judicial acceptance, it is clear that in some courts at least the clerk did retire as a matter of course and equally clearly such a practice was not acceptable after the East Kerrier case.

15. D.T. Thorne, "The retirement of the Justices' Clerk with his bench: another view" 116 JPN 599.

16. 1924 1 KB 256

17. At Page 234 B-C.

What was acceptable after East Kerrier? Although the prescription is variously phrased in the judgment, it can be summarised as follows:- the clerk should not retire with the justices as a matter of course at the time they are considering the facts. S/he should remain in court until the justices either return into court or until the justices send for him. The justices can always send for the clerk if they require advice on a point of law.

One of the main reasons for clerks' objections to the decision was that a number of problems were left unresolved by this statement. Perhaps the most serious of them was that Lord Goddard assumed - or appeared to - that magistrates would know when a point of law had arisen on which they should take advice. The clerks' experience told them that this was not always so. The magistrates were not - and of course are still not - lawyers, and their training in 1952 was even more rudimentary than it is now. What, then, was the clerk to do if she/he recognised that a point of law had arisen, but the magistrates did not, and did not ask the clerk to retire? Further, drawing a distinction between law and fact is an exercise which can defeat the most experienced lawyer, but the East Kerrier decision appeared to envisage that lay magistrates would be able to make such distinctions. Also if the bench asked the clerk to retire quite properly on a point of law, and whilst the clerk was giving his advice they began to discuss fact, what should the clerk do? And although the decision clearly allowed the clerk to advise on law did this include practice and procedure? And was it proper for the clerk to retire if all the magistrates wanted to see was the note of evidence? Also in domestic cases in the event of an appeal magistrates must be

prepared to state the reason for their decision. How was the clerk to assist the bench in framing the reasons for their decision if she/he had not heard their deliberations?

The decision in East Kerrier, then, caused the concern that it did because it was the first instance of judicial regulation of the clerk's role in court, because it conflicted strongly with the existing practice of at least some courts, and because it created more questions than it answered about the behaviour of the clerk.

Many of these questions had to be resolved over the next few years by other decisions which followed quite rapidly. The first of these - R v Welshpool Justices Ex parte Holley¹⁸ in 1953 - contained some reassurance for clerks.

In that case there was a prosecution for selling intoxicating liquor outside permitted hours. Some points of law arose in the case. The magistrates retired and asked the clerk to come with them. The magistrates considered the law, and then went on to consider the evidence. In order to confirm their impression of the evidence they asked for the shorthand writer. The clerk returned to court and asked the shorthand writer to retire. She did so, and read a relevant portion of her notes over to the bench. The justices found the offence proved and fined the defendant £5. The defendant moved for an order of certiorari objecting to the presence of the shorthand writer in the retiring room.

Again Lord Goddard dealt with the case. He held that the motion failed. He said that the justices did nothing wrong in taking the clerk with them, because they needed advice on the law. The fact

18. [1953] 2 Q B 403

that the clerk had remained in the room whilst the bench discussed the facts did not invalidate the justices' decision. Sending for the shorthand writer was not improper. It would have been better if the bench had gone back into court and asked for the relevant portion to be read in case there was a mistake. But the fact that the shorthand writer had retired did not invalidate the decision. Particularly reassuring to clerks was Lord Goddard's demonstration that he understood the difficulty of distinguishing law from fact when he said

"It is often difficult to disentangle what is purely a question of law from a question of fact and a discussion on law must have regard to the particular facts of the case to which it is desired to apply the law. We think it would be putting too high a burden on justices who had required, and legitimately required, the presence of their clerk for the purpose of taking his advice to say at a particular moment 'Now you must leave the room while we deliberate further'"¹⁹

However, with the reassurance there was a warning that

"Justices will, I feel sure, recognise that it is their duty to obey a direction of this court not only in the letter, but in the spirit, and that they are not to get round the direction which was given on the East Kerrier case merely by pretending that they require the presence of their clerk to advise them when there is nothing but fact to be considered."²⁰

Any optimism which may - on balance - have been engendered by the decision in R v Welshpool Justices Ex parte Holley however was destined to be short lived. That decision was closely followed by R v Barry (Glamorgan) Justices ex parte Kashim 1953.²¹ In that case there was a prosecution for a customs offence. At the end of the prosecution case the defence made a submission on law. The clerk properly retired with the justices at their request. The bench found

19. Ibid at p.406

20. Ibid. pp. 406-7

21. [1953] 2 All ER 1005

against the defendant. After the defence case they retired again, and again took their clerk with them, although the matters which fell to be decided at this stage were matters of fact. Again Lord Goddard dealt with the case. He quashed the conviction, reminded magistrates that they should not have their clerk with them when they were considering fact alone, and that they should not try to get round East Kerrier by asking the clerk out every time they retired. He followed this reminder with a strongly worded warning.

"It is well that clerks and justices should understand that this court requires them to follow directions which this court has given from time to time. Ever since there have been justices of the peace in this country they have been subject to the control of the Court of Queen's Bench ... and if justices, knowing quite well the directions this court has given, act contrary to them this court will have no hesitation in sending their names to the Lord Chancellor calling attention to what has been done."²²

As well as this admonition - which could hardly have been more forcefully expressed - Lord Goddard did elaborate on his idea of correct behaviour for the clerk. He made it plain that if the clerk saw a point of law which he wished to bring to the attention of the justices he was not immobilised by East Kerrier.

"We did not mean, of course, in the East Kerrier case that if a question of law were raised the clerk ought to stay in court till the justices said 'Come out with us'"²³

But the justices were not to ask the clerk out if they were considering fact, and if they did so and the clerk discovered that there was nothing for him to advise on, he should leave the retiring room.

22. Ibid at page 1007

23. [1953] 2 All ER 1006

The response of clerks in the pages of the Justice of the Peace was very interesting. It was stronger than the reaction to the East Kerrier case. The J.P. talked of the "considerable concern" caused by the case. It pointed out that justices and their clerks have to obey the Divisional Court.

"What they feel however is that there may be grounds for asking that the law should be altered so as to permit of what they consider a more helpful relation between the justices and their clerk."²⁴

It proposed that legislation should be drafted (without suggesting in what terms, however).

Examined from the point of view of legal principle it is difficult to understand why R v Barry (Glamorgan) Justices should have caused such consternation.

It did not go any further than East Kerrier. Apart from a very strong warning that East Kerrier was to be obeyed it contained two helpful points - one that the clerk who realised that there was a point of law was to be able to retire to point it out to the justices, and the other that if a clerk found himself in a position of being in the retiring room when there was no issue of law s/he was to leave the justices. These points clarified some of the uncertainties which had been left by East Kerrier, and therefore were surely helpful. The facts of the case do not appear to constitute a particular cause for concern. It seems very clear from the report that the clerk did retire at a point when it was patent that there was no issue of law involved.

24. 117 JPN 665.

The Justice of the Peace however, did not see the decision as a constructive one. It emphasised that justices would not know when a point of law would arise, that points could arise at any time during the justices' retirement, that if the clerk were there s/he would ensure that they did not go astray on matters of mixed law and fact, and that in long cases the justices might need to refer to the clerk's note at some length.²⁵ Examples were quoted of benches that had made mistakes because they did not have their clerk with them - one clerk described the occasion when his bench bound a defendant over in circumstances where they had no power to do so²⁶, and another told of occasions when clerks had to stop their benches in mid pronouncement to prevent them from doing things wrong in law.²⁷

The tenor of these arguments is, of course, to justify the presence of the clerk in the retiring room even at times when there is no obvious point of law arising. The justification for it was that magistrates need their clerk because one never knows when lay persons may go astray through ignorance of the law. Clerks' experience tells them that they may be needed in the retiring room to ensure that inadmissible evidence is, in fact, not taken into account, or to relate the evidence given in the case to the legal elements of an offence.

An overview of these earlier cases suggests that for clerks the real problem was felt to be a problem of lack of trust. The impression is given that they felt that they should be trusted to be

25. Ibid.

26. 117 JPN 697

27. 119 JPN 422

in the retiring room and to behave properly. None of the cases suggested that a clerk had actually behaved improperly - in fact the clerks were of the opinion that because their benches quite properly needed them they should be trusted to be in the retiring room without any appearance of impropriety arising.

Although consternation was caused by East Kerrier it was possible for some clerks at least to relax after that decision, if the decision was to stand on its own as a reminder of the distinction between the roles of the clerk and the bench - a reminder that it was simply not necessary for the clerk to retire every time the bench went out - but not a decision which needed to radically restrict the clerk's ability to assist the bench. In such a context, R v Welshpool Justices ex parte Holley was welcome reassurance, but R v. Barry (Glamorgan) Justices ex parte Kashim was indeed cause for great consternation. Its reminder that East Kerrier was to be taken seriously could not be ignored. Clerks were to be called upon to make clear public distinctions between law and fact, as to when their advice was needed and when it was not. They were not to be trusted to make these distinctions in private in the retiring room.

It is clear that after the Barry Justices case, that whatever its basis might have been, the uncertainty felt by magistrates courts was too great to be ignored and Lord Goddard felt the necessity to issue a practice direction in which he said

"It is evident from letters received both by the Lord Chancellor and myself, and from correspondence in newspapers, that there is a degree of uncertainty in the minds of magistrates on this subject and indeed some degree of misunderstanding as to the effect of what was said in the cases to which I have referred."²⁸

28. [1953] 1 WLR 1416

The First Practice Direction.

This was Lord Goddard's attempt to clear up the problems. It addressed itself to two issues.

First, it addressed itself to the question: on what matters may magistrates consult their clerk? The answer (succinctly) was law, mixed law and fact and the practice and procedure of the court, the sentence allowed by law, the level of sentences usually imposed for similar offences by the court or neighbouring courts. Further, if the clerk sees that a question of law does or may arise he can point this out to the magistrates who can then decide whether or not they want further advice. Magistrates can also ask the clerk to refresh their memory as to the evidence.

Secondly, the practice direction addressed itself to the question: in what manner should the bench consult the clerk? Lord Goddard said that he regarded this question as being of equal importance to the first question. His answer was a restatement of East Kerrier - if the clerk retires as a matter of course the inevitable impression will be given that he may influence the decision of the justices. Therefore the clerk should not retire as a matter of course, nor should the bench invite her/him out every time they retire. However, if they need the clerk they can send for her/him at any time. They should release the clerk, however as soon as s/he has given them the advice they need.²⁹

The guiding principle to be followed is the principle that justice must not only be done, but must be seen to be done.

29. For the text of the Practice Direction, see Appendix 4.

If indeed it was the feeling of the clerks that it should be possible for them to retire without it leading to suggestions that they had improperly influenced the bench then it was made plain by this that their views were not shared. In order for justice to be seen to be done the Practice Direction prescribed that the clerk must make a public and scrupulous distinction between those occasions when s/he might be in the retiring room and those occasions where it would be wrong to be there. At least however, the formula for making such decisions was clarified by the Practice Direction. The scope of the clerk's duties had received judicial attention, had been defined - even if the definition was not to the liking of the clerks.

Some were evidently satisfied. The Justice of the Peace in its Notes of the Week started the year optimistically when it expressed the opinion that the Practice Direction should have cleared up all problems, and that it should be possible for the courts to follow the rules without difficulty³⁰. The retiring president of the Justices' Clerks' Society - Mr. Albert Marshall of Bath - expressed the view at the 1954 conference that he was not worried by the series of decisions beginning with East Kerrier. He felt that clerks should go even further and advise their benches in open court so that the parties themselves knew the basis on which the court was acting.

Further clarification - and reassurance - was to come. The Practice Direction already referred to did not deal with domestic matters since magistrates exercising matrimonial jurisdiction were subject to the direction and control of what was then the Probate Divorce and Admiralty Division. Lord Merriman therefore issued a

30. 118 JPN at page one.

Practice Note³¹. This note expressly endorsed the principles of the earlier Direction, and said that the clerk should not retire as a matter of course. However, Lord Merriman recognised that domestic proceedings were often lengthy and involved points of law. Also previous decisions of the Court had insisted on a proper note of evidence being kept and in domestic cases the justices were required to state the reasons for their decisions in the event of an appeal. Therefore he accepted that "more often than not" the magistrates would need their clerk with them. Perhaps most importantly - certainly if our earlier arguments are correct - he said that he trusted magistrates to carry out his Direction.

"Having regard to the high standard of care which is generally shown by magistrates' courts in dealing with these domestic proceedings, I do not think it is necessary, for me to say more than that I am confident that justices taking part in them may be trusted to act, and to ensure that they appear to act, on the fundamental principle that they alone are the judges."³²

Hardly surprisingly the Justice of the Peace approved strongly of this direction, particularly because the direction recognised that the bench would want the assistance of the clerk in very many cases. The Justice of the Peace observed

"The whole difficult question which has so much worried both justices and their clerks is now completely cleared up. Justices will study and comply in both the spirit and the letter, with the principles laid down, and clerks can feel that any fears that they might not be permitted to give the justices the best possible service should now be allayed."³³

More reassurance was to come from Lord Goddard in 1953 in

31. [1954] 1 WLR 213. For the text see Appendix 3.

32. Ibid.

33. 118 JPN 65.

Ex parte How³⁴ where a motion for certiorari on the grounds of the clerk's conduct was refused. In this case the defendant pleaded not guilty to driving a trolley bus without due consideration for other road users. After the evidence had been heard the chairman of the justices had leaned towards the clerk and said "Dismissed". The clerk had spoken to the chairman, and the justices had then retired. The clerk retired with them, and remained with them throughout their five minute retirement. When they returned to court they convicted the defendant.

Lord Goddard said that it was not in every case where the clerk had retired with the bench that a motion for certiorari would succeed. The fact that the court had not followed the Practice Direction did not necessarily go to the merits of the case.

The role of the clerk under a new reign.

It is possible that some of the exasperation felt by clerks about the East Kerrier decision and its sequel was prompted by a suspicion that Lord Goddard's views were not views which were held by all members of the judiciary.

Lord Denning for instance was characteristically outspoken. In his address to the Annual Conference of the Justices' Clerks' Society in 1955 he said that the system of justice in this country depended on the close co-operation of laymen and lawyers, that laymen were inexperienced and could rely with utmost confidence on their clerks, with the result that justice is done.

"I hope it will not become the case that clerks do not retire with their justices but simply are asked questions in open court. It seems to me that in many cases it is only right and proper

34. [1953] 1 WLR 1480

that the justices should ask the clerk to retire with them..."

And with reference to matrimonial cases he noted

"I cannot myself see how magistrates can decide these cases without the help of an instructed clerk... It would be quite wrong to suppose that justices do not need all the help they can possibly get from their clerks in matters of this kind."³⁵

Lord Denning used perhaps even stronger words at the Annual Conference of the National Association of Justices' Clerks' Assistants in 1957

"It is said that if the magistrates' clerk always retires with them, it may be thought that he influences the decision of the magistrates. I do not think myself that there is any fear of that or that the ordinary people in this country think that there is any fear of that."³⁶

In 1959 at the Justices' Clerks' Society's Annual Conference Mr. Justice Finmore said that although he told magistrates to decide cases themselves and not do what the clerk told them he told clerks to be ready to guide magistrates and "keep them on the rails". He justified the ambivalence by saying that it stemmed from the fact that the bench and the clerk are partners.³⁷

The Justices' Clerks' Society in its memorandum of January 1974, 'The Lay Justices and their Clerk', said "it is known that Lord Parker was of the opinion that the rule in East Kerrier should be abrogated".

Certainly Lord Parker was most critical of the existing rules when he addressed the Annual Conference of the Justices' Clerks' Society in Harrogate in 1966.

His view was that the present position of the clerk to the justices was "thoroughly unsatisfactory and thoroughly frustrating

35. See the report of the Conference at 119 JPN 447.

36. 121 JPN 598.

37. 123 JPN 400 and cited by Latham in 'The Function of the Clerk in Magistrates' Courts' 127 JPN 548 at 549.

both for the bench and the clerk". He thought that the clerk could be a far greater help to the justices by assisting them not only outside the court and in law, but also on matters of sentencing. The clerk had the most experience and knowledge of sentencing, and should be able to advise generally. He even went so far as to say

"Personally I think there is only one answer and that is that the clerk to the justices - and here I refer to full time clerks only - should be on the Commission of the Peace."³⁸

On the question of when it was possible for the clerk to advise the bench he pointed to the problems in drawing distinctions between law and fact, and said that often justices would not know that a point of law had arisen and the clerk might be in doubt whether to introduce his views.

More importantly Lord Parker's judgments in the cases concerning clerks that came before him show a marked difference in attitude to the judgments of Lord Goddard.

Certainly Lord Parker was remarkably restrained in his judgment in the case of R v Consett Justices ex parte Consett Iron Co. Ltd. 196039. It would have been very difficult for him to have refused certiorari however, as the conduct of the clerk was quite astonishing.

The case involved a prosecution under the Factories Act 1937 which arose from an accident where a man was fatally injured. The company pleaded not guilty to two of the three charges against them. Counsel for the company made certain submissions on the law and the justices retired with the clerk to consider them. They returned, rejected the company's submissions on law, and proceeded to hear

38. See the report of the Conference at 130 JPN 478.

39. The Times, 14th May, 1960.

evidence of fact. At the close of the case the justices retired and after a very short interval the clerk made to follow them. Counsel for the company objected, but the clerk replied (according to the evidence of the company) "I don't know what you are worrying about. This case is as dead as a dodo." After four or five minutes the clerk returned and expressed the opinion to counsel that the East Kerrier case had been watered down by subsequent decisions and - significantly - "Anyway what do you people object to? Don't you trust us or something?" Counsel repeated that the clerk should not be concerned with findings of fact to which the clerk replied that that was a matter of opinion!

It was accepted by the Divisional Court after reading the affidavits of the clerk and the bench that the clerk had gone out to reassure the bench on a point of law, and that the clerk's reference to the case being as dead as a dodo was a reference to East Kerrier and not a reference to the case then before the court.

Despite this the conduct of the clerk (not to mention his ability to assess case law) was not of the best. Lord Parker thought that a person in court might feel a real likelihood that justice was not being done. But nevertheless, the Lord Chief Justice hesitated, saying that certiorari was a discretionary remedy which was only for extreme cases. He also cited R v. Camborne Justices ex parte Pearce⁴⁰ where it was emphasised that the continued citation of the principle that justice must be seen to be done was not to lead anyone to believe that this was more important than that justice was in fact done. Finally, however, he concluded that certiorari should go.

40. [1952] 1QB 4.

It is difficult to imagine such a mild and measured judgment being delivered on such facts by Lord Goddard had he sat on this case. Lord Parker's tolerance was later proved to be very great indeed, in a case in 1967 which involved the same bench and the same clerk - R v. Consett Justices ex parte Postal Bingo Ltd.⁴¹

In this case it was said that the clerk took a very active part in the proceedings. He cross-examined witnesses, he questioned prosecuting counsel and he gave instructions to witnesses. The picture was said to be one of a dominant clerk and a silent bench. The case involved some difficult points of law. The bench retired for two and a half hours. The clerk invited out the assistant clerk who had taken a shorthand note of counsel's argument and of the evidence, and the clerk and the assistant clerk remained with the justices throughout the retirement period.

The case is interesting because it involves, inter alia, exactly the situation envisaged by the Roche Committee when it commented that if the bench appears to run the court, there will be no problem caused by the clerk's retiring, but if the clerk is dominant in court his retirement will inevitably be challenged. However, although all parties in the case admitted that the clerk took a very prominent part indeed in the proceedings and that he retired for the whole of a two and a half hour retirement it could not be denied that there were very difficult points of law and mixed law and fact to be considered which would justify the clerk's retirement. Counsel for the company did his best to suggest that the clerk's behaviour in the retiring room was improper by arguing that heated dialogue took place in the

41. [1967] 2 QB 9.

retiring room, that the silent bench and dominant clerk were unlikely to have reversed their roles in the retiring room, that the long retirement suggested disagreement and that the disagreement could only have been on the facts. This was an argument based on speculation however. The strongest argument for the company was that the orders and convictions did not appear to be those of the justices alone, but, because of the prominence of the clerk in the proceedings, appeared to be the orders and convictions of the bench and the clerk. Justice was not seen to be done. A reasonable man seeing a clerk run the proceedings and then retire would think that he took a part in the decision.

Lord Parker however, was not prepared to accept any of these arguments. He said that it was abundantly clear that this was a case where the justices were entitled to have their clerk with them throughout to deal with the law. In that respect nothing wrong had taken place. So far as the dominance of the clerk in court was concerned he examined the instances of the clerk's conduct which were complained of in detail and found nothing fundamentally wrong. He pointed out that the practice of courts varied

"There are some justices, some benches, who require their clerks to cross-examine to clear up ambiguities, and prefer that he should do it rather than do it themselves; there are other benches who desire to do the cross-examination themselves and for the clerk to remain silent. There is no general practice, there is no accepted practice."⁴²

So far as ordering witnesses to the back of the court, one of the things the clerk did which was complained of, he said

"...I myself think that it was for the clerk to conduct the ordinary arrangements inside the court and that he was not thereby usurping a judicial function of the bench."⁴³

42. Ibid at p.18

43. Ibid at p.18-19

Perhaps the most significant part of the judgment - because it answers the plea from clerks that they must be trusted to retire without an appearance being created that they are influencing the bench, and because it does appear to expand on the Practice direction, is the following:-

"One thing that seems to me clear is that the spectator in court (i.e. the notional one who is the arbiter as to whether justice is seen to be done) must be taken to know that the justices can have the advice of their clerk and their clerk can retire with them in certain circumstances. If I am right they were entitled to have the clerk throughout on this occasion, and therefore the spectator must be taken to have known that there was nothing wrong in his retiring with the justices for two and a half hours."⁴⁴

This was very much in line with Lord Parker's view expressed in the first Consett case, that it was possible to put too much emphasis on the maxim that justice must be seen to be done. It means that the test of whether justice is seen to be done is the test, not of the ordinary man of Clapham omnibus notoriety, but a man educated in the rules which prescribe when it is proper for a clerk to retire with the bench. And because such a man would be taken to know that the bench are entitled to their clerk's advice on law, and that law was involved in this case, no objection to the clerk's conduct in retirement could properly be taken.

The strongest criticism made of the clerk's conduct in this case by Lord Parker was that it was not a model of how a case should be conducted, and that the clerk may have been officious and tactless but he was nevertheless within the law.

44. Ibid. p.20. Words in parenthesis mine.

It is difficult to imagine a clerk playing a more dominant role in court than the clerk played in this case, and yet his conduct was held to be - if not entirely desirable - acceptable, on the basis that this was the practice of the court.

The effect of the decision is therefore to concentrate attention purely on the issue of the clerk's retiring with the bench - or rather on whether or not there was a point of law arising when the clerk retired with the bench. The Roche Committee saw the issue as one of a correct balance in the relationship of clerk and bench, and the behaviour of the clerk in court and the practice of the clerk retiring with the bench were simply aspects of this relationship. The Committee wanted the bench to be the controlling partner in this relationship. Such a view of the relationship of clerk and bench is desirable although we shall be arguing later that it is impossible for the bench to be the controlling partner. The second Consett case directed attention towards the narrow issue of whether or not there was a legal issue to justify the clerk's retiring, and away from the way the clerk conducted her/himself in court, although as will be seen later the conduct of the clerk has been taken up by other routes.⁴⁵

Hardly surprisingly the second Consett case was enthusiastically received by clerks. In a contributed article in the Justice of the Peace "The Role of the Clerk in Court - or the Consett Justices Again" it was said that

45. See Hobby v Hobby [1954] 1 WLR 1020, Marjoram v Marjoram [1955] 1 WLR 520 and Simms v Moore [1970] 2 QB 327. For discussion of these cases, see pp. 149-158.

"This case represents a great advance in the High Court's understanding of what actually goes on in magistrates courts and showed considerable sympathy with the difficulties of a clerk serving a lay bench."⁴⁶

The author also welcomed the understanding displayed by Lord Parker that the conduct of the proceedings in court depends on the character, inclinations, experience and ability of the bench and the clerk.

A final case should be mentioned before this section can be concluded. However understanding Lord Parker may have been, he could not but grant certiorari in the case of R v Stafford Justices ex parte Ross, ([1962]. 1 W.L.R. 457.) The case does not develop the law but it is a reminder that highly improper behaviour by clerks is not unknown. In that case the clerk did not retire but he handed a note to the bench when they retired, which contained an explicit comment on the facts of the case! Not surprisingly his action was condemned.

The 1960s - an era of reform

The 1960s was a decade of change for clerks. The reforms of the Roche Committee were coming to fruition. Divisions had been amalgamated and full-time clerks appointed in many areas. The clerk to the justices was a full-time professional in most areas.

The change over from a majority of part-time solicitor clerks to a majority of full time clerks seems on the whole to have taken place smoothly, although inevitably there were some problems. An indication of the problems may be seen in a debate which took place in the pages of the Justice of the Peace in 1965 on the issue of the usefulness or otherwise of qualification as a solicitor to a clerk to the justices. "A Whole Time Clerk" wrote criticising the part-time

46. 131 JPN 291.

system, recommending that the reforms of Roche be continued, that more full-time clerks should be appointed - and paid properly! A touch of irritation with those who favoured part-time clerks was apparent in the tone of the article since the author described himself as having "had to unravel the tangle left to him by some four or five part-time clerks".⁴⁷

With a body of people who were (for the most part) professionally qualified, who were devoting their full attention to magistrates courts, and who were organised in the increasingly prestigious and influential Justices' Clerks' Society, questions about the nature of the future for clerks became important.

The J.P. throughout the 1960s is full of articles which asked "What is the future of the clerk?" - and, of course, gave a number of answers.

There are discussions about appropriate training and qualifications for justices' clerks' assistants since some career structure needed to be devised. And there are many discussions on the possibility of increasing the powers of the clerk, so that for instance she/he could issue process, authenticate orders of the court, rule on matters of evidence, or play a more active role in sentencing or even be on the bench.

Yet these ambitious people were, in effect, existing in a legal vacuum. There was nowhere any statutory definition of what constituted the clerk's role. In fact it was (and still is) the case that a magistrates' court is properly constituted without the clerk's presence. What law there was on the clerk's role was felt to be negative. As the editors of the J.P. pointed out in 1965

47. 129 JPN 7. For the extended debate see also 128 JPN 816 and 129 75.

"(Yet) the exact status of the clerk remains, to say the least of it vague, while East Kerrier, the judgment which, for most magistrates' clerks is engraved on tablets of stone, has further confounded an already confused situation."⁴⁸

The Justices' Clerks' Society's Annual Conference for that year gave the Council of the Society a mandate to press for reforms to clarify the position of the clerk to the justices.

The Council worked hard to this end, their most significant achievement being Section Five of the Justices of the Peace Act 1968, which finally provided some statutory recognition of the clerk's role. The first subsection of section five provided a rule making power to enable the clerk to do things which a single justice could do. This enabled the Justices' Clerks' Rules of 1970⁴⁹ to be made. The second subsection provided a rule making power in relation to the qualification of justices' clerk's assistants - which enabled the Justices' Clerks' (Qualification of Assistants) Rules 1979.⁵⁰ These provisions will be discussed at a later stage.

So far as the conduct the clerk in court is concerned, Section five subsection three of the 1968 Act is significant. It is a declaratory provision which does not extend powers of the clerk.

"It is hereby declared that the functions of a justices' clerk include the giving to the justices to whom he is clerk or any of them, at the request of the justices or justice, of advice about law, practice or procedure on questions arising in connection with the discharge out of sessions of their or his functions as justices, including questions arising when the clerk is not personally attending on the justices or justice, and that the clerk may, at any time when he thinks he should do so, bring to the attention of the justices or justice any point of law, practice or procedure that is or may be involved in any question

48. 129 JPN. 337.

49. S.I. 1970 No. 231.

50. S.I. 1979 No. 570.

so arising; but the enactment of this subsection shall not be taken as defining or in any respect limiting the powers and duties belonging to a justices' clerk or the matters on which justices may obtain assistance from their clerk."

Although the subsection does not extend the powers of the clerk, his existence and basic function is now contained in statute. That this was seen as important to clerks can be shown by reference to the debate on this clause in the House of Commons. Mr. Oakes the member for Bolton West, who spoke a number of times on the clauses and had clearly been well briefed by the Justices' Clerks' Society said

"It is estimated that in one way or another 3 million people come into contact, seek advice, come before, or act as witnesses in magistrates' courts every year and it is important that some definition is given to them and that they know who the man is who sitting in front of the justices, what his powers are, and that he can advise the justices on matters of law. Therefore from that point of view, it is important that a statutory definition be given."⁵¹

Reference to the concern of the Justices' Clerks' Society that this clause should be passed are made throughout the debates in both Houses.

However concerned the Justices' Clerks' Society was to have this provision on the statute book, it did not in reality take them any further than the existing case law. As already indicated, a magistrates' court is still legally constituted without a clerk. The

51. H. of C. Standing Committee Session 1967-68 Vol. VI Col. 46. This speech is part of the debate on an amendment which was passed and which resulted in that part of the section being added which makes it clear that the clerk may, of his own volition, bring a matter of law practice or procedure to the attention of the bench. The other significant amendment was made following debate in the Lords where Lord Parker pressed for the section to provide that the clerk could advise on practice and procedure as well as law. See Hansard H. of L. Vol. 292 Cols. 101-103.

Practice Direction of 1953 still defines those things which clerks may advise on and how they may do it.

The 1970s - a decade of protest

It is not surprising therefore that during the 1970s a good deal of discussion was still taking place concerning the exact boundaries of correct conduct for the clerk, and criticism was still being levelled at the existing law. Certain remarks from current judicial figures were not guaranteed to ease the minds of clerks.

In 1973 Lord Hailsham addressed the Cumberland, Westmorland and Furness branch of the Magistrates' Association. He said that the clerk was the justices' best friend - but should not be allowed to dominate the proceedings. He added

"... do not hesitate to decide against your clerk's advice and in favour of an objection if you think it well founded."⁵²

An irritated but unidentified clerk responded to this in an article "Keeping the Clerk in his Place".⁵³ He conceded that the justices had the legal responsibility for deciding questions of law. However he went on to say that he would have regretted but understood if the Lord Chancellor had reminded them of this fact and pointed out that it meant that in the last resort, after the most careful consideration, it was in their power to go against their clerk's advice. But s/he felt that to advise justices to go against their clerk's advice without hesitation was a remarkably retrograde step.

One can have a great deal of sympathy with this clerk's view - particularly since Lord Hailsham's words appear to have been seized

52. 137 JPN 240

53. 127 JPN 369

upon by an advocate in that clerk's court. The advocate made a submission that there was no case to answer, which the bench rejected on the advice of their clerk. At the close of the defence case, the defence advocate re-opened the point and encouraged the bench to ignore the clerk's advice. Consequently the clerk did not retire with the bench, who then made an (unrelated) error to the detriment of the defendant arising out of their failure to understand the law.

Indeed Lord Hailsham may have regretted his remarks three years later in 1976 when the case of Jones v Nicks⁵⁴ was decided. The defendant in that case had pleaded guilty to speeding, but submitted that there were special reasons for not ordering endorsement of the driving licence, since he would lose his job were his licence endorsed. The clerk advised the bench that special reasons under section 101 of the Road Traffic Act 1972 had to relate to the facts of the offence, not the offender and that the loss of the defendant's job should not be taken into account. The bench decided not to endorse the defendant's licence. The reason they gave was that if they did so, the defendant would lose his job. The case came before Lord Widgery who, of course, remitted the case to the magistrates with a direction to endorse. He pointed out that the justices were close to being asked to pay the costs of the case, and that the advice of a clerk should be accepted - to avoid waste of time and money.

The only case in the 1970's concerning the retirement of the clerk with the justices was R v Southampton Justices ex parte Atherton 1973⁵⁵. In that case the applicant was charged with offences under

54. [1977] R.T.R. 72, [1977] Crim L.R. 365, 1976 L.S. Gaz June 16th.

55. 137 J.P.N. 571.

the Trade Descriptions Act 1968. There was a considerable amount of evidence given in the case and also a defence pleaded under section 24 of the Act. The case took almost a whole day. When the justices retired they took their clerk with them. They retired for 20 minutes. The clerk remained out with them for the whole of that time. In his affidavit he said that he advised on the law, and on the level of penalty for the offence, and also reminded the bench that they must hear mitigation before they announced sentence. The clerk and the bench returned to court. The bench announced a conviction and then a fine of £100. There was apparently a dead heat between counsel and the clerk to stop the chairman from saying any more. Counsel protested that he was in very difficult position - but he did mitigate. The bench retired for a short period again with the clerk, returned and announced a fine of £80 with £21 costs.

There were two applications for certiorari: the first relating to conviction on the ground that the clerk had returned with the bench and stayed out with them for the whole of the period of retirement; the second related to sentence only and the fact that counsel had only belatedly been able to mitigate after the bench had wrongly announced sentence.

The first application was refused. The Lord Chief Justice, Lord Widgery reviewed the cases relating to the clerk retiring with the bench and concluded that because of the length of the case, and because there was law involved the justices were entitled to have their clerk with them. He cited Lord Parker's dictum that the spectator in court must be taken to know that the justices can have

the advice of their clerk in certain circumstances. He added a contribution of his own

"... I think it must be stressed that in these days, when legislation becomes more, and more complicated and the problems of law and practice become more and more oppressive, justices should not be discouraged from seeking the assistance of their clerk within the legitimate field in which he can advise them."⁵⁶

The first application for certiorari therefore failed. However, the second succeeded on the basis that, because of the conduct of the chairman, justice was not manifestly seen to be done.

This decision did not depart from the existing Practice Directions or case law, and it showed that the Lord Chief Justice was aware of the problems faced by lay magistrates grappling with increasingly difficult legal provisions, and their need for advice.

Despite this, however, the case was not received with enthusiasm by clerks.⁵⁷ The Justice of the Peace was very critical. Its comment was that although some benches might have thought that the often artificial convention of the clerk returning to court before the justices returned could be forgotten, they would be wrong since the decision in R v Southampton Justices ex parte Atherton. This is a rather negative assessment of the case. Certainly Lord Widgery endorsed what Lord Goddard had said about the desirability of the clerk not retiring as a matter of course, and the desirability of the clerk returning to court after he had advised the justices. But he did do this in the context of his opinion that in these days of

56. 137 JP 577 (ii-iii)

57. The author of "Keeping the Clerk in his Place" 137 JPN 369 (footnote 53) reacted strongly against the Southampton Justices case. However, his criticisms seem to be based on his reading of a very brief report of the case which did not give sufficient information to enable a proper assessment.

complex legal provisions he would not wish to see justices discouraged from seeking the assistance of their clerk.

The artificial convention referred to by the Justice of the Peace is one which still exists in some magistrates' courts. It operates as follows. The bench invites the clerk to retire with them. The clerk advises on the law. Her/his advice enables the bench to come to a decision there and then. However, in order for it to appear that there has been some separation between the advice of the clerk, and the decision of the bench, the clerk returns to court whilst the bench sit idly in the retiring room for a few minutes before returning to court and announcing its decision.

This practice is, of course, a waste of time in a busy court. To the clerk who is responsible for listing, this charade which is designed to make it appear that justice is being done may well seem to be quite unnecessary. If clerks were trusted to behave properly in the retiring room, it would not be necessary. However, to select this problem as the focus of the decision in R v Southampton Justices is not a very balanced assessment of the case.

But perhaps in reality R v Southampton Justices was resented because it did not display any increased faith in the abilities of the magistrates' clerks. We return in fact to the problem of lack of trust. To an increasingly professional body of people performing increasingly onerous and responsible work and with an active pressure group in the Justices' Clerks' Society it must have been - and still is - inexplicable that their status was not recognised. The clerks felt that it was time to change.

The year following the Southampton Justices case Lord Justice Lawton addressed the Justices' Clerks' Society at their annual dinner.

He was reported as having most endeared himself to his audience by referring to East Kerrier as "that bloody case" and by criticising Section Five of the Justices of the Peace Act 1968 for not going far enough. He expressed the problem as one of lack of trust, saying that for some reason or other Parliament had taken the view that magistrates' courts were not to be trusted, and had attempted to draw their teeth.⁵⁸

And indeed the feelings of clerks about these cases were expressed more strongly during the 1970s not because the case law was more restricting, but because the resentment against it was increasing.

An excellent illustration of the truth of this contention is a series of three articles written in 1975 by Cecil Latham, then a member of the Council of the Justices' Clerk's Society.⁵⁹ Not only do these articles discuss the objections held by clerks to the cases, but significantly they link these objections to the question of the future of, and status of, the clerk.

The first of Latham's articles is based, for the most part, on a memorandum "The Lay Justices and their Clerk" issued in 1974 jointly by the Justices' Clerks' Society. The memorandum is strongly critical of the law on the clerk retiring with the bench, and puts forward proposals for reform. It is worth examining in more detail, as the first clear statement from clerks of the problems of East Kerrier et seq. and of the direction of change which they envisage.

58. 138 JPN 310

59. See 139 JPN at 106, 120 and 135.

One of the principal criticisms made of the case law and Directions was that it was wrong of the judiciary to concentrate on defining when it may be right or wrong for the clerk to retire with the justices, since this did not control what the clerk in fact did. It controlled what s/he appeared to do, but it was possible for the clerk to appear to act correctly within the case law and in fact to behave most improperly or conversely to appear to act incorrectly but in fact to behave with the utmost propriety.

This criticism does have a great deal of force. The problem is that since it is impossible to control what the clerk says when s/he retires, control is instead perforce directed at when s/he retires - which is susceptible to scrutiny. However, it is in practice impossible to make sure that the clerk only retires at those points when law is to be discussed since law and fact may well be intertwined. Effective control over the clerk (i.e. a control which ensures that s/he did not advise on fact) is thus not possible by limiting when the clerk can retire.

In the place of East Kerrier et seq. the Justices' Clerks' Society recommended that the following rules be introduced. First that for the purpose of discharging his functions the clerk may, if the justices retire, retire with them, and second, that subject always to the right of the justices to retire and receive the advice of their clerk in private, the clerk may advise the justices in the performance of his functions in open court so far as is convenient to promote expedition and efficiency in the administration of justice.

We have, in this memorandum, clear criticism of East Kerrier and proposals for change which would allow the clerk and bench to take the decision as to when it was proper for the clerk to retire with them.

The effect of the proposals is that the only restriction on when the clerk retired would be those imposed internally by the clerk and the bench. They would have to be trusted to discriminate correctly issues where the clerk should properly advise and issues where the clerk should remain silent. Two things should be noted - one, that at no stage do clerks ask to be part of the decision on fact, and two, that they do not suggest that the clerk ought to retire with the justices as a matter of course.

The memorandum concludes with a plea for a positive attitude from the High Court and an expression of the willingness of clerks to accept scrutiny of the way they perform. The Justices' Clerks' Society were critical of the fact that the High Court had not attempted to ensure that the clerk did give advice in situations where he ought to do so, or shown concern over the quality of the advice given by the clerk.

The call for a more positive attitude was echoed by the Justice of the Peace when commenting on Latham's article. In its "Notes of the Week" it said

"When it comes to appeals concerning the conduct of the clerk these are all concerned with errors of commission; an appellant will never challenge the clerk for failing to intervene to correct a capricious bench or for neglecting to inform an ignorant one. Likewise the Divisional Court are (sic) never asked to criticise the clerk who fails to prevent his bench from doing something perfectly appalling or who through timidity or inadequacy hesitates to intervene where duty demands that he should."⁶⁰

It concluded with a demand for a new Practice Direction from the Lord Chief Justice phrased in positive terms, and recognising that clerks

60. 139 JPN 116.

in the retiring room "know how far their duties extend and where they cease to be competent".

By the end of the 1970s the position can be summarised as follows. Clerks felt that the rules governing when they did or did not retire were aimed at appearance, not reality. They wished to be trusted to make the decisions as to when they retired in conjunction with their justices, and not according to rules which they saw as misdirected and artificial. They increasingly perceived the problem as one, not of an over dominant clerk, but of an inactive or supine clerk. They asserted that it was vital that magistrates receive proper advice and that therefore the main concern of the High Court should be the positive concern of ensuring that they got it. East Kerrier and all of its ensuing confusions should be scrapped and replaced with positive control.

Many of the concerns of the rest of this thesis are linked to this discussion of the cases concerning the retirement of the clerk with the bench. The relationship between clerk and the bench is crucially affected not only by the mechanisms of the clerk retiring with the bench but also by the issues it raises about the dominance (or otherwise) of the clerk over the bench, the extent to which the bench can rely on the clerk to organise the proceedings in court, and what she/he may properly discuss with them in the retiring room. The question of the relationship between the clerk and the legal profession who are the real observers of the clerks' conduct - in that they make the decisions to refer the clerks conduct to the scrutiny of the Divisional Court - is raised by the cases on retiring. The whole question of the future of the clerk, the clerk's status, whether or

not the clerk should take on a judicial role, career and promotion prospects for clerks - all of these issues are reflected in the concern of the clerks over the problem of retiring with the bench.

These topics will be analysed in detail. But in their context, the lack of trust implicit in the decisions on the clerk retiring were a ball and chain around the legs of an ambitious, professional and frustrated body of people, who were all too aware that their identity and their job had recently and radically changed and who wanted this recognised.

They have so far been disappointed.

R v Guildford Justices ex parte Harding 1981.

Far from heralding any improvement in the clerk's position, the 1980s saw a fresh crisis - the decision in R v Guildford Justices ex parte Harding.⁶¹ The decision caused so much consternation that it necessitated yet another Practice Direction on the clerk retiring with the bench.

Thus far our analysis of the cases has attempted to provide a historically informed view of the law, looking in particular at the reaction of the ruled to the rules as they were made. The responses of clerks have been traced through articles and letters, mainly in the mouthpiece of the magistrates' courts - the Justice of the Peace. However clerks, and others, who contribute their articles and opinions in print are presenting a considered and sober analysis of the problem they perceive. Such analysis is very valuable, but arguments carefully marshalled and prepared for print perhaps do not reflect the depth of feeling which existed amongst clerks about the restrictions

61. 1981 The Times. Jan.20th.

on their retiring placed on them by the decisions of the Divisional Court. The irritation, frustration and even anger of clerks seeps out from between the lines of the Justice of the Peace rather than being directly expressed. However by a fortunate chance, the decision in R v Guildford Justices ex parte Harding was made at the time in which the bulk of field observations and interviewing was being done for this research, so that the immediate reactions of clerks came over very strongly in the interviews and in conversations with clerks at most of the courts observed. We therefore have direct evidence of the depth of feeling precipitated by the decision.

The case concerned a conviction for driving without due care and attention. The applicant had pleaded not guilty. The justices had asked the clerk to retire with them. Their affidavit showed that they wanted his advice on the correct standard of proof, and that they wished to consult his notes of evidence. Lord Justice Donaldson quashed the conviction. He criticised the clerk's retiring with the note of evidence, saying that justices ought to be able to take a proper note of evidence and not have to rely on the clerk's note. He also said that if the justices wished to refer to the clerk's note they should send for it and read it, but that it would lead to the wrong impression if the clerk retired so that the justices might read his note of evidence.

He was also critical of the clerk retiring to advise on the standard of proof in careless driving. He pointed out that it was exactly the same standard of proof applied in most criminal cases, and that a knowledge of the standard of proof in criminal cases was wholly fundamental to the proper discharge of the justices' functions. The report in *The Times* said

"His Lordship was forced to the conclusion either that the justices were incapable of achieving the standard rightly to be expected of them or the explanation given was a pretence."⁶²

The reaction of clerks to this case was very strong. What underlay their objections was that they felt that the decision demonstrated a lack of understanding by the High Court of what actually happens in magistrates' courts. Even the usually restrained Justice of the Peace said

"...the pill is not made any easier to swallow when judgments come showing, putting it mildly, a rather remote knowledge and attitude to what actually goes on in magistrates courts."⁶³

The clerks interviewed for the present research did not put it so mildly. One said

"The Magistrates' Courts' Rules were quite clear and shouldn't be messed about by High Court judges who, if they've ever seen a magistrates' court it was 40 years ago."⁶⁴

And another

"I think probably the real problem is that people that make these decisions in the High Court with regard to what advice the clerk should and shouldn't give and how far they should go etc., are probably based on very little knowledge in fact."

This general criticism was supported by more precise attacks on the decision. On Lord Justice Donaldson's dictum that the bench should take their own notes the Justice of the Peace commented that many magistrates were not good at taking notes, nor was there any reason for them to be since the state provided them with a clerk to do it for them. As one of the clerks in the sample put it

62. Ibid.

63. 145 JPN 298. We can only assume that emotion obstructed good grammar here.

64. This reference to the Magistrates' Courts' Rules must be wishful thinking.

"In a recent case the High Court said that magistrates shouldn't refresh their memory from the clerk's notes. That's buying a dog and barking yourself."

The same clerk made the good point that if magistrates are busy taking notes they will not "really hear" the evidence in the sense of paying attention to the demeanour of the witnesses when they give evidence.

On Lord Justice Donaldson's comment that the bench should take out the clerk's note and read it without the clerk being present one clerk commented that this was "ridiculous". He was considerably irritated that Lord Justice Donaldson did not understand that many clerks write shorthand, and others employ shorthand writers in court to take the note of evidence, thus usually making it impossible for the bench to read the note.

The other issue in the case was the criticism made by the judge that the bench could not have needed their clerk's advice on the standard of proof in careless driving. The reaction of one clerk sums up the criticisms of this dictum very well. She said

"I just find the Guildford case difficult to accept and respect because even on a careless driving which the judges in the Guildford case said was purely fact, ... Wilkinson the authority on road traffic law devotes pages to careless driving. Well there's obviously some law on it - case law, the sort of standards to be applied - and from my experience magistrates often need guidance on the simplest things."

This last phrase is the most crucial. The sentiment of clerks was overwhelmingly that it was misguided for Donaldson L.J. to believe that there were some points of law which were so simple that magistrates would not need advice on them. Over and over again clerks said that it needed to be understood that magistrates are lay people, they do not understand the law, and they get things wrong. Two quotations illustrate this

"...magistrates are only lay people and without guidance they arrive at some pretty horrendous decisions."

"Time after time I find that even with experienced magistrates they do need to be reminded of the standard of proof."

The Justice of the Peace also contained examples of situations where, following the decision in the Guildford Justices case, benches were deprived of advice they needed or showed their need for advice on basic issues.

What the clerks said about the tendency of magistrates to make mistakes and the necessity of the clerk preventing this in relation to the decision in the Guildford Justices case is repeated many times. It is a crucial problem for clerks and one which will be examined in detail in the section on the relationship between clerk and bench and also later in this chapter when we examine the opinion of clerks about the law governing their activities.

So far as the decision in the Guildford Justices case is concerned clerks saw it as an impediment to justice and yet another setback when they might have expected that they were to be more trusted than had been the case in the past. That clerks saw changes in their courts which merited recognition is evidenced when the Justice of the Peace editorial responding to the Guildford case said

"Surely it is time for the Practice Direction of 1953 to be re-stated in terms appropriate to present day conditions."⁶⁵

The plea for a new Practice Direction was a prayer which was answered.

A new Practice Direction was issued. Its style and approach were rather different, although its sentiments were essentially similar to the old one.

65. 145 JPN 139

It dealt with one of the problems raised in the Guildford Justices case when it provided

"Some justices may prefer to take their own notes of evidence. There is however, no obligation upon them to do so. Whether they do so or not, there is nothing to prevent them from enlisting the aid of their clerk and his notes if they are in any doubt as to the evidence which has been given."⁶⁶

However, no carte blanche to remain in the retiring room if clutching a minute book was implied in this provision, since it was followed closely by another

"If the justices wish to consult their clerk solely about the evidence or his notes of it, this should ordinarily and certainly in simple cases, be done in open court. The object is to avoid any suspicion that the clerk has been involved in deciding issues of fact."⁶⁷

The responsibility of the clerk to advise the justices and the need for the clerk(s) to retire to do this was phrased more positively in the new Direction. Instead of warning about not retiring as a matter of course, and about returning to court after advice had been given the new Direction said

"The justices are entitled to the advice of their clerk when they retire in order that the clerk may fulfill his responsibility outlined above."⁶⁸

(The responsibilities of the clerk were exactly those delineated in the existing law). Encouragement was given to clerks to advise the bench in open court rather than retiring with them.

"If no request for advice has been made by the justices, the justices' clerk shall discharge his responsibility in court in the presence of the parties."⁶⁹

66. [1981] 1 W.L.R. 1163 For text see Appendix 4.

67. Ibid

68. Ibid

69. Ibid

Although no great departures from the existing rules were made in the Direction it spoke throughout of the responsibility of the clerk and of what the clerk should do rather than what he should not.

The Practice Direction of 1981 was well received by clerks. Those interviewed after the Practice Direction (i.e. after 2nd July, 1981) commented favourably. Some felt relief that they could return to the status quo after the hiatus of the Guildford case. Some were more enthusiastic, responding to the positive attitude of the Direction. Brian Harris in an article entitled "The Role of the Clerk: A New Direction" said

"The principal advance of the new Practice Direction therefore, is that it speaks of the role of the clerk in terms of duties, not restrictions."⁷⁰

He saw the positive attitude expressed by Lord Chief Justice Lane in the Direction as having a morale boosting effect on clerks since, although there are always defendants keen to challenge the intrusive clerk, there is no similar body of persons challenging the supine clerk who does not do those things which ought to be done. A positive attitude from the Lord Chief Justice therefore could be seen to be giving encouragement to clerks to act where the Directions said they have a "responsibility" to act.

Harris's article is crisp, intelligent and forward looking. It is an excellent analysis of the Direction and an expression of the attitude of the modern clerk who is professional and ambitious and wishes to see the job of the clerk developing new responsibilities.

70. 145 JPN 403

To that end Harris along with other clerks is prepared to grasp the nettle and expose the clerk's expertise to public scrutiny by giving advice in open court. Harris says

"There is an increasing willingness amongst court clerks to offer their advice to their justices publicly on matters of law, and this is to be welcomed, not least because the parties are made aware of the legal basis on which the court is acting and are thus able to challenge it where they believe it to be wrong."⁷¹

One of the clerks interviewed expressed it as follows

"The recent Practice Direction I don't think has altered much of the law as it was, apart from an attempt to encourage court clerks to give advice in open court... Although this is a difficult thing to do, the fact that something is difficult doesn't mean to say that it shouldn't be done."

The Practice Direction of 1981 has not, however, signified any laxity in the attitude of the Divisional Court to the conduct of magistrates' clerks. In 1982 the Divisional Court said that there must be no reversion to "the bad old days".⁷² In an unreported case R v Warley Justices ex parte Nash the justices had dealt with a trivial case of burglary. After the prosecution evidence they retired for coffee, and their clerk went with them. After the conclusion of the defence case, when the only question for the magistrates was whether or not the defence that the applicant had been in the shop the day before and left his finger prints about was believed, the clerk also retired with the magistrates.

71. Ibid at p.405. An interesting point taken by Harris in his article is that the injunction to clerks to give advice in open court if not asked to retire appears in para.3 of the Direction which covers the clerks' responsibility to refresh the justices memory on evidence and to advise penalties. It does not appear after para.2 which covers advice on law, law and fact, and practice and procedure.

72. Ormrod.L.J. in R v Warley Justices ex parte Nash LEXIS transcript. 13 July 1982.

Lord Justice Ormrod said that the case was clearly one where no actual injustice had occurred, but reluctantly he quashed the conviction because the appearance was created that the clerk had been involved in decisions on fact. The Justice of the Peace was not impressed with the decision in this case⁷³. Its editorial saw the case as a return to the days of East Kerrier. It is difficult to see why, since the cases and Practice Directions have always been clear that the clerk should not retire when the only matter for consideration is a question of fact - and the clerk retired on a question of fact in this case. However the editorial does make the good point that if such a creature as an unjust or malignant justices' clerk exists, the Practice Direction and the cases will not stop her/him from wrongly influencing the magistrates, since the law focusses on appearances and not reality. Again we have, in effect, a plea for trust. The Justice of the Peace asserts that "The system of lay magistrates' courts rests as much on the lawyer clerk as it does upon the lay magistrate". Clerks feel that they play an important role which is usually not acknowledged, that the law deals with appearances and not with reality and thus implies that they are trustworthy, and that therefore decisions such as the one in Nash's case are counterproductive.

However, although we have criticised the law on the clerk's retiring with the justices for lack of clarity, it is clear on some things. One of these things is that the clerk must not be involved or appear to be involved in decisions on fact. The clerk should therefore not retire if the only issue under consideration is one of

73. 147 J.P.N. 209-210.

fact. If clerks do not show that they are capable of understanding and following this much of the law, they are perhaps not likely to be trusted.

The Conduct of the Proceedings

The Roche Committee contended, as we have seen, that the question of the clerk retiring with the bench was simply one aspect of the whole issue of the conduct of the clerk in court - if the clerk played a proper role in court her/his retirement would not be objected to, but if the clerk was over dominant in court problems would arise over retirement.

The consumers of magistrates' justice and/or their lawyers may have agreed, since, shortly after the East Kerrier case, there were two appeals to the High Court challenging the conduct of the clerk in court⁷⁴ and later R v Consett Justices Ex Parte Postal Bingo [1967] linked the conduct of the clerk with retirement.

However, although the retirement of the clerk with the bench has been carefully scrutinised and regulated by the decisions we have discussed, the conduct of the clerk in court - particularly the way the clerk relates to the bench in court - has not been similarly examined and ruled upon. The cases have settled a number of procedural points and stated the general principles to be applied⁷⁵, but very little specific guidance has been given.

74. Hobby v Hobby [1974] 1 WLR 1020 and Marjoram v Marjoram [1955] 1 WLR 520.

75. The cases referred to are those at note 67 above R v Consett Justices Ex Parte Postal Bingo Ltd (above) and Simms v Moore [1970] 2 QB 327.

The first case concerning the conduct of the proceedings was Hobby v Hobby in 1954. This was an appeal to the Probate Divorce and Admiralty Division from a decision of a magistrates' domestic court. At the hearing before the magistrates the husband had attempted to establish adultery by his wife. Both parties had been legally represented.

The clerk was alleged to have interfered with the cross-examination of the wife, and with the examination in chief of the husband. The wife's solicitor had handed the clerk the wife's proof of evidence and the clerk had used it as the basis of his notes. The clerk did not record the cross-examination of the husband by the wife's solicitor. It was also the clerk who announced the reasons for the decision of the court.

The High Court's decision was that the clerk's conduct had been wrong and the case was sent back to be retried before a different court and a different clerk. Sachs, J. who delivered the leading judgment in the case held that as both parties were represented by solicitors it was for those solicitors to decide how best to conduct their client's cases and not for the clerk. However, Sachs did recognise that there were matters on which it would be proper for the clerk to intervene; the freedom of the litigant to conduct their case as they wish must be balanced against the clerk's duty to assist the court as to what is and what is not relevant (although, of course, the clerk is not the one who makes a ruling as to what is or is not relevant). Sachs, J. commented that

"Sometimes the dividing line between the part a clerk may, on one hand take in order to see that the time of the court is not wasted, and the interventions on the other hand which in the

interests of the justice appearing to be done, he ought not to make, is difficult of demarcation."⁷⁶

It was decided that the dividing line had clearly been overstepped by the clerk in this case, but no explicit guidance was given as to where the line should be drawn. The clerk's use of the proof of evidence as the basis of his notes was condemned and the clerk was reminded of the obligation to take a full and proper note in domestic cases.

Two propositions, therefore, can be confidently stated after Hobby v Hobby: that if the parties to a case are represented the clerk should not interfere with the way in which they present their cases, subject to limits of reasonableness and relevance and the rules of evidence; and the clerk should take proper notes and not use a proof of evidence as the basis of notes. These propositions scarcely give the clerk a great deal of guidance as to what role is a proper one for her/him to play. How far should the clerk control the proceedings in court? What is the correct relationship between clerk and bench in court? How far may the clerk reasonably interfere with an advocate's conduct of a case? What procedures should be followed if the parties are not represented? None of these questions was dealt with.

Nor was any further guidance to be obtained from Marjoram v Marjoram⁷⁷ in the following year. In that case the court committed a depressing list of errors - it misdirected itself on corroboration in adultery, it failed to give proper assistance to an unrepresented party in domestic proceedings as required by Section 61

76. [1954] 1 WLR 1025

77. [1955] 1 WLR 520.

of the Magistrates' Courts' Act 1952, it allowed in evidence a letter written to the court by the husband without having given the wife's solicitor notice of its contents, it refused to allow the wife an adjournment to deal with the matters in the letter and it refused to allow the wife's solicitor to address the court on the law at the end of the case. The case was sent back for rehearing. The most telling phrase in the case comes at the end of the judgment of Lord Merriman where he says

"I might perhaps add, finally that we were told that an assistant or deputy clerk was acting on this occasion. It might be just as well if the real clerk acted on the rehearing."⁷⁸

The unfortunate clerk in this case simply made mistakes - a regrettably large number of them in a short space of time. The error of his ways was pointed out and the case referred for rehearing. We can glean no general guidance from the case as to the proper conduct of clerks in court. We are certainly awakened to the problem of inexperienced clerks who get their procedure wrong, and warned to avoid the mistakes listed but we are not guided as to the proper role of the clerk in court.

A much more helpful case, however, is R v Consett Justices ex parte Postal Bingo Ltd.⁷⁹ In that case a complaint about the retirement of the clerk with the bench was linked to a complaint about the conduct of the clerk in court. It was contended that there was a dominant clerk and a silent bench and that this should be seen as relevant to the fact that the clerk later retired with the justices.

78. Ibid. at p.529

79. [1967] 2 QB 9.

It was suggested that the roles that had been played out in court were unlikely to be reversed in the retiring room.

We have already seen that in this case the divisional court supported the retirement of the clerk on the basis that there were matters of law to be discussed. The conduct of the clerk in court was also, if not supported, at least viewed leniently, and some general principles governing the conduct of the clerk were established.

The first aspect of the clerk's conduct which was objected to was the fact that the clerk had interrupted the cross-examination of a prosecution witness and had taken over the questioning of the witness. There was a conflict in the affidavits as to whether the questioning by the clerk had continued for some time, or whether the clerk had asked a simple question which was answered at length by the witness. The divisional court did not find it necessary to find on the facts. Lord Parker instead made a general point - which contrasted sharply with the admonitions in Hobby v Hobby that clerks should not interfere where parties were represented. He said

"There are some justices, some benches, who require their clerks to cross-examine to clear up ambiguities and prefer that he should do it rather than do themselves; there are other benches who desire to do the cross-examination themselves and for the clerk to remain silent. There is no general practice; there is no accepted practice. So far as this case is concerned, I am quite satisfied that anything the clerk did by way of questioning was done at the implied request of the bench."⁸⁰

The second matter complained of was that the clerk had ordered witnesses out of court - even when both parties wanted them in court.

80. Ibid. at p.18.

However, since this was the settled practice of the bench Lord Parker did not object.

The clerk had also refused to allow counsel to have a person (not his solicitor) sitting with him to assist with instructions, and further, he had ordered a witness to leave one of his company's files with the court until the bench agreed that the file might be taken away.

Again, none of this was found to be objectionable. Lord Parker said

"I myself think that it was for the clerk to conduct the ordinary arrangements inside the court and that he was not thereby usurping a judicial functioning of the bench."⁸¹

His only criticism was that what had happened in the case "was not a model of how a case should be concluded in a court of summary jurisdiction"⁸² but was not enough to justify quashing the conviction.

It seems, then, that however prominent or even domineering the clerk may be, if the clerk does not usurp the judicial function of the bench and follows the accepted practice of the court her/his conduct will not be such as to produce, in the view of the reviewing court, the conclusion that justice has not been seen to be done. It seems that this is so even if the "accepted practice" of the court is for the clerk to cross-examine witnesses in the middle of counsel's cross-examination! The clerk can take a very prominent role in the proceedings under what is almost a doctrine of "implied request".

81. Ibid. at p.18-19.

82. Ibid. at p.19.

Lord Parker was perhaps somewhat less liberal, however, in the case of Simms v Moore 1970.⁸³ Simms v Moore concerned a prosecution for possession of an offensive weapon. The defendant was represented. The prosecutor was the officer in the case and thus also a possible witness in the case. The officer therefore handed the witnesses statements to the clerk who proceeded to examine the prosecution witnesses. This was in fact the standard practice in some Metropolitan courts at the time. Objection was taken to this procedure on two grounds - first that it was contrary to rule 13 of the Magistrates' Courts Rules 1968 and second that justice was not seen to be done. Neither of these objections were upheld. Lord Parker dismissed the first on the basis that

"Justices have always had an inherent power to regulate the procedure in their courts in the interests of justice and a fair and expeditious trial."⁸⁴

He dismissed the second on the basis that the defendant was not prejudiced in any way since he was represented by counsel who could have seen the prosecution statements if he had desired to do so. However, Lord Parker, having been informed that the practice of the clerk thus examining prosecution witnesses was a constant practice in many magistrates' courts, laid down some general rules - which could hardly have been cheering to any clerk desirous of behaving in a domineering fashion. He said that neither the court nor the justices clerk should take an active part in the proceedings except to clear up ambiguities in the evidence, and so far as examining witnesses is

83. [1970] 2 QB 327.

84. Ibid. P. 331.

concerned, this should never be done if the party concerned is legally represented, nor if the party is unrepresented but is competent to and desires to examine the witnesses himself.

Lord Parker then went on to define when it would be proper for the clerk to question witnesses, and how this should properly be done. He held that where an unrepresented party is not competent to examine witnesses properly the court has a discretion to allow the clerk to do so. This applies if the incompetence is on the part of the prosecution as well as defence. The clerk may use a proof of evidence or statement to assist him, but the other side should have sight of it and it should not be used as the basis of the note of evidence. The general rules which should guide the courts when considering when and how the clerk should intervene are promotion of the interests of justice in the case, the rules of natural justice and the principle that justice should be seen to be done.

The effect of these cases is to establish some guidelines on a limited number of areas, the obligation of the clerk to take a proper note of evidence in domestic cases, a prohibition on using a proof of evidence as a basis of the clerk's notes, and a rule that the clerk should not conduct the examination of witnesses either in chief or in cross-examination if the party is represented or competent to examine themselves.

However, even this last point is hardly free from controversy. The general rule in Simms v Moore is not entirely consistent with R v Consett Justices ex parte Postal Bingo Ltd, since in the latter case the clerk does appear to have taken a substantial part in the examination of witnesses. Therefore although Simms v Moore establishes some general rules, contravention of them will possibly

not be a ground in itself to challenge the decision of the court. The general principle that justice must be seen to be done is still the guiding one and the notional line which the clerk must not cross lest s/he subvert this principle is still not very precisely defined so far as the conduct of the clerk in court is concerned.

Many matters concerning the proper conduct of the clerk in court are left then for courts to determine their own practice. But the issues are far from simple ones and when "a court" consists of lay magistrates and a qualified and experienced clerk, it will almost certainly be the clerk who, cognisant of the case law and the procedural pitfalls, will be the one who decides the boundaries of correct conduct.

The most frequently occurring problem in practice is the problem of the unrepresented defendant who is not competent to cross-examine. The rules of cross-examination are technical, and few unrepresented persons can successfully cross-examine without considerable assistance. The clerk has difficult decisions to take here. S/he should not descend into the area by conducting a proper cross-examination, s/he is not cognisant of the defendant's case but may well know enough to understand that a defence advocate would cross-examine vigorously. The clerk may well be tempted to risk becoming "domineering", or open her/himself to the accusation of taking too prominent a role in the proceedings. The decided cases do not offer much assistance in resolving these common problems which confront clerks.

The way in which clerks do conduct themselves in court will be examined in detail in later chapters when we examine the ways in which

the clerk relates to the bench, to the legal profession, to the unrepresented defendant, and to the other courtroom personnel.

Clerk's Assessment of the Law

Having traced the development of the law relating to the clerk in court, and shown the reaction of clerks to the cases as they were decided, what is intended in this section is to make an assessment of the opinions of clerks as revealed by the present survey, about the present state of the law relating to the clerk retiring with the bench. This area was chosen because as we have seen, it is the area of law in which most of the decisions relating to the behaviour of clerks have fallen.

Clerks in the sample interviewed were asked what their opinion was of the present state of the law on the clerk retiring with the bench and also whether they thought that this law needed to be altered in any way. Their replies were most instructive.

34% (17) thought that the law was satisfactory and did not need altering. 63% (31) thought that the law was unsatisfactory and needed change. Only 4% (2) didn't know or had no opinion on the matter, and both of these were trainee clerks.

It demonstrates, even at such a simple level of analysis of the questionnaire, a remarkable situation if almost two thirds of clerks are not satisfied with those rules which govern the basis of their relationship with the magistrates and their behaviour in court. It indicates that, despite the new Practice Direction, the problems of East Kerrier have not yet been resolved. We have already said that the lay magistracy deals with the vast majority of criminal cases in this country. These magistrates rely upon their clerks to run the courts and to give them legal advice. Their clerks feel that their

ability to carry out these important tasks is hampered by the existing law.

What problems, then, do clerks see with the law, and how would they like it changed?

Legal change in the period of research

It is important to emphasise at the outset that the interviewing took place at a time of developments in the law relating to the clerk's retiring with the bench. The interviews took place over a period of 8 months, from January to August 1981.

R v Guildford Justices ex Parte Harding was decided in January, and the Practice Direction was introduced on the second of July 1981.

As we have seen, many clerks objected strongly to the decision in the Guildford Justices case, and it must be true to say that it was this decision which prompted many clerks to express dissatisfaction with the law. Certainly those clerks interviewed after the Practice Direction expressed less concern about the difficulties of operating the rules. Comments such as "I think the recent Practice Direction has almost got it right" were made by several clerks. However, whilst it could be said that the Practice Direction wiped out the unwelcome effects of the Guildford Justices case and expressed the rules in a positive fashion, it did not make any real changes in the law as it existed prior to the Guildford Justices case. It would certainly not be true to say that the Practice Direction of 1981 solved all the clerks' problems or dispensed with all their objections to the restrictions on their retirement. Many clerks regarded the Guildford Justices case as a particularly objectionable decision in a line of cases which was anyway unsatisfactory.

The type of change desired

Only one of the clerks in the sample thought that the law should be changed so as to make it harder for the clerk to retire with the bench. That clerk said

"There are no set rules except for that direction we've had. Well I think they ought to be more strict. That would mean that if they (clerks) made mistakes they would be discovered more easily. I think it is very important that it should be very strict - after all magistrates' courts deal with the bulk of criminal offences really. Very seldom do matters go to the Crown Court."

This, however was very much a lone voice. No other clerk wanted the rules on retiring to make it more difficult for the clerk to retire.

A substantial proportion (28%) of clerks who wanted change in the law wanted change which would simply clarify the situation. These clerks protested that the Guildford Justices case was unhelpful and that they awaited a Practice Direction to clarify the situation. As one of them put it.

"Personally I wouldn't be bothered what changes they made because I would work in accordance with the law as it's set down. The only thing I would ask is that the law is made clear."

However the majority of clerks (65%), who saw the need for change, wanted a change which would make it easier for the clerk to retire with the bench. There were a number of reasons why this was so.

The overwhelming reason for clerk's desire to be able to retire more often was to ensure that the bench did not make mistakes. Over and over again clerks emphasised that magistrates were lay people and that they did not know the law. It was stressed that even experienced magistrates have been known to make bad mistakes and that the clerk needed to be there to protect defendants - and prosecutors - from those mistakes, and to preserve the legitimacy of the court.

Many clerks commented that if the bench made mistakes they looked ridiculous in front of all the people in the court. One clerk said that if the bench announced a wrong sentence.

"...they look rather foolish and you look foolish as well."

Another commented

"...they can make mistakes and it only makes the bench look stupid and puts the law into disrepute."

The clerks did not see such errors as necessarily being a reflection on the bench, although they could be. One clerk commented that the Practice Direction of 1981 was good, but that it didn't "cover the situation where your bench is not a bright bench". Another commented that his court could not provide experienced chairpersons in each court, so that often benches needed help. A third said that he saw the problem as being one of lack of training of the bench. Many clerks, however, simply expressed the view that lay persons operating a legal process needed help constantly because one never knew when a point of law might arise in a case.

This was the central complaint of clerks - that it is not possible for any clerk to predict when a point of law may arise. Therefore to base the law around a requirement that the clerk should retire only when a point of law does arise does not make sense. Some examples from the many in the interviews illustrate the point. One clerk said

"Until you know what their decision is on the facts you can't really know for certain that there is no technical legal point. And it is always possible in a case where you think the facts are perfectly straightforward - either they believe the prosecution or they believe the defence - for the magistrates, without this being anticipated, deciding that perhaps the dishonest intent arose halfway through the facts. Now you haven't anticipated this, but you would be in difficulties if they have based their decision on it..."

Another said

"I think it's fraught with danger to expect lay justices to go out without any guidance at all. I always feel apprehensive if the justices have gone out on their own and they come back in. As I say, I try if I can to ask them what they've decided before they announce it in open court because one does get cases I remember years ago when I had a very experienced chairman of the bench who had been on the bench for years who was sat in No.4 court where the bench is so much higher than the clerk's desk - unlike Courts 1 and 2 where you're sitting in a position where you can hear what they are saying. We had a guilty plea - I can't remember the nature of the case but an advocate appeared for the defence and gave a long mitigation, and after consideration in court the chairman said 'We've listened to what you've said and we're going to dismiss the case.' So I jumped up and said 'Of course you do mean an absolute discharge' - which was the best I could do in the circumstances."

The interviews contain many examples of this type of situation arising, where magistrates went wrong because they did not have the guidance of the clerk. A few clerks felt that benches made mistakes because they were insufficiently trained. (The question of training is of course very important, and will be discussed in detail in a later chapter.) However many clerks stressed that even experienced magistrates who knew the job well still went wrong, and that unless the clerk was with the bench in the retiring room to correct errors as they arose, problems and embarrassment would be caused.

It must be stressed that none of the clerks interviewed wanted to be part of the tribunal of fact. They were very clear that this was an area that they were very glad was outside their province. But they were most anxious to ensure that decisions on fact were taken correctly, according to the relevant legal principles, and they felt that the only way to ensure this was for the clerk to be with the bench.

The clerks in the sample were not asking for a change in the details of the provisions of the Practice Directions, or the decisions

in the cases. They were looking for a fundamental shift in the basis of the rules. What they wanted was to be trusted, to be able to retire whenever they wanted - and every time if they felt it necessary. A few brief examples of clerks' opinions will illustrate this:-

"...I think in that respect the clerk ought to be given far more latitude in using his own common sense in retiring."

"My own opinion is - strictly my own opinion - is that I think the clerk should retire with the bench if he considers it necessary on any occasion."

"I think we should retire every time, hear what their decision is and if there are any queries we can raise it and then once we've heard what it is and we feel it is correct in law and procedure, then we should leave them."

"But after all you should be able to rely on the sense of the clerk that he's not going to go out and start making decisions for the justices."

Another pointed out that if the clerk were to be able to use his own initiative about when to retire it would mean that the clerk would have to have the trust of those people appearing in court regularly, such as solicitors. However some clerks were confident that such trust was assured

"I can't see what all the fuss is about because solicitors tell me in court in difficult cases 'Go and retire with them' because they - and I'm sure this happens in all courts - they trust me and they know I wouldn't become involved in matters that weren't my concern."

These statements strongly reinforce the conclusions which were drawn from clerks reactions to the developing case law - the message that today's clerks feel that they are professional, responsible, and trustworthy. As one clerk put it

"I think another historical aspect of it is that for many years in many divisions throughout the country certain clerks were very involved in all of the processes - recommending sentencing, recommending findings of guilt and innocence and so on and so

forth. I'm sure that happened certainly during the first half of this century and magistrates were guarding against that. I think latterly clerks have become far more prevalently qualified professionally, know their place, have a very good working relationship and I think there is no need now for the kind of detailed clarification of the clerk's role in retiring."

So there may have been the bad old days when clerks were wayward and unprofessional. Now, however, clerks claim that things have changed substantially. They feel that clerks can now be trusted to behave professionally.

The theme that changes in magistrates courts necessitated changes in the role of the clerk was taken up by another clerk who argued that the Divisional Court was out of touch with public opinion

"...what public opinion is concerned about is not that clerks have too much influence with their justices, it's that laymen are required to take those decisions without professional advice. Now they have professional advice on sociological and other matters from the probation service, from doctors or whatever, but the legal advice - the principles on which they are meant to decide the case - must come solely from their clerk. I think the public would be happier to see the clerk retire as a matter of course with the bench throughout their decision in every possible case. In that way you would be then acknowledging a situation which should exist."

Conclusions

Many clerks are obviously content with the restrictions presently placed on their retirement with their benches. If the rules are clear they are willing to follow them. What they perceive to be unrealistic decisions by the Divisional Court cause exasperation, but with a new Practice Direction restating the old rules these clerks are content.

There are however an equal number of clerks who are far from satisfied with the restrictions placed on their retiring, who want to be trusted to exercise their own discretion in these matters, and who resent the present rules.

It must be a matter for some concern that half of the clerks in the sample perceive the rules that govern their behaviour as inappropriate to their own understanding of their job. Whether or not such concern should lead us in the direction of recommending changes to make it easier for the clerk to retire will not be discussed here. As we have stressed, the question of the retirement of the clerk with the bench is intimately connected with the whole relationship of clerk and bench, with the relationship of clerk and other actors in the courtroom drama, and with the development of the clerk's responsibilities out of court. When these factors have been examined we will attempt at the end to make an assessment of the probable and/or desirable future.

The practice of clerks in relation to retiring with the bench

Our aim here is to examine what clerks say they do so far as retiring with the bench is concerned and also from observations at nine different courts to assess what clerks actually do in practice.

The clerks' accounts of their practice

The clerks who were interviewed were asked two questions. They were asked what practice they usually adopted in court so far as retiring with the bench was concerned. Also, to discover what demands were made upon them by the bench, they were asked what sort of issues the bench asked them to retire on the most often.⁸⁵

The replies of clerks to the first question about the practice they adopted were concerned mainly with the issue of whether or not they would take the initiative and retire with the bench when the bench had not asked them to retire.

The reasons why this was the focus for clerks is interesting. In the Practice Direction of 1953, where Lord Goddard is discussing the question of on what it is proper for the clerk to advise, he does envisage the clerk taking the initiative

"Moreover it would be proper for the clerk himself to call the justices attention to the fact that a question of law does, or may, arise if they do not appear to be already aware of it. It would then be for them to consider whether they wanted his further advice on that question."⁸⁶

However when Lord Goddard is discussing the manner in which justices may consult their clerk it is clear that it is the justices who are to

85. They were asked these questions before they were asked for their opinion on the law.

86. [1953] 1 WLR 1416

be the initiators of the clerk's retiring. After warning that the clerk is not to retire as a matter of course and that justices are not to try to get round the decisions by asking the clerk out in every case, the Direction says

"Subject to this, it is in the discretion of the justices to ask their clerk to retire with them if, in any particular case it has become clear that they will need his advice. If in the course of their deliberations they find that they need him they can send for him."

The Practice Direction of 1953 therefore appeared to envisage the justices being sole controllers of the clerk's retiring. The clerk could take the initiative in proffering advice, but the implication was that she/he should do this in open court.

This is made explicit by the Practice Direction of 1981, which says

"If no request for advice has been made by the justices, the justices' clerk shall discharge his responsibility in court in the presence of the parties."

The problem with giving the justices control over asking the clerk to retire with them is the one already mentioned - that justices do not always know when a point of law arises. Of course the clerk can give the justices her/his view of the law they before retire, but as several clerks pointed out, since law and fact are so closely intertwined, one often doesn't know what legal advice is needed until one knows what view of the facts has been taken by the bench.

Many clerks therefore, in practice do take the initiative and retire without being asked in certain circumstances. 66% of the sample said that they would retire without being asked in some circumstances. Only 34% said that they would only retire when they

were asked, and 4% (two clerks) of these added the rider that this was because the bench asked them out all the time or very often!

Clerks who never retired unasked

Several of these clerks who said that they only retired when they were asked mentioned a factor which must have made it appear that they sometimes did retire unasked - and that was the existence of buzzers or light systems to summon the clerk to the retiring room. In many courts, the magistrates' retiring room is furnished with a light or buzzer switch which they can use to summon the clerk. In some of the courts this light or buzzer is invisible or inaudible. Therefore although the bench was taking the initiative in summoning the clerk, the observer in court may be unaware of this.

Some of the clerks who said that they did not retire unless asked also said that they tried if possible to give their advice in open court. One said

"Well I don't [retire] unless they ask me. Sometimes certain advice is given in court and there are times when I want the parties to hear what I say as well, so if there is something that I feel the justices should know because it's a point of law and they haven't retired, I will say so in open court, so that if anybody particularly wants to disagree with it they can do so."

(This clerk was interviewed before the Practice Direction of 1981.)

Another clerk said that where the sole question was a point of law he tended to offer his advice in open court, but he did point out that there were points where he could not do this until he knew what preliminary decisions they had taken. He explained the problem in an imaginative way

"...if I can explain that the decision making in a bench of magistrates is rather like a flow diagram with a number of points, and I as clerk may well think that the critical point is point number three, but they may well be agreed that it's number four. I can't give public advice on number three because I'd be wasting my time because they in fact think it's number four.

And so on any question of mixed law and fact and on many questions of sentencing I think it's highly desirable that the bench have the advice of their clerk - with them when retiring."

Clerks who would retire on their own initiative

The replies of the two thirds of clerks who said that they would retire without being asked deserve closer analysis. Just under half of them said that they usually waited to be asked but that sometimes there was a point of law which had been raised and which they thought the bench needed advice upon, and that they would then retire unasked. A typical response from these clerks would be

"We normally only retire when the magistrates ask us, unless there is an obvious point of law or something that we should mention to them."

An example from the court observations will illustrate the problems confronting clerks which lead to this particular practice. A case was brought before the court involving a complaint of breach of the peace. A young man was alleged to have been behaving in a rowdy way, and to have been swearing in a local park. The defendant pleaded not guilty. He was extremely well prepared, articulate, and had his father with him as a McKenzie⁸⁷ man. The clerk dealt very sensitively with the case, taking time, explaining what was happening at every stage and assisting the defendant to frame questions in cross-examination. The bench eventually retired to consider the facts. They retired for almost an hour. During that time the clerk discussed the case with me. His concern was that the magistrates may well not have realised that because the case involved a complaint of breach of the peace the standard of proof was proof on the balance of

87. McKenzie v McKenzie [1970] 3 All E.R. 1034 decided that a defendant is entitled to have with him any person to take notes, quietly make suggestions and give advice.

probabilities. He was afraid that the bench were deciding the case on completely the wrong basis. Several times during their retirement he said "I don't know if I should retire or not". Eventually the magistrates buzzed through and asked the clerk to retire. When he returned he reported that the magistrates had asked him for advice on the standard of proof, and his suspicion that they had not understood that the standard was proof on the balance of probabilities was confirmed. The bench had been undecided as to whether to acquit the defendant, but having been told of the lower standard of proof were then happy to do so.

The clerk's dilemma in this case illustrates very clearly the problems that may arise, and the reasons why clerks who feel that they have a point of law which the bench should know about retire unbidden. The clerk in the example was at pains to point out after the case that it constituted a good reason for letting the clerk decide on his own initiative when to retire with the bench, and that clerks resented the lack of trust displayed by cases like East Kerrier and the Guildford Justices case.

Apart from those clerks who would go out without any request from the bench, there were another group who also retired on their own initiative - but who had devised a method of circumventing the law. This group of clerks (about 20% of all clerks interviewed) adopted one of two approaches. Half of them simply told the bench that they wanted to retire.

"... if there's a point of law involved or something which they may have missed - or not realised there is a point of law involved - then I will often say 'there is a point of law involved in this case and I'd be obliged if you'd send for me before you come back into court'."

The other half persuaded the bench to ask them to retire.

"We always make sure that the chairman wants me out there, and will announce - get him to announce it publicly. It may be that I prompt them.... 'Do you wish me to come with you?' and leave it to them. If they say 'No' then I don't go"

This latter approach is perhaps a little more subtle, and of course leaves the bench with the decision ultimately as to whether they want the clerk. But it would be an unusually insensitive or stubborn bench who in the face of such an indication would neglect to take their clerk's advice. As one clerk said

"If I think it's something that they need assistance with I'll say 'Do you want me to retire with you,' They always say 'Yes'. They get the hint."

Playing the game

Some clerks took a slightly cynical view of the whole process of the retirement of the clerk. They took the view that it was necessary, if tedious, to abide by the rules. They believed that they should 'play the game' even if the game was unnecessary. Experienced clerks knew that if they wanted to retire they could almost always do so, that the initiative was often their own, but that they had to keep up appearances. As the clerk last quoted put it, if he wished to retire all he had to do was ask the bench if they wanted him, and they got the hint. Other clerks mentioned that they made a parade of retiring, so that it was clear to everyone that the bench had asked the clerk out

"I wait for them to ask me to retire, and then I make it abundantly clear in court by replying myself in court, that this is the intention - and I say 'I will, Sir.' And it's abundantly clear to everyone in court that I've been asked out."

This pantomime may be performed for a very select audience.

"...(if) there is a special message which can be taken through completely unrelated to the case, in that case I would inform the solicitors why I was going in ... So I tend to explain why I'm

going in. If it's solicitors I'm not familiar with I actually ... say 'I've been asked to retire.' With local solicitors, they are used to the signs and they understand what's going on."

It is, of course, the legal profession in court who constitute a danger to the clerk who does not play by the rules. Realistically they are the only people likely to challenge the clerk's conduct by taking a case to the Divisional Court. However they may not constitute a danger, but be a positive assistance to the clerk who wishes to retire unasked. At least one clerk said that the local profession would tell him to go out if they had a complex case under consideration.

Knowing the Court and the Bench

Several clerks interviewed mentioned differences in practice between various courts, and indeed the fact that there are such differences was obvious from the field notes and observations.

At least two factors are important here. One is the way in which the clerk to the justices approaches the question with other clerks. At this level the clerk to the justices can at least attempt to formulate policy - to decide what the details of the practice of the clerks shall be. Clerks to the justices mentioned, for instance, encouraging their clerks to give advice in open court. Certainly the influence of the clerk to the justices on new clerks, and clerks in training is considerable. But the clerk to the justices does not train all of her/his own staff. At most courts there will be clerks on the staff who were trained elsewhere, and whose practice will vary from that of the clerk to the justices. There were definite divergencies of practice between individual clerks at each court. The clerk therefore does not succeed in enforcing a particular pattern of retiring with the bench so far as all clerks are concerned.

However, the clerk to the justices does not only train the court clerks under her/him. S/he often has a very large part in the training of the bench; and what they are capable of doing without assistance will affect the pattern of retiring at a particular court - even against the inclinations of clerks. One unwilling clerk said

"My own opinion is that the clerk shouldn't retire at all unless he's requested to do so. I don't think the practice - which is here, where a clerk will more or less be expected to retire - I don't think that's right at all. But it's something I've had to get used to doing since I came here. I think the main fault is the fact that the magistrates at this particular court are not well trained enough, and that's all there is to it."

If all or many of the magistrates at a particular court lack training or confidence, they will be asking the clerk to go with them almost every time they retire. The court clerks will have to comply, even if they would rather not - they can hardly refuse help if it is asked for. The influence of the clerk to the justices is therefore crucial, particularly so far as the training of the bench is concerned, on the pattern of retiring at each court.

The pattern of retiring will also be affected by another factor - the experience of the particular magistrates who are sitting. Over the years clerks get to know their magistrates very well. They know just how much experience, confidence, and intelligence their magistrates have. The clerk will look at the line up behind her/him, and know how much help they are likely to need. Comments such as 'I've got the chairman of the bench today. I can relax', or 'These are very experienced magistrates' were frequent, along with other less appreciative comments.

Obviously an experienced bench will need less help. As one clerk put it

"I tend to treat each bench individually, knowing, with my experience of the makeup of the bench and my knowledge of them as to how much guidance they are probably likely to want..."

The confidence of the bench has a direct effect on the number of times the bench ask the clerk out. One clerk said that, if a point of law was raised in a case, he would try to give advice in open court before the justices retired. However

"Usually justices, when such a point has been raised, would ask me to retire with them so that it could be fully explained to them, rather than they be left with a public statement, but that depends on the confidence of the individual members of the bench."

So the ability of clerks to follow the provision of the practice direction and the exhortations of their colleagues, and to give advice in open court may well depend on improvements in the training of the bench.

The Needs of the Bench

The clerks who were interviewed were asked to make an assessment of what the issues were on which they were most frequently asked for advice by the bench. The aim was to find out what their demands on the clerk were - why clerks were being called on to retire.

A depressing 10% said that they were asked out on anything and everything. One response was

"Most of the time they ask you to go with them for everything."

However it is obvious that the issue on which magistrates most look to their clerk for help is the issue of sentencing. Magistrates courts do deal with a high percentage of pleas of guilty, so they are likely to spend a proportionately large amount of time sentencing. But one might have thought that if they did such a lot of it, they might get used to doing it without advice.

70% of clerks said that sentencing was the issue on which they were most often called upon to advise. 50% mentioned points of law as being one of the issues they were frequently asked about, and this 50% includes a number of clerks who were still guiding their benches through the new approach of the Bail Act 1976.

The clerks interviewed were asked simply to state what issues they were asked to retire on the most often. 14% mentioned in this context that magistrates asked their advice on fact. Sometimes this arose because fact and law are often closely linked.

"It's surprising really the amount of time that's taken up by questions on evidence or relating to evidence. I'm a bit wary of the way I answer those because they're mixed - more fact questions - and really you have to shy away from the temptations they place in your way to comment on the facts."

Sometimes it seemed that the bench was looking for advice where it certainly should not have been. One clerk said

"I only advise on law. I get asked on fact often, but I only tell them on the law, the various legal rulings."

Another

"But occasionally you feel they ask you in to see what your reaction is. They'll say - sometimes the evidence is a bit involved - they'll tell you how their minds are thinking and you have to remind them and say 'Well it's your decision'. And you have to point out to them - I'll say 'Well this is a question of fact, I really can't help you'."

The clerks who admitted that they were from time to time asked to give advice on fact were all anxious to make it plain that they didn't oblige, that they would always point out that it was a matter for the bench and not for them. It may well have been that the clerks who were interviewed were motivated to admit that they were sometimes asked to give advice on fact because they felt it was pointless to conceal it since they were being interviewed by someone who was

initiated - who had herself been a court clerk. One clerk said he was most often called upon to advise on law

"...but that isn't the only one obviously - you probably know that. If they ask me what do I think, then I say 'Well what do you mean what do I think?' You've got to be careful..."

It is clear from these observations that magistrates find it difficult to distinguish between fact and law - to put it at its best. Inevitably, therefore, one is relying on the integrity of the clerk not to comment on the facts, despite what appear to be open invitations to do so.

This problem is part of the whole issue of the way in which the clerk relates to the bench, which is the subject of the next section. Questions were carefully designed in that section of the questionnaire to elucidate whether or not the bench asked advice on fact. They were scarcely needed. But these issues will be investigated in more detail in the next chapter.

What do clerks actually do?

As we have already detailed, one aspect of the field work consisted of court observation.

Two courts were observed for a period of one month each, and five courts for periods of two weeks - a total of four and a half months of observation. Verbatim notes of the proceedings were taken as far as possible, and particular attention was paid to patterns of retiring.

The courts chosen were situated so that a geographical spread over England and Wales was achieved, and all sizes of courts were observed, so that the sample although not large was as representative as possible.

The patterns of the clerk retiring with the bench varied a great deal between individual courts. For instance at one court, Court A, the clerks almost invariably retired. Over a period of a month's

observation there were only two or three occasions when the clerk did not retire with the bench. Many of these retirements were at the prompting of the bench, but many were not. One clerk absolutely invariably retired with the bench on every occasion, whatever they were considering, and whether or not they had asked him to retire. His colleagues retired much more often than not, but they occasionally stayed in court. At this court, a defending solicitor who appeared at the court almost every day commented that the practice of the clerks was to go out with the bench and have a cup of coffee "and decide sentence with them". He said "Usually I'm addressing four people not three". When I expressed doubt about this he was most emphatic that it was so. However this solicitor appeared very affable towards the clerks, and did not seem to wish to challenge the clerk's pattern of retiring. In fact at this court, the type of incident mentioned in the interviews occurred, where a defence solicitor asked the clerk to go out. There had been some legal argument in a case where there was a charge of assault against the defendant and a complaint for a bind over arising out of the same incident. The prosecution asked the magistrates to hear the evidence but submitted that the assault charge was inappropriate and that it was a proper case for a bind over. The bench heard the prosecution evidence, and retired, without the clerk. The defence solicitor approached the clerk and said 'Do they understand?' The clerk said 'I think they will decide they have enough evidence for a bind over rather than the other'. The defence solicitor made another (inaudible) comment, to which the clerk replied 'Yes - I'll make sure they understand'. The clerk then retired with the bench. She

later returned to court and indicated to the defence solicitor that the bench were taking coffee but would return in five minutes and that he should not worry. Therefore despite the fact that the clerks' practice at this court was rather unorthodox, it did not seem likely to be referred to the Divisional Court.

Two other of the courts observed, courts C and D, had a similar pattern of retiring - the clerk went out with the bench almost every time. However the pattern was certainly not as marked as it was at Court A, and the clerks left the magistrates to their own devices on many occasions over the period of observation.

A general picture of patterns of retiring is very difficult to draw. A simple count of how often the clerk retired with the bench would be meaningless for several reasons.

At some courts it is simply not possible to tell if the clerk has retired with the bench. For instance at Court C the magistrates' retiring room was accessible from the public part of the building. If, therefore, the bench retired and the clerk later went out, one did not know, without shadowing him, whether he had gone to collect papers from another court, gone to his office, gone to speak to the bench, or gone to get the cricket score!

At some courts the pattern of the clerk retiring depended on what type of court was sitting. At all courts clerks almost invariably retired in domestic cases, as was envisaged by the Family Division. The way in which courts divide up their list of the day's cases between the courts sitting can affect the pattern of retirement. A court dealing with rates, T.V. licences and postal pleas of guilty in traffic offences is less likely to need to retire to consider matters than is one dealing with a list of several contested cases. Also,

the larger courts sub-divide their work in a very specialised way. Court E, for instance, runs about eight courts per day. One of those courts might be a "reports court" where a series of defendants who had been remanded for medical and/or social enquiry reports would appear. Such defendants frequently pose complex sentencing problems, and the bench dealing with them would legitimately need the advice of their clerk in the retiring room in many instances.

Similarly the question of whether or not the clerk had been asked out by the bench was not always clear cut. On many occasions the retirement of the bench was preceded by a period of inaudible whispering between bench and clerk. In each situations one could not tell if the bench has asked for the clerk, or if the clerk had decided that the bench needed her/him and gone out without being so requested.

Despite this it was obvious that clerks do, consistently, retire unasked if they think that the bench may be experiencing problems, or may need advice.

At some courts there seemed to be an established policy that if the bench retired, the clerk would give them a few minutes to discuss and would then retire to see if they needed help. Time after time the bench would retire, the clerk would remain in court chatting to ushers, or solicitors for a few minutes, and then retire to the bench, often re-appearing with or without the bench after a very short time. On many such occasions there would have been time only for the clerk to ask if help was needed and for the bench to reply in the negative, or for the bench to tell the clerk what sentence they were proposing and for the clerk to confirm its legality. However such a pattern of retiring is hardly that which was envisaged by the Practice Direction.

Again though, it must be said that it is dangerous to generalise. On many occasions clerks retired with the bench only because the bench consistently asked them to. This was especially so where the chairperson of the bench lacked confidence or experience. Inexperienced magistrates depended heavily on the clerk, in court and when they retired. It was not however always the case that it was the inexperienced benches who consistently asked the clerk out. Perhaps the most confident, intelligent and sensitive chairwoman observed during the field work - a magistrate of considerable experience who certainly did not lean on her clerk - always asked the clerk to retire with her. This can only have been a matter of a policy decision on her part, since she certainly was not in need of help when she was in court and her experience of sentencing was extensive.

There were numerous occasions during the fieldwork when the clerk's contention that lay magistrates made mistakes if the clerk was not there to help them was borne out. In one case the bench imposed one fine for two offences and had to be corrected. In another, domestic, case the bench retired alone. When they returned to court and announced their decision it did not conform to the applications made by the parties. The clerk went through the applications correcting what the bench had said so that it conformed to the changes in the provisions for custody and access which were the subject of the application. The bench had obviously not fully understood the nature of the application. Both parties' solicitors looked to the clerk to get it right, nodding as he detailed the correct terms, whilst the bench also nodded to indicate that the clerk was conforming to the sense of their decision. In a further case there was argument between defence and prosecuting solicitors as to whether the

prosecution had the right to re-examine or not. The bench appeared to be unwilling to allow re-examination. The clerk was vigorously trying to attract their attention. She finally succeeded. The bench said that they would retire "and see what the clerk has to say". This was, of course, an ideal situation for the clerk to give advice in open court. The clerk did not seem to want to retire. She grimaced at the two solicitors, but went out. She returned alone after a few minutes. Two minutes later the bench returned. They sat down and the chair said to the clerk "Will you explain what we have decided?" The very strong impression was therefore given that the decision was not that of the bench. One wondered, even, if they understood what they had decided. The clerk explained that re-examination was permissible if new matters had been raised in cross-examination. So much was clearly legal advice. She then had to go on to detail what the new matter was which had, in fact, been raised by this cross-examination. This was fact - or at least mixed fact and law. It should have been a decision for the bench as to whether re-examination was permissible in the circumstances. It was laudable that ultimately the clerk's advice was made public. However one was left wondering how much advice the clerk had had to give and how far the bench had understood that advice.

It must be obvious from the accounts of clerks about their practice, and from the above discussion of the court observations that all clerks do not follow the Practice Direction on retiring. A few clerks and a few magistrates simply flout it. They are, however, a minority. The majority of clerks respond not to the provisions of the Direction but to a complex set of variables, which include the

practice they were taught in the past, the assumptions of the magistrates at their court, the experience of their bench, and the difficulty of the issue being decided at the time. Other factors may also intrude - the encouragement of defence solicitors, or just that the coffee machine is in the retiring room for instance!

The general relationship between the clerk and the bench is, however, the most important factor. This relationship is not a simple one, and has problems other than that of when the clerk should retire with the bench.

We will be considering the whole relationship between clerk and bench in the next chapter. It is clear, however, from the reactions of clerks, and from their behaviour in court that the rules contained in the Practice Directions are considered inappropriate by many clerks, and are not operated in practice. Clerks respond to the needs of the court, to the needs of benches of lay magistrates, and they feel strongly that those needs would not be satisfied by the pattern of retiring prescribed by the directions of the Divisional Court.

The problem is that when the clerk in a court takes a decision to retire s/he is responding to such a complex set of factors, that no rules devised by the Divisional Court could effectively prescribe for the situations which arise in fact. Clerks are asking therefore that reliance be placed on their integrity - to retire whenever they consider it appropriate without any adverse inference being drawn. They wish to be trusted.

CHAPTER THREE

THE CLERK AND THE BENCH

The clerk and the bench in court

Division of labour in the courtroom -

Is the division of speaking parts important?

The dominant clerk?

Maintaining the court organisation

Preserving legitimacy

The clerk and the bench in the retiring room

The clerk and the verdict

The clerk and the sentence

Overstepping the mark

Conflicts with the bench

The limits of the relationship

The clerk and the bench

We have seen in the last chapter that the legal rules relating to the clerk and the bench are complex and are resented by clerks who see them as an unnecessary restriction which prevents them from carrying out their job effectively. The rules arise in part as a reaction to the complaint that the clerk in court is too dominant and the fear that clerks might influence their benches improperly.

In this chapter we examine in detail the way in which clerks do relate to magistrates and assess how far they exceed their proper role. We shall show that the problem is not a simple one of clerks going too far, but is bound up with the way clerks see their own roles, their insistence on the importance of due process elements of their roles and the pressures of processing cases.

The first part of the chapter deals with the clerk and bench in the courtroom. The second part deals with clerk and magistrates in the retiring room.

The clerk and the bench in court - division of labour in the courtroom.

One striking difference between magistrates' courts in different parts of the country is the variation in the balance between the clerk and the bench in court. In some courts the magistrate in the chair will play a prominent role and will, for instance explain matters to the defendant, put questions to the witnesses and explain the requirements of the courts decisions to the parties. In other courts the bench will be seen to remain silent throughout the proceedings, speaking only to announce a decision, and then often leaving the explanation of it to the clerk.

One of the clerks interviewed for the present study gave an illustration of his experience.

"Where I was before they were very strict in the way procedure was carried out ... There the clerk would identify the accused and put the charge to him and that was more or less it unless they were asked some point of law by the magistrates or there was anything that arose during the course of the case. But here the clerk puts the matter to him, if there's anything that comes up during the course of the case it goes straight to the clerk who makes any decision in effect, of what can and can't be heard, and unfortunately its often announced here by the clerk rather than the chairman, and I don't think that's right. Also when it gets to sentencing point they will decide the sentence and it's left to the clerk to explain it and personally I don't think that's correct."

These differences from court to court were mentioned by Darbyshire¹ and also by Elizabeth Burney in her book "J.P. - Magistrate, Court and Community".²

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1. Unpublished Ph.D.Thesis. The roles of the Justices' clerk and the Court Clerk. University of Birmingham. 1978.
 2. Elizabeth Burney, 'J.P. - Magistrate, Court and Community', Hutchinson 1979. See Ch.9.

Both of these writers expressed concern about discrepancies from court to court. The present study aimed to supplement their evidence, and to discover something of the nature of, and the reasons for, the differences observed.

The question of the division of labour between the clerk and the magistrates in the courtroom is closely linked to the question of whether or not the clerk is dominating the bench or not. An assessment of whether or not clerks dominate their magistrates in court will develop from the discussion of the division of the 'speaking parts' in court between clerk and chairperson.

The clerks interviewed for the present study were asked for their general comments on the division of labour between clerk and bench. They were also asked to explain who would fulfil the task of speaking in three different situations. They were asked who would explain to the defendant about her/his right to trial, who would explain to the defendant the choices in methods of presenting a defence, and who would explain the meaning and effect of a decision about bail. The replies to these questions were very interesting, and give a very clear picture of the complexities and difficulties which can arise in relation to seemingly simple issues, and of some of the reasons why there is such variation between courts.

The clerks were first asked who would explain to the defendant the right to trial - i.e. where the defendant has a choice between trial before the magistrates or committal to the Crown Court for trial there, who would explain this to the defendant and seek the defendant's election. This does not appear on the face of it to be a particularly difficult issue, but it does in fact involve an astonishing amount of legal and procedural knowledge.

It is first necessary to know whether or not a particular offence carries with it a right to trial by jury, whether it must be tried by a jury or whether it must be dealt with by a magistrates' court. The Criminal Law Act 1977 simplified the number of categories into which an offence may fall from five to three,³ indictable, summary and 'hybrid' but it created a procedural quagmire around the steps to be taken in order to reach a decision as to venue for hybrid offences which can be dealt with either summarily or on indictment. Section 20 of the Act has now been repealed and re-enacted in Section 19 Magistrates' Courts Act 1980. It provides that the court must first take a decision as to whether the case is one which is suitable for summary trial. The prosecutor and the defendant have the right to be heard on this issue.⁴ There is also relevant case law. If the magistrates decide that a case is suitable for summary trial, then the defendant is put to her/his election. If the case is one involving criminal damage there is an additional stage of determination of the value of the goods.⁵ An experienced clerk can look down the list of the days' cases and without hesitating say which are summary, which hybrid and which must be dealt with on indictment. A less experienced clerk might have recourse to Stone's Justices' Manual for a few infrequently occurring offences. A lay magistrate is unlikely to know more than the most frequently repeated offences such as theft

3. Prior to the Act, offences fell into five categories - summary offences, summary triable on indictment, hybrid offences, indictable offences triable summarily and indictable offences. There were different procedural rules in relation to each type of offence.

4. See R v Horseferry Rd. Justices ex parte Constable. Times 27.1.81.

5. Magistrates' Courts Act 1980. Section 22.

or drunkenness. The clerk will have the procedural complexities of Section 19 at her/his fingertips. The lay magistrate understandably, may find the procedure confusing.⁶

Taking these factors into account, it is not surprising therefore, that every clerk interviewed reported that explanations about the right of trial were undertaken by the clerk. One clerk reported that in the past, the bench had tried to do it "but they got into such a mess, really to be quite frank, that they had to let the clerk take over."

Young & Clarke in their book Chairmanship in Magistrates' Courts⁷ envisage that it will be the clerk who will explain about mode of trial. They see the division of work between clerk and bench as dictated by their respective roles - they see the magistrate in the chair as the mouthpiece of the bench and therefore responsible for announcing the decisions of the court and the clerk "the chief executive officer" of the court and its professional adviser and therefore responsible for legal, technical and procedural items.⁸

Young and Clarke also expect that it will be the clerk who will explain to the defendant the procedural courses open to her/him in making a defence. (An unrepresented defendant must be told that s/he can remain silent or make a statement or give evidence on oath.) Contrary to this expectation, however, it would seem that some magistrates are asserting themselves on this issue.

6. The question of how effective the clerk is at explaining the complexities of the procedure to the defendant is explored in Chapter Four.

7. Agnes F. Young J.P., M.A., and Keith Clarke. 1976 Barry Rose.

8. Ibid at p.28.

Although 76% of clerks said that they would explain to the defendant their choices in making their defence the other 24% of the clerks said that the bench might do it sometimes. Only two of these latter clerks said that it could equally be clerk or chairman who did it. The other ten said that the chair would only do it infrequently - one commented that "Very exceptionally the chairman might chip in and do it", another said that very experienced chairmen might do it. These clerks had no objection in principle to the magistrates fulfilling this task - with one proviso - that they did it correctly. Their one objection to benches explaining the choices to the defendant was that they sometimes did it incorrectly.

Explaining to a defendant how she/he can make her/his defence is again more difficult than it might at first sight appear. It is necessary to explain, in a way that the defendant can understand, first that the defendant does not need to say anything unless she/he wishes to (i.e., the right to silence), if the defendant does wish to say anything, that s/he can either make an unsworn statement from the dock or that s/he can give evidence on oath, in which case s/he can be asked questions in cross examination by the prosecutor. None of these components should be forgotten, and the whole should be explained in a way that is comprehensible to a nervous, possibly unintelligent or intimidated defendant who may simply not know what is meant by "an unsworn statement" or have realised who "the prosecutor" is. None of this should be beyond the competence of a magistrate. There is, however, one argument which militates in favour of the clerk making the explanation. There will be a few cases where a defending advocate will wish to keep the defendant from giving evidence. However for the most part, an advocate will wish to put her/his client

into the witness box to give evidence on oath, for the simple reason that sworn evidence tested by cross examination is much more likely to be believed. Where the defendant has no legal adviser, s/he should still be made aware of this fact. Many clerks when explaining to the defendant what the choices are will say that if the defendant gives evidence on oath s/he is more likely to be believed, and on many occasions this information seems to tip the scales in favour of the defendant choosing to give evidence on oath. In most cases it will be advisable for the defendant to do so. In a few it may not. At any rate it is better that such a warning should not come from the bench from whom it sounds very much like an instruction to give evidence on oath, if not a promise to accept what the defendant says.

These arguments do, of course, reveal that it is well nigh impossible for an unrepresented defendant to make such a decision correctly, in the circumstances and that defendants are in acute need of legal advice at this as well as other stages of the trial. However a desire for legal representation for all defendants pleading not guilty in magistrates courts is unlikely to be fulfilled in the foreseeable future, and therefore measures designed to assist those still unrepresented cannot be neglected. It may be of marginal advantage to the defendant if such an explanation comes from the clerk, the qualification being that the clerk is a good one and able to explain clearly and sensitively the choices before the defendant.

The third issue relating to balance between clerk and bench which was examined in the questionnaire was the area of bail decisions. Clerks were asked who would normally explain the meaning and effect of a decision about bail to the defendant. The question of bail is of

course one for the bench to decide. Since the Bail Act 1976⁹, the defendant has a prima facie right to bail. Where bail is granted an explanation must be given to the defendant that failure to answer to it is a criminal offence with penalties attaching to it. Where bail is refused reasons for refusal must be given. Further, where bail is granted but conditions are attached, reasons for attaching those conditions must be given.

Such explanations are not simple. They are nevertheless clearly part of the decision of the bench, and as such should be made by the bench. Young and Clarke¹⁰ certainly envisage that the bench should announce and explain bail decisions.

The results of our survey are therefore rather disturbing. First, 14% of the clerks interviewed said that the clerk would always explain the meaning and effect of a decision on bail to the defendant. This 14% included all of the clerks at Court C, and most of the clerks at Court D.

One of the clerks at Court C, when asked to explain how "speaking parts" were divided between clerk and bench said

"There is no division here, because the clerk says it all, more or less, really, apart from announcing sentence."

At two of the courts in the sample, therefore, the clerk almost invariably explained the meaning of a bail decision to the defendant. These two courts were both courts in the North of England, and to this extent the contention that clerks play a more prominent role in the North was born out. However there was not a simple North/South divide.

9. Section Four.

10. In 'Chairmanship in Magistrates Courts'. Page 28.

At a number of other courts , the clerk fulfilled the function of explaining bail decisions. 44% of the clerks interviewed said that on some occasions it could be either the clerk or the bench who gave the explanation. The reasons given to show why the clerk might give the explanation were as follows. Half of these clerks said that they would intervene if the bench missed something, or if the bench got into difficulties. Half of the clerks said that they would not need to speak on bail decisions if they were with one of the more confident or experienced magistrates, but with other magistrates they would need to give help.

Only 42% of clerks said that explanations about bail decisions were always made by the bench.

The implication of these figures is that around half of the magistrates taking the chair in their courts do not or cannot, explain the meaning and effect of their own decisions. It is true to say that the Bail Act 1976 had upset the patterns of decision making on bail to which benches has become accustomed and this may have contributed to the unwillingness of some benches to venture an explanation themselves. However, the Act had been on the statute book for some time before the fieldwork was undertaken. It was brought into force on April 17th 1978. One might reasonably have expected a well trained bench to have become used to the provisions of the Act by the summer of 1981.

Is the division of "speaking parts" important?

The replies to the questions relating to the performance of specific speaking parts in court confirm the evidence of observers that there is wide discrepancy in the division of tasks between clerk and bench. They also show that there are courts where the bench appears to be inadequate to explain even the meaning of its

deliberations, and where the clerk fulfils almost all of the speaking parts in court.

Some clerks however were sceptical as to whether this was an important issue. They queried whether it really mattered how much the magistrates spoke and some argued that it was good that the bench should say relatively little during the proceedings. Such contentions need to be examined.

A few clerks said that magistrates should keep out of "the dust of the arena", maintaining that in an adversary proceeding it was dangerous for magistrates to play too active a role in case they unwittingly appeared to ally themselves with one side or another, or otherwise got out of their depth. A rather lengthy but amusing example illustrates the sort of problem perceived by clerks.

"....I remember a man we had here - he was a very skilled electrician - he took the making of an order against his wife very badly, and gave up his work and refused to pay. A classic case of wilfull refusal, and he'd been sent to prison twice and he came up again, gave sworn evidence as to what he had done in the past, and as to what he would be able to do in the future, and the chairman said "Well you've told us about the past and the future, would you please tell us what you are doing now?" You can't think of a more innocent question - and he said to him "What am I doing now, I'm standing in this witness box answering your bloody silly questions." Quite rightly as he still refused (to pay) he got imprisonment. I'm sure everybody in the public gallery was saying that it was not for not paying, that it was for cheeking the judge. And there are always these pitfalls and if the clerk falls in it doesn't matter but it is essential to protect the magistrates."

It is of course, true that there are dangers involved in "descending into the arena". Particularly in a contested case magistrates must take care not to create an appearance of bias in favour of one party or the other. However it is arguable that benches should receive sufficient training to be able to avoid giving an appearance of bias.

The dangers of the bench "descending into the arena" are perhaps

most marked where the court has to deal with an unrepresented defendant who pleads not guilty. The court may wish¹¹ or be obliged¹² to assist such a defendant to present their case. It may well be that such assistance is better rendered by the clerk, since the clerk is both expert and not part of the tribunal of fact. However, the bench should at least demonstrate patience with and understanding of the problems of the defendant who tries to defend her/himself without representation, and the bench should also be prepared to ask questions in clarification if these are needed. The dangers of descending into the arena cannot be used to excuse a silent bench, nor a bench which, at the end of a case cannot explain its own decision.

At some courts it was all too frequently the case that a situation arose where the clerk not only had to assist in contested cases but had to explain the simplest orders. In one case at Court C, the bench, having listened silently to an application for a bind over in a case of an admitted breach of the peace said that they would bind over the defendants. They then said "Now listen to our learned clerk". Their learned clerk explained what binding over meant. In the next case but one, the defendant had admitted several serious driving offences. The bench retired with the clerk to consider the penalty. They returned to court and announced the penalties. The clerk had to remind the bench that there was an application for costs

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11. In Simms v. Moore (1970) 2QB at 333 Lord Parker C.J. said that the court has a discretion here, and that the clerk should assist if there are reasonable grounds for thinking that it would best promote the interests of justice.
 12. Section 61 of the Magistrates' Courts Act 1952, now Section 73 of the Magistrates' Courts Act 1980 provided that in domestic cases if an unrepresented defendant is unable to effectively examine or cross examine a witness the court shall assist.

and a doctors fee, which they granted after this prompting. The bench fixed a period for him to pay, and then said "Now listen to our learned clerk", and the clerk explained to the defendant the meaning of disqualification from driving, how much the total fine was and where it should be paid. The sentence "Now listen to our learned clerk" was one heard frequently during that and other days at this court.

Whilst it may be true that there are dangers in benches descending into the arena during the determination of guilt or innocence in contested cases, these dangers can be overemphasised. The number of contested cases dealt with is anyway fairly small. By far the majority of defendants plead guilty. Of the minority who contest their cases, fewer still will be unrepresented. The cases given in the examples above are the typical face of magistrates courts, and it is disturbing if benches have to, or as a matter of policy do, fall back on their clerk to explain their orders.

Another argument arises from the example of the exasperated defendant imprisoned for non payment of maintenance. The clerk there was arguing that the magistrates should be protected from abuse which might later be said to have affected their decision. However, aggression and insolence from tense frightened defendants are a commonplace in magistrates courts. In one court during the fieldwork a defendant threw a bible at the bench, and in another the defendant spat his false teeth out at the prosecutor. Verbal abuse, often of a very colourful and imaginative type happens frequently. No matter who it is directed at, it is arguable that it is best dealt with calmly by the bench in a way which makes it obvious that they remain unruffled by it. Young and Clarke certainly envisaged that problems

of order should be dealt with by the chair.¹³

Another argument used by one clerk to explain why the magistrates should not take a very prominent role was the argument that importance is not to be measured in number of words.

"I think it is quite wrong to think that the importance of a member of the judiciary is going to increase in accordance with the number of words that he speaks, because it depends on what he is talking about."

Again, although in essence correct, this argument hardly justifies benches who are so weak on quantity and content that they have difficulty in explaining the meaning and effect of their own decisions.

Although there were some clerks who presented arguments that the balance between clerk and bench was not important, there were many clerks who did think that the issue needed to be taken seriously. One clerk lamented that at the court where he was currently employed the clerk was expected to do everything except announce verdict and sentence. His objection was that

"... you end up getting defendants looking at the clerk all the time rather than the bench, and I think it makes their power not seem what it should be."

This, of course, is the crux of the problem. If the bench remains substantially silent throughout the proceedings the appearance is given that it is a clerk's court and not a magistrates' court. The picture is one of a silent bench and a dominant clerk. It may be that technically the clerk is doing nothing wrong, and is not going beyond what it is proper for the clerk to do. R v. Consett Justices Ex parte Postal Bingo 1967¹⁴ is, after all authority establishing that it

13. Ibid. at pp. 15-23.

14. (1967) 2QB 9 - see discussion above at pages 152-158

is for the clerk to conduct the ordinary arrangements inside the court and to question witnesses at the implied request of the bench, so long as the clerk does not usurp the judicial functions of the bench.

But, as one clerk said

"If the clerk takes on all the speaking roles then he becomes the chief focal point of the court and I can see if the clerk did all the speaking actions apart from actually announcing the bare bones of the sentence then people would think that the magistrates had a secondary role and the clerk ran the place."

It is very difficult to prescribe a general rule defining who should perform which functions. However, Young and Clarke, who are fairly conservative in the role they delineate for the magistrate who takes the chair in court envisage that magistrate announcing any decision and explaining it, asking questions of witnesses in clarification of evidence and being responsible for order in the court. They see the clerk as helping the bench - possibly by suggesting appropriate ways of phrasing sentences or explanations. They do not see the clerk as acting as a mouthpiece for the bench.¹⁵

It is disturbing therefore that in some courts it appears that as a matter of policy the bench does nothing except announce the verdict and the bare bones of the sentence, and in others there are at least some benches that are unable to explain their own decisions.

If there are so many benches who are weak or lacking in confidence, the danger is that the clerk will dominate the court, or will be perceived to dominate.

The dominant clerk?

Clerks have been criticised for dominating their courts for a very long time. The report of the Roche Committee mentioned it as a problem.

15. See pages 26 and 28.

"There is a temptation ever present to clerks, and not least to the most efficient of them, whether part-time or whole time to dominate, or as it is often styled to 'run the court'."¹⁶

The Committee reminded the justices that it is their duty to see that the clerk does not exceed his authority, but this is a difficult task when the clerk is the expert and the bench consists of lay persons.

The question of whether the clerk is dominant in court involves an assessment, not only of the way in which the clerk relates to the bench, but also the way in which she/he relates to the defendant, to advocates and to all of the other actors in the court-room drama. But the way in which clerk and bench relate is central, since the magistrates are supposed to be in control, to have power in the court.

It is extremely difficult to make allegations that the clerk is dominant which will stand up to scrutiny. The question of whether or not clerk X dominates involves very subjective assessment. The pattern of the clerk's retiring can be noted as can details of who says what in court. But the question of whether these things add up to dominance is much more difficult to answer. It is always open to clerks to defend themselves (as they did) by saying that the observer is simply mistaken in his/her assessment of the situation.

The issue was therefore approached by asking clerks the following question. "It has been suggested that there is a tendency for clerks to dominate the bench in court. Do you think this is so?" Interestingly, 64% of clerks did think it was so.

The question was a very sensitive one, and was open to a flat denial, but only 36% of clerks gave one - and for 4% of this 36% the flat denial only extended to their own courts, leaving one with the impression that they perceived problems elsewhere.

16. Para. 64.

Understandably very few clerks were prepared to say that they themselves dominated their benches, although one brave man did say

"Well if clerks do dominate I would be one of the more dominant clerks. I accept that. I wouldn't admit to dominating them, I would always be claiming to give the justices the options that are open to them - and the options wouldn't be to do as I say or ignore what I say. I will try and spell out all the possible alternatives to them, and then if they sought further advice as to how to apply those options then I'd give it."

Another clerk, whilst not actually admitting to dominance said

"I regard it as my job anyway to be running the court.... I don't think that could be described as dominating the bench. I can see that it does occur. I can understand the criticism. I can understand circumstances where it appears that the clerk may be dominating the bench, but I wouldn't describe it as such myself."

This clerk was characteristic of a number of clerks who said that they believed that the appearance was bound to be created that the clerk was dominant. They felt that to an observer in court "it is almost inevitable that it will have that appearance", since, in order to fulfil her/his proper functions the clerk will of necessity have to take a large part in the proceedings. These clerks were for the most part satisfied that they were not in fact dominating the court - by which they meant that they were not usurping any of the judicial functions of the bench. Whilst it might be that an untrained observer perceived the clerk taking a very prominent part, doing a great deal of speaking and organising, would believe that the clerk was in control of or dominating the court, this was, to some clerks, not important because what might appear to be dominance was not real dominance.

This of course raises the question of who is to be the judge of the dominance or otherwise of the clerk. Obviously clerks felt that the unrepresented defendant, witnesses, and persons in the public gallery were not to judge them. An assessment of whether or not they overstepped the bounds of propriety and legality had for them, to be

based on the legal issue of whether or not they had usurped a proper function of the bench. Hence only the legal profession in court becomes the arbiter of the clerk's behaviour and the definition of what constitutes dominance becomes very narrow. The views of the clerks in this respect are however in line with the decisions in some of the cases. In R v. Consett Justices ex parte Postal Bingo Ltd.¹⁷ Lord Parker expressed the view that "the spectator in court" must be taken to know when the justices can legitimately have the advice of their clerk.¹⁸ The judiciary's arbiter of equitable dealing, the reasonable man, is now presumed to know quite a number of rules, and can hardly be described as guarantor that judicial proceedings are accessible to an uninitiated observer armed only with 'common sense'. But clerks can scarcely be blamed for applying the same standards to their "dominance" in court as are applied by the Divisional Court to the issue of the retirement with the bench, particularly when the Divisional Court is so vague as to what does constitute correct behaviour for clerks in court.

For some clerks then, the dominance that they admitted to was not 'real' dominance. Real dominance - i.e. clerks usurping the proper functions of the bench - does happen but according to them it happens either at another time or in another place. They said, for instance

"There was a day when clerks were God, if you will, and they ruled their benches with a rod of iron - that day has now gone."

"I think that there were some clerks, particularly in the past who ran their own courts, and perhaps it happens in some country courts, I don't know."

17. (1967) 2 QB 9 discussed above.

18. Ibid. at p.20.

"...I've seen it in other areas. It's so easy."

"You do hear gossip with solicitors, you hear about other courts."

At all the courts surveyed, one heard stories of the unacceptable behaviour of clerks at other courts. "You should go up the road, (or into the country, or over the border) to X court" was an instruction received at all courts visited: something regrettable, scandalous or remarkable was always happening elsewhere, but never, of course admitted to at any of the courts in the survey. Regrettably however it was necessary to leave aside the inaccessible thrills of "other courts" and concentrate on the supposedly mundane happenings of the courts in the survey.

Although the clerks denied that what they did constituted dominance, most admitted that they played a "prominent" role in court and believed that that prominent role was necessary. They argued that this was necessary in order to achieve two things - first to maintain the organisation of the court, and second to preserve the legitimacy of the court.

Maintaining the court organisation

Running the organisational side of court affairs is the responsibility of the clerk. Deciding which cases can be heard on any particular day, distributing them between courts with appropriate benches, and ensuring that the days cases are all heard without anyone having to sit into the next session, or late evening falls on the clerk. In a busy court the logistics of organising several hundred cases between a few courts, cases having prosecutors, defendants, defence solicitors, witnesses, some of whom may need to appear in more than one case and more than one court during the day, are extremely daunting. Unless the clerks keep a tight rein on the problem, it is

possible for the day to degenerate into chaos with solicitors wanted in more than one place at once, courts held up, or not guilty pleas building up unheard so that cases with witnesses in attendance have to be adjourned. The busier the court, the more pressure is exerted on the organisation. As one clerk said

"There are occasions, such as a very heavy court day when there are a lot of people toing and froing in court, especially with the sort of courts we have here, where the clerk has to take a dominant role - in crowd control if nothing else, just to keep the place running smoothly. So he may appear to be taking rather a dominant role, but its the sheer effect of trying to keep cases running smoothly."

This clerk was critical of clerks who played too prominent a role but nevertheless felt forced to do so herself because of the need to maintain the organisation of the court.

In one of the courts observed during field work the clerk - in this case the clerk to the justices - started the morning by announcing (to the bench) that he had sent for the duty solicitor. At that court the duty solicitor dealt only with defendants who were unrepresented and in custody, and it was the practice of the court to deal with defendants in custody first. When the duty solicitor appeared, he was not ready to proceed. The clerk reprimanded him. The solicitor explained that his wife had just had a baby and apologised for lateness. The clerk did not mellow, and said that in such circumstances another solicitor should have been sent. The duty solicitor said that he had ascertained that there was only one case in custody. The clerk turned to the court Inspector and said "Is that true?" The Inspector confirmed that it was and the clerk sent the solicitor away with the injunction to let him know when the custody case was ready. Throughout these exchanges the bench remained silent. The impression was created that the clerk was running the court, was making the rules and was the one affronted by the Duty

Solicitor's failure to arrive on time. The clerk was motivated not by a desire to take over from the bench, but by a desire to maintain an efficient and just court organisation.

Preserving legitimacy

The other major reason offered by clerks to explain why they might play a prominent role was that the legitimacy of the court had to be preserved. The court had to be seen to be playing according to the rules, and clerks argued that the rules were now so complex that lay magistrates needed a great deal of guidance. The following extracts from interviews illustrate this.

"The impression (of a dominant clerk) may be gained by people wrongly. The clerk has got to take a fairly prominent role. He's just got to - its far too complicated now for the bench to control anything themselves."

"You can leave your chairman to look as if he's in charge and create a good deal of embarrassment both to him and in the face of the court."

A prominent role for the clerk was seen as necessary because the rules and procedures which have to be applied in magistrates' courts, and the organisation which has to be run is too complex for the lay person. The danger clerks perceived was that if magistrates took a more prominent role, they might make mistakes. The clerk's role is to ensure that the rules are followed, and mistakes are not made. Mistakes, however, are made by magistrates, and have to be dealt with by clerks.

Young and Clarke point out in 'Chairmanship in Magistrates' Courts' that the clerk is the expert, that the clerk has the experience, and

"Above all the clerk will at all times keep before him the highest traditions of justice and try to guarantee that these are observed in every court for which he is responsible."¹⁹

"Try" is inevitably all that the clerk can do - there are occasions when the bench makes an error which the clerk cannot prevent. Young and Clarke advise the magistrate taking the chair to take the clerk into her/his confidence and tell the clerk what they are proposing by way of verdict, or sentence. The clerk can then confirm that what is proposed is within the law and conforms to good practice and bench policy.

In some courts surveyed it was the policy to follow such a procedure. But it seems that however carefully framed the policy may be, mistakes still occur.

Often they are simple and easily remedied mistakes.

"If its things they've omitted to do, for instance, forget to endorse his licence one can turn round and say "and licence endorsed?" without saying "You've made a mess of things, you're wrong"."

Sometimes in a traffic court the clerk is called upon to say 'And licence endorsed sir?' rather frequently. There are clerks who, in such situations, express themselves so that it appears that they are clarifying the decision, or that the bench have made an understandable slip, and there are clerks who allow irritation to creep into their tones. Good clerks know not only the law but the vagaries of the bench, and know to prompt before sentence is announced by saying 'This one is endorseable your worships'.

The forgotten endorsement is, however only a very small part of the clerks' worries. Benches do make more serious errors. Two examples from the many instances observed during the fieldwork will illustrate the nature of the problem.

In one court the bench had been having a great deal of trouble with the provisions of the Bail Act 1976. A case arose where the prosecution asked for a condition to be attached to bail that the

accused not approach two named people. The clerk asked why such a condition was being requested. The defence solicitor volunteered that the named persons were relatives and that the case concerned a dispute between the defendant and those persons. The bench announced that bail would be granted with the requested condition. The clerk half turned in her seat and said "Your reason sir?" (A reason being necessary to comply with the Act). The Chair gave a reason which was inappropriate to a bail application. The clerk's eyes widened, and she sighed and said "Presumably that he might interfere with witnesses?" The Chair said "What?" The clerk rose and whispered to the bench. The Chairman said (to the defendant) 'Yes, yes - and make sure you don't commit any other offences until... well... ever!' The clerk was perceived to sigh again.

The rest of the morning proceeded in this vein. The Chairman was quite unable to distinguish between the conditions of bail themselves and the reasons for imposing them. He shuddered to an ignominious halt several times. Everyone in court looked uncomfortable and some school girls with their teacher observing at the back of the court giggled and smirked.

In another court, the bench dealt with a series of not guilty pleas in traffic offences, and several times announced conviction and sentence in the same breath without giving the defendant the chance to mitigate. The clerk was inexperienced. In one case the defendant pleaded not guilty to an offence of passing a red traffic light. A police constable was sworn and gave evidence in chief. A plan of the area was circulated. The defence solicitor began to cross examine when the bench said "Is this a not guilty plea?" The defence solicitor raised his eyebrows and confirmed that it was!

After all the evidence had been completed the bench conferred. The Chair then said "This is a very dangerous junction and you are very lucky there was nothing coming. We are going to fine you £25 and..." At this point the defence solicitor leaped to his feet and said "Ma'am perhaps before you endorse his licence perhaps you might give me a chance to address you on reasons for not endorsing".

These are simply two examples of the sorts of errors from which the clerk must try to preserve the bench.

To find out how clerks felt and reacted to benches who made mistakes clerks were asked how they dealt with the situation if the magistrates announced a decision which was wrong in law. The response of one clerk reflects the feelings of most clerks

"...there are two ways of doing this. You can either stand up and make a spectacle of yourself by shouting "You can't do that sir", or you can lean over quietly to the chairman and explain that you can't do that."

Not surprisingly most clerks took the latter course. They saw their role as one of putting the error right without making the magistrate look stupid.

"I think the last thing you want to do is make the bench appear small or ridiculous in front of the public."

Preserving the public image of the bench so that "they don't make fools of themselves and look ridiculous" was perceived as a crucial part of the clerk's job in such situations. Also maintaining a good relationship between clerk and bench was important.

"I'm very diplomatic if I can be ... If you are rude they will hate you for it for ever but they'll have confidence in you if you pick them up on it carefully."

But the maintenance of a good relationship with the bench has the same end as dealing quietly and unobtrusively with errors - the end of creating a situation in which the business of the court is carried on smoothly and correctly. One clerk explained as follows

"... I'd get up and have a little whisper and say 'You can't do that' - for example with sentence. Sometimes you can't help hearing, and I'd rather stop them than let them go ahead and make the court look slightly ridiculous because then it would look as if I'd made the decision... We've a very good relationship here with the magistrates and there's a kind of electricity runs through it. Its funny how you can sense that they want to speak to you sometimes without them saying. There's a pause and you feel it. So I think things can run very smoothly."

For this clerk a good relationship with the bench was important, but as one aspect of maintaining an efficient organisation.

Clerks can develop a high degree of sensitivity to their magistrates in the interests of the smooth running of the court. They come to know which magistrates need help and which can manage alone without making errors. Clerks made comments such as

"... you've got to adjust your procedure according to the bench that's sitting on that particular day."

"... with a bench consisting of 80 plus magistrates the permutations and combinations are numerous."

"As you get to know the magistrates you have a pretty good idea how they can take over themselves."

"It even varies from one stipendiary to another....."

Some clerks are more skilled at this than others. Burney comments on the confusion caused when clerk and bench both began to speak at the same time.²⁰ Some of Burney's magistrates were critical of clerks who "jumped in"²¹ and took over things they wanted to do themselves. The clerks, however, were anxious in case the magistrates made a mistake.

"...my personal feeling is, I don't like putting them in the embarrassing position of having to be corrected, or my having to re-explain."

"... some of the magistrates are more confident and burble on, and you have to prevent them from doing it too long."

20. Burney. p.156.

21. Ibid.

Clerks were also conscious of a wide range of abilities amongst those who took the chair. They would relax in confidence with experienced intelligent chairpersons, but had to work a great deal harder with timid and inexperienced magistrates. After a period of employment at any court, the clerks become familiar with their benches. In discussions just before court comments from clerks such as "I've got Mr. Bloggs in the chair - we'll be here all morning" or "This magistrate is very experienced - I can sit back today" may be heard. And within the same court building the chairman of the whole bench may be sitting with a young inexperienced clerk in one court, and the clerk to the justices in another courtroom with magistrates who have very little experience or confidence. The balance between clerk and chair will be very different in these two courts.

The skills of the clerk in preserving the magistrates from making mistakes, and developing a sensitivity to the abilities of the magistrate taking the chair are skills which further the end of ensuring that the court runs smoothly and according to the rules. That it is essentially following the rules which is important is demonstrated by the fact that if the magistrates do not co-operate with the clerk and do not follow the rules then the clerk can abandon them, or "stab them in the back"²² by exposing their mistakes.

One clerk said

"If they'd invited me out and taken no notice of my advice and gone ahead and done something wrong I think I'd simply stand up in court and say - publicly point out 'that that was contrary to the advice given by the clerk'."

22. To use Carlen's expression in 'Magistrates Justice'.

Another clerk - perhaps he had had a bad day - was even more severe.

He said

"I try to be tactful and nice to them". But

"If the chairman had been particularly unpleasant and nasty during the course of the proceedings, I think I might throw tact to the winds and stand up and say "I'm afraid you can't do that." - because he might well have deserved it."

If the bench makes a mistake it can of course be rectified under the provisions of Section 41 of the Criminal Justice Act 1972.²³ Technically there are no problems in correcting an error, and none of the clerks (except one who appeared to be in ignorance of the provisions of Section 41 and the pre-existing case law) would have allowed an error to remain uncorrected. As one clerk said, in a remark which has all the characteristics of the liberal bureaucrat

"Normally you get a bench coming back and saying, you know, 'Our learned clerk has advised us that we did not act in accordance with the law on the last occasion and we have decided to make the following adjudication' and pray that no-one gets too upset about it because you can't have duff decisions drifting around the records."

Where the bench is in error then the main concern of clerks is to smooth the situation over. Their usual approach is to speak quietly

23. The Criminal Justice Act 1972 S41(1) provides that "Subject to subsection (4) of this section, a magistrates' court may vary or rescind a sentence or other order imposed or made by it when dealing with an offender; and it is hereby declared that this power extends to replacing a sentence or order which for any reason appears to be invalid by another which the court has the power to impose or make". Subsection Four imposes a time limit of 14 days and provides that the powers of subsection (1) are exercisable only by a court constituted in the same manner or having a majority of the justices as the court that imposed the original order. The Home Office Circular No. 230/1972 of December 8th, 1972 relating to this provision shows the government's recognition (if such be needed) of the possibility of fundamental errors being made. It reveals that the sort of situation the government had in mind was where a conviction is announced prematurely "perhaps because a submission of no case to answer is misunderstood as constituting the whole of the defence case".

to the bench, explain the problem and correct the decision without making the bench look foolish in the public eye.

Almost all clerks interviewed spoke of a good relationship with their benches. Nevertheless it was obvious from some replies that clerk and bench can come into conflict, and that it is possible in such situations for the clerk to 'discipline' the bench by withdrawing some of her/his protection - by being less than tactful with the bench and exposing them to public ridicule. We will see later in this chapter that where clerk and bench come into conflict on law, clerks use a similar method - the threat (at least) of exposing the bench to the censure of the Divisional Court.

To summarise the discussion so far we have first noted that there are, as other observers have said, wide variations in the division of speaking parts in court between clerk and magistrates. Clerks justify taking many of the speaking parts on the basis that the law and procedure surrounding such things as putting the defendant to her/his election are very complicated. It has been demonstrated that there is much truth in this. However it is very disturbing to discover that magistrates' lack of ability to deal with issues in court sometimes extends to an inability to announce and explain their own orders. The finding of this survey, that in some courts magistrates cannot explain their own decisions on bail is important and needs to be taken up.

The question of whether or not magistrates can explain their decisions is affected most directly by two factors. The first is the training of the bench - and this is usually the responsibility of the clerk. The second is the policy of the court which can dictate to a large extent the division of labour between clerk and magistrates in an individual court. Again the clerk to the justices has a

significant effect on this. The questions of the clerk's role in relation to training and policy making will be discussed in chapters eight and nine.

Clerks themselves do believe that there is a problem that the clerk can be too dominant in court. Allegations of dominance by researchers are difficult to support because of their subjective nature. The clerks themselves drew a distinction between 'dominance' which they denied in themselves, and 'prominence', which they admitted to. Their denial of 'dominance' was on two bases.

First, they said that real dominance was usurping the functions of the bench and that they did not do this. They might appear to be in charge in the courtroom, but they argued that the appearance they created was not important. The reality of dominance - the question of whether or not they impinged on the judicial functions of the bench - was what mattered to clerks. The issue of whether or not clerks 'dominate' thus becomes an issue which is within the judgement only of lawyers. However such arguments are in line with those of the Divisional Court when it assumes that the reasonable man, arbiter of whether or not justice is being done, has a substantial amount of legal knowledge.

The rhetoric that trial by magistrates' court is trial of the ordinary man by the ordinary man is here wearing a little thin. Very many unrepresented people pass through magistrates' courts. If they are to continue to do so, the accessibility of those courts' proceedings to them should be more than a pretence. Courts where the magistrates are so silent and take so little part in the proceedings that they cannot even announce their own decisions do not look like magistrates' courts. They look like clerks' courts. Such

appearances should be important. (The question of the extent to which clerks may exert what they call "dominance" i.e. influencing the judicial decisions of the magistrates is discussed in the second half of this chapter.)

The second argument with which clerks justified their prominent role is an argument typical of the liberal bureaucrat. Clerks argued that it was their job to keep the court running smoothly. The pressures of workload, the logistics of providing each court with the necessary personnel they need to ensure that cases are called in the right order means for clerks that they must appear to be in control. When we examine, in Chapter Nine, the clerk's policy making role we shall demonstrate that the clerk in court is carrying out practices and policies developed and decided by the clerk to the justices outside court to deal with the court's workload efficiently.

The third argument presented by clerks to justify their prominent role was that they had to preserve the magistrates from making errors and looking foolish. They were conscious that, as lay persons, magistrates are called upon to operate a very complex and difficult set of rules. Many examples of magistrates who were unable to do so were observed, and were cited by clerks. Clerks were anxious to maintain the credibility of the courts.

Clerks' anxiety to preserve the magistrates from error was, however, more than simply a wish to save the bench from embarrassment or diminution of reputation. It was fundamentally a desire to ensure that the values of due process were observed, and that the game was played according to the rules. This is confirmed because clerks would and did, as a last resort abandon the bench, cease to protect them from error or even intentionally make public their errors if the errors of the bench were leading them into irregularity or injustice.

The idea of the clerk as a liberal bureaucrat is thus confirmed. Clerks wanted to run an efficient organisation, but they insisted that it be run according to the rules.

The clerk and the bench in the retiring room - the clerk and the verdict

The discussion of the case law relating to the retirement of the clerk with the bench in Chapter Two showed that the magistrates retiring room is sacrosanct. Limitations are placed on the occasions when the clerk may enter the retiring room as well as on the things the clerk may do when retiring with the bench. The retiring room is therefore inaccessible to the researcher, since on the decided cases, the presence of a researcher in the retiring room would potentially invalidate the decisions in the cases observed.

There is thus only one way in which it is possible to gain direct experience of the events which take place in the retiring room - that is by being a clerk or a magistrate.

The writer was employed as a court assistant for five months, (April-September 1971) and as a court clerk at the same court for one year (June 1974 to June 1975) and consequently, was able to observe the way several clerks conducted themselves in the retiring room as well as experiencing the problem at first hand. These periods of employment however, took place before the present research project was formulated. Working as a clerk did serve to create an interest in this area for research, as an understanding of the very great extent of the clerk's power and influence developed. It also constituted first hand knowledge and experience which was extremely useful in designing the project. It also affected the results of the research in a beneficial way. The clerks who were spoken to and interviewed during the field work were told that their interviewer had worked as a

court clerk and this did influence some at least to speak more openly. Their replies to questions sometimes indicated that they felt that avoidance of issues or any pretence on their part about difficulties or sensitive areas of their work would be pointless in the face of someone who had experienced their problems in practice. Almost all the clerks interviewed were extremely frank in their replies to what were rather delicate questions about their relationship with magistrates in the retiring room.

To the researcher, the events which take place in the retiring room are crucial, fascinating and taboo. To clerks they are routine. Asking clerks questions designed to persuade them to describe what happens in the retiring room would probably have resulted in descriptions of the type of event which occurs routinely. For instance the bench retire to consider sentence. They call the clerk in to ask what the range of possible sentences for the offence is, or they tell the clerk that they are considering prison and want to know if they should have reports on the defendant. These are simple requests for the clerk to confirm the legality of the decision they have made, or to give information about things preliminary or collateral to their sentence. Occasionally the bench may be called upon to pass sentence on an offence unfamiliar to them and they will wish to know what their more experienced colleagues would do in the circumstances. Most of the requests made to the clerk by magistrates in the retiring room relate to sentence, simply because magistrates do a great deal of sentencing. They deal with comparatively few not guilty pleas.

When magistrates do have to deal with a plea of not guilty, however several interesting issues arise concerning the relationship between clerk and bench.

Superficially, the relationship between clerk and bench is clear. The clerk gives the legal advice, the bench take the decisions on fact. Closer examination reveals problems. First the clerk is a legal adviser, but the bench is the tribunal of law as well as the tribunal of fact and technically it is the magistrates who take decisions on law.

The points of law which benches of lay magistrates have to deal with can be complex. For instance on R v. Consett Justices Ex Parte Postal Bingo²⁴ Lord Parker said that the justices had been called upon to take a decision on a point upon which the House of Lords were unable to decide, i.e. following the decisions of the House of Lords in D.P.P. v. Armstrong²⁵ and the Divisional Court in D.P.P. v. Regional Pool Promotions Ltd.²⁶ under what circumstances could there be said to be a playing of a game of chance, and what participation by players is necessary before there can be said to be a game of chance under S42(1) of the Betting, Gaming and Lotteries Act 1963.

The most trivial of cases can raise the most complex points of law. When such a situation arises the clerk has to guide the bench very carefully. One clerk expressed his problem thus:

"...often I've gone round in circles with a bench knowing that they didn't bloody understand the points that advocates were making and the points that I was making. So you would tackle it a different way - and I'm sure that one or two magistrates in my time as clerk will have thought that I was trying to persuade

24. [1967] 2 QB.9.

25. [1965] AC 1362.

26. [1964] 2 QB 244.

them of a different approach and that maybe I was shifting my ground in some way in order to persuade them to go one way or another."

Benches do have difficulty in grasping legal argument on occasion.

Another clerk explained that:

"It's because advocates tend to go a little too far and a little too fast that they (the bench) get confused."

Obviously in such situations the influence of the clerk is strong.

It would be asking a very great deal of a bench of lay magistrates to expect them to examine the legal arguments of prosecution and defence, weigh up the advice of the clerk and come to an independent and reasoned decision. For the most part on pure points of law, the advice of the clerk must be decisive (although we shall see later that conflicts can arise). This is a strong argument for encouraging the clerk to state her/his advice in open court so that the advocates can hear it and deal with any points arising from it. When pure points of law do arise in court, what takes place is often a three way debate between prosecution, defence and clerk with the arguments at a level and speed - as the clerk cited above explained - which excludes the bench and means that the clerk must then explain and interpret for the bench in the retiring room. The bench may be the tribunal of law, but decisions of law must in effect be for the most part the responsibility of the clerk.

This may be unexceptionable when the point is one of pure law. However, problems of a different order arise where the issues are of mixed law and fact. In practice the onus must be on the clerk to make the separation as a judge should for a jury. Distinguishing between law and fact when, as a lay magistrate, one knows little law, is an impossible task to perform unaided. One clerk explained the approach he took in such situations:

"When it's a matter of interpretation of law with rules of evidence then I find that the easiest thing to do is to start off again - break it down into simple terms almost as if you are lecturing to them - give them each situation bit by bit. They make a decision and you get them to go on to the next one. By doing that, 80% of the time they'll come to a common sense decision because they've had things explained to them in such a way that they can follow it."

This clerk took an approach, variations on which are adopted by his colleagues in other courts, of explaining what the law says, and then explaining what decision on fact arises as a consequence for each element of the offence and so guiding the bench to an eventual verdict of guilty or innocent. Another clerk explained it similarly:

"I'd be bound to point out the ingredients of an offence, and to say now do you find any evidence of dishonesty in theft or procurement or whatever it is....."

The situation may be further complicated by alternative propositions of law and fact. For instance the clerk may have to explain that if the magistrates find (a) as a matter of fact, then one legal proposition is relevant, but if they find (b) as a matter of fact then they must consider other legal propositions. The decision making process is therefore a closely co-ordinated exercise between clerk and bench.

Apart from these difficult distinctions between law and fact a further problem can arise in assimilation and assessment of evidence. The clerk has not only to ensure that the bench understands the ingredients of the offence, but also that the rules of evidence are understood and adhered to.

For instance if evidence has inadvertently been given, and then ruled inadmissible the clerk may need to ensure that the bench have understood, and do not take in into account. Or a statement may have been admitted as evidence that such a statement was made, but not as evidence of the truth of that which was stated. This is a difficult

distinction for a lay bench. The clerk must ensure that they have grasped the principle. One clerk said:

"... It can happen that during the course of the case some evidence has been produced which would appear to be strongly in favour of one side or another, and I know it would be one's duty to say 'It isn't evidence...'"

He continued:

"One really has got, to some extent, to protect the defendant in the circumstances."

The clerk may not only have to ensure that the bench understand that evidence must be excluded but also why it must be excluded. Although the magistrates are the tribunal of law, it has been suggested that the clerk should in certain circumstances deal with an evidential matter in the absence of the bench. In R v. Weston-Super-Mare Justices ex parte Townsend [1968]²⁷ it was held that if, in a magistrates' court, it is desired to warn an accused that if he attacks prosecution witnesses he may be cross examined as to his character, the proper action is for the magistrates to adjourn and for the prosecutor to join with the clerk to explain matters to the accused in the absence of the bench. The clerk may thus have to ask the bench to retire, and when they return, will not be able to explain to them what has taken place or why a particular line of questioning has stopped.

From the few examples given above it should be evident that when magistrates are taking a decision as to the guilt or innocence of a defendant they are performing what is often an extremely difficult task on which a very great deal hangs, with little training or

27. [1968] 3 All E.R. 225.

expertise. Not surprisingly they rely heavily on their clerk to assist them - to explain the many rules and to make plain the issues on which they must take their decisions.

As we have already mentioned, some magistrates ask their clerks for help on matters which are not the province of the clerk.

"... and sometimes they say 'What do you think?' because they are in a bit of a state because they can't decide - for example in care proceedings where emotions are running high. It's an extremely difficult situation and you know they are looking just for an extra opinion to help them. And, I have said to them if they've asked me 'I'm glad I haven't got the responsibility. It's a difficult one and I'm afraid I can't help you'."

Another clerk commented:

"Very occasionally you'll be called in and they'll say 'Well what do you think?' and then it's up to you, it's your responsibility to point out to them that it doesn't matter what I think - it's not relevant."

Magistrates do place temptations in the clerks way to exceed the clerk's proper role. Not because they are corrupt but because they are unsure. They are leaning on someone who has greater knowledge and experience than they have to help them. In such situations one relies on the integrity of the clerk to do what the two clerks quoted did - and decline to offer an opinion.

Do clerks succumb to the temptations which are placed in their way? The conflicts must be greater for the clerk in a situation in which they are not in agreement with the magistrates, and therefore the clerks interviewed were asked what, if anything, they would do if they were asked into the retiring room, and when they got there discovered that the magistrates were going seriously wrong on a question of the guilt or innocence of the defendant. Their responses to this hypothetical situation suggest that clerks do not wish to become involved in the fact finding process - that they are glad that this difficult burden is not on their shoulders. Reactions such as:

"I wouldn't like to be a magistrate..... it's not your problem."

"If they reach a decision which were I a stipendiary I wouldn't have done, well so be it. Who is to say who is right and who is wrong?"

were very common. On the whole clerks were satisfied with the division of labour between clerk and bench. They had no ambition or desire to alter the nature of the role. Indeed later in the questionnaire when they were asked if they thought the clerk ought to be on the bench, they responded overwhelmingly in the negative and although the issue has been canvassed many times, some reacted with absolute horror that such a thing was mooted. Even if the system produced decisions that they thought were wrong, they still supported the system.

"Let's face it, with years of experience behind you magistrates do make decisions that you don't agree with as clerk, but this is what it's all about."

The clerks job as defined by clerks is to ensure that the rules are followed, and if they are, that is the extent of the responsibility that they have and want. One clerk to the justices commented:

"But it is a sign of youth when a court clerk will come and say 'They've just disqualified a man for careless driving, he's got three children he's going to lose his job what can we do?' And I ask them if the case was conducted regularly, and they say 'Oh, yes!!!', and was the penalty a legal one - 'Oh, yes!'. 'Well you've done your job, and that's where it ends'."

The clerks interviewed denied any desire to interfere with the magistrates' decision on the facts - but they obviously felt some conflicts. One commented:

"I can only think of about twice when I've actually felt upset going home and worrying about a decision."

Another:

"If we diverged greatly on facts I would just feel ghastly and leave them to it."

It is obviously not easy for clerks if they feel that the bench is going wrong. What they do in this situation is try to ensure that the magistrates are taking their decision according to the law. We have shown that often fact and law are closely intertwined and also that questions of evidence are also difficult. It is in this process of sifting fact and law and weighing evidence that the clerk can have a considerable influence on the bench. One clerk said:

"If I thought they were going seriously wrong, you know, I would have to say 'Have you considered the weight to be attached to the evidence? Do you regard the witnesses as truthful? What about the cross examination? Do you think that in spite of the cross examination you still believe....?' But in the end it may be that you've got to leave it to them even if they are going to go wrong."

Another described his role thus:

"Unless it's pure law where the absence of certain evidence must lead to acquittal - and then of course they would probably be looking towards you in any event - I would in that situation say 'Well you haven't got the evidence therefore you must acquit.' But if it's on fact, then of course it's their decision. But if they are going seriously wrong then I would try to put them on the right direction and say 'Look at the evidence logically and sensibly' but other than that I wouldn't influence them on fact."

Some clerks are very aware that this process of directing the magistrates' minds to the evidence can fundamentally affect the decision that the bench reaches.

"I think I'd put it very politely - have they considered such and such a thing, such and such a point. I wouldn't put it as though I'm influencing them - if you put it politely you can get around it and give your opinion but as a suggestion to them. There are ways you can do it. And then they do think about what you've said, and in some cases you get 'Oh yes - we hadn't thought about that' and they do come round or at least consider it, which at least makes you feel better if you know they have considered it."

Another clerk said:

"I think because the clerk points it out, not telling them there isn't any (evidence) but asking them in a questioning way, magistrates will usually think 'That's right isn't it, there's no evidence for that'."

What these clerks were doing was not setting out to change the magistrates' minds on fact, but trying to ensure that magistrates took their decision in a lawyer-like fashion, taking into account the ingredients of the offence and weighing the evidence properly. But by doing what they do they have considerable influence on the verdict.

The problem is that there is a very fine line between what is proper for the clerk to do, and what is improper behaviour. Influencing the magistrates' decision on fact alone is improper and clerks seem not to set out to do this, but what they do do in the way of directing the minds of the bench to the law, the ingredients of the offence and the evidence may influence the magistrates verdict on guilt or innocence.

We know that magistrates can be unsure of themselves and can look to clerks for help. But even where clerks are giving what to the clerk is bona fide advice on the law, they may well be giving out a great many clues or even broad hints as to what they think of the merits of a case, or of the facts of a case. Such clues and hints, coming from someone who has expertise, experience and the respect of the bench will carry a great deal of weight.

The two clerks last quoted were at least aware of the influence they could have on the bench. However many of the clerks interviewed described how they would go through the evidence with the bench without demonstrating any awareness that by doing this they might be influencing the bench. This is perhaps the most worrying thing - that clerks do not realise that they can influence the bench, short

of a direct comment on the merits of the case. They do not realise that, for instance by directing the minds of the bench to one particular aspect of the evidence, they may possibly create doubts which were not in the minds of the bench before they spoke.

It may well be entirely proper for the clerk to direct the bench to a particular ingredient of an offence, or to a particular aspect of the evidence. But we know that magistrates look for help where they should not and it is therefore desirable that clerks understand the less obvious ways in which they may influence the magistrates.

Burney's magistrates admitted to asking the clerk to retire when they didn't need a clerk - for reassurance - they also admitted to some fairly devious ways of extracting an opinion from the clerk on the merits or sentence.²⁸ Benches faced with difficult situations can feel insecure. They turn to the clerk for help. Clerks need to be aware that there are more ways of influencing a decision than by saying outright that they think the defendant to be innocent or guilty.

Lack of awareness of their own power is one problem. Using their power improperly is another and, it seems, a real problem. In Burney's survey a clerk said that he would in court, put Stone's Justices' Manual face downwards as a sign that he thought a solicitor was making too much of a legal point and would say 'Huh' if he didn't believe a witness. This by-play was directed at the bench. One wonders how discreet the clerk was in the retiring room. Burney commented:

28. See pages 158-159.

"This example does show how easy it is for the clerk merely by his demeanour to tell the magistrates something they ought not to know - especially when it is remembered that while somebody is pleading not guilty the clerk has in front of him a bit of paper with a note of any previous conviction, which must on no account be revealed until after a finding of guilt."²⁹

Again, one has to rely on the integrity of the clerk not to influence the bench - although this of course does not guarantee propriety if the clerk is not aware of the situations in which s/he may influence the magistrates.

The clerk and sentence

The Practice Direction of 1953 envisaged that the clerk should be able to advise the bench on sentence in a number of ways. First, the clerk can advise on the penalties which the law allows in respect of a particular case. Secondly the clerk can advise on the sentences imposed by the bench or neighbouring benches for comparable offences. The Practice Direction of 1953 did not specifically mention that the clerk could advise on decisions of superior courts and other authorities on sentence. However, possibly this aspect of the clerk's advice was intended to be included under the umbrella of advice on the law.

The Practice Direction of 1981 mentions advice on the range of penalties which the law allows and guidance relevant to choice of penalty provided by the law, and the decisions of superior courts or other authorities. It does not specifically mention that the clerk can advise on the sentencing norms of the bench or neighbouring benches.

29. At page 159. The clerk does not necessarily have details of the defendant's convictions during the trial, but may have them in some cases.

Despite these seeming inconsistencies clerks do advise on all three aspects, and this amounts to a considerable participation by the clerk in the sentencing process. One clerk interviewed gave an example of the sort of situation where he would advise on the policy of the bench:

"For example here we have a six month prison sentence that normally follows the importation of two kilos of cannabis, so say here the importation was under a kilo or something like that, and they were going for a full six months then I would draw their attention to it and say well the rule is six months for two kilos without any aggravating factors and pro-rata thereunder, and I think if you're departing from the usual practice you ought to be in a position to give your reasons why. There may well be good reasons and perhaps its good for them to say."

The same clerk gave a useful example of the way in which decisions of the Court of Appeal might be referred to the bench:

"If it's something that's well outside the guidelines laid down by the Court of Appeal then we draw their attention - say theft by an employee, which is always difficult to deal with. The Court of Appeal say that there a custodial sentence is normally inevitable. If the person is not in a managerial position it can be suspended. Say they were going very very leniently on the theft of an employee I'd draw attention to the remarks in the Court of Appeal on sentencing on that type of case and say yet again 'You're departing radically from what's established as a norm and it might be a good idea to give reasons for such a departure.' They may not have appreciated in fact what sentencing practice is for that particular type of case."

The clerk can thus play an influential role in sentencing, particularly in maintaining consistency of sentences whilst s/he remains within the guidelines laid down in the Practice Direction.

However, it seems that some clerks do go further than was envisaged by the Direction.

Temptations for clerks to exceed their authority and influence the bench must again be greatest where clerk and bench disagree and the clerks in the sample were asked what, if anything, they would do if they were invited into the retiring room and found that the magistrates were going seriously wrong on penalty. Almost all clerks

mentioned one, two, or all of the aspects of advice laid down in the Practice Direction. Some were very clear that they would go no further than that:

"I wouldn't interfere, because if they go wildly wrong in sentence then there's a method of putting it right isn't there - if it's detrimental to the defendant. If it's not detrimental then I suppose it's not justice but there's nobody hurt."

"They've often made decisions as to sentence that I wouldn't have done, but there again there is always a right of appeal if they are too harsh and if they are too lenient it's just something you accept, its not part of your role."

But others did not take such a philosophical view - they took what might be described as a more robust view of their role.

"Sometimes if I think a sentence is very severe - if for example they wanted to send a man to prison for the first time, maybe for six months, I might ask 'Do you think three months would be sufficient?' And then very often suggestions are adopted like that, and they say 'Yes, three months is enough'. But if magistrates say 'No, this is a serious offence we intend to impose the maximum', well there we are! They can do it."

It is doubtful whether or not one could say that this clerk was exceeding his authority. First he was making a suggestion to the bench. He was not telling them what he thought or what they should do. Also he was quite clear that if the magistrates rejected his suggestion that was perfectly correct, and purely a matter for their judgement. Further the clerk would have been aware of the discussions and research from many quarters focussing on prison overcrowding and encouraging courts to pass shorter sentences of imprisonment where they are appropriate. This would be quite a proper matter for the clerk to bring to the attention of the bench. Indeed the clerk is the best person to do this, since it may well be expecting too much of a lay bench that they will all be au fait with such research and discussion. Nevertheless it is clear that suggestions such as the one made by the clerk in the example above will be very influential with the bench - whether made properly or

improperly. Another clerk said:

"If it was a serious type of offence, then if they were considering probation and I considered that it was a serious offence and didn't really merit it in view of the defendant's record and various other factors then I may well suggest that they were on the wrong course, but certainly there's no question of the clerk insisting and I've always attempted to ... the magistrates do in fact have the final decision."

The magistrates may well have the final say, but one wonders how often their final say in this clerk's court will differ from the clerk's advice, since the advice of an experienced and qualified adviser must carry a great deal of weight. It is difficult to say categorically that this clerk was exceeding his proper role, since he may only proffer the sort of advice he was speaking of where a sentence of probation would be out of line with the sort of sentence passed by the rest of the magistrates at that court. He did not refer to bench policy however. Nor did the clerk who made the following remark:

"You'd then probably suggest to them what punishment is best in this case - tell them all their powers and then tell them what probably you think would be most suitable and why."

Another clerk was aware of the temptations but seemed not to be about to fall into them.

"It's very difficult to draw a line between saying 'Decisions of the Court of Appeal say that's not a suitable sentence' and telling them which sentence is suitable - which they all like you to do. A lot of them are almost begging and pleading 'Tell me what we ought to do.' It's more easy to tell them what they ought not to do."

Two of the clerks who were interviewed said that although they took a restrictive view of their role, they knew that others went further.

One said:

"If it was something they clearly had no power to do then I'd tell them so. If they queried, of course, the sentence they were giving compared to the majority of cases then I'd tell them what the normal course of action is likely to be.... I know for a fact that some clerks would go a lot further than that but I don't like to because of the way I've been taught."

The other:

"I wouldn't at any time say 'You're doing it wrong!' I know some clerks do."

14% of the clerks interviewed (i.e. 7 out of 50) gave replies to the question on sentencing which implied that they, or other clerks they knew might go further than was envisaged in the Practice Direction.

Again, this is not because magistrates' courts all over the country are staffed by power hungry clerks. For the most part it is because sentencing is an extremely complex task. The factors which must be taken into account, for instance, before a bench passes a sentence of imprisonment are very numerous. Added to this there are many policy considerations relating for example to length of prison sentence, prison overcrowding, the necessity to consider alternatives to prison, and criminological research relating for example to the suitability of prison for particular types of offenders. It is expecting too much of lay magistrates to require them to study and learn all of the information relevant to each sentence. They must depend on the clerk.

A Home Office Research Study on sentencing practice in magistrates' courts acknowledged that the potential influence of the clerk on sentencing was considerable.³⁰ It observed also that the extent of the influence which the clerk exerts depends upon how the clerk sees his role. Although many of the clerks in the Home Office Study are satisfied with the way the role was defined, there are others were are not satisfied.

30. Tarling, R. 'Sentencing Practice in Magistrates' Courts'. Home Office Research Study No. 56.

In 1976 in an article in the Justice of the Peace Journal³¹ a clerk argued strongly for clerks to take a greater part in sentencing. S/he pointed out the enormous body of law, policy and research on sentencing and argued that the only person in court who could have it at their fingertips was the clerk. The clerk should not, it was argued, decide sentence. The magistrates should determine sentence - but should do so after receiving the advice of their clerk on all aspects of the sentence. Similar points were made at the Justices' Clerks' Conference in 1978.

The author of the article in the Justice of the Peace did acknowledge that it would be difficult to play such an important role in the sentencing process without influencing the magistrates in any way. However, s/he pointed out that the difficulty of this task was no different to the difficulty of the task when the clerk assists the magistrates in deciding the issue of guilt or innocence. We have already argued the difficulties attached to the process of the clerk advising on guilt or innocence. The same problems of the persuasive power of an expert assisting lay people, of benches need for help and their tendency to ask questions they should not, apply also to the clerk's influence on sentencing.

One of the clerks in Burney's survey said:

"It's very easy to tell them ... for instance on sentence its proper for them to want to know what's open to them, but the way you answer could influence them. For instance you could say 'Obviously, you could send him to prison - or you could (ironic intonation) give him a conditional discharge... Sometimes I think of something fairly ingenious and I'm biting my tongue not to tell them. You mustn't give them that solution."³²

31. 140 JPN 496 (1976) 'Sentencing and the Justices' Clerk.'

32. Burney, P. 157-8.

But the argument in the Justice of the Peace article is still very persuasive - if the magistrates cannot be expected to know all the factors which need to be taken into account in sentencing they must have advice from someone who is expert, and the only person available is the clerk.

It seems from the replies to the questionnaire for the present research, that clerks not only take the robust role proposed for them by the author of the Justice of the Peace article, but that some of them sail very close to participation in the ultimate decision of the bench. If the clerks are to be awarded the right to play an increased role in sentencing this is one thing that they must not do.

One situation where it is proper for the clerk to give her/his opinion on sentence is after the sentence has been passed. The clerk can have a very important influence in educating the bench on sentencing policy and practice, not just in the formal training now received by all magistrates, but also in discussing with the bench after the court. One of Burney's magistrates said:

"It's not fair to try and test yourself against the clerks - they're supposed to give the legal answer. They won't say if they think the sentence you're proposing is too heavy but occasionally one might say afterwards 'Coo you stung them, Sir'."³³

One of the clerks interviewed said:

"If it's a question of the kind of penalty I may advise them. Some courts do get justices who are mini Judge Jeffries and want to put every one inside. I do have a chat with them."

The clerk can therefore help to mould magistrates attitudes by discussing sentencing with them out of court. The clerk to the justices will also have a great deal of influence when bench sentencing policy, or sentencing norms are decided. These matters

33. Burney P.258.

will be elaborated further when we discuss the influence of the clerk out of court.

Overstepping the mark

Our discussion of the role of the clerk in the determination of verdict and sentence has demonstrated that the clerk has considerable influence when she/he is acting quite properly within the established rules. We have also seen that clerks are conscious of the ease with which they could overstep what is acceptable, and indeed that some of them do so.

Not being entitled to expect such frankness from clerks, the question of the clerk exceeding her/his proper role was also approached rather more directly. Clerks were asked whether, if they wished to do it, they could influence their benches on matters which are outside their proper role. The replies to this question revealed to an even greater degree the extent of the clerk's potential influence on the bench, and the extent of clerk's consciousness of the limits and possible abuses of their power.

Only 12% said that they could not improperly influence their benches and the answers of even some of these clerks were rather equivocal. One, for instance said that he could not do it, but in the next breath that he could not bring himself to do it. Another said "Do I have to answer that?" When told that there was no compulsion to answer he said "Well I won't then!" It may be that such a refusal merited classification with those who felt that they could influence the bench if they wished to!

88% said that, if they wished to, they could influence the bench improperly. About a quarter said that it could not be done with every clerk and every bench, but that with some benches it would be

possible. One said he could do it

"To an extent, yes. But I'd have to pick the magistrates."

another:

"But certainly, we've got 160 justices here, there are bound to be a wide spectrum of characters - strong, not so strong - and yes it certainly is possible to do it."

These clerks were not admitting that they did influence their benches - but that they knew that they could if they wanted to. One of them put it:

"I've no doubt that, without meaning to be big headed, John Doe with certain magistrates most certainly could. But John Doe being the type of lad he is, wouldn't wish to do so."

Again we see that it is the weaker, less confident magistrates that clerks know are vulnerable to influence.

"Some magistrates want help, and they will sometimes look to you for it when they shouldn't. But then it's entirely up to the clerk not to respond to that - most of the magistrates know they mustn't ask."

Interestingly the three clerks interviewed who sat mainly with stipendiary magistrates all gave the same answer to the question - that it would be possible for them to influence the magistrates, but that it would be noticed either immediately or very soon. Clerks who sat mainly with lay magistrates were conscious that the onus was on them to stay within the rules.

Several clerks emphasised that they knew that they must be very careful not to exert improper influence because of the great respect for the clerk who is viewed by a lay bench as their trusted professional adviser.

"I believe there are times when I could do it. I think far too many justices ask clerk's opinions. It's an easy mistake to make and it's a mistake you could criticise justices for, but you can't blame them. Obviously the clerks are there five times a week. The justice probably sits once a fortnight - so they want to know what's going on - they want to know what they should do. I feel I could do it. I'm scared to - basically I don't think it's right."

Other clerks said that it would be possible for them to influence their benches that "It is possible for any professional adviser."

Another factor stressed by several clerks was the influence of the clerk to the justices.

"It would be very easy to do it. I think in this court anyway because the clerk has such a great deal of respect and standing.... The clerk's advice... carries a great deal of weight and you don't often find they go against the clerk's decision. As I say I think that's because of respect generally held - it filters down like that. And it would be very easy to abuse it - it's up to individual's integrity I think".

One of the clerks to the justices who was interviewed said that he had been at his court since before all of his bench, and that his experience was many times that of most magistrates. In these circumstances it would be "the easiest thing in the world" for him to influence the bench. He had been responsible for training, educating and sitting with nearly every magistrate at the court.

The influence of a clerk to the justices can be detrimental as well as positive. One clerk commented that at his previous court he had been expected to retire with the bench and play a large role in the retiring room, and that it would have been very easy at that court for him to have influenced the bench. At his present court, with different traditions he thought it would be very difficult.

Another rather distressing story came from a different clerk.

"In fact I know a court where the clerk ran the court to such an extent that you could have said it was his decision. It was very bad.... but what he and the bench decided was very just, and that's the only reason that I can think he never got found out. But his magistrates now are left without a leader, and what do they do then? They are on their own basically. It was very funny because they don't know basics really."

With lay magistrates at any rate, the onus is squarely on the clerk to make sure that s/he stays firmly within the bounds of acceptable conduct. This applies particularly to the clerk to the

justices who can affect the policy and attitudes of the whole bench, and who certainly needs to be aware of the extent of her/his influence and the limits of acceptable behaviour.

Defining those limits was acknowledged to be very difficult by many clerks. The ease with which benches could be influenced was mentioned several times. A clerk to the justices said that

"A little word or phrase, or even a grunt or raised eyebrows could influence them. But you've just not got to do it. An enormous amount depends on the professional integrity of the clerk and his own standard of self discipline."

A total of six clerks mentioned that they were aware that they did not need to intervene directly to influence their benches.

"If you mean do I sort of raise my eyebrows and not say anything? I think I've been told that I voice my opinions like that."

"I mean all you would have to do is put a few words in here and there and put the seeds of doubt and you would be away. I don't think you should do it."

Perhaps the most constructive thing to arise from this section of the questionnaire was not the knowledge that clerks have a great deal of power in the retiring room - we had shown this already - but that clerks are aware of their power. They know the extent to which they can influence their benches, and they know what they must avoid doing.

Perhaps also it would have been reassuring if more had shown a realisation that they can influence some benches without directly telling the magistrates what they should do, but that their influence can be exerted more subtly and even non-verbally.

The dependance of the courts on the clerks integrity is obvious, and was stressed by several clerks. In court, and in the retiring room, the opportunities frequently present themselves for clerks to influence the bench. Clerks said that they knew that the opportunities were there, but that they did not take them.

There is, of course, no guarantee that clerks do not influence

their benches. It is necessary to trust them, since their activity in the retiring room is concealed. This is why clerks in their reactions to cases limiting their opportunities to retire were asking that they be trusted - and why they saw such limitations as inappropriate. The only possible "guarantee" of integrity which is given credence may be a professional qualification. Not all clerks are qualified, and the debate around professionalisation has been an important issue for clerks in recent years. It will be discussed in the second section of this thesis.

Conflicts with the Bench

The last three parts of this chapter have been concerned with the dangers of the clerk going too far. It would be wrong however to forget that there can also be a danger of the clerk not going far enough. There are occasions when the bench needs advice and may not get it. The converse of the dominant clerk is what has been called the weak or supine clerk.³⁴

We have already given an example of the weak clerk in court, who allowed his bench to convict and sentence unrepresented defendants in the same breath without giving them a chance to mitigate. Such events are just as worrying as situations where the clerk appears to go too far.

Similar problems can also arise in the retiring room. The examples given of magistrates who are lacking in confidence and who look to the clerk for too much help are examples of events which do happen, but they are not descriptions of what invariably happens.

34. By Brian Harris 145 JPN 403. in 'The Role of the Clerk: A New Direction'.

Situations also arise where the clerk may not give advice when the bench need it.

Also it should be noted that benches are not invariably receptive to what the clerk has to say and they may make it difficult for the clerk to give them the advice they should have. One clerk gave a graphic example.

"It's a very difficult position to be in because sometimes you've got to give them advice they don't want to know. I mean I've found that in the past - not so much now but when I was younger - I found I was supposed to be either keeping quiet and thinking to myself "Well you might as well let them get on with it", or I was saying to myself "Well you can't let them do it you know, you must tell them, its your duty to tell them". And many a time I've said something and they haven't liked it. And of course, in an extreme case it could make you rather unpopular... There are magistrates who have got hobby horses. I mean I have known magistrates in the past who have thought - I know it sounds old fashioned but its true - they regarded poaching as a heinous crime which should be severely punished. On the other hand they didn't see anything wrong with a chap driving around when he was obviously drunk because they may have done it themselves."

Benches are not all inexperienced and timid. There are occasions when the clerk will wish to give advice, and the bench will not want to hear it, or take it.

Of the clerks in the sample a total of 38% said that the bench had never disagreed with their advice on the law and refused to take it. But of these one had been a clerk to the justices for a long time, and felt that because he had so much experience benches would always listen to him although he believed there to have been minor disagreements in the past. Another was a qualified but new clerk who had been taking courts for only a month.

62% of clerks had experienced conflicts with their benches, when their benches did not wish to accept their advice. There were numerous strategies for dealing with the problem.

Given that clerks are, and see themselves as, the guardians of legality in the court they are not surprisingly extremely concerned to ensure that the rules are followed, and that benches do take their advice. Very few were therefore prepared to simply forget a disagreement with the bench and let the bench proceed unchecked. Only four clerks said they had simply let the matter drop. One of these reported that:

".... it was only a road traffic offence and it was to the benefit of the defendant and the prosecution raised no objection and I didn't think it necessary to take it any further."

He felt then, that there was another guardian of legality to protect the side whose rights were unfringed and it was not solely his responsibility to ensure that the rules were observed.

Two others said that the situations in which they had found the bench refusing to take advice had been situations where they had agreed with the bench that the law and justice did not coincide, and they had allowed the bench to do justice. One of these clerks gave a dramatic example of the situation which had arisen in his case.

"It was an extreme case. It was a 16 year old boy who had a little 'pop-pop' bike and he'd knocked a man over and the man had been killed. So he faced a charge of death by dangerous driving, and when the news reached the boy's father, who had a heart condition he had a heart attack and he died. At the time the delay at the Old Bailey, where it should have been committed, was 9 months to a year. I advised the magistrates that they had no jurisdiction in the juvenile court to deal with homicide - homicide was man killing; it was their decision as to whether causing death by dangerous driving was man killing. If they thought it was, they would have to send it to the Old Bailey, if they thought it wasn't they could deal with it. They retired by themselves and they came back and said "We do not think it is homicide, we are going to deal with the case" which they did. The boy pleaded guilty, he was fined and disqualified and I may say both sides were represented and both sides hoped this would happen. Afterwards the magistrates said 'Please don't think we didn't accept your advice as correct, because it obviously was correct, but we made our decision to avoid what we thought was an appalling injustice of hanging this over this boy's head for that length of time'."

In this instance then, all the lawyers present had colluded to avoid

the rules in favour of a just and humane decision.

Not all refusals on the part of the bench to take the clerk's advice have such a happy ending. It is very rare that a clerk will be pleased that the magistrates have gone against her/his advice.

Perhaps the mildest strategy adopted by clerks where they find themselves faced with a recalcitrant bench is to make a note on the papers or in the minute book that the bench has taken a decision contrary to their advice. This was a strategy adopted by clerks who sit with stipendiary magistrates.

"... if a stipendiary magistrate doesn't always accept your advice there is nothing you can do about it, and I just make a note, 'Clerk's advice not accepted'."

But it was also a strategy of many clerks who sat with lay benches. One of them said nostalgically:

"In the days when the magistrates wrote the register themselves, going back 40 or 50 years, the clerk at that time used to make the magistrates write on the register 'Fined £10 contrary to the advice of the clerk'."

Another strategy open to less senior clerks is to call on the support of the clerk to the justices. The experience of one trainee was

"I actually went out and sought confirmation of my advice from a more senior clerk. They just wouldn't accept what I was saying!"

Q. "Was it O.K. once you got confirmation".

A. "Yes".

But this is not a strategy available to clerks to the justices or even easily available to their deputies or older clerks and experienced assistants. What is available to all clerks is the threat of the Divisional Court. If a bench take a decision which could be argued to be wrong in law, the case can be appealed to the Divisional Court by way of case stated. In such a situation the magistrates must

respond to an application to state a case within 21 days and must set out the facts found by the court and deal with the question or questions of law on which the application is based.³⁵ Usually such a case is prepared by the clerk, who then discusses, develops and amends it with the bench.³⁶ And of course the assistance of the clerk is invaluable in such a situation. However, if the bench are given advice on the law by the clerk, they refuse to follow it and are taken to the Divisional Court, they will not be able to count on the support of the clerk. What is more, they may find that they become liable for costs in the Divisional Court.

The threat that a case may be taken to the Divisional Court if they do not follow the advice of the clerk can therefore have a salutary effect.

"I've had benches which have said 'Right we accept the advice you are giving us, but we don't like the advice, can we ignore it?' And I have said 'You depart from my advice at your peril'. Remember Lord Hailsham said on one occasion to the justices at the Magistrates' Association 'He's not God, if you want to disregard his advice you may do so'. What he didn't say was if justices deliberately disregard their clerk's advice they may become liable for costs in subsequent proceedings, and there was a case reported in the last few months where justices were upset on appeal where the clerk gave an affidavit that the court had gone against his advice and the Divisional Court, I believe it was, said the justices had gone as near as they could to incurring costs in their own cause."

The threat that if the justices don't accept advice they will have to go to the Divisional Court unsupported usually, it seems, persuades them that they should conform. But not always. One clerk actually had to carry out the threat.

35. See S.87. Magistrates' Courts Act 1952 and Rules 65-68 Magistrates' Courts Rules 1968.

36. Such a procedure was envisaged by Home Office circular 55/1975.

"The bench disagreed with my advice on the law in X town in particular and I let them have their particular way and we ended up with a case taken to the Divisional Court and the bench quashed on appeal."

Q. 'Were you responsible for preparing the case stated?'

A. 'I was, yes.'

Q. 'Did you support the decision?'

A. 'No. I said it was completely contrary to the law as I advised them, since there was a reported case on the particular subject. They were following a more common sense argument - and saying it was bureaucratic and just matters of paper and that it shouldn't be so. But the law was clear and they went against it.'

Of course the point of the clerk making a note in the minute book would be so that the clerk could, in the event of the decision being challenged, know what her/his attitude to the decision had been. It may be that the same clerk might make a note in the minute book on an issue on which s/he did not feel particularly strongly and use the threat of no support in a case stated in a case where s/he felt more strongly.

There are occasions when clerks feel so strongly that they may go further even than this. We saw that when clerk and bench come into conflict, clerks may do what Carlen called a "stab in the back"³⁷ and withdraw their protection from the bench and show them to be at fault in public. The threat of the Divisional Court represents the same mechanism - a threat that the clerk will withdraw her/his protection to persuade the bench to follow the rules. The clerk's allegiance to the rules may be stronger than her/his allegiance to the bench, and it is possible for the clerk to 'go public' about a disagreement in the retiring room. One clerk said he would

"Just make a note in my notebook, and if I had an approach from either advocate I would say my advice had been against it. In the interests of justice I would feel duty bound to do that

37. (Magistrates' Justice.) Martin Robertson 1976.

although I probably wouldn't go out of my way to draw attention to it unless it was more gross and obvious and I felt that great injustice had been done. I would then say to someone, look I think this is wrong in law and the justices have gone against me, I've told them this, I've made a note of it, and I would support any application you might make in another court. I would feel it my duty to do that."

Thus the clerk can go a long way towards creating a situation where her/his advice is actually re-inforced by the Divisional Court.

Two clerks interviewed said they would take a very strong view if they gave their considered legal advice and the bench refused to take it. One of them said

"Traditionally when I was under articles the clerk there... said that 'If you give them your considered opinion it is a considered opinion and they are not prepared to take it, then you put your coat and hat on and go home'."

The other said that if he gave an opinion and the bench categorically refused to go along with what he told them, then

"...one has to think about packing one's bags and doing something else."

These clerks clearly did not expect that such a situation would arise, and they would have found it very difficult if it had. But other clerks took a different view. One stressed that it was a magistrates' court, not a clerk's court, and the bench had every right to disregard his advice. Another - a clerk to the justices said that he always told his magistrates when training them that they could, if they wanted, disregard the clerks advice.

It seems that all clerks use some strategy to protect themselves or ensure that the bench follows their advice. It does appear however, that there are some very considerable differences in attitudes of clerks to benches who disagree with them - which ranged from philosophical resignation to considering alternative employment. It is an area which does rouse strong feelings. At least partly this is because of the strange position of the clerk - the clerk is the

lawyer to the bench, yet the bench of lay persons with little training and possibly minimal experience, is the tribunal of law. Technically the bench takes decisions on law. In practice they must rely heavily on the clerk. If the bench decides to reject the clerk's advice, the clerk has no authority to resist it. Only the Divisional Court can reprimand and even penalise. The clerk cannot insist that her/his advice be followed.

The limits of the relationship

Burney found that the relationship between bench and clerk is a very personal thing, varying from court to court. She asserted that although the way bench and clerk related was very different at each court, benches all believed that the balance struck at their court was good.³⁸

Satisfaction amongst clerks about their relationship with their benches is also high. All of the clerks interviewed, when asked to describe their relationship with the magistrates replied positively. Burney surmised that satisfaction amongst magistrates was high because the bench is educated by the clerk to the justices as to the best relationship between clerk and bench, and this must be true. So far as clerks are concerned, we have reported statements from clerks who, having moved from court to court, noted great differences in the way clerk and bench related both in and out of court. But nevertheless, despite the fact that some clerks obviously had doubts about the balance struck at their courts between themselves and the bench, they still described their relationship with the bench as good. In general it seems that clerks have a high regard for their benches, despite the magistrates who lean too heavily upon them, or who refuse

38. Burney 1979 at p.252-3.

to follow their advice.

One striking difference from court to court is the extent to which the clerks actually know the individual magistrates. Court C for instance was a comparatively small court, with few enough magistrates for all of the clerks to know them. Also it was the tradition at Court C for the magistrates and the clerks to take coffee together. All courts sitting retired at roughly the same time and coffee and biscuits were served. Clerks and benches chatted about the business of the day, general matters relating to the court, and purely personal matters. The magistrates addressed clerks by their first names. The clerks usually addressed the magistrates as Mr. Smith or Mrs. Jones. A great deal of light hearted banter went on and several of the magistrates went out of their way to say how well they related to their clerks, how good the clerks were, and how much better it was at Court C than what they had heard of other benches.

At Court G however, the clerk to the justices said

"I've currently got 145 magistrates. I only have a vague idea what some of them are occupied at."

The clerk to the justices is likely to know the bench rather better than the other clerks, since s/he is likely to have played at least a part in their training, will play a role in meetings of the bench, will be referred to by magistrates for help during their service, and will see them at social events. The deputy or deputies will probably participate in some of these events. Also it may well be that a long serving clerk has given many years of service to a particular court, and will thus know all the bench. But at a very large court, even the clerk to the justices cannot hope to know all of the bench, and ordinary clerks will know them even less.

There was a great divergence of opinion amongst clerks as to

whether the way they related to the bench outside court affected their relationship in court. Some clerks felt that a good personal relationship with the magistrates meant a good relationship in court. Others strongly disagreed

"There are some I really dislike, but I'm quite indifferent, I just take it as a job and go through the whole sitting with them."

was one clerk's assessment. He was supported by the opinions of many other clerks who felt that whatever you knew of the members of your bench outside court, you related to all of them in the same formal way in court. One clerk to the justices knew several of his bench through the Rotary Club, had magistrates as personal friends, played squash regularly with one of them, but said that even if they were on first name terms outside court they were still 'Sir' in court.

Another clerk said that he would not wish to know the magistrates in any way outside the court, because he believed that "familiarity breeds contempt".

Other clerks were more positive about the situation and felt that if one knew the magistrates characters one knew how much help they might need in court, whether they would be confident, or tentative and in need of support. One said that she knew which were the more confident ones and which were lacking in confidence

"...and they will confide in you and you say 'Are you going to take the chair?' and they say 'Oh my goodness, I can't take the chair!!' - you know nervously - 'You'll help me?' And there of course where you have a magistrate taking the chair for the first time they might say "Will you check everything, will you check what I'm going to say is right?" And of course I do that. And then of course you play a more active role. You are getting up more often and trying to give them confidence in what they are doing."

This must be a positive aspect of knowing the bench well - although interestingly this latter clerk came from Court G which has a very large bench.

The personalities of clerk and bench must play a role. There are inevitable clashes of personality between clerks and some members of a bench - even it seems between the clerk to the justices and magistrates. There are also some clerks who are personally more sensitive and aware, and this shows through in the way they handle their benches.

But aside from such personal considerations, at the core of the relationship between clerk and bench are the traditions of the court. These will have a crucial influence on the extent to which the bench have a role in court, on what the bench will expect from the clerk in the retiring room, and on how well bench and clerks know each other.

To an extent such traditions will be formulated by the bench. To an extent they will be formulated by the clerk to the justices, particularly if she/he has been at a court for a long period of time and has educated the bench and the clerks into her/his principles. Again we emphasise the influence of the clerk particularly in the process of education as a crucial influence at the court.

Conclusions

In the retiring room as in court, clerks take their role as guardians of 'due process' seriously. Whilst they identify with "their" magistrates, and in general speak highly of magistrates their ultimate allegiance is not to the bench, it is to the rules. This is shown clearly by the fact that they will abandon their protection of the bench if the magistrates threaten to break or ignore the rules. Clerks are prepared to expose the errors of the bench, both in court and to the scrutiny of the Divisional Court if magistrates fail to act according to the clerk's sense of justice and her/his understanding of the rules.

We have shown that clerks frequently take a robust attitude to their role, exploiting all of the possibilities that exist to guide the magistrates and sometimes exceeding what is envisaged by the law. However, the country is not full of megalomaniac clerks eager to usurp the functions of the bench. Clerks do not want to be part of the tribunal of fact. The case law, the present study and those of Derbyshire and Burney show that there are - as perhaps inevitably there must be - clerks whose behaviour is designed to influence the magistrates decisions on the facts. However, if one takes a cross section of clerks and examines their relationship with the magistrates in detail it becomes clear that clerks do not want to encroach on decisions of fact. Their desire to have free access to the retiring room, and the way they behave when they are in it are motivated by their wish to ensure that the magistrates take decisions in accordance with substantive law, the rules of evidence and procedure and the principles of sentencing.

However there are some problematic aspects of the clerk's relationship with the magistrates. It is clear that many clerks do not realise that it is possible to influence magistrates in very subtle ways. Some clerks were aware that they needed to take care not to affect their magistrates decisions by giving them subtle clues about their own opinions, but others were not conscious of this as a problem. Magistrates faced with difficult decisions do look to their clerks for reassurance and for help with verdict and sentence. Clerks said that they avoided these requests to become involved. But conscientious avoidance of requests to state an opinion are of little use if clerks give themselves away by the way they say things, their intonation, their gestures.

Dealing with the problem of those clerks who overstep the mark

and exceed their role in the retiring room is effectively a matter of training of the magistrates. The clerk in court will be observed by any number of people, including the legal profession. In the retiring room the clerk's behaviour is only open to the scrutiny of the bench. Clerks interviewed were in no doubt that if they exceeded their role with a stipendiary they would be stopped very quickly. Lay magistrates must be effectively trained to do the same thing. The issue of training will be explored in Chapter Eight. Suffice it to say at this stage that the magistrates are trained by the clerk!

The converse of the clerk who oversteps the proper boundaries of her/his role is the clerk who does not go far enough. Interviews and court observations did show that magistrates did not get enough help from some clerks, because those clerks were insufficiently qualified, or trained or lacked experience. The question of clerks' qualifications and training will be examined in Chapter Ten.

CHAPTER FOUR

THE CLERK AND THE DEFENDANT

The clerk's awareness of the problems of unrepresented defendants

Explaining the proceedings to the defendant

How well do clerks assist the unrepresented?

Clerks opinions of their effectiveness

The frustrated advocate

By-passing the defendant

Due Process and Organisational Maintenance

Duty Solicitors - A Gift to the Liberal Bureaucrat

The clerk as prosecutor

Conclusions

The Clerk and the defendant

The focus of this chapter is the way in which clerks deal with defendants who are not represented. The reason for concentrating on the unrepresented defendant is that where the defendant does have representation by solicitor or counsel, the clerk has very little direct contact with the defendant. The advocate will make applications for remands or bail, or will mitigate in relation to sentence. Even where there is a not guilty plea, although the clerk will put the formal matters relating to charge, venue and plea to the defendant, the defendant's choices will have been informed by consultation with her/his advocate, and throughout the case contact between court and defendant will be mediated by that advocate. Should the clerk be tempted to play a more active role in proceedings where the defendant is represented, s/he would be discouraged by the decision in Simms v. Moore 1970¹ where Lord Parker C.J. said that in general neither the court nor the justices' clerk should take an active part in the proceedings except to clear up ambiguities in the evidence, and that the court should certainly take no part in the examination of witnesses where the party concerned was legally represented.

Where the defendant is not represented, however, the situation in both theory and practice is rather different.

So far as the law goes, where a party is not represented and is not competent through a lack of knowledge of court procedure or rules of evidence, or other matters to examine the witness properly, "the court can, at its discretion permit the clerk to do so".² Where the

1. [1970] 2 Q.B. 327, see discussion in Chapter 2 above.

2. Ibid. at pp.332-3

clerk examines the witnesses s/he must do so only to promote the best interests of justice, and must take care to see that nothing is done which conflicts with natural justice or the principle that justice must manifestly be seen to be done.³ In relation to domestic proceedings the rules are expressed rather more positively in Section 73 of the Magistrates Courts Act 1980. That section provides that, in domestic proceedings if it appears to the court that an unrepresented party is unable to examine or cross-examine a witness, the court shall find out on what matters the witness may be able to give evidence, or on what matters the witness should be cross-examined and put those matters to the witness.

The theory, therefore, is somewhat limited. The court is to help the unrepresented defendant or party with the examination of witnesses if the defendant or party to domestic proceedings cannot do it him or herself.

The practice is rather different. Undoubtedly the examination and cross-examination of witnesses is difficult for someone who is not represented, but the problems of unrepresented defendants are not confined to problems of cross-examination. The defendant in a criminal case will have a series of very difficult decisions to take which may necessitate application to, or explanation to, the court. The defendant may wish to be granted bail against police objections. S/he will have to decide in some instances where the case should be tried, and whether it is appropriate or not to plead guilty. S/he may, if convicted, wish to say something in mitigation of penalty.

Not only do many unrepresented defendants not know how to do such things, they may well not even know that they will have to do them.

3. Ibid.

Many will be completely unprepared to take the decisions or make the explanations required of them. Therefore they need help, and that help must come from the court - from the bench, and probably for the most part from the clerk.

A large percentage of defendants who appear before magistrates criminal courts are not represented. A study in 1976⁴ showed that 46% of defendants are represented at some stage during their case, although even this 46% may have appeared before the court without representation possibly at the early stages of the case.

There has recently been a proliferation of duty solicitor schemes designed to provide representation for defendants. At some of the courts studied, such schemes were in operation, but there were nevertheless still many defendants without representation. A study in 1982 of six magistrates' courts with duty solicitor schemes nevertheless found that 38% of defendants on their first appearance who were charged with criminal offences were unrepresented.⁵

A number of defendants, therefore, at some stage of the process depend upon the clerk to help them to present their application or case to the court. Whilst one should argue for representation for those who appear before the magistrates, it is highly unlikely that extension of legal aid or duty solicitor schemes will ever cover all defendants. It seems remote that any government would, for instance grant legal aid for traffic cases, yet endorsement can affect job prospects - too many of them together can result in loss of livelihood

4. M. King. 'Magistrates Courts Surveyed'. Rights. Vol.1 No.1 (1976) This study covered 76 courts and 782 cases. It included some traffic cases, but only those where the defendant appeared in court.

5. Bridges, Carter and Garbing. 'The Impact of Duty Solicitor Schemes in Six Magistrates' Courts'. L.A.G. Bulletin. July 1982. p.12

- and the only person likely to help a defendant to do justice to her/himself in an application to find special reasons why her/his licence be not endorsed is the clerk. Indeed in the present climate it does not seem likely that legal aid for more serious matters is likely to be extended - perhaps the opposite is more probable. The standard of help that the clerk is able to give to unrepresented defendants is likely to continue to be important.

Research has shown very clearly the considerable problems faced by unrepresented defendants. Bottoms and McLean's study of 'Defendants in the Criminal Process'⁶ and Susanne Dell's study of female offenders⁷ showed that unrepresented defendants were nervous, afraid and often did not understand what was happening to them. Research done for the Interdepartmental Committee on the Distribution of Business between the Crown Court and Magistrates' Courts⁸ showed that a significant proportion of defendants dealt with summarily (8-16%) were so confused that they did not know that they had been offered a choice of forum for the trial of their cases.⁹ Pat Carlen's study of 'Magistrates' Justice'¹⁰ also stressed the alienation of the defendant.

Since these defendants rely on the court to explain matters to them, the courts are seemingly not succeeding. A great deal of the blame for this would appear to lie with clerks who should, with the

6. Routledge & Kegan Paul, 1976.

7. S. Dell, 'Silent in Court'. Bell. London, 1971.

8. Cmnd. 6323, 1975

9. J. Gregory 'Crown Court or Magistrates' Court'. O.P.C.S. Survey 1976.

10. P.Carlen. 'Magistrates' Justice'. Martin Robertson 1976.

magistrates, be making the proceedings as clear as possible. This study set out to discover how aware clerks are of the problems of defendants, how they deal with defendants who are not represented, how effective they thought they were in helping defendants and also the nature of the factors which influence the way the clerk deals with unrepresented defendants.

The clerk's awareness of the problems of unrepresented defendants

The clerks interviewed were questioned to determine how aware they were of the likely state of mind of unrepresented defendants. A very few (8%) did display an astonishing lack of insight into the problem. One clerk remarked

"I think they're often unrepresented by choice. They don't seem to be bothered. You explain the procedure. I think they normally seem quite calm about it."

However 92% of clerks were aware that defendants who appear before the court unrepresented are nervous and afraid. One, for instance, said that he knew defendants were frightened -

"They don't always give you that impression, but having talked to a lot of people, ushers particularly - and that's the best way of finding out what the reaction is - the defendants will go out and not realise what has been told them in court. I think you've got to be aware of this."

Others showed an ability to identify with the fears of the defendant and commented that they would be afraid in the same circumstances.

"... put a court clerk in the witness box as a witness in a strange court following a motor accident and see how nervous they are. You'd be amazed."

It was also reassuring to find that clerks realised that the defendant's demeanour does not always reflect her/his true state of mind.

"Yes - a lot of people are unrepresented. And one mustn't assume from the smirk, smile or giggle of the defendant that he is therefore amused at the proceedings. This is very often a manifestation of his nervousness."

A clerk to the justices said about truculent defendants

"I always tell the young court clerks that the worse the defendant is, the better they must be - that if they keep their cool and become completely polite the storm will blow out. He finds himself bashing his head against a brick wall and what he is consciously or subconsciously wanting is an irritated reaction, and if he doesn't get it he'll pack up."

On the whole, there is a high level of awareness amongst clerks that defendants may be disabled by nerves from understanding the proceedings in court.

Clerks were also asked if they thought that defendants had difficulty in understanding court procedure and jargon.

Only 10% of the clerks interviewed thought that defendants did not have difficulty in understanding the language and procedure of the court. This, however was a totally different 10% from those who denied that defendants were nervous or afraid. However these clerks took the view that they did more from confidence in their own abilities than confidence in the understanding of defendants! One of them said that defendants do not have difficulty -

"Not in my courts. One puts a charge in layman's English which they'll understand and I don't try to blind them with science by any means."

It may be that this clerk (and others like him) does therefore try very hard to explain things to the defendant in a way which is simple to understand. But what such clerks do not understand is the factor pointed out by one of their colleagues

"Yes, in fact I'm convinced sometimes that defendants have gone through the entire procedure and not known what's happened to them at the end... I've asked people if they've understood the election for instance, and they just nod their head, and I think they just do that because they think its expected, and I don't really think they've understood it."

Another clerk made the same point, showing again an ability to identify with the problems of the defendant:-

"If I came to court and I stood there and I was unrepresented and somebody turned round to me and said 'Do you understand?' I wouldn't, for the sake of showing myself up say 'No'. I'd say 'Yes' and let it all carry on above me."

Many clerks were conscious of the jargon which is used in the courtroom, and the necessity to explain it to the defendant.

"I don't use words like 'election' - I use 'choice' ... if you started talking about *res ipsa loquitur* or something like that it throws them a bit!"

"For instance with juveniles you have to explain the charge to them. I have said 'They say you nicked it?'"

"I personally feel Latin phrases and what have you have got no place really, and if they're used in court I would normally say "Oh what you mean is so and so, don't you?" and encourage people not to use that sort of thing."

Again several clerks showed an awareness that the defendant might appear to be aggressive or amused as a mask for nerves.

"Sometimes you find people come over as very ungrateful. One thing you learn with experience - sometimes you get someone very aggressive or with a big smile on their faces as if they can't stop laughing, and with experience you learn that that is nerves as well. It's not that there is any disrespect to the court. Because your first reaction is to get shirty and start being rather school teacherish in your attitude to them. The more polite and patient you are with them the less... well they tend to relax and you get on much better."

An interesting factor which emerged from clerks' replies to these questions is the stereotypes which some clerks seem to operate in relation to defendants.

Pat Carlen found that the police in magistrates courts categorised defendants into five main types - the villains, the regulars, the nuts, the immigrants and foreigners and the normal ordinary person.¹¹ Clerks seem to operate a simpler classification. They divide defendants into repeat players and one shotters.¹²

11. 'Magistrates' Justice'. Martin Robertson, 1976.

12. To adopt Marc Galanter's terminology
(See Law and Society Review. Vol.9 No.1 (1974))

The repeat players they see as not nervous and confused, not in need of help. They are "the hardened types" or

"the seasoned campaigners with a list of previous convictions as long as your arm."

Such defendants may even be perceived as a threat

"Quite a lot of unrepresented defendants know nearly as much as we do..."

"You get one or two who seem to enjoy having a go - barrack room lawyers..."

They are to be contrasted with the one shotters, (who may also be "normal ordinary people".) One clerk put it thus

"There again you always get the one person who's done one thing wrong in his life and he's sorry about what he's done, and he comes in and they tend to be nervous. The people you get back every week have got used to the proceedings and they're very chuffed about it."

Clerks use these stereotypes to decide who is deserving of time and attention. Such stereotypes carry with them considerable dangers of misclassification. The defendants who have been before the court on previous occasions may well not be used to the proceedings. They may never have understood what goes on in court, and their light hearted manner may mask nervousness. Also if clerks' behaviour towards the defendant differs markedly on the basis of such stereotypes there is the danger that the clerk will unwittingly communicate to the bench that the defendant has previous convictions.

In general, the level of awareness amongst clerks is high, if rather uneven. Clerks on the whole do understand that unrepresented defendants are nervous and afraid, and have difficulty in understanding the language and procedure in court. How, then, do they use this knowledge in their practice in court?

Explaining the proceedings to the defendant

The task which confronts the clerk is an extremely difficult one - much more difficult than the task of the defence lawyer. A defendant's solicitor will be able to see the defendant in private, and discuss the case with her/him at length. The clerk must deal with a defendant who is probably nervous and afraid, who is the focus of attention in a very public setting, and who is called upon to make instant decisions on a number of matters for which s/he is, in all probability, not prepared.

The defence advocate can listen to the defendant's story and can then advise as to whether or not the defendant should elect for trial, plead guilty or whatever decision is needed. The clerk cannot advise. S/he must explain to the defendant sufficient to allow the defendant to make a choice. Such choices may involve many variables or require the understanding of difficult concepts. A few examples will illustrate the difficulties.

Explaining the meaning of the offence with which a defendant is charged, may cause problems. One clerk said that the most difficult thing to explain to a defendant is

"The legal concepts contained in what they are charged with. Trying to explain to a 13 year old recklessness in criminal damage is one of the most dreadful jobs going because they really don't know what it is all about".

The mental element of offences was mentioned many times by clerks as being something which defendants found difficult to understand. Several clerks reported particular problems with middle aged women accused of shoplifting who come to court saying that they were guilty of theft but that they did not intend to steal. Explaining to these defendants that their plea of guilty could not be accepted if they did not intend to take the goods clerks found to be almost impossible.

However, undoubtedly the worst difficulty reported by clerks is explaining to defendants the procedure for determining mode of trial of a hybrid offence - i.e. one which can be dealt with by the magistrates or by the Crown Court. 46% of clerks interviewed said that this procedure was the most difficult thing for them to explain to unrepresented defendants.

The procedure is now contained in Section 19 of the Magistrates' Courts Act 1980.¹³ The Act prescribes a two stage process. First a decision must be taken as to whether the offence is suitable to be dealt with summarily. Both prosecution and defence have the opportunity to make representations on this question, but of course, an unrepresented person will have no idea what makes a case suitable for summary trial. In most cases to a lawyer it will be quite clear cut which is the most suitable forum. If the case is one of the few which are really marginal, representations can involve a knowledge of relevant case law and possibly the policy of the bench. An unrepresented person cannot realistically be expected to make such representations effectively.

The second stage of the process is to put the defendant to her/his election explaining that even if s/he decides to be dealt with by the magistrates they can still send the defendant to the Crown Court to be sentenced if they feel that their powers are insufficient having heard more about the defendant.

If the case is one of criminal damage, the procedure is even more complicated, since there is a preliminary stage of determination of the value of the goods.

13. At the time of the field work the procedure was contained in S20. Criminal Law Act 1977. This section is now repealed by the Magistrates' Courts Act 1980. Schedule 9.

Hardly surprisingly most defendants are utterly confused by this procedure. It appears to the defendant who is first asked for representations as to mode of trial, and then put to their election, that s/he is being asked the same question twice. As one clerk said

"You say it, and after the defendant has gaped at you for 5 minutes you give the long caution, and it seems to them to be the same thing twice. The judges don't see it that way, but the fact is that the defendant is utterly confused by it."

The reference to "the judges" was a reference to the decision in R v. Horseferry Road Justices Ex parte Constable in 1981.¹⁴ In that case the court granted an application for judicial review by a defendant who had not, it appeared, been given the opportunity to make representations as to mode of trial. Lord Justice Donaldson said that in such cases it was of fundamental importance that the procedures in what was then Section 20 of the Criminal Law Act be followed, and that it should be recorded by the court that the defendant had been given an opportunity to make representations.

This insistence that the letter of the section be followed results in a large number of very confused defendants. One clerk said

"... they just think you are repeating yourself, and they look at you as if you are quite mad."

Another commented

"The mode of trial procedure brought in in 1967 is just a joke. Even the most intelligent defendant couldn't understand it."

Some clerks even resorted to explaining to defendants that the procedure was bound to be confusing

"...so that one, in quite a jocular way, tries to tell him 'We're about to embark on something that's a bit silly - but it has a point and I'll explain it when we get to it'."

14. The Times 28.1.81.

Perhaps the ultimate irony for clerks is that there will almost never be any representations for the unrepresented defendant to make. If the case were one where the seriousness of the offence possibly merited trial on indictment the court would have taken care to see that the defendant saw a solicitor. This would have happened either when the defendant applied for legal aid, or if there was no such application, at an early court appearance, since the quick section 1 Criminal Justice Act 1967 procedure is only available for represented defendants, and neither court nor prosecution would wish to go through the extremely lengthy and complicated procedure of an old style committal with an unrepresented defendant. Thus if the offence were so serious that there was a possibility of committal on that basis it would be in everyones' interest to provide the defendant with legal representation.

The difficulties that clerks reported in explaining the procedure under Section 19 Magistrates' Courts Act 1980 to unrepresented defendants were confirmed by the court observations. It was patently obvious that most defendants did not understand the choices they were confronted with, however carefully they were explained. R v. Horseferry Road Justices Ex Parte Constable¹⁵ where Lord Justice Donaldson insisted that the letter of the Section must be followed had been decided just before the bulk of the field work took place. Some clerks were, therefore, faithfully following the correct procedure and giving the defendant the chance to make representations as to mode of trial before putting them to their election. The result of this was that many defendants were extremely confused.

There were other clerks who simply did not follow the procedure.

15. The Times 28.1.81. See discussion above.

Where the case was clearly suitable for summary trial the clerk simply did not ask the defendant to make representations, but asked prosecution and bench, and then put the defendant to her/his election. A typical example from the field notes is provided by the case of two defendants charged with stealing two car batteries. The clerk having read the charge, said 'Suitable summary trial, your worship?' the bench responded 'Yes' and the clerk proceeded immediately to ask the defendant if he elected trial by the magistrates or at the Crown Court. This happened at many of the courts observed. At one court a clerk sitting with a stipendiary magistrate attempted several times to ask the defendant for representations as to venue, only to be interrupted by the stipendiary magistrate who proceeded straight to election.

Section 19 of the Magistrates' Courts Act 1980 and the decision in the Horseferry Road Justices case of 1981 are generally regarded by clerks as unworkable and as unfair to unrepresented defendants. In some courts and by some clerks they are generally not followed. Clerks have been criticised for not helping unrepresented defendants¹⁶, and we shall shortly be criticising them for bypassing the unrepresented defendant and taking decisions in which the defendant should be involved but is not. However in relation to the mode of trial procedure it is very difficult to see how they can offer effective help. The procedure is such that it is only accessible to lawyers. With the best intentions it is difficult to see how the clerk can be effective in these circumstances. Despite the problems, the provisions which were introduced in Section 20 of the Criminal Law Act 1977 were re-enacted in the Magistrates' Courts Act 1980 without

16. For instance by M. King, Rights. Vol 1 No.1 above.

amendment. Indeed one would not wish to deprive the defendant, represented or not, of a right to make representations as to mode of trial, but the problem of understanding the procedure for unrepresented persons does re-inforce the need for representation and illustrates the inadequacy of the help that it is possible for the clerk to give.

Another area where clerks have a great deal of difficulty is in explaining to the the unrepresented defendant how to cross examine. One clerk said

"I try to explain it as well as I can, and I know that in some cases perhaps even my explaining just isn't good enough and they still don't understand."

A familiar sight to anyone with experience of magistrates' courts is a puzzled defendant, who has just heard the evidence of the first prosecution witness against him, and who is invited to ask questions. Almost invariably the defendant begins to tell his side of the story, only to be stopped and told that he will have a chance to speak later, but that now he should just ask questions. Many defendants have no idea at all of what they should do. One clerk explained his problem thus

"The biggest problem I think I find with unrepresented defendants is that when you ask them if they have any questions they wish to ask a witness they won't ask a question, they just launch into a statement that's their version of the facts. It's very difficult to control them... because its so difficult for them to frame a question, and generally you've got to let them say what they want to say, so you get an idea of what their case is and from that hopefully try and put a question to the witness."

Even if the clerk helps in this way, s/he cannot, of course actually cross examine, since to do so would be to descend into the arena. The clerk can only assist the defendant to frame questions to ask the witnesses. There are also technical problems, in that the defemce may involve an attack on the prosecution witnesses' character. It is

extremely difficult for the clerk to explain to an unrepresented defendant that if he calls the policeman a liar or suggests that the stolen property was placed in the boot of his car by the prosecution witness then her/his character is in issue, without running the risk that the defendant will say things which s/he would be ill advised to say.

In R v Weston Super Mare JJ. Ex parte Townsend¹⁷ it was said that in such circumstances the prosecutor should ask for an adjournment and, in the justices' absence, enlist the help of the clerk in warning the defendant of the risk he runs. This, of course may solve the problem if done promptly, but may be difficult if the prosecutor is not a qualified lawyer, but is a policeman conducting his own prosecution.

Many other issues where defendants have difficulty in understanding were mentioned by clerks. They included understanding the choices open to them in making their defence, understanding the nature of hearsay evidence, unconditional and conditional bail and special reasons for not disqualifying a motoring offender.

Where defendants continue to be unrepresented, the way the clerk goes about explaining all these issues, the amount of skill and patience displayed by the clerk will be extremely important. How well do clerks do these jobs?

How well do clerks assist the unrepresented?

As we have already mentioned, the existing research suggests that clerks may not be very good at assisting unrepresented defendants. The O.P.C.S. Survey of 1976¹⁸ carried out for the Interdepartmental

17. [1968] 3 All E.R. 225.

18. Gregory J. 'Crown Court or Magistrates' Court.' O.P.C.S. 1976.

Committee on the Distribution of Criminal Business showed that significant numbers of defendants charged with hybrid offences did not even realise that they had made a choice of venue. The Report of the Interdepartmental Committee stressed that "It is of the utmost importance that in deciding whether to consent to summary trial the defendant should be provided with the information necessary to enable him to make an informed decision"¹⁹ and it proposed that the wording used by clerks should be simplified.²⁰ However the provisions of Section 19 of the Magistrates' Courts' Act 1980 complicate the problem rather than simplifying it by adding the procedure for making representations as to mode of trial. The wording of the section as to procedure for election is still very similar to the original wording in Section 19 of the Magistrates' Courts' Act 1952.

19. Cmnd 6 323 Para. 188

20. Ibid Appendix 1.

PROPOSED WORDING OF THE EXPLANATION GIVEN IN COURT BY THE CLERK
TO A PERSON CHARGED WITH AN INTERMEDIATE OFFENCE

You are here to answer a charge than can be tried either by the magistrate(s) here or by a judge and jury at the Crown Court. Have you had a notice explaining this?

You have the chance now to say whether you agree to be tried here or whether you would rather your case was heard before a judge and jury.

[Before deciding, you may want to see a solicitor. If so, the court can adjourn to enable you to do that.]

You should know that if you ask this court to deal with your case now and if you plead guilty or are found guilty, the magistrate(s) has(have) the power to send you to the Crown Court for a sentence which might be higher than the one he is (they are) allowed to give you here.

Now would you answer this (these) question(s). [Do you want to see a solicitor? If not, where do you want to be tried, here or before a judge and jury?]

Bottoms and Mclean's study of unrepresented defendants reported clerks delivering the caution as to choice of venue with little regard for the comprehension of the defendant and at great speed, with the result that many defendants who chose summary trial did not realise what they had done.²¹

A study by Michael King²² covered 76 courts and had the advantage of taking place when the courts surveyed did not know that they were being observed. Students recorded details of a total of 782 cases. The cases observed ranged from murder to more serious motoring offences, the criterion for inclusion in the sample being that the defendant appeared in court. 410 cases were cases where the defendant was not represented, and in 300 of them the defendant pleaded guilty. When asked if they had anything to say in mitigation 62% of defendants said nothing or simply apologised. In only about one third of cases (100) was the defendant helped by the clerk. The magistrates gave help in 60 cases. In some of the cases clerks were observed to help over plea, and mitigation. In other cases, although the defendant appeared to the observer to need help, s/he got none.

The results of such studies reveal cause for concern. It appears from them that some defendants who need help are not being assisted by clerks, although other defendants are being helped. It is interesting therefore, to try to assess what factors may affect the question of whether or not the clerk assists unrepresented defendants.

In the courts observed for this survey there was no real difference in attitude or approach to unrepresented defendants between courts. It was not the case that all or most clerks at one court

21. A.L. Bottoms and J.D. McLean. 'Defendants in the Criminal Process' Routledge and Kegan Paul. 1976.

22. Magistrates' Courts Surveyed. Rights Vol.1. No.1 (1976)

were helpful, and all or most at another were unhelpful - but there were striking differences between individual clerks. It was possible to find, for instance, a court where the clerk to the justices was remarkable for his patience and kindness to unrepresented persons, and who made it plain that he stressed the necessity of taking such trouble to his staff, but where nevertheless there would also be one of those staff who characteristically dealt with defendants in a perfunctory and offhand manner.

To give a more detailed example, one could go into one court, and find a clerk who put choice of venue to an unrepresented party thus

"Mr. Jones, you can either have this case dealt with summarily or on indictment. If you chose summary trial then I must tell you that the magistrates may, when they have heard about your character and antecedents, commit you to the higher court for sentence. Where do you wish to be dealt with?"

- all this delivered at speed

However one could go into the courtroom next door and find a clerk who would say

"Mr. Jones, you have got a choice. You can have this case dealt with by this court, by the magistrates here. Or you can have it dealt with at the Crown Court, which means you will go before judge and jury. Do you understand? Now if you decide to have it dealt with here, and you are found guilty, I should tell you that the magistrates can still send you to the higher court to be sentenced, if they think that their powers to sentence you aren't enough."

- this delivered slowly and carefully with frequent checks to see that the defendant heard and understood.

We shall later (in Chapters 8 and 9) argue that the clerk to the justices has a very considerable influence on the policies operated by her/his court, and certainly the attitude of the clerk to the justices towards unrepresented people will affect that of junior staff that s/he trains. However it seems here that the character and aptitude

of the individual clerk is a more important factor in affecting how sympathetically that clerk deals with people who are unrepresented.

Undoubtedly the court observation did reveal some examples of very bad clerking. In one case at Court E a defendant appeared who admitted an offence of using a vehicle without tax, but disputed the amount of back tax he was liable to pay. The clerk administered the oath and proceeded to examine the defendant. His manner was irritable, he continually interrupted the defendant, snapped at him, used jargon which the defendant patently did not understand and made the defendant look stupid. The defendant was then cross-examined by the police inspector. It was a perfect example of how not to help an unrepresented party.

At Court B another regrettable incident illustrates the problems of a bad clerk. A woman - an ordinary citizen - was bringing a prosecution for assault occasioning actual bodily harm. She and the defendant were ushered into court. The clerk asked the woman 'What is happening today?' The woman looked confused and said 'I just want him dealt with for pushing my son in the river.' The clerk said sharply 'What is happening today?' The woman obviously did not understand. The clerk sighed. 'Perhaps the police can help us?' A policeman said she should ask for summary trial. The woman obviously did not understand and stood silent. The defendant was represented by counsel, and counsel submitted that it was a suitable case for the defendant to be bound over. A conversation between the clerk and counsel took place as to what should be done with the charge. Eventually the clerk said to the woman 'Do you understand what is happening?' She, not surprisingly, said 'No, not really.' The clerk explained, and invited her to withdraw her charge. She said 'Alright I just don't want it to happen to any other child'.

The defendant was bound over, but the woman obviously had not understood what had happened to her case.

In Court A a plea of not guilty in a driving case was taken. The clerk said that in view of the plea the case could not be heard on that day and he and the prosecutor between them fixed up a date for a hearing. Several times the defendant tried to speak, but was ignored. Eventually he said 'Can I say something about that?' The clerk replied 'No - you can't waste our time now.' The defendant said 'But I'll be in America on that date!' The clerk snapped 'Well why didn't you say that!' The defendant had been trying to do so for some time!

However incidents such as these were balanced by incidents where clerks went out of their way to be helpful. In another case at Court B, a clerk helped two unrepresented lads to make a submission of no case to answer which secured that the case was dismissed. At Court A, a clerk never once failed to speak gently and considerately to a defendant who screamed abuse at him, refused to answer his questions, and finally spat his false teeth out at the prosecuting solicitor!

At Court D, a lad of 18 denied a complaint for breach of the peace. The clerk took trouble to find out if the lad wanted to be represented. The lad said he had been refused legal aid but "I have been told there is a precedent called McKenzie's friend whereby I can have someone with me, and if that's so I'd like my father." The clerk smiled, rose and explained to the bench what a MacKenzie's friend was and asked if they agreed to the father so acting. They did. Throughout the case the clerk was extremely helpful to the defendant. The defendant was very articulate, and very competent as an advocate. When the time came for the defendant to give evidence

the clerk said 'It seems to me you are very competent to go through the evidence yourself'. The defendant did so. There came a point where he began to give hearsay evidence. The clerk stopped him, and said 'Now - just a minute - there are rules of evidence about saying what other people have said'. The defendant said 'Oh - well - if I can just say quickly what I wanted to say.' The clerk said 'Well if it's inadmissible it doesn't matter how quickly you say it. Will it help if you say what you did as a result of what you were told?' The defendant replied 'Yes, that will help' and proceeded with his evidence. Throughout the clerk's manner was patient and gentle and he assisted the lad in the presentation of his case, explaining carefully and in words that the defendant would understand. The case against the defendant was dismissed. The clerk commented afterwards that the defendant had done very well indeed, and that he had enjoyed seeing how a MacKenzie man case worked in practice. He regarded the case as an interesting change in routine, not in any way as a nuisance or a waste of time.

This study did not aim to quantify the cases where the clerk helped the unrepresented defendant. However the field notes, which are mostly verbatim records, contain far more examples of clerks being helpful than of clerks being obstructive. Certainly defendants who were not represented were helped on more than one third of the occasions when help might be needed and so the results compare favourably with those of King's study. The quality of help was very variable - it varied with the individual clerks, their sensitivity, patience, confidence, rather than from court to court.

However having said this, the opinion of some clerks as to the quality of service they gave to unrepresented defendants was unrealistically high indeed.

Clerks opinions of their effectiveness

Clerks in the sample were asked whether or not they thought that the clerk could help an unrepresented defendant to present his case as effectively as if the defendant were represented. Not surprisingly 76% of clerks said that they could not be as effective as a solicitor or barrister appearing for the defendant. The reasons they gave were that the clerk had had no instructions. One put it

"However much the clerk can try and assist him it can never be as good as having had a solicitor who knows what he wants to say, and knows how best to put it to the court in his client's interests - because the clerk has not interviewed him beforehand and the clerk doesn't know if there might be some real terrible reason that he doesn't want to tell the court. If you try and help him to come out with some explanation you might be making things worse for him."

Another reason mentioned was that the clerk "Can't serve two masters", and cannot act as an advocate would in challenging the prosecution's case.

"The best the clerk can do is ensure that no miscarriage of justice is carried out."

Amongst this 76% of clerks, there were however some who thought that the service provided by the clerk was, despite its limitations, good enough.

"I think he can do it well enough usually... I'm talking about the sort of case where the ordinary prudent man wouldn't waste his money on a solicitor. Where he would, then legal aid would normally be granted."

"... taking into consideration the costs, the time, public funds, I think a clerk is quite a reasonably good substitute in simple cases."

There were others who thought that the service was not only good enough, but better than that which defendants might otherwise receive! One clerk, although he thought that theoretically the clerk could not give as good a service as a solicitor or barrister appearing for the defendant, nevertheless said

"I can think of a lot of cases where a clerk's done a lot better than a solicitor or barrister would have done in my view in that particular case."

This clerk's reply was very close to those of the 24% of clerks who did think that the clerk could be as effective as a solicitor or barrister appearing for the defendant!

Some of the 24% qualified their answers by saying that the clerk could only be as effective if the case was not very complicated. One clerk said that assistance from the clerk was better because the bench were better able to appraise the defendant.

"I can't help feeling that sometimes an unrepresented defendant will come over more sincerely in his story than perhaps an advocate who the bench have heard standing up on his feet giving mitigation three or four times before that morning - and every day for the last week. It has a ring of truth about it perhaps if the defendant puts it forward in his own stunted words."

Other clerks had a very low opinion of the level of help given by the legal profession.

"I think very frequently the clerk can do a lot better than a young barrister who is doing legal aid and hasn't prepared his case."

"... with some advocates its often been said that he's better off with assistance from the clerk than he might have been being represented by a particular solicitor."

But however one rationalises it, it does seem rather an overestimation of the clerk's abilities to say that the clerk will be as good as a defence advocate. We have examined the sorts of problems that the clerk faces in assisting unrepresented persons. Add to these the fact that the clerk has taken no instructions and thus does not know the nature of the defence, or mitigation and it is obvious that the clerk has a formidable task if s/he is trying to be as effective as a defence advocate.

The attitude of some of the clerks, that they could not be as effective as a legal representative but that the help they gave was

good enough, is absolutely typical of the liberal bureaucrat. These clerks felt that the justice that defendants were getting was "good enough" in the circumstances. The clerk who said that "taking into consideration the costs, the time, and public funds" he thought that the clerk's help was satisfactory was typifying the attitude that whilst it is important that the defendant be protected, nevertheless the system does not need to become bogged down with unnecessary frills. The clerk's help is "good enough" in the circumstances.

By limiting legal aid in magistrates' courts governments have, in effect, taken the decision that the clerk's assistance is sufficient. Even duty solicitor schemes do not solve the problem for a significant number of defendants. In reality sometimes the clerk's help is good, sometimes it is not. It cannot be as good as an efficient defence advocate would be. We have in fact, a system of "good enough" justice which is sometimes not even "good enough"!

The frustrated advocate

We have shown that the assistance given by the clerk to defendants who are unrepresented varies from abysmal to good.

Similarly the attitudes of clerks towards the task of helping unrepresented persons varies from enthusiastic to negative. The clerks in the sample were asked if they enjoyed helping unrepresented defendants. Most seemed rather taken aback that this question should be asked - but the results were interesting. 58% responded positively, saying that they did enjoy the task; 22% responded negatively and the other 20% said that it was "just part of the job".

The replies of this last 20% were very uniform - they professed no feelings about the task, it was something that was part of the job, so they did it.

The reasons given by those who did not enjoy helping unrepresented defendants were very varied. Some said that they simply did not want to have to do it.

"... I find it a bit of a bind actually if the truth were known." Others said that they didn't enjoy it because it was a "a pretty thankless job" and that defendants were aggressive and ungrateful. However two of the clerks who said they didn't enjoy helping defendants said that their lack of enjoyment sprang from the fact that they were always conscious that they could not do a proper job, that they were unable to be as effective as a legal representative of the defendant.

The majority, who responded positively, contained a fair proportion of "frustrated advocates" - clerks who enjoyed helping the defendant because they enjoyed advocacy, they saw it as a challenge, as 'helping the underdog'.

"I get enjoyment out of helping the person as against the solicitor on the other side and I feel its only in the interests of justice that he should be helped to an equal extent as the other party."

"Absolutely - I mean first and foremost I'm an advocate... I welcome the opportunity to help unrepresented defendants - and unrepresented prosecutors. And its a great challenge and very satisfying, and its a sort of frustrated barrister coming out."

One clerk who had practised at the bar before becoming a court clerk said that his problem was that he was tempted to go too far in helping defendants. These "frustrated advocates" placed a great deal more emphasis on the due process aspects of their role than other clerks. Those clerks who did not enjoy helping unrepresented defendants tended more towards a crime control model emphasising a desire to process cases as smoothly and quickly as possible and seeing nervous unrepresented people as hampering their task of processing the day's list.

By-passing the defendant.

The problem of the pressure under which courts operate has a significant effect on the help that unrepresented defendants receive. The pressure to get through the list conflicts with the clerk's duty to protect the unrepresented defendant.

The clerk's job is defined by statute (in a provision fought hard for by clerks)²³ as that of legal adviser to the magistrates. The clerk is the court's lawyer, and as such has to preserve the lay magistrates from mistakes - preserve their legitimacy in the face of attacks upon it. The clerk is also responsible for running the organisation of the court, and often this entails processing a long list of cases under pressure of time. We have seen that maintaining the organisation of the court can come into conflict with protecting the bench, and that in some circumstances the bench may be abandoned. Protecting the bench, and running the organisation can also come into conflict with the third aspect of the clerk's role - the role of guardian of due process. The clerk must see that the rules of due process are followed to a greater or lesser extent, and this becomes a particularly difficult problem in relation to the unrepresented defendant. By their nature, unrepresented defendants have no-one to protect their due process rights except the clerk. But the clerk has to balance the need to assist unrepresented parties against the need to get through the list of cases. And if unrepresented parties are to be given full protection a great deal of time must be taken up - a far greater amount of time than if they were represented, since if they were given solicitors or counsel the usual time saving jargon and procedures could be used without the necessity of explaining every step to the defendant.

23. Justices of the Peace Act, 1968. Section 5(3)

This can result in the clerk, usually in collusion with the bench and with legal representatives bypassing the defendant and arriving at a solution which all perceive as just, but which saves the time of explaining the situation to the defendant.

An illustration of this process is afforded by the case cited above of the woman who was prosecuting a defendant for actual bodily harm after an incident in which she alleged that the defendant had pushed her child into the river. The result - of binding over the defendant - was possibly a just one, but it was arrived at consensually by clerk, advocate and bench, bypassing the lack of comprehension of the woman making the complaint.

The same type of incident occurred in many cases - the clerk's definition of protecting the defendant being to arrive at what the clerk and possibly other lawyers agreed to be a just result, without regard for the fact that the defendant did not understand what has happened.

In one case at Court C a 17 year old was charged with criminal damage - breaking a window. When asked for his plea he waved his arms around vaguely and said 'Er - guilty'

Clerk: I'm sorry, did you say guilty or not guilty?

Defendant: Err.....

The defendant's friend from the back of the court shouted "Yer guilty Jim!"

Defendant: I just tapped it.

Jailer: Did you do it, or didn't you".

Defendant: Yes

Jailer: Guilty Sir

Clerk: We can always change it sir.

Bench: Yes, yes.

The policeman in charge of the case outlined the case against the defendant

Clerk: (to defendant) Do you agree?

Defendant: No - I didn't mean to smash it.

Clerk: Did you hit it and not care if it smashed?

Defendant: No, I just tapped it.

Clerk: (to bench) In that case I would advise you not to accept the plea.

The clerk then explained to the defendant that the case would have to be adjourned.

Defendant: Do I have to pay a fine?

Clerk: No, no not yet - if at all

Defendant: Am I getting sent away?

Clerk: Sighs 'No - you aren't getting sent anywhere'
(Indicates probation officer) Just speak to this man.
He'll explain it to you.

Defendant: Yeah - am I gettin' sent away?

Clerk: No, no no-one's sending you away. Just go with this man and he'll explain what happened.

Patently the defendant did not understand what had happened - but the decision was taken without his participation and the time for explanations had to wait until he was outside the court. The decision could in itself hardly be described as an unjust one - had the defendant been represented it would almost certainly have been the same since the prosecution did not have its witnesses at the court and could not have proceeded on that day. Yet it was a decision arrived at whilst the defendant was no more than a bystander to the process. Explaining to the defendant would have taken a great deal of time, and

the court was not prepared to spend that amount of time on the defendant's comprehension of events. The clerk, the bench, the prosecution were satisfied that justice had been done. That was what mattered.

Due Process and Organisational Maintenance

We have shown that most clerks do understand the problems faced by unrepresented defendants, and that although they have an inflated idea of their own effectiveness many clerks do help the unrepresented and enjoy doing it. It is also obvious from our discussion of the data so far that there are clerks who are not helpful to the unrepresented. There are those who are obstructive and impatient, who are lacking in understanding or sympathy and who are prepared to bypass the defendants lack of comprehension. These variations cannot be accounted for on a court to court basis, as individual clerks at the same court vary widely in their approach.

What then makes some clerks enthusiastic and more effective protectors of the defendants rights and others less effective?

The answer to this question lies not only with the individual personalities and talents of clerks, but also with the way in which clerks respond to the pressures of organisational maintenance.

Even though clerks might be keen to help an unrepresented defendant, doing so takes up time. If the court is operating under pressure to get through a list of cases, time is at a premium. One clerk's comment sums up the difficulties. She said that it was too easy to forget that defendants were nervous and did not understand what was going on around them.

"You've got to be prepared to repeat things. In a busy court it is difficult because everybody else is so anxious to get on and get through - even the magistrates sometimes."

A clerk who wishes to spend time helping a nervous inarticulate defendant has to do so in the face of advocates, police officers, witnesses, magistrates, other defendants who wish to have the day's business dealt with quickly. Their sympathy for what the clerk is trying to do may not be very great.

How much help the defendants receive will depend on where the clerk makes the compromise between the conflicting demands of protecting the defendant's rights and processing cases quickly. Where the compromise is made depends on many factors.

One is the confidence and status of the clerk. At Court B for instance the clerk to the justices was known to lean heavily in favour of the liberal due process aspects of his role. He was known always to take a long time helping unrepresented parties, and was very unpopular with police because he occasionally secured an acquittal against them and because he took such a long time in court. His attitude strongly conflicted with the crime control values of the police. No-one could hurry this clerk - not even the bench since he had trained them, and was a much respected figure. At the same court, however a heavy workload put pressure on the clerks to hurry, and police, ushers and even the bench could pressure other, less experienced and respected clerks to get through the list quickly.

The actual pressure of business is a very important factor. Several clerks mentioned, for instance, that they very much enjoyed helping juveniles since there was less pressure of business in the juvenile court. The adequacy of staffing, a sufficient number of magistrates to sit on cases, and the adequacy of accommodation may also be factors which affect workload in a court, and affect the willingness or ability of clerks to give proper help to those who are not represented.

It may also be that clerks who are professionally qualified and experienced as advocates will be more confident in helping unrepresented defendants. Apart from any such professional experience, clerks are not likely to have experience or training in the art of advocacy.

The ability to express complicated ideas, and jargon in simple easily understood words is crucial to the clerk's role and is also another part of the clerk's job for which they receive no training.

All of these factors determine where the individual clerk makes the compromise between the competing demands of her/his role - and determine the quality of help received by that percentage of defendants who are dealt with by magistrates' courts and who are not legally represented.

The implication of this is that if we are to protect the interests of unrepresented defendants effectively, it is necessary to pay particular attention to the quality of clerking. This must include not only examining the training and qualifications of clerks, but also the pressures of the court organisation. Inadequate facilities, insufficient staff, increasing workload are not simply crosses which clerks to the justices have to bear. They affect the question of whether defendants in magistrates' courts are getting a minimum of help - are getting the possibility of justice.

Duty Solicitors - a gift to the Liberal Bureaucrat

The attitude of clerks to their role as guardian of due process rules is perhaps best revealed in the attitude of clerks to duty solicitor schemes.

64% of the clerks interviewed had experience of duty solicitor schemes. Only 4% found them unsuccessful. The rest were in favour

of them, and many were enthusiastic about them.

One might have thought that clerks would have reservations about such schemes. Not all courts have duty solicitor schemes, and we shall see later that the relationship between clerks and advocates is not good. However clerks did not have reservations about duty solicitor schemes. They reported that such schemes made their jobs easier for three basic reasons - the duty solicitor relieved them of difficult defendants, allowed them to stop worrying about injustices to confused defendants and saved time.

So far as difficult defendants were concerned, many clerks explained that the problem of equivocal pleaders could be solved by referring them to the solicitor. Clerk after clerk mentioned the problem of the lady shoplifter - typically a middle aged woman charged with stealing small items from a store who comes into court and pleads guilty, but then says that she did not intend to take the goods, she is "under the doctor" nervous, confused. Such defendants simply cannot understand what the clerk is explaining to them in open court about intention in theft, and will often oppose entering a plea of not guilty because it means an adjournment, with the case hanging over them for several weeks. The clerk will also be aware that such women will probably consult a solicitor and appear again in court a few weeks later, represented and pleading guilty. Where a scheme is operating, such defendants can be referred to the duty solicitor for immediate advice. The clerk is relieved of a difficult task and the defendant's rights protected. Clerks also mentioned disturbed defendants and defendants with speech impediments as candidates for referral to the duty solicitor.

Clerks were not necessarily cynical about using the duty solicitor in such circumstances. Many were genuinely concerned that

the situation in court did not allow defendants to do themselves justice. One clerk said

"It makes you happier because you know things are all right and people have had advice if they've needed it."

Another pointed out with satisfaction that

"Remanding people in custody without representation no longer exists here."

However the most significant factor about duty solicitor schemes for clerks was that they saved time. One clerk said

"It must be better for the clerk if the defendant is represented. It saves a lot of time wasting."

Another said that if a defendant came up with a point of law

"Rather than explain all that, which takes a long time because you have to go into three or four areas of law and it gets quite complicated, it's best to refer him to a solicitor. It saves a lot of time."

Representation, or on the spot referral relieves clerks of the burden of difficult explanations, but above all saves the time that such explanations take, and also allows clerks to plan the work of the court.

"It makes sure and certain at the earliest moment in time - like the first hearing or at least the second hearing - absolutely what is happening in that case, and in fact promotes the avoidance of delays and efficient despatch of business, within courts. Fantastic! Fantastic scheme, and most welcome in these courts."

These were the words of the clerk to the justices of a busy court.

Clerks feel the conflicts of their roles very sharply - and thus are only too pleased to shed their role as protector of due process for the defendant where this is possible.

The clerk as prosecutor

"There is one situation in which even the mildest of clerks assume a tough manner and brusque ones really let rip. This is when the court is dealing with fine defaulters or husbands who have refused to pay maintenance, where terror inducing tactics are the normal tool"²⁴

24. Burney. p.145.

This was Burney's observation of situations where the clerk acts as prosecutor. It is the responsibility of the clerk to the justices to collect the fines and other monies due to be paid into the court. If defendants default in their payment, there are procedures for inducing them to pay. This process and the influence of the clerk over it will be discussed in Chapter Nine. One part of the process is to bring the defendant back before the court to discover why s/he has not paid. The powers of the court to dispose of those who have not paid include, in certain circumstances, imprisonment - either suspended or immediate.

When such defendants come before the court, the clerk is the one who has brought them there, and is the one responsible for discovering why they have transgressed. The clerk is therefore placed in a situation very much like that of a prosecutor.

Burney's observation that usually mild clerks can become tough in such situations appears from this survey to be quite accurate. For instance in one case in Court C, a clerk with a usually patient and gentle demeanour, and who had half an hour earlier taken much time and trouble with an inarticulate atheist defendant who did not wish to take an oath, proceeded to deal with a fine defaulter. The defaulter was brought before the court and the clerk outlined fines which had remained unpaid for several months. The defendant said he had had a cold. The clerk asked sarcastically if he had had a cold since December. The defendant said he had. The exchange then proceeded as follows:

Clerk: You just ignored this, didn't you?

Defendant: Umm, yeah.

Clerk: Is there any reason the magistrates shouldn't send you
 to prison now?

Defendant: What?

Clerk: (with emphasis) Is - there - any - reason - the -
magistrates - shouldn't - send - you - to - prison -
now?

Defendant: Umm ... er...

Clerk: It carries 51 days sir.

Bench: You will go to prison for 51 days.

Clerk: Go with the officer.

The clerk's manner throughout was sarcastic, and uncompromising. Doubtless the court knew what the defendant did not - that the police would not wish to take the time and trouble to transport the defendant to prison, and that he would be encouraged to borrow the money and pay the fine then and there. However the exchanges reported above were the sum total of the case and no enquiry took place as to what the defendant's means actually were.

Such cases were by no means unusual. Clerks were, almost without exception, severe and uncompromising with fine defaulters. They were, and acted as if they were, prosecutors. They lost any identification with the defendant. Despite the fact that sentences of immediate imprisonment were passed far more frequently on fine default cases than in any other type of case - or in fact all other types of case put together - there was almost never anyone in court to ensure that the defendant's rights were protected. Research by NACRO²⁵ has shown that a significant proportion of short stay prisoners are in prison for non-payment of fines and maintenance. Those who are there for non payment of fines have been, in effect 'prosecuted' for their non-payment by the clerk to the justices, and have been sent to prison without even the clerk's protection in

25. G. Wilkins. 'Making them Pay', NACRO 1979

putting their case. (The influence of the clerk to the justices on court policy in relation to fine defaulters is discussed in Chapter Nine.)

Not only did clerks behave like prosecutors towards defendants they also suggested means of disposal to the bench, whispered to the bench whilst the bench reached a decision, and retired with the bench. Such a state of affairs is highly unsatisfactory.

However even clerks who appeared severe with fine defaulters had their limits. One was unfailingly sympathetic to single parents with small children. At another court, court B there was a magistrate who became noticeably enlivened when she had to deal with fine default cases. She was responsible for a large number of immediate committals to prison. After one such case she was heard to remark in open court that it would teach the defendant a lesson and it was a pity that they did not give them haircuts nowadays! She was observed to commit forthwith for non-payment a young woman whose baby and toddler were just outside court waiting for her. She had neglected to make any enquiries as to the circumstances of the defendant before committing her. Clerks who sat with this chairwoman took a tolerant and helpful attitude to defendants - as if to redress the balance. It was not that they objected to defendants being imprisoned, but that they wanted it to be done only after the correct procedures had been followed, and other alternatives explored.

At some courts fine default cases were dealt with by a separate court. At others fine defaulters were dealt with in between other cases. Any unrepresented party observing the clerk dealing with fine defaulters in the way some clerks did could have had little confidence in the clerk's sympathy or willingness to help them.

Dealing with such cases in a separate court is therefore to be

encouraged but it does not dispose of the problem of the high number of immediate committals to prison which occur in these courts without defendants having the benefit even of assistance from the clerk.

Conclusion

There is a large number of factors which affect the likelihood that the unrepresented defendant will be given effective help by the clerk.

First there is the complexity of the law itself. Clerks rightly point to the difficulty of explaining some procedures, concepts and skills to unrepresented defendants. The procedure for determining mode of trial is the example which was examined in detail. It must be difficult, if not impossible, to explain this procedure to a nervous defendant who is called upon to take a decision s/he may well be unprepared for. It is perhaps not surprising that surveys found defendants who had not understood this procedure. It may well have been that the complexity of the procedure and their nervousness meant that they would not have understood, however well the issue was put to them. This is a strong argument in favour of representation for defendants charged with hybrid offences, because the assistance given by the clerk will rarely be effective.

The second factor is the attitude of the clerk to the justices and the training s/he gives to court clerks. The clerks to the justices can, and do, have significant effect on the attitudes of their staff, particularly those staff who are articulated to them or trained by them. A clerk to the justices who emphasises the need to take time and have patience with people who are unrepresented will produce trainees with different attitudes to one who emphasises the need to get through the list of cases. However the clerk does not

determine the abilities of her/his staff, and it certainly appears that the clerk to the justices attitudes do not have such significant effect that there are noticeable differences between different courts. The variations are more marked from clerk to clerk than from court to court.

An important factor is the aptitude of individual clerks. Some are sympathetic, patient and adept at explaining things in simple terms. Others are not so skilled. These are factors which should be taken into account when selecting clerks for the job. However if courts are to have a healthy number of properly qualified applicants from which to choose clerks, improvements in status and salary are needed. There is no specialist training for court clerks except the Diploma course, which covers magisterial law. The Diploma is not taken by all clerks - more and more of them are professionally qualified. Clerking is a specialised skill even for the legal profession and specialist training, including the aspect of assistance to the unrepresented, would help.

The character of the individual clerk is, however, a small part of the problem. Possibly the most influential of all the factors which impinge on the quality of service offered to defendants is the pressure of work at the court. The clerk is, as we have said, responsible for running the court organisation. Many courts operate under pressure. The need to process a lengthy list of cases conflicts with the needs of defendants for time and patience. The greater the pressure of work, the less time there is for the defendant. Therefore factors such as availability of staff, availability of magistrates, court accommodation, all affect the likelihood that the unrepresented defendant will receive the help s/he needs.

The likelihood that the clerk will take the time in court to help people who are not represented can also be affected by the experience, confidence and status of the clerk. The pressures of work affect many court users. The magistrates, the legal profession, the police and the queue of waiting defendants all want their cases heard and to get away to other tasks. They can exert very direct pressure - even on a clerk who is willing to be patient with defendants - to speed up the proceedings. However these pressures are more easily exerted on younger less experienced clerks than on more senior clerks. This factor can account in large measure for the differences which may be perceived in different courts in the same building. No-one will be able to hurry a clerk to the justices who thinks it worth spending time on a case. Very many people may pressurise a new or inexperienced or less than confident clerk.

The clerk's ability to protect the due process rights of the defendant is therefore affected by many variables. If a substantial number of defendants in magistrates' courts are to remain unrepresented, protection of their rights depends upon relieving pressures of workload, and on prioritising improvements in the clerk's relationship with the unrepresented defendant, including procedures for selecting and training clerks and magistrates and educating other participants in the criminal justice process.

CHAPTER FIVE

THE CLERK AND THE POLICE

The range of police participation in court

Control of time - manipulating the court list

Problems of police advocacy

The clerk as legal adviser to the police

The relationship between clerk and police out of court

Conclusions

The Clerk and the Police

In her analysis of 'Magistrates' Justice'¹ Pat Carlen emphasised the importance of control of time in court. She showed the courts working under pressure, and demonstrated the advantages that accrue to those who work in the courts from completing the list of cases quickly. She stressed the problems for defendants unable to understand the reasons for the order in which cases are called, unable to see the logic behind transfers of cases from one court to another or the reasons why they had to wait several hours for their cases to be heard.

Control of timing in magistrates' courts she ascribed to the police.

"During judicial proceedings in magistrates' courts the timing of events is monopolised by the police. They are the ones who set up the proceedings, it is their responsibility to see that defendants arrive at court; it is their job to draw up the charge sheets; it is their job to ensure that all relevant documents are in the hands of the clerk of the court. And policemen are very jealous of their competence in programming the criminal business."²

Carlen was perfectly correct in pointing to the importance of the control of time - particularly control of the list of cases and when they are called. In all courts, for each court session, there will be a list of cases to be heard. All of the participants in these cases will be summoned to appear at the same time (usually 10.00 or 10.30 in the morning.) Inevitably some cases will be taken early in the list and some later, the participants in the later cases having to wait unproductively for their case to be called. Most participants will wish to get away from court quickly. Defendants and witnesses will wish to return to their jobs. Advocates will wish to get back to

1. Carlen P. 'Magistrates' Justice', Martin Robertson 1976.

2. Carlen p.25

offices or other courts. The police will have duties elsewhere. Most people waiting in court will want their case to be given priority, so that they can get away. Also there are advantages for everyone if the court deals speedily with the list. A slow court can mean that cases have to wait until the afternoon to be heard, and this may mean missed lunch appointments, lost pay, clients waiting for solicitors who are still at court. Control of the list is therefore a powerful position to hold - both in respect of the order in which cases are called, and in respect of the speed with which they are called.

However, Carlen was mistaken in ascribing control of the list to the police. Carlen's research took place in courts in Inner London and to a large extent the role played by police in Inner London courts is different to their role in most magistrates' courts throughout the country. The police may have controlled the timing of cases in the courts surveyed by Carlen, but they do not do so in all courts. In the majority of courts it is in fact the clerk or the court staff who control the calling of the list of cases. The participation of the police in courts is very different from court to court. In some the police do very little, in others they do a great deal. The extent of their participation in court is very important in determining how much control or influence over the court proceedings they actually have.

We therefore need first to look at what jobs police actually do in court.

The range of police participation in court

The police can, and do, have a wide range of different roles in court. In some courts they do very little, in other courts they do a great deal, including controlling the list of cases.

At all of the eleven courts studied the police were, hardly surprisingly, responsible for serving summonses and executing warrants.

Even in relation to this task, however, there were variations from court to court, in that at some courts the "warrant office" (the police office from which summonses are served and warrants executed) was in the court building and its staff had other jobs in the court, but at others the warrant office was entirely separate from the court.

Also common to all courts was that the police acted as gaolers dealing with all defendants in custody.

At only two courts the police played no role in the prosecution of defendants in court. At the other nine courts the police played some role in the prosecution of cases, but the nature of this role varied very widely indeed. At five of these courts the police supplemented the work of the local prosecuting solicitor's department. The prosecutor's department would supply one or more solicitors to the court on each day, and these solicitors would be assisted by police prosecutors. The nature of this assistance was not the same for each court. At most of the five courts the prosecuting solicitors dealt with contested cases and more serious crime, whilst the policemen dealt with minor traffic cases. However a different system operated at Court E where a policeman (not in uniform) sat with the prosecuting solicitor in every court, feeding the prosecutor relevant information, files, records, but did not prosecute himself. At Court F the prosecuting police inspector enjoyed a good reputation with the clerks, one of whom said

"I personally prefer to see the police inspector in court. I think very often they are as competent if not more competent than the prosecuting solicitor."

It appeared that, because of this man's reputation the division of cases between the courts sometimes meant that he dealt with the more serious cases.

The remaining four courts were London Courts. In these courts, although the Metropolitan Police Solicitor sometimes represented the police, more often than not each policeman or policewoman prosecuted her/his own cases. Court B, however, had police presenting officers who dealt with uncontested matters. The other three courts had no court presenting officers although the court inspector advised inexperienced officers.

At only five courts out of the eleven surveyed the police acted as ushers. They collected and collated information about who was present at court and what was happening in their cases. They ushered people in and out of court, administered oaths and shuffled papers back and forth to appropriate courts. Of these five courts, four were the courts in the London area. The other was a large city court, Court G.

At only four courts were the police in charge of calling the list, i.e. determining the order in which cases were dealt with by the court. Court G was one of these, and three of the four London courts were the others.

The above information is more easily digestible in diagrammatic form. [See page 293, over]

These variations in the role of the police in court were very important in determining the impression created by the court.

Magistrates' courts used to be called police courts. Some older court buildings have the words 'Police Court' engraved in the stonework. It is, however, an image that magistrates' courts have tried to escape. Some courts have done so much more successfully than others.

At Court D, for instance, the only role the police played was that of gaolers. During the court observation it was very rare to see

	Police act as gaolers & serve summoneses etc.	Police Prosecute own cases	Police assist prosecuting solicitors	Police act as ushers	Police call the list
Court A	X		X		
Court B	X	X		X Mixed*	
Court C	X				
Court D	X				
Court E	X		X		
Court F	X		X		
Court G	X		X	X	X
Court H	X	X		X	X
Court J	X	X		X	X
Court K	X		X		
Court L	X	X		X	X

*Some courts at Court B had civilian, some police ushers.

a uniformed police officer in court. They did appear with defendants in custody, but they just as rapidly disappeared. The police department which dealt with service of warrants and summonses was not in the same premises as the court. The police presence was so unobtrusive that on one occasion a defendant was sentenced to a period of imprisonment forthwith for non-payment of a fine, and the clerk had to ask him to sit at the back of the court whilst someone went to find a policeman to take him into custody. The defendant complied with the

request to wait - what would have happened had he not done so is an interesting point!

In contrast at Court G the police prepared the list of cases, called them on in the order they thought fit, acted as gaolers and as ushers. In Court One at this court, the police officer in charge of list sat next to the bench and the clerk. The acoustics in court were so bad that what passed between police, clerk and bench could not be heard by the defendant - or by anyone else. The speed at which cases were processed was phenomenal. Many of the cases observed were timed at less than one minute. The speed at which cases were dealt with at this court and the fact that the acoustics were bad meant that defendants were completely confused. On more than one occasion in one morning defendants (fortunately represented) were remanded in custody so quickly that they had not even time to get from the cell door to the dock before the police pushed them back down to the cells again. The police directed the whole process. They called the cases on, they brought the defendants into court, they interpreted the words of the magistrate to the defendants who (because of the acoustics) did not hear, they ushered defendants out of court again. Their only difficulty appeared to be keeping up with the rate at which the magistrate disposed of cases. The police appeared to control this court.

Court D and Court G were at different extremes so far as police presence was concerned. The other courts observed fell somewhere between these two. What factors determine the extent of police participation in, and control over the court?

The actual physical properties of a court may affect its image. At one tiny country court observed the court sat only twice a week, and the courtroom itself was a room on top of the police station. The

image of the police court was rather difficult to escape, although the police presence in the courtroom itself was minimal. Another of the courts observed was housed in the same large building as both a police station, and the Crown Court.

Another very significant factor in determining the level of police presence was the existence or non-existence of a prosecuting solicitor's department. In the Metropolitan Police area, for instance the police conduct their own prosecutions, and the number of police in court is very high. The problems that police advocacy creates for clerks will be discussed later in the chapter. At courts where there was a prosecuting solicitor's department (i.e. most out of London courts observed) there were fewer police in court, and they played less part in the proceedings.

The physical properties of the court are outside the control of the clerk, unless s/he is fortunate enough to have a new court building planned. The existence or non-existence of a prosecuting solicitors' department is also beyond the control of the court.

However, probably the most important factor in determining whether or not the court appears to be a police court or a magistrates' court is whether or not the police have jobs in the court organisation itself. If the police act as ushers, and if they call the list of cases the appearance is created that the police are part of the court, and that their interests are the interests of the court. The question of whether or not the police do jobs in the court organisation is a question over which the clerk to the justices at the court has some control. At those courts where police still do these jobs, reducing the police presence in court requires policy decisions to be taken and put into practice. It requires the hiring and training of civilians

to do the jobs the police do in court. Responsibility for such measures lies with the clerk. The enthusiasm with which the clerk to the justices pursues a policy of 'civilianising' the court can determine whether or not the police do act as ushers, or call the list of cases in court.

One should not underestimate the difficulties faced by clerks in seeking to change a system which has operated for years or even decades, or minimise the difficulties of persuading the Magistrates Courts Committee to provide money for staff to perform those functions previously undertaken by police. However clerks can and do have an impact.

At Court B, for instance, unlike the other London Courts, the police did not call the list. They did act as ushers, but the clerk was in the process of acquiring and training civilian ushers, so that the police would cease to be needed. As one of the clerks at Court B put it

"They're nice people, but the sooner the warrant office leave the building and just become gaolers the better."

The same clerk to the justices had been vigilant when the police introduced "presenting officers" to prosecute guilty pleas. He said

"...as they are the same officers coming day after day there is a possibility they will acquire an aura of being part of the court set up, and this is difficult. They did refer to themselves as court presenting officers, but as people may think that they were then part of the court we have now asked them to refer to themselves as the police presenting officers."

A clerk who is determined to minimise police control over, or police presence in court can have a considerable effect. This will not be an overnight effect, and may take many years to put into practice, but it is yet another area where the clerk to the justices has a crucial effect on the nature of the court. The attitude of the

clerk to the justices to the police is important.

Many court clerks were aware that there were dangers in too high a police presence in court and, in particular, dangers in the police doing jobs in the court organisation. However they were also conscious of the need for the protection provided by uniformed police. One commented

"I think magistrates and clerks are entitled to be protected from criminals. Let's face it there are dangerous criminals coming through the courts. One never knows what they might do."

But despite this they were anxious that the image of the police court should be dispelled.

"I expect that defendants get a bad impression if the first person they meet, who asks them who they are, if they are pleading guilty or not guilty, are they represented, is a uniformed police officer, albeit in shirt sleeves and carrying a clip board."

This clerk also pointed out that where police do jobs in the court organisation it is too easy for court staff to forget that the people they work with every day are policemen.

"To us they appear different. Its almost as if they've been dunked in a barrel of dye ... and it comes as a tremendous shock when, at the end of a case, the warrant officer will say, 'You awarded costs against us!' And I say 'What do you mean, us?' And they say 'Well we're police too,' and you lose sight of it."

Court staff may forget that the cheerful friendly man with whom they work every day is, simply by virtue of a uniform that they have become blind to, intimidating, or simply part of the enemy or "the other side" to many who come to court.

Clerks were also conscious of the fact that where police worked as ushers and possibly also called the list of the day's cases, court staff and uniformed police could appear to be far too familiar. We have already mentioned Court G where the policeman who called the list sat very close to the bench and the clerk. At Court B where the clerk called the list but the police acted as ushers, the uniformed

police ushers (known as the warrant officers) could frequently be seen holding whispered conversations with the clerks. These conversations would concern the state of the list - perhaps a suggestion that a case be transferred to another court, or information that a defendant was heavily pregnant and should be taken early. However such conversations were not audible to defendants. All that the defendant could see was the clerk - who might later proceed to retire with the bench - whispering to a policeman during the course of the defendant's case.

Suggestions have been made that, because a high police presence - a court full of blue uniforms - can be intimidating, the police should not wear uniform if they are working at the court. Clerks were, on the whole dismissive of such ideas.

"In many little ways we try to stop the court having the appearance of a police court, and its not so much the fact of people being in uniform - perhaps more it is what they are doing."

If police are going to do jobs in court, clerks feel that they should be recognisable as policemen.

"I think it is better that they are easily identified. In the juvenile court they wear uniforms here as well, though in the past they have worn a casual jacket - but even there I think it is only fair that the juvenile knows who they are dealing with, and the parents know who everybody is. It's confusing enough without having to try and figure out who the police are."

Control of time - manipulating the court list

We have said that a high level of police participation in court is problematic, particularly where the police do jobs for the court itself. The appearance is created that the interests of the court and police are the same, that police and courts have the same purposes and the same ends. We have also said that although clerks are aware of these problems, they nevertheless come to forget the need (which

they do recognise) to separate themselves and their role from the police, and that they become too intimate with police in court.

Besides these problems, however, there is another and more serious issue, which is that where the police act as ushers and call the list of cases in court they acquire real power to influence events to their own ends.

Calling the list of cases is far from being a simple operation. We have mentioned already the fact that at the commencement of a court session all the participants in the listed cases should be present at court, and they will wish to get away as soon as possible. For most people, waiting time at court is unproductive. They will simply have to sit around until their case is called.

All courts have a set of priorities for calling cases, usually based on the assumption that short cases will be dealt with first so that the maximum number of people can be got away from court as soon as possible. Therefore remands, pleas of guilty, quick committals will be dealt with before contested matters. However there are cases which may demand priority - police officers who have been on night duty, people who are ill or disabled. Also the basic priorities of a court may apply only in a limited way - a court may not have any contested matters listed for that session, or there may be a contested drunk and disorderly case which will take much less time than a five handed remand with five different advocates applying for bail against police objections.

The person calling the list therefore is in a position to operate her/his own set of priorities on the day. The person calling the list is inevitably inportuned by people waiting to get away, and is in a position to do them favours. If the police call the list, they can call it according to their priorities and they can grant or refuse

time bonuses to those who want to get away.

Another very important aspect of listing is information about which cases are ready to be heard. Although all cases are in theory supposed to be ready when the court commences they are never all ready. Advocates may wish to speak to their clients, defendants may not have arrived from prison, solicitors may be engaged in another court. The person calling the list needs to be in possession of this information to call the list effectively. Even if the police do not actually call the list, they retain some power if they are in possession of information about which cases are ready to be heard by virtue of their acting as ushers.

This problem is illustrated by an incident at Court B. Court B was particularly interesting since it was part way through the process of civilianisation. The clerk at that court had decided as a matter of policy that the clerk in court should control the list - i.e. determine the order in which cases were called on. Police, however still acted as ushers in the court, and had been used to control the order in which cases were called. There was therefore something of a power struggle between the clerk and the "warrant officers" (as the police ushers are called) to control the list.

The basic problem for the clerks at this court was that, although they had nominal control over the order in which the list was called, the warrant officers in fact had the information necessary to call the list. Warrant officers could, and did, feed information on which cases were ready to be called on selectively to clerks. For instance, on one occasion the warrant officer had suggested that a particular case be called, but the clerk had extra information and vetoed calling it. The clerk himself called another case, but in

that case the defence solicitor was on his feet in another court. Since that particular defence solicitor was renowned for having too large a number of cases on each day he was reprimanded by the court. After the court had finished its business and bench and clerk had left the court an altercation took place between the warrant officer and the defence solicitor involved, in which the defence solicitor upbraided the warrant officer for calling on his case when the warrant officer had agreed not to do so. The warrant officer protested that it was not his fault, that the clerk had overridden him and called the case anyway. So that whilst the clerks were discouraging solicitors from having a large number of cases on one day because it made listing difficult, the warrant officers were colluding with the solicitors by feeding the clerk selected information about which cases could be called on.

Clerks were aware of the problem. One of the clerks remarked
"...one can have difficulties with warrant officers who do want to have some control."

and pointed out that it was sometimes difficult for younger clerks to control the warrant officers. One of these younger clerks said

"...I've been reminded quite a few times by my clerk to make sure that I'm seen to be controlling things and not the officer."

Control of the list is therefore only real control if the clerk is also controlling the supply of information which allows that list to be called according to the policy of the court. The clerk to the justices at Court F, where the list was called by the clerk, said he had experienced courts where the list was called by the police, but that he wouldn't allow it - not only because it gave the impression of a police court but because one never knew how the police would control the list and what priority they would in fact give to cases.

The dangers that Carlen pointed to of police controlling the list

of cases are very real. They are by no means common to all courts, however, and are mainly, but not entirely, problems of London courts.

In most courts the list is controlled by the clerk, and it is controlled within a general policy laid down for that court. The priorities which prevail will be those of the clerk to the justices and the bench, and within this the preferences of individual clerks. It is the clerk therefore who has the power to grant favours, or not, in relation to each day's list, and the clerk's interests are those of the court organisation. Clerks are likely to be affected by the desire to get through the list expeditiously and to achieve an even division of cases between the courts. They are, of course open to pressure from many quarters. We shall discuss in the next chapter the way clerks deal with pressures from the legal profession to accede to advocates requests for priority. Where the police do not call the list themselves there is also pressure from police.

In all but the biggest city courts clerks come to know the police who appear regularly in court, and occasionally the police attempt to exploit their relationship with the clerks.

"A lot of people would try to get priority with listing. Certain people will try, you just don't have to let it happen."

A young female clerk said

"Yes, I had that problem when I originally started work at the court, and I think its more of a problem for female clerks, especially with the young P.C.'s. They're very friendly when you see them out of court and they'll try it on in court as well. It's necessary to put them to the back of the list several times, even if it means becoming rather unpopular in order to make clear the point that you're not going to call his case first because you're mates."

The clerks who had experienced pressure from police they knew were adamant that they would not yield to it if it was improper.

"They ask to get on early if they've been on night duty. They don't do it unfairly. They have usually got a reason. They

know that we won't slip one in."

The problem mentioned earlier of police who work at the court behaving in a familiar way towards clerk and bench and thus giving the impression of a police court can apply also to police regulars. One clerk commented.

"I don't like police officers talking to magistrates particularly if there are people in court at the time. I think it looks bad. I always try and have a quiet word if that occurs."

However at the courts which had become the most civilianised, the problems were the least, because police simply did not appear at court very often. At Court D, for instance, police appeared as gaolers in custody cases, occasionally as witnesses if there was a plea of not guilty, and there was a court inspector, but that was all.

"Apart from a prosecuting inspector one very rarely sees a policeman these days. So they haven't got the same links and relationships with the clerk and his staff to be able to take advantage."

Thus, the lower the police presence in court, the less the likelihood that they will retain any power to influence events in court improperly, either directly or indirectly.

Problems of Police Advocacy

Not only do problems arise where the police have jobs in the court organisation, but they also arise in relation to policemen acting as prosecutors in their own cases.

At all the courts observed, except the four London courts, solicitors from the local prosecuting solicitor's office were in court every day. Any difficult or contested matters were dealt with by a qualified prosecutor.

In the four London courts, the Metropolitan Police Solicitor's Department was sometimes instructed, but more often than not cases,

including pleas of not guilty, were prosecuted by individual police officers.

This caused many problems for clerks, since police officers would sometimes find difficulties in conducting the prosecution, and expect to receive help from clerks.

Such assistance used at one time to be forthcoming. It used to be the practice for the police to hand to the clerk the prosecution's witness statements in a contested case. The clerk would then take the prosecution witnesses through their evidence. This practice was disapproved of in 1944 by the Departmental Committee on Justices Clerks,³ which said

"It is the practice in some places, including one important city, for the clerk to conduct all, or almost all the examinations in the absence of professional advocates; this is not in accordance with the law and is moreover unnecessary and undesirable. The clerk should have as little to do with the conduct of the case for either one party or the other as is consistent with reasonable lucidity and despatch and the police in particular ought to be in a position to conduct their cases or to secure the professional assistance necessary for the purpose."⁴

The practice was also disapproved of in Simms v Moore⁵ (discussed in Chapter Two) which case was brought in 1970 to challenge this practice. Lord Parker, C.J. held that it should not be done except where the other side had a copy of the witnesses statement, and that the clerk should not use the witness statements as the basis of the note of evidence. However even if these precautions are taken, if the clerk has a proof of evidence for a prosecution witness who then diverges from it, the clerk may be in possession of information that

3. Cmnd. 6507.

4. Ibid para. 38.

5. [1970] 2 QB 327.

s/he should not have.⁶

Despite the considerable problems involved in clerks taking prosecution witnesses through their evidence, the practice has only recently stopped. One of the clerks at Court H said

"When I came to this court I was horrified to find that you were handed a bundle of statements in order to take the police through their evidence. However it became obvious that it was not our policy to prosecute cases, and I would only ever do it if the defence was represented and had a copy of the statements."

But despite the fact that clerks do not now take police witnesses through their evidence, there are still problems caused by police advocacy.

Although some police officers become quite adept in court, others do not. It is not unknown for young and inexperienced officers to be expected to deal with quite complex cases with no assistance except from a more senior police officer. The most unexpected cases can throw up points of law. For instance, at Court H a policeman had arrested a man who had been attempting to throw himself into the Thames in order to commit suicide. Arrest had been the only way to prevent the man from jumping. The officer charged the defendant with breach of the peace. The stipendiary dealing with the case expressed his sympathy but said that he could not see how trying to kill oneself was a breach of the peace. He put the case back for the policeman to think about it. The policeman thought - but could not obtain any legal advice and had no idea how to argue the point himself. The defendant was released.

Several London clerks recollected cases where the police had missed a vital element in their case, and defendants had been released on a submission of no case to answer.

6. This point was made in article by Glanville Williams in an article 'Advocacy by police, and Justices' Clerks' (1956) Crim. L.R. 169

One clerk commented

"The Metropolitan Police let themselves down by expecting police officers to be advocates. They should follow the countrywide view, I think - the practice of having a police prosecutor and solicitors prosecute all cases."

Clerks faced with inexperienced and floundering policemen are in a difficult situation. The police may well feel that they should be assisted by the clerk. They may actually receive some assistance - for instance as in the example from Court H where police were granted an adjournment so that they could seek advice, but even this may not be possible if an adjournment would be unfair to a defendant. Clerks do not feel that they can, or that they want to, go very far. A clerk at Court B said

"We have never considered that it is part of the clerk's job to bolster up an inadequate or inefficient police prosecution."

The problem is one which is peculiar to those courts observed in the London area. All other courts had prosecuting solicitors - although some of those prosecuting solicitor's departments had only recently been established.

The Royal Commission on the Police in 1962 recommended that the use of police as advocates for the prosecution be reviewed.⁷ It deplored the use of police officers as prosecutors, except for minor cases and it said

"Anything which tends to suggest to the public mind the suspicion of an alliance between the court and the police cannot but be prejudicial."⁸

The establishment of prosecuting solicitor's departments in many areas followed these recommendations. But there are still some courts where police prosecute nearly all of their own cases. The Royal

7. Cmnd. 1728. Para 381.

8. Ibid.

Commission on Criminal Procedure⁹ has therefore said

"We consider that there should be no further delay in establishing a prosecuting solicitor service to cover every police force."

Clerks would welcome the enforcement of this recommendation in areas where there are not now prosecuting solicitor's Departments. The evidence shows that most clerks take seriously the need to avoid bias or the appearance of bias in their relationship with police. Although some clerks are more sympathetic and helpful to police than others, clerks in general would wish to be relieved of difficult decisions as to how far they can go in helping policemen who are inadequate to the task of dealing with their own prosecutions.

Also, apart from such 'due process' reasons for desiring representation for police, clerks also have organisational reasons. Unrepresented prosecutors can slow down proceedings almost as much as unrepresented defendants. There are time bonuses from represented prosecutors. Even though the allocation of cases between courts may be made a little more complex because of the need to accommodate prosecutors, clerks are still positively in favour, on the whole, of representation for police.

The clerk as legal adviser to police

Almost all clerks said that the police came to them for advice. The few who said that police did not do so (12%) were mainly younger, less experienced clerks.

For the most part, these requests for advice concerned procedural matters such as warrants to be checked or issues of court security. One clerk gave the illustration of an officer who had telephoned him because a witness in his case was on the Isle of Man and he wished to

9. Cmnd. 8092. Para 7.3.

know how to compel attendance at court. Frequently also requests for advice concerned the policy of the court. Another clerk said that sometimes an Inspector would ring up to ask a question such as

"There's a case coming to court next week, and the value of the property stolen is £3,000, two defendants involved, its all recovered. Will the magistrate insist on trial by indictment? Its borderline - we can only tell him its borderline - and the magistrate will decide on the day."

Several clerks also mentioned requests for advice on Licensing matters. On areas of law such as procedure in magistrates' courts, Licensing law and, of course, the policy of the bench, the clerks are the experts. This expertise is exploited by the police, but also by the legal profession, by probation and social services and even occasionally by defendants. One clerk said he didn't mind who he helped: "It's a sort of open shop".

Where requests for advice from the police were confined to questions about the correct procedure to follow, clerks readily gave the advice requested. However, there is a need for clerks to take care that they do not allow themselves to be put in the position of becoming a legal adviser to the police. The Departmental Committee on Justices Clerks said about this

"It is essential... that the clerk, whilst courteous and helpful alike to public and police and ready to facilitate convenient procedure should never allow himself to act as if he were the solicitor of either party, least of all the police... that which the clerk should not be tempted to do is to help the police in the preparation of their case, or to use a lawyer's phrase, "advise on evidence" for them. The proper person to do that is a superior police officer, or where the case demands it, a solicitor acting for police."¹⁰

Clerks were approached by police for this sort of advice, and most were very reticent about giving it.

"If it goes to the fundamental points of a case that is something I wouldn't seek to become involved in."

10. Report of the Departmental Committee. Cmnd 6508. para 51.

"... well if its a matter of licensing I might help them. If its something else I say 'Well you've got your prosecuting solicitor's department, what are you paying them for?'

"I mean obviously if the clerk gives them some advice and it happens to be wrong then they might very well blame the clerk for that if the case were dismissed. It puts the clerk in a difficult situation if he happens to be in court dealing with the case when he happens to have given the police advice about it."

To a certain extent clerks felt that they were breaking the police of a bad habit. At Court C where a prosecuting solicitor's department had just been set up one clerk commented

"Well quite often now we tell them that they've got their own legal department - to go and see them."

Where there was no prosecuting solicitor in court regularly, clerks were tempted to give advice. This was so especially in London where the police might need advice quickly, or on the spot. Clerks thought that the Metropolitan Police Solicitor's Department was slow in providing advice. Even so, there were some clerks who took a hard line. One clerk at Court B said

"It's not my job to act as a police solicitor."

There were other clerks who saw no problems about giving advice to police, and this appeared to be so even where that advice was on the merits of a particular case. One clerk confessed

"I can see that it can arise - where I've given the police advice as to the case and found myself dealing with it in court."

Such a situation should not arise. It is exactly the problem to which the Departmental Committee addressed itself. Advice on the preparation of a case or on evidence should not come from the clerks. Whilst a clerk might have a discussion with a solicitor about the view s/he would take of the law in a case due to come up in court, this is very different to advising the police in the way that a prosecutor might, about the preparation of a case, or the evidence in it.

In many courts, clerks get to know some of the local police officers. The police in turn know the clerks by name, and may even have social relationships with them. It can become very difficult in this situation for clerks to avoid requests for help from police.

The relationship between clerk and police out of court

The clerks who were interviewed were asked to describe their relationship with the local police outside the courtroom itself. The responses varied widely.

Two refused to answer - because one was engaged to a policeman and the other was married to a policeman.

Almost all described their relationship with the police as good - but what they meant by such an assessment was different from clerk to clerk. Some clerks were enthusiastically friendly.

"We've got to work together in here so I think it helps to have a good relationship outside of court. I'm not saying that we go out boozing with them every night or anything like that. I mean its good to have a friendship with them. It helps when we come to court."

"In court, so long as the rules of natural justice are applied, what happens out of court has absolutely no bearing as far as I am concerned."

Some clerks, particularly clerks to the justices socialised with senior police officers regularly. One described his relationship with police as

"Very, very good, but then as a member of Rotary I'm there with the Chief Superintendent. I've been to their policeman's ball."

Other clerks to the justices discouraged socialising with police.

"We get invited out to various social events, and as a rule you don't go, which is slightly boring but its safer."

This clerk pointed out that if he was seen socialising with police the local solicitors would accuse him of being prosecution minded, and if he was seen drinking with solicitors the police would complain that he was defence minded. Clerks were aware that they had reputations

amongst the police and that the police might seek to exploit those who had a reputation for being soft. One clerk whose father was a retired police officer said that this fact was known to the local police but

"Some of the clerks do have some semblance of a reputation, and I don't think I'm regarded as easy - and that is how it ought to be."

At courts where a policy of civilianisation has been pursued, clerks expressed fewer problems over police approaching them for advice, and fewer problems over police attempting to exploit a social relationship.

Where social relationships do exist, then obviously clerks must be vigilant that such relationships are not used improperly, and that their familiarity with police out of court is not expressed in any way in court, or in relation to court proceedings. Whilst some clerks were very aware of the dangers of familiarity with police, there were others who were much more complacent, and appeared not to see the difficulties.

The clerk and the police - Conclusions

We have seen that police participation in magistrates' courts varies very widely. Carlen's assertions that control of timing in magistrates' courts is important are perfectly correct, but her ascription of this control solely to the police is not correct for most courts. For what is probably the majority of courts in the country, control of timing both at the level of policy and immediately in court, is in the hands of the clerk.

The extent to which police appear in court and have control over aspects of the courts operation depends on a number of factors,

including the vigour with which the clerk to the justices pursues a policy of 'civilianising' the court.

Some courts still look very much like police courts. Others operate very efficiently with police doing little except serving summonses and warrants and acting as gaolers. Such a minimal role is desirable, since we have shown that where police have other jobs in court, at least an appearance is created of police control or of identification of interests between the police and the court. We have also seen that the police can exploit their position, so that their own ends are served, rather than court policy being followed. Where, for instance, the clerk is nominally in control of the calling of the list, if the police regulate the information necessary to call that list, then the police effectively retain a high degree of control.

Where police are employed in the court or appear there regularly, they may attempt to take advantage of their familiarity with the clerks to attempt to negotiate favours such as priority in listing. In the Metropolitan area, where police frequently prosecute their own cases without legal advice, it may be that police expect assistance from clerks which it would be improper for the clerk to give.

The less the police are called upon to do in court, the less the danger that the police will retain any real or apparent influence over the court.

Even out of court it seems that police may expect help from clerks. The fact that the clerk is expert on magisterial law and procedure means that s/he will inevitably be used as a legal resource by all who use magistrates' courts. It may be innocuous for police to request procedural advice from clerks, but the replies of clerks to questions about their relationship with police seem to indicate that

police ask for, and some clerks give, the sort of advice on the preparation of cases that police should properly get from their own legal advisers. This may be much less likely to occur where there is a police prosecuting solicitor's department, but it seems that such departments may be too small or as yet too inexperienced to advise police on all matters. Before police prosecuting departments became so widespread, police obviously developed a habit of consulting clerks, and this habit seems not to have been broken.

There is a strong, if unevenly distributed tendency for the clerk to take over jobs which used to be performed by police in the court organisation, particularly calling the list of cases.

The question must be asked whether it is better that these jobs are performed by clerks. Where the police control the listing and calling of cases, the danger is that they will arrange matters to the convenience of police and prosecution. Where the clerk controls listing and calling of cases her/his interests will be, ultimately those of the court organisation. The clerk will aim to even the load of cases between the courts, to look after the needs of the bench and to get through the list of cases quickly. Achieving these ends will not necessarily favour any particular group within the court (although it may do, as we see in the next chapter.) Certainly court regulars will have readier access to the clerk to request priority in listing and this inevitably disadvantages unrepresented defendants. However the clerk's interests will not be served by favouritism to any particular group, but by achieving the most expeditious disposal of cases. Control by the clerk is therefore to be preferred to control by police, particularly if the clerk is prepared to subordinate pressure of case load to the needs of the unrepresented defendant.

CHAPTER SIX

THE CLERK AND THE LEGAL PROFESSION

Conflicts between court organisation and advocates

"Getting away from court"

Professional double booking

"The Learned Clerk"

The clerk as cynical legal adviser

Conclusions

The Clerk and the legal profession

The pattern of legal professional practice varies markedly from court to court. Some courts, for instance, rarely see a member of the Bar, others see many barristers each day. Court C, one of the courts in the survey serves a provincial town. At the time of the survey, clerks estimated that there were about fifteen local solicitors who practised at the court regularly. There would also be the occasional appearance by a local solicitor who did not usually do criminal work, and sometimes they would see a solicitor from out of town. Barristers hardly ever appeared at the court.

In contrast Court E serves a large city. Clerks there estimated that there were forty or fifty solicitors practising at the court. The city has a large bar, and barristers - particularly the less experienced members of the junior bar - were to be seen in court every day.

Court B is an Outer London court. The clerks estimated about twelve local firms of solicitors practising there regularly and many other firms appeared occasionally. Court B is one of the courts in which the London bar cuts its teeth, but it also, occasionally, sees the stars of the London criminal bar.

Common to all of the courts in the survey, however, was that a very large proportion of the representation of defendants was done by a comparatively small number of local solicitors. At Court C there were three or four regulars. At Court E clerks reported that five or six firms did 70% of the work and, similarly, at court B about six firms did the majority of the work.

At each court therefore there was a small group of lawyers who knew, and were known by, the clerks very well indeed. These solicitors would appear in court regularly several times a week, and

some of them every day. A very substantial proportion of their practice consisted in representation of defendants in magistrates' courts, often on legal aid certificates. Many of the courts also had a small group of prosecuting solicitors who appeared consistently in the same court several times a week.

The conditions of work for these lawyers depend, to a large extent, on the efficiency with which the court is organised, and the extent to which clerks are prepared to take into account the legal profession's needs and problems. Unfortunately, the needs of lawyers practising in the court often conflict with the needs of the court itself, and the relationships between clerks and advocates is often strained.

Conflicts between court organisation and advocates

(1) "Getting away from court"

One of the first desires of any lawyer with a case in a magistrates' court is to get away from court quickly - not necessarily because the experience of appearing there will be an unpleasant one, but because of the desire to return to the office, to the chambers, or to get to another court, to deal with other pressing business. The bonus may be financial - in being able to accomplish more work - or it may be a leisure bonus in being able to get away from the office in the evening. At another level it may be said that the waiting area of magistrates' courts is not the most pleasant place to spend a morning, and the waiting time paid under a legal aid order not the most lucrative way to pass one's time.

We have demonstrated, in Chapter 5, that for most courts control of the list of cases and the order in which they are called on is in the hands of the clerk. The clerk will be required to juggle a number of competing priorities in calling the list. S/he will wish

to get the greatest number of people away from court as soon as possible, but freedom to transfer cases from court to court may well be restricted by security considerations, by membership of the bench by the deployment of prosecuting solicitors and other factors. The order in which cases are heard will also be affected by the readiness of parties to proceed, special needs such as officers on night duty and the likely length of cases. The legal profession competes for priority amongst these considerations. Clerks in busy courts are consistently importuned by impatient advocates with optimistic assessments of the length of their cases.

The clerk to the justices and her/his staff will not only have control of the day by day decisions about order of hearing, they will also have a very important effect on the court's policy about priorities in hearing the list. All courts have such a policy - usually, very basically, that the quickest cases are given priority. This generally means that remands are dealt with first, followed by pleas of guilty, followed by contested matters. Committal proceedings are usually dealt with early if they are paper committals, applications for occasional licences and the daily retinue of local drunks at the beginning of the day. But the exigencies of the day and the actual length of cases can reverse the order suggested by the policy. As was indicated in the last chapter, a drunk who still retains some of the previous evening's beligerence and pleads not guilty may well take less time to hear than an application for a remand with five defendants all separately represented and all applying for bail against police objections.

The policies of courts in relation to the listing demands of the legal profession differ markedly from court to court. Within the basic policy for order of cases, some courts will award priority to

the legal profession and some will not. An examination of the contrasting policies of courts D and B will illustrate this.

At Court D, the legal profession were given priority. One clerk explained that

"...I think solicitors do come to expect that their cases, irrespective of legal aid, will be dealt with before unrepresented defendants, and they do in fact complain if it works the other way - whether or not there's a good reason for you dealing with an unrepresented defendant earlier."

At this court, the clerks were extremely sympathetic to the needs of local solicitors, to the extent of operating a sort of unofficial appointments system for them.

"So on a busy day with several solicitors waiting we can send solicitors back to their office and tell them we'll phone them ten minutes before they are wanted, and they undertake on that basis to be here."

At this court, therefore, if there were six cases waiting to be heard where the defendants were pleading guilty, and three of those defendants were represented, the represented defendants would be given priority irrespective of the length of their cases.

At Court B however, the legal profession were not so sympathetically catered for. Clerks dealt with cases strictly in order of their length. One clerk explained that in the traffic court, for instance, she might take unrepresented defendants first, because where a defendant was represented (perhaps in order to put forward special reasons why s/he should not be disqualified) the represented defendant would be likely to take longer, so

"...you take it on a little bit later in the day and get rid of as many defendants and police officers as you can."

No priority was given to the legal profession at this court. Clerks on the whole took the view that it was just as important for defendants to get back to their jobs as it was for solicitors to get back to theirs.

The policy at this court had caused some consternation amongst advocates but the clerk to the justices at court B explained that the profession had, for the most part, become used to the situation and had learned that by jumping up in court and requesting that their cases be taken out of order they only delayed matters.

At some courts, therefore, the regular advocates - the few solicitors who appeared frequently - could be given preferential treatment by the court as a matter of policy. Within the general policy order of cases, represented defendants got priority over unrepresented, in effect, and even an unofficial appointments system operated. At other courts no preference was given, even to the regular advocates.

But even at courts which were unwilling to give advocates priority as a matter of policy, lawyers were accorded some preference, so that at least between two cases of equal length, the one with a represented defendant would be taken first. For the most part however this was not out of a sympathetic concern for the needs of their professional brethren, but because clerks have been reminded of the pressures on the legal aid fund. As one clerk put it

"If they are on legal aid, for instance, they get paid waiting time, and it's money down the drain."

Also in relation to individual cases, solicitors are able to bargain for preferential treatment where unrepresented defendants are less able to protest or to seek to influence the decisions of the court. At an individual level the court's regular solicitors will know the clerks well, and will attempt special pleading if they are in difficulties and need to get away from court. They will know which clerks are likely to be susceptible to such persuasion, and which are not.

At a different level, the local Law Society may seek to influence the listing policy of the court. For instance, at Court F, when the Duty Solicitor Scheme was set up it was agreed between the court and the local profession that the Duty Solicitor's cases should be dealt with first. The justification for this was that as the Duty Solicitor was doing a public service s/he should get priority. The clerk to the justices had agreed to this and enforced it, although he was somewhat cynical about it, pointing out that if the Duty Solicitor came to court and saw six or seven defendants who consequently became her/his clients on legal aid certificates s/he had performed a public service which was nevertheless very lucrative to the solicitor. This clerk adhered closely to the agreed policy - he not only gave the duty solicitor priority but insisted that the duty solicitor's cases be heard at ten o'clock when the court began. This strict adherence to the policy was not of course always convenient for the duty solicitor!

Some Law Societies had urged the court to instigate an appointments system, so that all cases were not listed for the same time in the morning. This was one of the most contentious issues between clerks and the profession. In the smaller courts it was sometimes possible for the clerk to release a solicitor until a later period in the day. The reason why this was possible in smaller courts was because the clerk would be able to make an accurate assessment of the likely timetable of all courts in the building and predict with some certainty that none of them would be able to hear a particular case or cases before a particular time. In a larger court, however, running five to ten courts at once it was impossible for the individual clerk to know what was happening in all other courts. If the clerk in Court One released some cases until later in

the day, Court Five, scheduled to hear a contested case with eight witnesses, might instead find itself dealing with a last minute change to a plea of guilty and a consequent remand for reports. It would thus be able to take the cases released from Court One. If the clerk in Court One had let the parties go, Court Five might then contain three irate magistrates called in to do nothing, and Court One would later contain three irate magistrates sitting on into the afternoon when their colleagues had gone home. Clerks felt that efficient listing depended on their having the patience of a saint and the foresight of a prophet, and that the demands of the legal profession for an appointment system were unworkable in practice.

Clerks were also impatient of inexperienced advocates who expected their priorities to be automatically accommodated by the courts. One clerk complained

"... we get young barristers who come here ... and say I've got two contested dangerous drivings and I must be in the High Court at 12.00 and of course that is quite ridiculous."

Clerks are also under pressure from other groups. The police for instance may request to be given priority - possibly there will be officers in court who have been on night duty. Although unrepresented defendants often do not know enough to complain, they may present genuine requests to clerks - so if the clerk is approached by "A man (sic) coming along with a babe in arms needing a feed or somebody who is diabetic needing insulin" s/he will need to accommodate their requirements.

Whatever the policy of clerks, and however sympathetic they may be, they may find themselves unable to accommodate lawyers who wish to get away from the court. This inevitably leads to discontent. It seems that at many courts, the legal profession is not satisfied with the listing arrangements and clerks equally feel that lawyers' demands

are unreasonable. A clerk to the justices reported that

"Some solicitors write me rude letters afterwards and say they don't really see why they should have to hang around all day waiting for applications to be dealt with. But I tend to ignore those."

No court appeared to have solved this problem of the incompatibility of the court's needs and the advocates' needs. Indeed the relationship between clerks and advocates was complicated further by disputes over advocates who came to court with several clients to represent in one session.

Conflicts between court organisation and advocates
(2) Professional double booking

All clerks interviewed were united in identifying as a problem the fact that local solicitors with a healthy practice in the magistrates' court frequently expected to be able to represent several clients in one court session.

This created a problem because the court may have planned its list of cases for the day to be distributed conveniently and evenly between the number of courts available. If a solicitor was representing three clients on that day, that solicitor's cases may be listed in three different courts. One of those courts may wish to call on a case in which the solicitor is involved, but be unable to do so, because the solicitor is on her/his feet in another court.

One of the clerks interviewed illustrated the problem thus

"...there might be a case where there are four defendants, and those four defendants are represented by four different solicitors. They are occupying one court for quite a length of time. Each of those four solicitors might only have one other case that morning but because of the length of time they're spending in one court, two other courts can be kept waiting."

Clerks reported that solicitors with several cases

"...expect to come along to the court on the morning of the court with all of their cases in one court."

Often there are too many courts, and too many other considerations to be taken into account for this to be possible. The clerk may have to weigh up many constraints in distributing the day's cases between the available courts. There may be a limited number of courtrooms; there may be a limited number of magistrates - possibly one or more have been unable to fulfil their rota duty. It may be that there are cases where the Local Authority appears as prosecutor, with the result that such cases can only be listed in one court since some magistrates may be local councillors. There will be a limited number of prosecuting solicitors so that other cases must be fixed in particular courts. Certain cases with defendants in custody may have to remain in those courts with direct access to the cells.

These are only a few of the more obvious listing problems faced by clerks. Accommodating the desire of a solicitor to have all her/his cases in one court may simply be impossible.

The clerk will be responsible to the bench for efficient listing, and may well come under pressure from the bench if courts are held up

"...sometimes it's the magistrates champing at the bit, waiting to get on and blaming the clerk. The clerk obviously justifies his existence, and blames the solicitor, and the solicitor gets it when he appears."

The magistrates may even decide to take the matter out of the clerk's hands, and take action themselves.

"We had some justices a while ago who took a great stand on this and when the case couldn't come before them because the solicitor wasn't ready they said "Right, we're going" and one can't blame them."

Several clerks felt that solicitors took an irresponsible attitude to the problem.

"... the solicitor doesn't mind, it's like water off a duck's back I suppose. He will take his telling off and carry on his case because he is probably on legal aid and getting paid for it and he's not worried particularly."

Clerks felt that solicitors were not sympathetic to or co-operative with the needs of the court organisation. The solicitors who were spoken to at the various courts did not believe themselves to be irresponsible. They pointed out that their double booking was not always premeditated. They did not always have control over the date to which cases were remanded, nor could they control clients who consulted them for help at the last minute.

Clerks made the point that in such situations the solicitor should send another member of the firm to court or instruct counsel. But solicitors were unwilling to do this, at least partly because, in order to show an acceptable profit from their work in the magistrates' court, they needed to be able to represent several clients in one court session.

Clerks understood the reasons why solicitors wished to take several cases in one court session. One commented

"It is suggested to solicitors that they instruct counsel if they've got more cases than they can handle but I don't know that that goes down very well. Ultimately I suppose its a matter of money."

Some clerks were most unsympathetic to solicitors

"Why should you organise the cases to the convenience of someone who is grabbing money right left and centre?"

The strategies of courts for resolving the problem were various. Some courts encouraged solicitors to telephone in advance to let the court know the various cases that the solicitor was involved in. The court would then try to accommodate the solicitor, or if this was not possible the court would press the solicitor to instruct counsel.

At other courts the liaison between court and profession seemed not so efficient and a more aggressive line was taken. A clerk at one court said

"We try and make it so bloody unpleasant for them that they don't do it too often."

The clerk will influence the attitudes of magistrates to solicitors who delay court hearings by being needed in two places at once. At a different court a clerk reported that at a meeting of the bench, the clerk to the justices had pressed for solicitors who kept the court waiting to be reprimanded by the magistrates.

At some courts liaison meetings between clerks and the local Law Society had taken place, but did not seem to have solved the problem. Where certain members of the profession had, in the eyes of the court, behaved particularly badly the clerk had reported that solicitor to the Law Society, but this strategy seemed ineffective also.

The problem is undoubtedly a very real one - it seems for all magistrates' courts. If local solicitors are to make an acceptable living from criminal litigation they need to take on large numbers of cases. They are unlikely to accede to requests to instruct counsel on every occasion where they find themselves with several cases.

Clerks are responsible for running the court efficiently. Their magistrates, who are at court voluntarily, resent the inconvenience of being kept waiting for solicitors who are occupied elsewhere. Clerks are unlikely to be given staff and premises to take the pressure off the court organisation. Efficient liaison between solicitors and the court's listing office may alleviate the problem. There do not seem to be any realistic solutions to it.

"The Learned Clerk"

The tension which exists between clerks and the profession makes itself felt in another area - in the way in which advocates and clerks relate to one another in court.

The clerk is the legal adviser to the magistrates. S/he is

doing a legal job. If advocates wish to raise points of law during their case, they know that they are, in effect, addressing them to the clerk who will advise the bench. However, despite their responsibilities, clerks are by no means all professionally qualified. 58% of the clerks interviewed for the present survey were professionally qualified. The rest were qualified by having a Diploma in Magisterial Law, or by having Part One of the Law Society's examinations, or by experience.¹ (The question of clerk's qualifications is dealt with fully in Chapter Ten.)

Clerks believe that this has an effect on the way in which they are regarded by the legal profession. They feel that advocates look down upon clerks who are not professionally qualified. One clerk said that advocates sometimes tried to give her a hard time but

"I think possibly once they are aware of your qualifications, that may make a difference."

A clerk to the justices reported

"Elsewhere I've experienced court clerks who are not lawyers and they have much greater difficulty in dealing with members of the profession."

The bar came in for particular criticism from those clerks who came in into regular contact with barristers. One clerk said

"Members of the Bar are even less likely to treat you as equals unless they know you or unless they suspect that you might be legally qualified. Then their attitude subtly changes."

74% of the clerks interviewed described some problem in their relationship with lawyers who practised at their court. They described lawyers as underestimating them, as attempting to exploit

1. The regulations governing qualifications of Justices' Clerks' Assistants are the Justices' Clerks (Qualification of Assistants) Rules 1979. Justices' Clerks themselves must be qualified professionally (with the exception of some who qualify under transitional provisions) by S20 Justices of the Peace Act 1949.

them or their colleagues who were not professionally qualified and as taking advantage of inexperienced clerks. This was so, whatever the type of court, whatever the types of advocates they saw.

The sorts of incidents that clerks complained of ranged from advocates lending an ironical intonation to their voices when referring to "the learned clerk", to advocates misrepresenting the law in the hope that the clerk would not pick them up on the point. Clerks are frequently called upon to advise the magistrates on points of law which can be complex and of which they have very little notice. One clerk described a case where he had spent a lunch hour reading on a point of law in order to advise the magistrates. His advice had later been "upheld" by the Court of Appeal in a reserved judgement. Considerate advocates give clerks warning of such situations before they arise, and discuss the law with clerks. Inconsiderate advocates do not do so, and place the clerk in a difficult position.

Magistrates' courts see their fair share of bad advocacy, and if the other side is unrepresented it falls to the clerk to discourage, for example, advocates who insist on asking leading questions during examination in chief. Some advocates respond badly to such interference by the clerk.

Local solicitors who practised regularly in the same courts and who had heavy case loads were described as "taking advantage" by manoeuvring to have their cases dealt with early. They would, for instance approach an inexperienced clerk saying that their case would take half an hour to be heard. An experienced clerk automatically doubles an advocate's estimate of the time needed for a hearing. An inexperienced clerk may be taken in, and call on a case which ties up a court for a long time and leaves other shorter cases waiting.

Such ploys on the part of advocates can cause an aggressive or antagonistic attitude from clerks. A young clerk who was not professionally qualified said

"I am employed to advise the magistrates and if any solicitor plays me up I don't care how many qualifications he's got - if he's pushing his luck I'll tell him."

Many of the tensions between advocates and clerks are caused by the conflicting needs of the profession and the court organisation. Advocates "trying to take advantage" are trying to exploit the system to their own ends to get away from court as soon as they can. But it is difficult to ignore the high percentage of clerks who were convinced that there was a great deal of snobbery and unreasonable behaviour towards them by the profession. The clerk's resentment at this treatment was exacerbated by the fact that the legal profession frequently looked to them for advice.

The clerk as cynical legal adviser

"We get the comical situation at times where you get somebody ringing up for advice and you don't know who it is and then in the end you say 'Why don't you see a solicitor?' and they say 'But I am a solicitor'."

This story is told, with minor variations, by clerks at many courts. It captures the somewhat cynical attitude of the numerous clerks who believe that the legal profession do not regard them as equals, but yet that the profession exploits them by approaching them for help.

96% of clerks reported that local solicitors came to them for legal advice. Some of them obviously resented this. One remarked

"I tell them to look it up. They're paid more than me."

Another, rather more mildly, made the same point

"... it goes against the grain a little when one realises that we give the advice and at the end of the day they reap a handsome reward for the advice given to their client - by virtue of the advice they've been given from the court."

It would seem that some solicitors do bother clerks unnecessarily, since several clerks remarked that they were asked for advice on points which the solicitor could easily have dealt with her/himself. One clerk reported that she had been irritated by a solicitor that morning who had telephoned the court to discover whether or not possessing an offensive weapon was an indictable offence.

Not all clerks were cynical about the local profession looking to them for advice. Some clerks simply saw it as a quid pro quo - the clerk helped the solicitor with advice on magisterial law, the solicitor helped the clerk when the clerk was conveying his house. Possibly help given to a solicitor might be a guarantee of good behaviour.

"If you help them, alright you build up a better relationship and you expect that they would assist you in a similar circumstance, and certainly wouldn't try any funny business and be awkward and play it silly in court.

There were also those clerks who were philosophical about the situation, and who reported no problem arising from solicitors approaching them for advice - beyond the necessity to ensure that it was a situation in which they could properly advise. But they were in a minority.

Most clerks displayed some ambivalence towards the legal profession. They did not have any fundamental objection to solicitors approaching them for advice - they advise all of those who use the courts, where they can properly do so, because they are the experts. But nevertheless they resented the fact that solicitors looked to them for advice, but did not regard them as equals, preyed on clerk's expertise and then made things difficult for the clerks in court.

Conclusions

The relationship between the legal profession and clerks is regrettably bad. There are undoubtedly instances of wrong behaviour on both sides. Some clerks are obstructive to advocates. Some advocates are unreasonable towards clerks.

Amelioration of the problems may be achieved to some extent by efforts by clerks to accommodate the needs of the profession - for instance by instigating liaison discussions with local solicitors which have the function of both education and determination of court policy. Efforts from advocates are also needed. Closer liaison at the level of individual cases from advocates would be helpful together with a more sympathetic understanding of the needs of the court.

Also, although there is no excuse for the snobbery and bad behaviour towards unqualified clerks of which clerks accuse the profession, we will later be arguing (in Chapter Ten) that one of the most urgent priorities for clerks is the institution of an all professional service. When there is greater exchange of personnel between legal professional practice and the courts service, then both sides are likely to achieve greater understanding of the other's problems.

However such moves do not attack the root of the problem, which is that the needs of the court organisation conflict with the needs of the advocates. This is a problem which cannot be solved by changes in individual attitudes. It can be significantly assisted, however, by relieving the pressures on the court organisation. If there were more magistrates, more courtrooms, more clerks, more court staff, the listing and allocation of cases in court would not be such an enormous logistical problem, and the needs of the profession (not to

mention the costs of the legal aid fund) could be better catered for. The legal profession might be best advised, instead of directing attention to the problems of individual courts, to direct its attention at a national level to the allocation of resources to magistrates' courts.

CHAPTER SEVEN

THE RELATIONSHIP BETWEEN THE CLERK AND PROBATION OFFICERS
AND SOCIAL WORKERS

The clerk and the probation service

The influence of the clerk to the justices

The clerk and social workers

The history of the relationship

Dressing for the part

Identifying with the client

Understanding court procedure

Improving the relationship between court and social workers

The relationship between the clerk and probation officers and social workers

In this chapter we examine the relationship between clerks and probation and social services. Superficially both probation officers and social workers have a similar function so far as the court is concerned - the provision of information to the court about defendants to assist the court to make an informed decision. In fact there are very great differences between the jobs that social workers and probation officers do, and very marked differences in their relationship to the court. Whilst the relationship between the court and probation officers is almost universally one of friendly respect, the same cannot be said for that between the majority of courts and the social workers who appear in them.

The clerk and the probation service

The probation service has its origins with what were called 'police-court missionaries' at the end of the last century. Probation officers and probation orders have been in existence since the Probation of Offenders Act 1907.

Magistrates' courts have, therefore, known the probation service for a very long time. Some of the clerks interviewed for the present survey had very long service in magistrates' courts, but not even the longest serving clerk interviewed could recollect a court without probation officers. Several reminisced about the days when there had been so few officers that they were able to know them all personally. The longest serving clerk described his relationship with probation officers in his early days as a clerk as "very close and very cordial", and he regretted that there were now too many officers to permit such a personal relationship with them all. But although the intimacy of earlier days is no longer to be found, probation officers

are in court every day, and over a period of time clerks do get to know at least some of the local officers.

The relationship between clerks and probation officers is not confined to the courtroom. Clerks who serve on probation case committees come to have a close understanding of the way the probation service works, and similarly the probation officers develop a better knowledge of clerks and magistrates. There is also often involvement in training from both sides. Some clerks teach on training courses for probation officers. The probation service also provides training sessions on the courses organised by clerks for the training of magistrates.

All newly appointed magistrates must be trained. This training is divided into two parts. Part One is introductory material and is followed by practical experience in court. Part Two is more detailed and contains substantial material on sentencing. The "Blue Book", which specifies the areas to be covered by magistrates training, provides that magistrates shall examine

"Probation and supervision. An explanation of the legal aspects and of the social work implications. Special requirements and breaches of orders. Function of the Probation Case Committee. The ranges of work undertaken by probation officers."¹

Therefore the clerks to the justices who organise these sessions, and the new magistrates who attend them gain a good basic understanding of the probation officer's job. At a magistrates' training session observed during this study a probation officer gave an excellent seminar on social enquiry reports, detailing the ways in which a probation officer collects and tests information for such a report, and explaining how decisions as to content and recommendations for

1. 'The Training of Magistrates'. Lord Chancellor's Department 1978.p.22.

sentence are made. The justices' clerks running the training session reported that they had exercised considerable care to find a probation officer who had an aptitude for training and who was a good speaker. These clerks regarded it as extremely important that their benches should have a thorough understanding of the way the probation service operates.²

The probation service itself is conscious of the need to maintain a good relationship with the courts, and it puts a great deal of effort into educating officers about the expectations, practices and procedures of the court. Carlen and Powell have shown that probation officers are expert at maintaining their credibility with the magistrates and their good relationship with other professionals working in magistrates' courts.³ Their study demonstrated that probation officers were jealous of their tradition of good standing with clerks and bench, worked hard to maintain it, and indeed were contemptuous of social workers who did not work to foster such a relationship.⁴

The daily presence of probation officers in court, the out-of-court contacts, and the efforts of the probation service to understand and accommodate to the needs and expectations of the court have

2. No session on the operation of the Social Service Department was included - although such a session did form part of training for juvenile court magistrates.
3. Pat Carlen and Margaret Powell. 'Professionals in the Magistrates' Courts: The Courtroom Lore of Probation Officers and Social Workers', in Howard Parker, (ed.) 'Social Work and The Courts.' Edward Arnold 1979.
4. Carlen and Powell, *ibid.* detail a "set of precepts for maintaining credibility with magistrates" (p.111) which probation officers use, which include making themselves visible and appearing competent in court, talking to magistrates out of court, dressing appropriately, providing positive re-inforcement for magistrates, and tailoring their report writing to the

expectations of the bench.

succeeded in creating a very positive relationship. Almost every clerk interviewed reported that her/his relationship with probation officers working at the court was good or excellent. One said

"I don't think there is anything unsatisfactory in our relationship at all."

Another commented

"Well in fact I seem to know probation officers in court more than anyone else. I can relax with them whereas you've got to be on your guard against relaxing in the presence of police officers and solicitors because they are out to trip everybody up and get the best for their client."

The only clerk to express reservations about probation officers (specifically, about their sentencing recommendations) nevertheless said that the probation staff at his court were good.

Carlen and Howard (1979) have demonstrated the effort invested by the probation service in developing a good relationship with the court, and the sophistication of probation officer's understanding of the needs and expectations of the court. The present research demonstrates, however, that the positive relationship between probation service and court is also fostered by a system of mutual favours and assistance between clerks and magistrates and the probation service.

The favours done by clerks for the probation service consist mainly of instances of free legal advice. To a great extent such advice concerns the business of the court. A probation officer may ask a clerk if the sentence s/he wishes to recommend in a report is one which is available to the court, or may ask what view the bench usually takes of a particular type of offence. Frequently probation officers will look for advice if they are considering proceeding for breach of a probation order - if, as one clerk put it, they want to

know "whether to bring proceedings to court or let things go a bit longer".

However probation officers also use clerks for advice on matters which are not directly concerned with proceedings before the court. One clerk being interviewed commented that he had just given some advice to a probation officer

"That was a matter that involved some civil law, and how the order that this court had made would be affected by orders made by a civil court."

Many clerks reported that they were used by probation officers as a sort of unofficial advice agency for probation clients on all areas of law.

The clerks expressed none of the cynicism or impatience in relation to requests for advice from probation officers that they expressed in relation to such requests from police or the legal profession. Several clerks said that they encouraged probation officers to come to them for advice - that they were happy to help. One said

"I consider it my duty to help them in any way I can."

Clerks see probation officers as part of the criminal justice process, but unlike solicitors they are not "making a handsome profit" from it, and unlike police they cannot be expected to know the law or employ their own lawyers. Also, helping the probation service does not open the clerks to any risks of acting partially.

Helping the probation service also has its rewards, in that the favours done by clerks are amply repaid by reciprocal favours done for the court by probation officers. As one clerk commented

"...you're normally quite helpful to them because if they want they can help the magistrates - and they don't have legal advisers to go to."

The favours done by the probation service for the court are many and varied. One of them consists of taking difficult, frightened or confused defendants off the hands of the court.

We showed in Chapter Four an instance where a defendant whose case was remanded but who was under the mistaken impression that he was being sentenced to imprisonment was referred to the probation service, so that an explanation of what had happened in his case could be made. Commonly, even where there is no question of a social enquiry report or a probation order, a probation officer will be called upon to calm down and explain matters to confused defendants. Interpreting the language and ritual of the courtroom to defendants mystified by it is a speciality of the probation service. Dealing with "difficult" people is another.

"I think the probation officers can be helpful in court where you've got difficult defendants - and particularly inadequate defendants. Then I think the probation service can be helpful to really see whether or not they are just trying it on or are backward, or whatever."

"...they can have a word with them (defendants) in much more straightforward terms without the encumbrances of legal niceties in court, you know."

Coping with "the nutcases" is yet another speciality.

"I had a drunk about four or five days ago who came up wearing nothing but a pair of pants, and he couldn't remember where he'd lost his clothes. The magistrates... were worried about somebody out in the wide world with nothing but a pair of pants."

It was, of course, the probation service who dealt with this.

Helping the confused and inadequate seems to have been formalised in some courts as a job for probation officers.

"With this court, perhaps its because we don't have a duty solicitor scheme, the probation service try to weed out from the list people who look as though they might require some advice before they get into court."

Other courts had a system of "stand down reports" or "day of hearing

reports" where a probation officer would take a convicted defendant aside and elicit background and mitigating factors and present these to the court in a quick oral report. Such reports hardly fulfil the usual rigorous requirements of social enquiry reports. They are really used as substitutes for a lawyers plea in mitigation, or the more laborious process of clerk and magistrate eliciting the information direct from a frightened and inarticulate defendant.

Such reports must often be helpful to a defendant too overawed by the court to explain her or himself properly.

However, such day of hearing reports are in some senses problematic. Their usefulness must be limited in that there are no checks on the correctness or adequacy of the information in them. If used frequently they may have the effect of transferring the decision about whether a full social enquiry report is needed from the bench to the probation service. This may be a good thing, but it should be a decision consciously taken. The other danger is that such reports will be used as a substitute for legal representation.⁵

As well as making such reports, probation officers do other tasks. They find clothes and money for destitute people, check for bail hostel places, and even run errands and act as impromptu ushers. The probation officers interviewed by Carlen and Howard⁶ said that they were willing to do things which were no part of their proper duties because it kept them in good standing with the court. The

5. Although some do not perceive this as a danger. Carlen and Howard (ibid) and Bottoms and McLean (1976) suggested that defendants may be happier with a probation officer than with a lawyer.

6. See ibid. p. 102.

present research confirms that it is an effective strategy. Clerks like and respect probation officers. They see them as doing valuable work and doing it well. They are prepared to listen to what the probation service have to say. The probation service, therefore has a direct route to the good opinions of the magistrates through contact both in and out of court, and an indirect route through clerks.

Many of the clerks interviewed were enthusiastic in their praise of probation officers for 'due process' reasons. Clerks recognised that some defendants could not present their cases adequately because of nervousness or other problems. Clerks also recognised that their own attempts to elicit information from defendants were not necessarily effective. Many clerks were, therefore, pleased that a relatively impartial person could render assistance. One clerk, with a mixture of cynicism and sincerity made the following comment

"We find it not very useful in this area to hand out literature - because it's made into paper darts, and all the bail forms are plastered all over the cell walls or stuffed into the ventilators ... so I think if there's somebody not directly associated with the magistrates who can help, then that's fine. That's the sort of role I like to see them play."

However clerks have organisational motives for their enthusiasm about the probation service. We have already seen in Chapter Four that explaining complicated procedures and provisions to unrepresented people is expensive of time, and that it is in the clerk's interests to save time. Referring "difficult" defendants to the probation service saves time, and clerks consciously use such referral as a time saving mechanism. One clerk remarked that deferring the case of a distraught defendant so that s/he could speak to a probation officer

"...saves an awful lot of court time and a lot of money."

Another remarked

"We had a case last Monday - it could have taken all day but after chats with solicitors and probation officers there was an agreement and it lasted about an hour."

The probation service also resolves problems arising in relation to defendants who do not fit into any of the recognised categories of the court or who are not susceptible to any established procedures.

"I mean there are obviously cases of people coming to this court who just oughtn't to be here, or who are not deserving of any punishment, and they can't really get help from any recognised agency because there just isn't an agency to deal with their particular problem. I think sometimes the probation service can be helpful there, dealing with cases that don't fit into any recognised categories."

Referral of 'difficult' defendants to the probation service satisfies both the liberal in the clerk, since the defendant has been referred to a caring agency, and the bureaucrat since the time of the court has been saved.

The influence of the clerk to the justices

The relationship between clerks and probation officers is generally sound, for the reasons we have explained. But still, given that in all courts the relationship was good, at some courts it was better than at others.

Some of the reasons for this were rather mundane. At a few of the courts the probation service was housed in a separate building, possibly at a distance from the clerks' offices. Thus informal discussions and consultations between clerks and probation officers were made more difficult. It seems that even the layout of the court can make a difference. A clerk at one court commented that the courtrooms were so laid out that the probation officers sat behind the clerk. He therefore could not see them and it was difficult to talk to them so that he did not know them very well.

However problems of geography can be overcome if necessary and the attitude of the clerk to the justices can be influential. A clerk who is enthusiastic about the importance of probation officers will seek to foster a close relationship between the clerks, the magistrates and the probation service.

A good example of a clerk with a favourable attitude was the clerk at Court L, who thought that probation officers were

"...amazing! They're absolutely essential."

This clerk was particularly conscious of the large number of people who came before the court which he categorised as "general social problems". He instanced prostitutes, alcoholics, vagrants and itinerants. He was of the opinion that such people needed help, and that the usual arsenal of remedies available to the magistrates was inappropriate. The probation service was, in his view, invaluable in trying to find ways to help such people. This clerk consequently made great efforts to develop a close relationship between clerks and probation officers. At his court, there was a Probation Liaison Committee meeting three or four times a year, and a court clerks' and Probation Officers' Liaison Group meeting from time to time. Probation officers and clerks were encouraged to be friendly. Probation officers were invited into the clerk's office for coffee, and social meetings were arranged. The clerk to the justices claimed a close relationship with senior probation officers and with the community service officer, and encouraged formal and informal liaison.

At this court, a great deal of effort was invested in keeping up a healthy relationship. Although clerks to the justices at other courts described their relationship with the probation service as good none of them put quite so much effort into maintaining it. An

enthusiastic clerk to the justices can, therefore, considerably assist in the creation of a healthy relationship between probation officers and the court.

The court is the focus of the probation officer's job. It creates the officer's work, directly by requiring reports, making probation orders and other sorts of supervision orders, or indirectly by passing the sentences which result in aftercare responsibilities. The efforts that the probation service invests in maintaining a good relationship with the courts have paid off in terms of magistrates' courts. The clerks - whose influence on bench attitudes is considerable - have a very high opinion of the probation service, and desire to help them to the best of their ability. Unfortunately the same cannot be said for the attitude of clerks to social workers.

The clerks and social workers

The history of the relationship

Whereas probation officers have been working closely with courts for very many years, extensive contact between social workers and the courts is more recent.

Magistrates and clerks have been used to appearances in court by social workers, where the social worker's client became the subject of court proceedings. However, contact between the court and social services was increased considerably by the Children and Young Persons Act 1969.

Unfortunately the increased contact commenced in an atmosphere of controversy over the new legislation. The Act had been preceded by two White Papers, 'The Child the Family and the Young Offender'⁷ and 'Children in Trouble.'⁸ The emphasis of both papers was on dealing

7. 1965. Home Office

8. 1968. Home Office

with children in trouble in the community, and on avoiding children going to court. The 1969 Act contained much less radical provisions than the first White Paper which had seen no role for juvenile courts. Nevertheless, it did transfer some of the responsibility for making decisions about children from the courts to social service departments - for instance where the court made a care order under the 1969 Act, the decision about what happened to the child once the order was made lay entirely with social services.⁹ The 1969 Act also came at the same time as the re-organisation of social service departments under the Local Authority Social Services Act 1970.

Magistrates resented the limitation of their powers under the 1969 Act.¹⁰ The Social Services Departments were perhaps not in the best situation to begin to implement it. The relationship between courts and social workers under the new legislation did not, therefore begin in an atmosphere of cordiality. Anderson, in his study of representation in juvenile courts reports that there was "scarcely concealed hostility between magistrates and social workers at this time."¹¹

One of the problems was that social workers were often not experienced in the rules, procedures and expectations of the courts. Inevitably comparisons were made with those who were experienced.

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9. The Criminal Justice Act 1982 has reversed this process somewhat by allowing magistrates to specify the terms of care orders where an order is made subsequent to an offence.
 10. See Donald Ford. 'Children Courts and Caring.' 1975. Constable. Chapter Three.
 11. R. Anderson, 'Representation in Juvenile Courts.' Routledge & Kegan Paul 1978.

Anderson asserts¹² that

"Magistrates began to draw distinctions between the local authority social workers and the probation service; the latter with its longer professional links with the court was felt to be more capable of providing the 'right' attitudes, being more aware of the bench itself and their expectations."

One of the clerks interviewed for this survey echoed the same sentiment.

"The probation service has been with us a long time, and of course there is a special relationship in that they are officers of the court ... the social workers approach is not anything like as professional.

In this atmosphere of mistrust, hostility and disadvantageous comparisons with the probation service, magistrates began to use, it seems, some fairly crass stereotypes of social workers. Donald Ford, a magistrate intimately involved with juvenile courts writes of this period

"The direction of many attacks was against the social workers and the social services departments of the local authorities. The idea that a 'young social worker' (they were always young!) could know better than an experienced bench was not an acceptable proposition. This gave rise to what has been called the 'mini skirted dolly bird' syndrome! It always seemed to be the judgement of a 'mini skirted dollybird' female social worker that the magistrates took greatest exception to....It interested me that when fashion changed a new epithet emerged: 'the betrousered baggage'"¹³

The present research was begun on the naive assumption that the relationship between social workers and the courts had improved. The parties have, after all, had ten years to acclimatise to each other. This assumption, however, turned out to be quite wrong, and it is regrettably obvious from the remarks of clerks that the relationship has not become any better. Court clerks, at any rate, still have a

12. At pages 22-23.

13. Ford, D. 'Children, Courts and Caring.' Constable, London, 1975, at p.34-5.

very bad opinion of social workers and operate stereotypes of them as critical as those reported by Ford. A Selection of comments from clerks will illustrate this point.

"They drift into court and drift out of court and they've got to 'relate to their clients' and they're wearing roll neck pullovers and scruffy jeans."

"There's this sort of picture of some social workers in jeans and long hair and you wonder if they are defendants or social workers... but, I do take them seriously, obviously."

"Social workers have got a bad reputation. Usually they are very young and you can't be sure they are going to be any better in their appearance or their reaction to court proceedings than the clients they're with ... and they seem to be as aggressive as the juveniles they are there to help."

"Any difference of view I have about social workers is down to my own individual bias, and I suppose its true to say that I tend to think of social workers as being a lesser breed of person."

For clerks, "the betrousered baggage" seems to have been replaced by the lout in the Levis!

The remarks quoted above are only a small selection of similar responses coming from clerks when asked about their relationship with social workers at their court. The quotations are all from clerks at different courts.

The stereotypes are obvious and censorious, and are cause for concern in themselves. It seems likely on the available evidence that magistrates share these opinions, or that they will be influenced by them, directly or indirectly.

Although the Criminal Justice Act of 1982 has returned some of the discretion about disposal of juveniles to the juvenile court, nevertheless the close involvement of magistrates and social workers in the juvenile court is going to continue, and the opinions held by clerks and magistrates about social workers remain a cause for concern. The extent to which magistrates lend credibility to social

workers' evidence, reports and recommendations is at stake, as is the likelihood that clerks will foster effective liaison and a productive relationship with social workers.

The history of the 1969 Act cannot be rewritten, but the conflicts and resentments it generated can be ameliorated in some respects. Some of the comments of the clerks interviewed for this survey clarify their attitudes to and opinions about social workers and contain valuable indicators of ways in which the relationship might be improved.

Dressing for the part

A significant part of the clerks' criticism of social workers seemed to revolve around what social workers wear in court.

Magistrates' courts, in common with other courts, appear to be obsessive about dress. The standards they impose on anyone associated with the court are high, and rigid. There was a time, for instance when much heart searching took place about whether it was proper for lady magistrates to appear in court without a hat¹⁴ although such informality is now commonplace. Men associated with the court are expected to dress smartly in a suit, or at least a collar and tie. Women are not usually permitted to wear trousers. In the formal setting of the courtroom, information as to the character and respectability of individuals are taken from dress.

Probation officers are aware of this. One of the probation officers interviewed by Carlen and Powell said

"... if I'm going to court with a client in front of a magistrate whom I know to be very much of the old school, I will tie my hair back and I would wear a skirt, simply so that he's not antagonistic to the picture I present. Now that's daft if you think about it logically - the fact that I'm bothering to dress

14. See for instance, *The Magistrate*. Editorial Vol.28 No.1. (1972)

up for a magistrate. But if its a court where I don't know the magistrate I tone down, because I think there's more chance of his taking what I say seriously. If he can dismiss me as a slip of a girl, or an unrealistic hippy, then there's less chance that he will read my recommendation seriously."¹⁵

This officer was aiming to conform to the expectations of the magistrate, but clerks, as well as magistrates take these matters seriously. Their stereotype of social workers focussed on the length of hair, the wearing of jeans. They saw the appearance of social workers as a failure to adjust to the expectations of the court and as a statement by social workers that their primary identification was with their clients, rather than with the court. The reason given by many clerks for objecting to the appearance of social workers was that

"...sometimes you have a job picking them out from defendants."

One clerk confessed

"I have had the misfortune to think a social worker was a defendant and ask him which case he was."

It would require systematic observation of juvenile courts to assess whether the appearance of social workers is in fact deviant. The present study included juvenile courts, but the largest part of the court observations took place in adult courts. However, given this limitation, eighteen months employment and many months of observation at different courts turned up very few social workers whose dress differed markedly from that of the probation service. One social worker who did appear looking "scruffy" had been called in that day from a youth employment workshop at the request of the magistrates who did not want to delay a case for formal reports. This worker was very careful to make apologies for appearing at court in his working clothes. A social worker questioned about court dress

15. Carlen & Powell (1979) p. 112.

said that although she was sometimes surprised by the informal appearance of some social workers nevertheless at her office everyone had "their court dress" - a smart outfit for appearances at court.

It would seem that clerks' stereotype of social workers appearance is - like all stereotypes - a very imperfect reflection of reality. Almost certainly there are some social workers who resent the conventions about dress in court, and flout them. It is perhaps less likely that there are some who are unaware of the conventions and thus do not conform. But the most interesting aspect of clerks' stereotype of social workers appearance is the criticism that they look too much like defendants. This image is linked to another criticism made by clerks of social workers - that social workers identify excessively with their clients.

Identifying with the client

Clerks perceive social workers as having too little concern for the tasks of the court, and as seeing issues solely from the client's point of view.

One clerk expressed his feeling forcibly.

"I think some of them are deplorable, terrible! I think it seems to be that - I can't honestly say that whether they go through a brain washing system or whatever, but their training - well they seem to come out and look at things just from the client's side and how they can get as lenient a sentence for them, whatever the cost. Even if it means obstructing the court to some extent...I know most court clerks feel the same way."

Another said

"They want to be seen on the defendant's side and not as officers of the court, whereas the probation officers on the whole manage a very successful balance between the two."

And a third

"I think generally social workers tend to be labelled differently to probation officers in that they tend to have a much more client oriented label."

Again these quotations are from clerks at different courts, and reflect the attitude of many other clerks.

The comparison which is made of social workers with probation officers is very revealing. The clerks expect social workers to behave like probation officers, and because they do not always do so, the clerks are critical. However this is, to a large extent, a failure by clerks to understand the job of the social worker.

The probation officer is an "officer of the court".¹⁶ The social worker is not. The probation officer's job is focussed specifically around the court which provides her/him directly, or indirectly via prison, with his/his work and clients. The social worker's job is not focussed on the court in the same way. Some of a workers' clients may come referred directly from the juvenile court, but very many do not. Social work clients originate in the main from the local community, and although court appearances may be a fact of life for many clients such appearances may well be a reflection of crises and failures in clients lives. For social workers their court appearances may not be a part of a process that originated with the court and is maintained because of the courts action over a set period with the possibility of referral back to the court, in the way of probation or parole. For social workers court appearances are just one aspect of a relationship with a client - and usually the least successful aspect. A social worker in Carlen and Powell's sample said (of the adult court) - "its a parade of all your failures".¹⁷

16. The Departmental Committee on the Probation Service (Cmd. 1650, 1962) defined the probation officer as "social case worker who is an officer of the court".

17. Carlen and Powell, 1979, p. 110.

It is true that since 1969 local authority social workers have had greatly increased involvement in juvenile courts, and that in respect of children they may be given responsibilities under supervision orders which are comparable to the responsibilities of probation officers. But for the social worker, clients referred in this way will form a small proportion of their case load. They are highly unlikely to ever have as much court experience as a Probation Officer.

However clerks expect social workers to have the same attitudes to their clients as they expect from probation officers. Most clerks do not seem to understand the nature of the social workers role - although there are a few who are beginning to. A more informed attitude may be seen particularly in clerks who do a lot of work in the juvenile court. One commented

"But I think in fact so often when you break it down, and you get to know them personally, as we do in the juvenile court ... you begin to understand their way of thinking. I think so often it's a question of not understanding it, rather than actually being that far apart."

Possibly where clerks have increased contact with social workers in the juvenile court they do begin to understand the differences between the jobs of social workers and probation officers. Some of the distortions in the clerks' image of social workers may thus be broken down.

Understanding court procedure.

Associated with the criticism by clerks that social workers are too client-orientated is another - that social workers are not sufficiently court-oriented. Clerks criticise social workers for not knowing the rules.

"... they've got no idea about report writing or report presentation or even what's expected of them when they get into court, and before long they've moved on and there's another."

"Some social workers are good but others tend to have a sloppy attitude to the court... they don't bother to find out what's expected of them."

"They don't give their evidence so well - they don't seem to understand giving evidence as do probation officers."

Again there is the same comparison being made between probation officers and social workers, and again it is a comparison which is difficult to justify, since social workers will very rarely have the same amount of experience of courts as probation officers.

However this criticism of social workers is one which is also made by probation officers. Carlen and Powell's study refers to a "professional rift" between probation officers and social workers and cites criticisms of social workers by probation officers for their being unfamiliar with the powers of the court, and ignorant of appropriate ways to approach the court.¹⁸

Probation officers are very aware of the need to have the respect of the court. They work hard to gain the credibility of the court so that the interests of their clients will be served.¹⁹ They feel that if the magistrate respects them s/he will be more willing to listen to the officer in court and more willing to follow a recommendation in a report, even when it is a little unusual.

Whereas clerks do trust probation officers - and try hard to ensure that the magistrates understand and trust them also - they do not necessarily respect the judgement of social workers in the same way.

Some clerks saw social workers as living 'in cloud cuckoo land'.

"Sometimes they do present a very rosy optimistic picture which doesn't help the defendant because the expectations of the defendant are raised too far."

18. Carlen and Powell (1979) p.109-110

19. Ibid p.111.

"I don't think I've ever had the same confidence in the social services that I've had in probation officers. I think this boils down to experience of them and not being satisfied that their enquiries are necessarily exhaustive and the information they put before the court sufficiently reliable to be dependable."

One clerk who criticised social workers for their naivety was nevertheless prepared to concede that they might be right.

"I think clerks tend to see social workers, when they are writing their reports to the court, as seeing life through rose tinted spectacles or in a slightly naive way - and that's probably because we've become rather case hardened after many years of exposure to similar sorts of cases - perhaps their reality is better than ours - I don't know."

This clerk was, however, in a minority. Very few of his colleagues were prepared to concede that social workers might see defendants more accurately than they themselves did.

In one sense it is not the clerks' view of the social worker that matters. It is the magistrates who are responsible for taking decisions. However the evidence of magistrates like Ford (1975) suggests that their views of social workers may be little different from their clerks'. We have seen (in Chapter Three) that the clerk has considerable influence on the bench in court, and we shall argue (in Chapter Eight) that the clerk also influences the magistrates through their training. The attitudes of clerks should not, therefore, be ignored.

Improving the relationship between courts and social workers.

There are a number of indicators in the data of ways in which the relationship between court and social workers might be improved.

First, familiarity, it seems, breeds respect. Several clerks commented that when they came to know individual social workers and discussed their work with them they gained respect for them.

"Well I suppose I'm slightly anti social workers generally, although individual social workers one gets to know after a time and you get to trust their judgement."

Many clerks felt that the poor relationship was 'just lack of familiarity' or 'entirely a question of the degree of personal contact'.

There are some very obvious ways in which contact can be increased. One is by the clerk to the justices taking initiatives to create or increase discussions with social services. One clerk to the justices reported that he had liaison meetings with the local authority social services department as often as there were probation case committees, and that although he could never hope for the same relationship that he had with the probation service because social workers do not appear in court with comparable frequency, he nevertheless now knew the senior officers in the department. There was thus a chance of communication in case of problems, or issues needing resolution.

The participation of the clerk to the justices in training programmes for social workers was also welcomed by some clerks. One said

"... I go along to the Social Services Training Section from time to time and talk to social workers about their involvement with the courts and what I expect from them - or the courts expect from them - so that they're not living in cloud cuckoo land."

At another court the clerk to the justices and his deputy "arranged meetings with clerks and social services staff because.... magistrates, particularly the juvenile panel had a certain amount of suspicion of them". This clerk also arranged meetings between social services and magistrates and visits to various institutions.

Such liaison meetings ought to be helpful in informing clerks and magistrates and, given that some of the problems seem to arise from a lack of understanding by clerks and magistrates of the role of the social workers, should improve the relationship between court and

social workers.

More training for social workers in matters relating to the court, its powers, procedures and the job of the social worker in court should also assist matters. Social workers may argue that they attend court on few occasions, and that therefore the expenditure of a great deal of time in training for court appearances is not justified. However, the occasions when they do go to court, whilst infrequent, will be very important for their clients. It is short sighted to ignore the fact that the court has power, and power which affects the way in which social workers do their jobs. If social workers wish to have an impact on those who wield that power, then they must familiarise themselves with the expectations of the court. Training in the powers and procedures of the court for social workers could take place as in-service training in their departments, or as part of their professional training. Although one hesitates to add more to Certificate of Qualification in Social Work courses, they might appropriately contain more information, not only on the powers of the courts but also on procedure and evidence, and the court's expectations of social workers.

Social workers also have a great deal to teach clerks. Some of the clerks responses to the questionnaire indicate a certain rather smug superiority which is unjustified. Other responses indicate a willingness to learn more. Either way, ongoing training for clerks about, inter alia, the job of the social worker may help to dispel some of the misconceptions. The organisation of such training should be the responsibility of the clerk to the justices.

The role of the "court liaison officer" or the "court team" is also another possible avenue for confronting the present problems.

Some social services departments have appointed a worker or a team of workers (depending on workload and other factors) who are attached to the courts - in the sense that their duties are to liaise with the court, and with social workers appearing in court to ensure that the proceedings run smoothly. They are, at some courts, able to relieve social workers of appearing by presenting reports if the author of the report is not needed. If social workers do appear, they can brief them as to the court's expectations, and support them and deal with questions and problems. At courts where there was such a liaison officer, or where there was a court team almost all clerks reported a positive relationship with them. One clerk described the court liaison officer as

"... a buffer between the court and the individual social workers - who no matter how hard they tried - could never get the same experience of court as a probation officer will."

Clerks were able to get to know the court social workers well and had a reference point for dealing with any difficulties. They were able to develop a relationship in which they could come to understand the needs and attitudes of social workers. Not all courts had a liaison officer or court team. Perhaps more social services departments could consider using them. They did, so far as clerks were concerned, play an effective role in developing understanding between court and social worker. Cordial relations at the level of the clerk to the justices and senior social workers may be less of a guarantee of understanding between the two groups than daily liaison between a social worker who demonstrates a familiarity with the court's needs and expectations and the court clerks.

Anderson's study of representation in juvenile courts showed that the attitude of juvenile courts to social workers can differ considerably from court to court. For instance he showed that the

degree to which a court accepts the client orientation of the social worker varies with the extent to which the court itself accepts a welfare orientation as opposed to a punitive orientation.²⁰ Parker, Casburn and Turnbull²¹ also demonstrate wide variations in the approach of juvenile courts to social workers and social enquiry reports inter alia. These differences of approach develop with the traditions of the bench over the years. They are perpetuated in the way the bench trains and educates its new members, and by the experience those new members have when they begin to sit on the bench. The clerks, and especially the clerks to the justices, play a very considerable part in this process.

Any attempt to influence the attitude of juvenile courts by educating new magistrates is not likely to have any substantial effects since they must then react against their experienced colleagues and qualified and experienced clerks. Educating the educators - the clerks who run the training courses and sit in the courts - may be more effective.

Certainly where there exists such a pervasive and continuing antagonism and lack of understanding between the court (clerk and bench) and social workers, some measures need to be taken to alter the situation. It is true that the juvenile court is still suffering from the legacy of conflicts associated with the 1969 Act. But these problems cannot be used as an excuse for failing to confront any of the difficulties of the present. It would of course be naive to hope that a better understanding between clerks and social workers would

20. Anderson 1978.

21. Howard Parker, Maggie Casburn and David Turnbull. 'The Production of Punitive Juvenile Justice.' 20. Brit. J. Criminol. 236. (1980)

solve all the problems of the juvenile court, but it must help some of them.

SECTION TWO - THE CLERK OUT OF COURT

CHAPTER EIGHT

THE INFLUENCE OF THE CLERK TO THE JUSTICES ON MAGISTRATES AND COURT

STAFF OUT OF COURT

The education of justices of the peace

Origins and development of training for magistrates

The present training requirements

The participation of the clerk in training

The content of training

Stage One Training

Stage Two

"In service" training

The impact of training on magistrates

Conclusions

Clerk and magistrates out of court

The influence of the clerk to the justices on court staff

Conclusion

Chapter Eight

The influence of the clerk to the justices on magistrates and court staff out of court

In Chapter Three we analysed the relationship of the clerk in court to the magistrates, and emphasised that this relationship is affected by the traditions of the court as to what constitutes the proper balance between the clerk and the bench. It was also noted that some magistrates taking the chair in court were competent and articulate in performing their tasks and that others were very tentative, unsure and prone to error. Several clerks emphasised the importance of training in relation to these factors.

The influence that the clerk has through training is perhaps even more important than the clerk's influence in the court itself, since clerks teach magistrates not only about the nature of magistrates' jobs, but also about the correct relationship between clerk and magistrate. This can have a fundamental effect on the attitudes that magistrates bring to the job and on their behaviour in court.

In addition to training for new magistrates clerks are also involved in ongoing training for all magistrates and many clerks also develop and discuss issues of court policy with their magistrates and so can shape and alter the court's approach to issues such as sentencing policy or legal aid.

Clerks to the justices also have an influence on court clerks at their court. Although it may be difficult for a clerk to the justices to affect the attitudes of a qualified and experienced clerk to any significant degree, s/he can nevertheless have a good deal of impact on the attitudes of new and trainee clerks. The clerk to the justices may remain a reference point for standards for clerks throughout their careers.

The Education of Justices of the Peace

Origins and development of training for magistrates

For many centuries justices of the peace carried out their duties without any training apart from the experience that they acquired as they sat on the bench. However, as was noted in Chapter One the present century has seen an increasing concern about the quality of justice meted out by magistrates. One of the consequences of this concern has been an emphasis on the need for magistrates to receive some training for their duties, especially when they are newly appointed. Interestingly, the desirability of training for magistrates has been consistently expressed with reference to their relationship to their clerk. The perceived danger of untrained magistrates has been that their ignorance leaves room for dominance - or at least the appearance of it - on the part of the clerk.

The Royal Commission on Justices of the Peace reporting in 1948 recommended that all justices, on appointment, should be required to give an undertaking to follow a scheme of instruction designed to educate them in the nature of their duties. The Commission expressed its opinions about the desirability of training in the following terms.

"In the course of court proceedings a justice must be sufficiently instructed to perform his duties, without constant reference to the clerk."

and

"When justices know and understand their duties they and the clerk can work satisfactorily together: if they are ignorant the clerk must either watch them make mistakes that may be serious to the parties and to the justices, or intervene and take too much part in the proceedings."¹

1. Royal Commission on Justices of the Peace. 1946-48 Cmnd. 7463, Para 89.

The recommendation of the Royal Commission that justices give an undertaking to be trained was not put into practice. The Justices of the Peace Act of 1949 instead imposed a duty on the newly created Magistrates' Courts' Committees to make and administer schemes for training magistrates in their area.² This provision came into operation in 1952, and the Lord Chancellor's office circulated a model scheme for training.

The success of these provisions was uneven. This was due, at least in part, to the fact that although the Magistrates' Courts' Committees were under an obligation to provide training, the justices were not under an obligation to receive it.

In 1964 the Lord Chancellor therefore established a National Advisory Council on the Training of Magistrates which investigated the situation. A White Paper of 1965³ announced the introduction of compulsory training for magistrates appointed after 1.1.1966. The White Paper stressed the necessity for training in view of the complexity of the job of lay magistrates, and in particular it cited the paragraphs quoted above from the report of the Royal Commission. Again the need for training was perceived in the context of the need for a correct balance between bench and clerk.

The White Paper envisaged that clerks would carry out a large part of the new training, since they were operating training under the existing schemes, and had the necessary expertise.

The National Advisory Council was replaced by the Advisory Committee on the Training of Magistrates, which was given a brief to

2. By Section 17 of the Act.

3. 'The Training of Justices of the Peace in England and Wales'.
Cmnd. 2856

keep training policy and the operation of training schemes under review.

The Present Training Requirements

The basic requirements for training set out in the White Paper of 1965 still apply, although they have been modified and updated.⁴

Training for new magistrates takes place in two stages. The First Stage, which must be completed before a magistrate sits to adjudicate consists of attendance at court on not less than three occasions as an observer, instruction at not less than four one and a half to two hour sessions and prescribed reading from the handbook for new magistrates. Periods of court observation are to be followed up by discussions.

The Second Stage normally takes place after the magistrate has been adjudicating for at least six months but must be completed within twelve months of appointment. It consists of not less than ten one and a half to two hour sessions of instruction or practical exercises, visits to penal institutions and attendance as an observer at a magistrates' court other than the one at which the magistrate normally adjudicates. There are also schemes of training for magistrates who become members of the juvenile court panel, and the domestic court.⁵

The Participation of the Clerk in Training

The organisation of training is the responsibility of the Training Committee- a Committee of Magistrates on the Magistrates' Courts' Committee who "appear to have the appropriate qualifications,

4. They are now set out in 'The Training of Magistrates', produced by the Lord Chancellor's Department, and known as The Blue Book.

5. The requirements for juvenile court magistrates are set out in 'Basic Training for Juvenile Court Magistrates' (The Orange Book) and for domestic court magistrates in 'Basic Training for Domestic Court Panels' (The Purple Book).

interest and aptitude".⁶ Each Training Committee is served by one or more Training Officers who are usually justices' clerks.⁷

Most of the training of magistrates is done by clerks. Part One of basic training for new magistrates is generally carried out by the clerk to the justices for the Division to which the justices are appointed. Part Two is usually done over a wider area than a single Petty Sessional Division but it is again usually the responsibility of a clerk to the justices or several of them.

Training for magistrates appointed to the juvenile and domestic panels is also carried out by the clerks.

The ongoing training needed when a major new piece of legislation affecting magistrates' courts is brought into force (for instance the Bail Act 1976, the Domestic Proceedings and Magistrates' Courts Act 1978 or the Criminal Justice Act 1982) is also the responsibility of the clerk who may, or may not, enlist the help of others.

Clerks to the justices are encouraged to take advantage of any training provided by the Magistrates' Association, academic institutions or the probation service. The Chairman or Chairwoman of the bench and other senior magistrates will also often have some involvement in training,⁸ but there are many long serving clerks who

6. The Blue Book. P.2.

7. They do not need to be justices clerks, but if they are not they should be "persons with knowledge and practical experience of the duties and needs of lay magistrates, and their courts and committees". (The Blue Book. P.3.)

8. An article in The Magistrate in 1975 (D.A. Crockatt 'The Chairman and the New Magistrate' Vol.36 No.3), for example stresses the usefulness of involvement of the chairman in training new magistrates. Young and Clarke (Chairmanship in Magistrates' Courts. 2nd ed. 1926) emphasise the chairman's role especially during court observation. Hood, in "Sentencing in Magistrates' Courts", Stevens 1962, stressed the influence of a strong chairman on other justices pp.78-81.

will themselves have trained those senior members of the bench. The local liaison judge may also play a part in training programmes.

But although there is input from other sources the people who educate the magistrates, who explain and interpret their role are, to a very large extent, the clerks. Of the eight clerks to the justices interviewed about training, all were responsible for Stage One training. Five were also Training Officers, and therefore responsible for Stage Two and any other training. Of the remaining three, two had been training officers and the third, a relatively new appointee, was keen to take on the job in the future.

In the rest of this section we will examine what clerks teach magistrates, what they believe magistrates need to know, and also the impact that the clerk's training has on the bench.

The Content of Training

The basic syllabus for training magistrates is set out in the Lord Chancellor's Department's handbooks. The clerks interviewed on the whole approved of the training syllabus. Several of the longer serving clerks to the justices commented favourably on the improvement they had seen in training during their service. Most clerks pointed to the fact that training must be restricted since magistrates are volunteers and have a limited amount of time at their disposal. Also an unevenness of enthusiasm for training amongst those appointed to the bench would still seem to be a problem even given that new appointees must now undertake to follow the basic training course. One clerk remarked

"You find at training sessions the same ones turn up every time and some don't even come at all, but there's not very much you can do about it."

Similar comments were made by some other clerks.

To counterbalance this however, the evidence available shows that

in general magistrates are enthusiastic about training. Baldwin's research⁹ showed that magistrates were satisfied with the training they received and that a great majority had pursued training beyond the basic requirement or intended to do so. It also showed however that the quality of training provided is variable. Baldwin showed that there was a relatively widespread disregard of the basic training syllabus and enormous variation in the depth and variety of courses offered among benches.

It would be wrong to suggest that the training syllabus was disregarded at any of the courts observed for the present survey, since no evidence on this point was collected. Indeed all of the clerks to the justices interviewed were enthusiastic about, and involved in, some sort of training, and some very impressive training sessions provided by clerks were observed.

Although no assessment can be made of the extent of adherence to the basic training syllabus for new magistrates evidence was collected about provision of training for magistrates taking the chair. We have already discussed in Chapters Two and Three the importance of a correct balance between the clerk and the magistrates in court. In practice this amounts to a balance between the clerk and whichever of the magistrates is taking the chair. If the magistrate in the chair is uncertain, unsure of when to speak and what to say, the clerk will be required to intervene when s/he should not do so, or need not do so. A competent and confident chairman or chairwoman is necessary if an appearance of dominance by the clerk is to be avoided. For the purposes of the present survey, the issue of chairmanship training was

9. John Baldwin. 'The Compulsory Training of the Magistracy.' [1975] Crim. L.R.634.

particularly important, because it is one measure of the extent to which clerks - and magistrates - take seriously the question of the participation of the magistrates in court and the "dominance" of the clerk in court.

Two of the clerks to the justices (out of eight interviewed) reported that there were no chairmanship courses available for their benches; the other six reported that such courses were available, but that enthusiasm for them was variable. One clerk stressed that everybody who took the chair went on a course, but another said

"In... shire we have run Chairmanship courses but it's fair to say that the majority of chairmen do not attend those courses prior to taking the chair."

A third clerk was of the opinion that although courses were available, good chairmen were born not made.

It may be that training for magistrates to take the chair in court is an area which deserves greater emphasis. Taking the chair and playing a full role in court is a difficult job for a lay person. The importance of the chairman's role was stressed by the Royal Commission when it said that

"The efficiency of the court and the repute in which it is held, depend perhaps more upon the chairman than upon any other factor."¹⁰

This view is reiterated in Young and Clarke's book, "Chairmanship in Magistrates' Courts".¹¹

If we examine the matter from the point of view of the clerks, one of their complaints is that they are wrongly criticised for being too dominant in court. They claim that there is an appearance of dominance which is deceptive; that although they take many of the

10. Royal Commission on Justices of the Peace. 1946-48 Cmnd. 7463.

11. 2nd Ed. 1976 Barry Rose. P. 15.

speaking parts in court they are not usurping any of the functions of the bench. If this is correct, then an improvement in training for magistrates taking the chair would go a long way towards removing any appearance of dominance. If the dominant clerk is not an appearance but a reality, then training for the chair is even more important.

We have seen however, that an appearance of dominance on the part of the clerk may well not be the result of timidity or weakness on the part of individual magistrates taking the chair, but the result of the policy or practice of some courts where the Chairman or Chairwoman is not expected to participate beyond a bare minimum in court. Training for individual Chairmen or Chairwomen is unlikely to change these practices if such training takes place at a local level, since the clerk will be responsible for perpetuating, if not defining, the practice of the court. A clerk who believes that a minimal role for the magistrate taking the chair in court is an appropriate one is not likely to train his magistrates to go beyond this. Training which takes place on a wider basis than the division may be more useful in this respect, since magistrates will come into contact with clerks and magistrates from other divisions who may have different ideas.

Young and Clarke's book on Chairmanship prescribes a much more robust role for the magistrate who takes the chair than is found in practice in some courts. Their recommendations have obviously not created uniformity between courts.

In one sense, uniformity is neither possible or desirable. The balance between the clerk and the magistrate in the chair will depend on the character, confidence and experience of the chairman or chairwoman, and of the clerk. However, in Chapter Three it was demonstrated that some magistrates are not sufficiently confident to

announce their own decisions. The uneven enthusiasm of clerks for chairmanship courses may well contribute to magistrates' diffidence. Perhaps this is an issue which should be pursued by the Justices' Clerks' Society.

Stage One Training

Almost all of the instruction in Stage One training for new magistrates is done by the clerk to the justices for her/his own bench. This training is very important since it constitutes the magistrates' first contact with their new role. One clerk to the justices explained that

"It's very influential indeed, because they come to me without very much idea. Having initially been appointed, had their letter of congratulations from all and sundry and so on they come here thinking they're going to set the world to rights. They very soon realise they can do no such thing. I warn them from the outset - "Now you've come here to an entirely different sphere of activities from that you've ever been engaged in."

The content of Stage One is aimed at teaching magistrates background information about the court, and also how to act judicially. All the clerks to the justices interviewed were agreed that "the judicial approach" is the most important thing that they teach new magistrates. One explained it thus

"I always start by frightening them to death on what can go wrong - there's certiorari, mandamus and all that sort of thing - to put all their prejudices aside and judge the case on the evidence. Don't listen to tittle-tattle and don't have anything to do with a case you know anything about...the judicial approach."

One important aspect of a background information and a component of the judicial approach is the relationship between the bench and others in court. The clerk is thus responsible for explaining and defining the proper attitude for magistrates to take, for instance to an unrepresented defendant or to the police. The importance of this was explained graphically by one clerk to the justices.

"...the clerk can exert through training, a considerable influence, I think, on the tone of the bench. You see a clerk can start off by saying 'You are peace enforcement officers, you are part and parcel of law and order and so are the police. Your objectives are identical and it's up to you to help each other.' That is one thing. The magistrates would accept that. The other is 'You are judicial individuals and you enforce the law with an even hand, with complete independence, and you owe allegiance to no-one except the law, and that being so you will deal justice out with an even hand whether or not one side is wearing a blue uniform.' Now this is going to have a fundamental effect, and you build on it as you wish, and they have no means of knowing that you are right or wrong."

A clearer description of crime control and due process models of justice would be difficult to find! This clerk was quite well aware that he was responsible for the model of justice operated by his bench.

He stressed the important point that these are new magistrates, coming to the job usually without any knowledge of the criminal justice system. Their introduction to their new role is provided by an expert in the job. They have no means of judging the clerk's evaluation of the correct way for them to carry out their new task. They will accept her/his interpretation.

It may be very difficult for a new clerk to the justices to influence the approach or practices of established magistrates but s/he can certainly form the attitudes of new members of the bench to their job.¹² Therefore whilst a new and young clerk to the justices could hardly expect to have an immediate influence on the attitudes of her/his bench, s/he can have a gradual one, and there are many long serving clerks who will have been responsible for training every member of the bench at their court. In the long term the clerk can

12. Burney (Chapter 10) cites the instance of a new clerk who did extensive Stage One training in which he encouraged new magistrates to stand up to senior magistrates who were untrained.

have a very significant effect on the attitudes and behaviour of her/his bench.

Another aspect of the judicial role which clerks are called upon to teach their new magistrates in Stage One is the relationship between clerk and bench. Within the framework of the legal rules it is the clerks who decide their own relationship to their bench. One of them put it

"You've got to explain to them the relationship between them and the clerk. Here again if you were particularly wicked you could give them a completely wrong concept of this - and this is where you've got to have a high degree of professional integrity and self discipline. Because to an extent you are teaching them things which may not be to your own practical advantage."

For those clerks who are not even "particularly wicked" there is still considerable legitimate leeway for interpreting what is a proper relationship between bench and clerk. For instance the traditions of benches which mean that in some divisions the chairperson participates considerably in the courtroom, and in others the chairperson scarcely speaks, have not arisen by accident. The definition of what is a proper division of labour in court will have been heavily influenced by the clerk - or possibly by several over a period of years.

As the clerk cited above said, teaching a bench of magistrates to be independent of the clerk may not be to that clerk's practical advantage. A subservient bench is, up to a point, easy to work with for the clerk. The cases proceed quickly if the magistrates do not have to be assisted in their speaking parts. Conflicts of the sort described in the chapter on the clerk and the bench in court are less likely to arise. There is less uncertainty about who should take which speaking part. The magistrates are less likely to make mistakes - since the clerk is doing a great deal of the work. Strictly within the legal rules, therefore, the clerk can have a

significant effect on the extent to which the magistrates play an active role in court.

More seriously, of course, the clerk could give the magistrates "a completely wrong concept" of the clerk's role. It would be quite wrong to suggest that any indication that clerks do so arises from this research. It does not. But as the clerk to the justices already quoted pointed out, clerks police themselves on this issue. They interpret the rules about their own conduct to their magistrates.

This means that two things are very important. First, that the rules themselves are clear and consistent, and second that the discipline and professional integrity of clerks should be capable of being relied upon.

The rules, unfortunately, are not particularly clear or consistent, as was explained in Chapter Two, and they concern the visible manifestations of the clerk's relationship with the bench (whether s/he retires with the magistrates or not). It would indeed be difficult, if not impossible, to draft rules to govern a relationship as variable and intimate as that between clerk and bench.

We have to rely then, on the integrity of the clerks - who would certainly claim that their integrity is to be relied on.

Stage Two

The second stage of magistrates' training, which takes place after they have been adjudicating for some time covers more topics and is more specific than Stage One. One of the most important and extensive aspects of Stage Two as laid out in The Blue Book is punishment and treatment of offenders.

Whilst it is possible for clerks to give magistrates a purely factual account of the types of sentences available to them, there are

other aspects of sentencing which are more difficult to present in an objective way - the objectives and philosophy of sentencing, or the situations in which particular sentences might be appropriate for instance. Here the attitudes of the clerk may have an impact on those of the bench. This may be for better, or for worse.

In 1974 Mr. George Pratt described a 'magistrates' clerk' was quoted in the Daily Telegraph after he had spoken to "a group of crime and punishment reformers who are out to create a national campaign to bring about sterner punishments and deterrents." Mr. Pratt was reported to have been severely critical of rehabilitation as an aim of sentencing. He was quoted as saying

"Apart from the inadequate types most criminals are bad; some are positively wicked. The attitude towards criminals has been largely determined by theoretical sociologists who despite protests of judges, magistrates and leading police officers have had a dire influence on successive governments."

It is not difficult to see what attitude to sentencing policy Mr. Pratt would communicate to his magistrates, if he was quoted accurately. His attitudes would conflict sharply with those of many of the clerks spoken to for the present survey. Nevertheless those attitudes must have their influence on his bench.

Although during Stage Two of their training magistrates will be exposed to a wide range of influences (depending on the skill and enthusiasm of the training officer) nevertheless their reference point whilst they are sitting, and when they have problems or difficulties will be their own clerk.

So far as specific sentencing options are concerned, again the clerk's attitudes may be important. The influence of the clerk at this stage is not, however, sufficiently recognised. Magistrates' sentencing practices have been the focus of a great deal of attention. They are encouraged presently, for instance, to restrict the sentences

of imprisonment they impose because of the serious problem of prison overcrowding. It may well be that attention to the instruction that magistrates receive when they are novices and perhaps more impressionable could be more fruitful than exhortations to experienced magistrates whose approach may be less flexible. Attention to training means, of course, attention to the clerks and those things they teach new magistrates.

New magistrates will usually be particularly vulnerable to wrong or biased instruction. Experienced magistrates may develop their own views on sentencing using wider sources of education than their clerk, but their colleagues who are novices will inevitably be guided by the respected expert who is responsible for their training. The standard of magistrates' sentencing practice owes a great deal to the standards of the clerks, and depends on the clerks being intelligent, informed and as far as possible unbiassed.

The clerks to the justices who were interviewed for the present survey were few in number (there were eight). However they did represent as wide as possible a distribution of age, experience, qualification, type of court and geographical spread. All were conscious of the importance of training for new magistrates and aware that the training for new magistrates they provided had an impact on the attitudes of those magistrates.

"In Service" Training

As well as providing training for new magistrates who are appointed to the juvenile court panel and the domestic court panel, clerks are also responsible for the ongoing training of the bench. This becomes particularly important when there are major changes or developments in the law applied by magistrates. Clerks for instance had trained the magistrates in the Bail Act 1976 some little time

before the field work for the present survey - with what appeared to be a mixed success.

The government has hardly been shy of increasing the jurisdiction of magistrates' courts in recent years. For instance, the Domestic Proceedings and Magistrates' Courts Act 1978 recently reformed and increased magistrates domestic jurisdiction. Training the newly created domestic court panel to operate this legislation must have been a formidable task. The statute did not simply make some alterations to the existing law but changed its philosophy - doing away with the old matrimonial offences and introducing new rules for the award and assessment of maintenance. The Act also introduced a new sphere of work to magistrates' courts by creating jurisdiction for domestic panels to deal with matrimonial violence.

The responsibility on the clerk in providing training on such pieces of legislation is onerous. The 1978 Act deals with pressing and difficult social problems. At a time when the existence of any domestic jurisdiction in magistrates' courts has been under attack, magistrates' responsibilities have been increased. Clerks have had to train magistrates to use such legislation with very little assistance beyond a few Home Office Circulars. The approach of the clerks to this Act, and to others must have had a significant effect on the way the legislation is put into practice.

It is not only in formal training sessions that clerks have an influence on the education of magistrates. Many benches have newsletters which the clerk to the justices and her/his staff will contribute to. Some of the clerks interviewed simply left copies of interesting articles in the magistrates' retiring room. Court libraries ranged from a few dusty volumes in a bookcase to extensive

and up to date collections of journals and monographs. The clerk's influence through court literature can be considerable.

One clerk interviewed had grasped the nettle of his potential impact on his bench, and saw as a most important part of his role the production of papers dealing with important issues for the court. At the time he was interviewed he had recently circulated to his magistrates a paper which considered the use of imprisonment. This paper set out the problem, and explained what magistrates were being asked to do in general terms. It also explained the import of the problem in very specific terms, recommending that prison should be regarded as a scarce resource to be used for the deterrence of those who commit acts which seriously threaten lives and liberty. In terms of the offences dealt with by magistrates the clerk saw such acts as those involving personal violence of a serious nature, serious acts of public disorder, serious sexual offences and child abuse and acts of gross vandalism. The paper continued with some forthright observations on the use of suspended sentences¹³ and set out suggested amendments to the agreed tariff of penalties operated by the bench.

This was an open statement of the clerk's views. It was concise and concrete. It cannot have failed to have its impact on the bench. It was a good deal more frank than many clerks would care to be, yet because of its frankness probably more open to challenge than the more subliminal methods of other clerks. It was written by a clerk who recognised his own power, and that power openly acknowledged and exercised was thus more open to challenge and criticism.

13. For instance "For my part I cannot think of a case in which a suspended sentence is ever appropriate. Certainly I would ask you to think long and hard before imposing one".

The impact of training on magistrates

The clerks to the justices interviewed for the present study all said that they thought that training had considerable impact on magistrates. Existing research confirms this view. Hood found that the most important factor in explaining variations in magistrates sentencing of simulated road traffic offences was that of bench membership.¹⁴ He considered that the development of a common policy of a bench was a subtle process influenced by clerks, and by senior magistrates.

The fact that magistrates' training has influence on magistrates' attitudes is confirmed by Bond and Lemon.¹⁵ Their research, which separated out the influences of training and experience, showed that both of these factors affect magistrates' attitudes. This influence exerts itself predominantly in relation to the procedural aspects of magistrates' work, to their perception of their role and their attitude towards specific sentencing options.

It would seem, therefore, that it is precisely in the two areas which emerged as important from this survey that magistrates are in fact influenced by training.

Conclusions

The indication from this survey in conjunction with others cited above is that clerks have very real power through the mechanism of training.

14. R. Hood. 'Sentencing the Motoring Offender.' London. Heinemann. 1972.

15. R.A. Bond and N.F. Lemon. 'Changes in Magistrates' Attitudes During the First Year on the Bench', in 'Psychology, Law and Legal Processes'. McMillan 1979. See also Nigel Lemon. 'Training, Personality and Attitudes as Determinants of Magistrates' Sentencing'. 14 Brit. J. Criminol 34 (1974)

They can influence whether their bench favours a crime control or a due process model of criminal justice. They have an influence on the sentencing patterns of their court. They give magistrates their definition of the magistrates' role, and they define, within the limitations of the law, what the role of the clerk is to be in relation to the bench.

If we recognise the existence of this power, two questions become pertinent. First, should we continue to allow clerks to exercise it? Second, if we agree that they should, do we wish to seek to influence the way they do it?

Several things suggest that the answer to the first question should be in the negative. The main concern of the law has been to ensure that the clerk is no part of the decision of the bench, either on guilt or innocence or on sentence, but the relationship between bench and clerk is an intimate one and the legal rules only refer to one part of it. Given this, is it right that we trust the person from whom we perceive the danger of intrusion into trial by our peers to proceed, to define what is proper in her/his relationship with a lay tribunal? As the clerks surveyed pointed out we rely on the integrity of the clerk in this matter.

However we do rely on the integrity of the legal profession in general to define what is proper conduct for themselves and to police that conduct. Most clerks are professionally qualified, and there seems to be no reason why we should place less trust in clerks than their colleagues in other forms of practice.

Also, if we rely on clerks to operate in court a proper relationship with their bench, why should we not trust them also when they teach their benches what will happen in practice?

The possible answer to this is that the clerk's public behaviour in court is often scrutinised by other members of the legal profession but the watchdog of the clerk's private behaviour is the bench. We must question how efficient the bench is as a watchdog if the clerk has told them what they are to watch for.

The real, if not entirely satisfactory, answer to our question as to whether clerks should continue to train magistrates is pragmatic. There are very few others who could do it.

Elizabeth Burney's reaction to the problems she perceived in magistrates' training was to say that "Nothing much is likely to change in magistrates' training so long as it is still primarily in the hands of justices' clerks."¹⁶ Perhaps this is so, but into whose hands could it be placed? Burney's own recommendations for an improved training scheme are not very different from the present arrangements.¹⁷ They do include more participation from experienced magistrates, but one must bear in mind that the person who trained the experienced magistrates is the clerk.

There are very few people outside magistrates' courts who are competent or interested. Links between courts and colleges or universities exist, and in some cases they are strong links. This is particularly so in relation to those universities involved in training clerks on diploma courses. However opportunities for these links are by no means widespread. There are indeed, comparatively few academics who have the necessary expertise and understanding of the practical problems to be of use.

16. E. Burney, 'J.P. - Magistrate, Court and Community.' Hutchinson 1979 Ch.10.

17. Ibid.

All the avenues for such links as exist should obviously be exploited, but even if they were they could not possibly cope with the necessity for providing local training for magistrates all over the country.

It is perhaps more practical, if not necessarily more satisfactory to consider whether we wish to seek to influence the way that clerks train their benches.

Certainly the suggestion of "teacher training" for clerks is a useful one. The teaching of adults is not easy - it is a skilled job and it can only be useful for clerks to acquire those skills. However any courses for clerks would need to be specific to clerks, since they would need to concentrate not simply on teaching methods, but on how best to put over the sensitive subjects clerks are required to teach to lay magistrates - particularly how to approach teaching magistrates about the role of magistrate and clerk in a way that encourages an input from both experienced and new magistrates and possibly from others. Also the provision of courses is not in itself sufficient. Clerks must rightly be rather tired of admonitions to do more and different things which come without the resources to enable them to do it. Magistrates' courts need more staff, Training Officers need more time. Improving magistrates' justice even to the limited extent we are proposing demands that money be spent.

All of this also begs the question of who teaches the teachers? Here perhaps the admittedly thin expertise in higher education could be exploited, but again there are resource implications.

The attention at a national level of the Justices' Clerks' Society and the Magistrates' Association to the problems pointed out in this chapter would be constructive. Clerks have real power, which fact should not be denied, but should be considered carefully.

One clerk when asked if he thought that the clerk to the justices influenced the character of the court as a whole said

"I think nowadays - more so than it used to be - the clerk has a very strong influence on the way the court is conducted by the magistrates themselves. Particularly through training. I think we have influence there."

Is, then, the production of brief training syllabuses by the Lord Chancellor's office a sufficient investment of time and effort into such an important facet of magistrates' justice.

Clerk and Magistrates out of court

The training of magistrates is perhaps the most obvious and significant area where the clerk can influence the magistrates out of court. It is not, however, the only situation where the clerk is important.

The relationship between the clerk to the justices and senior members of the bench will usually be quite a close one. The clerk who is on the Magistrates' Courts' Committee is also likely to know well the magistrates involved in that Committee. The closeness of the relationship between the clerk and senior magistrates and the clerk and the rest of the bench varies very widely from court to court.

As we saw in the chapter on the clerk and the bench in court, some clerks know their magistrates very well, they socialise with them, they have magistrates as personal friends. Other clerks know few members of their benches. The nature of the relationship must depend on several things - not least being the size of the bench. The juvenile court panel at one of the courts surveyed was almost as large as the whole bench at one of the other courts. The possibility

of knowing 50+ magistrates well must be greater than that of knowing 150 or more.

Long serving clerks came to know their benches very well. One clerk pointed out that most of his magistrates were young enough to be his children, and that he had trained them all. He felt it a problem that they might hold his views in too much reverence for his own good.

Magistrates felt that the closeness of their relationship with their clerk could depend on the personality of the clerk. One said, in the presence of her clerk

"Well our clerks are alright, aren't you? I don't like a clerk who talks down to you. We get on very well here, but there is a clerk not a million miles from here.... I can't abide that - treating you, well, as second class citizens!"

The clerks were careful to stress that however much or little they knew the magistrates out of court it did not affect their relationship in court, except in so far as they knew which magistrates were confident and which might need help.

One factor which influenced the extent to which magistrates knew each other, and to a lesser extent their relationship to clerks was the type of magistrates' rota operated at the court. There was an enormous variation in the way the rota was organised from court to court. Some courts organised it on a six monthly or a three monthly basis. Magistrates' availability was juggled against the requirements of the different courts and the sex and qualification of the magistrates needed. Two courts had computerised this process, which saved clerks their time in preparation, but not their tempers in sorting out problems and alterations after the rota had been produced.

Some courts operated a fixed rota system - the same magistrates always came in on the same day each week or each fortnight. One court had its bench sitting for one, or two, full weeks in every

quarter. Some courts planned sittings six months in advance, one only two weeks in advance.

Several clerks were very critical of the fixed rota system. They pointed out that if the same magistrates attended on the same day every week, magistrates knew one fifth of the bench well, and the rest hardly at all. They also mentioned the possibility of bench idiosyncracies being perpetuated, and argued that this gave clerks greater trouble in pointing out bench norms when one days' magistrates began imposing penalties out of conformity with their colleagues.

Some clerks were keen on computerisation of the rota - usually those who had not already got it. One of the difficulties of the clerk responsible for drawing up the rota is that when it is prepared the clerk is importuned by magistrates expressing preferences for those of their colleagues with whom they wish to sit - or more frequently those they definitely do not wish to sit with. Such requests can apparently be expressed with a reprehensible lack of tact! However manual preparation of the rota has advantages for clerks, since they can take account of magistrates idiosyncracies to their own advantage - for instance by making sure that any eccentric magistrates are on rota with colleagues who can be expected to stand up to them.

It is possible for the nature of the rota to influence the extent to which clerks know magistrates, especially at the larger courts where some clerks may specialise - for instance in juvenile work - and come to know a small group of magistrates very well. However it is not particularly significant, and size of bench is more likely to be important. Also seemingly trivial factors - such as whether the clerks take their morning coffee with the bench can affect the nature of the relationship - or perhaps are symptomatic of it.

Many clerks were observed to use conversation over coffee to discuss issues of procedure, sentencing, new law, etc., with the magistrates.

The most important aspect of out of court relations between clerk and bench is that between the clerk to the justices and senior magistrates, especially the Chairperson of the bench. It is at this level that policy decisions relating to the operation of the court are introduced, discussed and implemented. The role of the clerk in this policy making role is discussed in a later chapter.

The influence of the clerk to the justices on court staff

We have examined the relationship between the clerk and the magistrates, and shown that the clerks, and especially the clerk to the justices influences them in many ways, in and out of court. Besides the role of the clerk as legal adviser, s/he also has a role as a manager of the court organisation. The clerk to the justices is responsible to the Magistrates' Courts' Committee for the running of the court. We shall examine in ensuing chapters the policy making aspects of this part of the clerk's job, and also those areas where the clerk's administrative duties take on a quasi-judicial aspect. Another part of the clerk's task is the management of the staff employed at the court and particularly important here is the influence of the clerk to the justices on her/his staff of clerks who take courts.

Many of the clerks to the justices interviewed were very modest about any influence they might have on their clerks, pointing out that clerks are professionals and have their own standards. Not all clerks are professionally qualified, however. Even those who are will be involved in areas of both law and practice that they will not be familiar with when they first come to work in a magistrates' court.

Whilst it is most unlikely that a clerk to the justices, however respected and experienced, will alter significantly the approach of a senior clerk who comes to the court with many years of experience, s/he will influence those new to the job and those in the process of training.

So far as new or less experienced members of staff were concerned, clerks to the justices were more willing to admit that they might have an influence. One clerk admitted

"I think it must necessarily follow that the standards I set must rub off - or the standards I don't set!"

Another said that he influenced his staff

"...probably less than I imagine I do. In other words I intend to influence them a great deal."

The clerks to the justices almost certainly underestimated their influence over new and junior members of staff. In interviews and conversations, court clerks frequently used the clerk to the justices where they had trained as a reference point for their standards. Many remarks came prefaced by "the clerk where I started wouldn't allow...." or "I was always taught at ----- that you should.....". In the same way that clerks to the justices were surprised at magistrates who remembered their lessons from training, they would probably be surprised at the number of times they were quoted by their clerks or ex-clerks.

This influence on new clerks does not come through formal training. Staff training programmes are not extensive - often the only schemes for staff training mentioned as available were regional ones run for more junior staff. Clerks who were in the process of acquiring qualifications, including articulated clerks, often took courts of all types without supervision (provided that they were qualified

under the 1979 Qualification of Assistants Rules).¹⁹ Their expertise in magisterial law had been acquired by sitting as an assistant with an experienced clerk for a greater or lesser period of time, the length of this apprenticeship depending on the aptitude of the individual clerk, and the discretion of the clerk to the justices. Such is the pressure of work at some courts that qualified but completely inexperienced clerks were thrown in at the deep end of the traffic court almost immediately upon appointment. Some floundering trainees were observed during the fieldwork. The staff training situation is far from desirable - but is not likely to be improved without the allocation of resources.

However inadequate the apprenticeships of some clerks, the experience certainly has its effects on them - the standards set by the clerk to the justices do affect their practice and their attitudes to some extent. The approaches of different clerks and their effect on the methods of different courts were the subject of frequent comment and sometimes criticism by clerks. Certainly those most influenced were the clerks who had begun by being employed in the court office and who had, by the encouragement and attention of the clerk to the justices, become qualified to take courts. Such clerks may have had no other reference point for their standards than the clerk to the justices and other clerks at the court until they were constrained (by ambition or the 1979 Rules) to attend the Diploma course or a course leading to professional qualification.

The record of some clerks to the justices in encouraging junior members of staff to qualify was impressive. One clerk to the

19. S.1 1979 No. 570 provided for minimum qualifications for clerks taking courts. A full discussion of the content and importance of these rules is in Chapter Ten.

justices pushed his secretary to qualify as a barrister, which she did in a very creditably short time.

It may be that now that the Justices' Clerks' Society (if not all clerks) are looking for professional qualifications from all court clerks the sort of patronage which encouraged people "up the ranks" will wain. Clerks to the justices will employ staff already professionally qualified, and will seek to guide and influence them less.

The clerk's influence is not likely to go altogether, however, and it is interesting to discover how they would wish to exercise what influence they have. To acquire some idea of this, clerks were asked what they thought were the most important attributes of a good court clerk. A characteristic response was that of a clerk to a large city court

"First patience. Secondly temperament. Third ability to follow an intricate argument and get to the core of the problem. Fourthly knowledge. I think I'd put them in that order really. I don't mind any court clerk making a mistake on law at all. I would hope that generally speaking unless it was some finer point he'd make no mistake in practice. What I'd consider unforgiveable is treating witnesses or defendants or anyone badly. But I'd put patience first."

The emphasis of nearly all the clerks was on temperament. The need for patience was particularly given priority. One clerk said that "if a person isn't temperamentally suited to be a court clerk its the most refined cruelty to make him one". The need to be able to communicate with what one clerk called "ordinary folk" was also seen as important - and this clerk pointed out that it was not just for the sake of the defendants, but that magistrates are also "ordinary folk".

Only one clerk gave priority to ability as a lawyer. His response was the converse of the clerk cited above

"First of all he must be a lawyer. Secondly he must possess

intelligence... Thirdly he must possess patience, because particularly when dealing with unrepresented defendants, an ability to understand that their intemperateness, bloody mindedness and differences of attitude, from you and people like you can irritate you and get in the way of your helping the bench to do justice to them."

At a time when the desirability of professionalisation is urged by clerks it is perhaps surprising that ability as a lawyer was not stressed rather more. A legal professional qualification is not a guarantee however that a clerk will be patient, or able to put over legal ideas in a way which is easily understood by lay persons. The unique quality of the clerk's job is the necessity to be always interpreting the law to lay persons - both magistrates and the high percentage of unrepresented defendants in magistrates' courts. Unfortunately the enthusiasm of the clerks to the justices for patience and clarity in dealing with unrepresented defendants is often overridden in practice by the exigencies of workload. However the fact that clerks emphasised the need for patience is perhaps another indication that greater emphasis on the due process protection aspects of the clerk's role would be possible if the strains on the court organisation were relieved.

Conclusion

The opportunities exist for clerks to the justices to have a great deal of influence upon the bench and upon court staff through training. Most clerks appear to be aware of the influence they have with magistrates during their training courses. There is a great deal less awareness of the impact they have on staff and particularly on younger and less experienced clerks.

At most courts, the clerk to the justices is a figure of very considerable respect. Court clerks and magistrates frequently referred to the opinions of "our clerk", and what he would or would

not approve of. The clerk to the justices was the constant reference point for standards.

It is a matter for great concern, therefore, that very little time or effort is expended by the government in assisting clerks to the justices to fulfil their training role. It is also important to consider in this context the question of the supine clerk - the clerk who does not fulfil his responsibilities or exert his influence where exertion is needed. Baldwin's research, referred to at the beginning of this chapter, showed that the basic training requirements for new magistrates were not being fulfilled by all magistrates. The present research shows that although some clerks produce regular discussion bulletins and papers for consideration with their magistrates, and provide an up-to-date library, others do not do so. Also it seems from the interview responses that all clerks are not aware of the extent of the influence they have on members of their staff.

Some clerks to the justices could take a much more active role than they do. The supine clerk may be a problem out of court as well as in it.

CHAPTER NINE

THE POLICY MAKING ROLE OF THE CLERK

Changing the practice of the court organisation -
the problem of delay

The court organisation - fine enforcement

The clerk and the character of the court

The Policy Making Role of the Clerk

The aim of this chapter is to demonstrate the extent of the clerk's control and influence over the court organisation by examining the ways in which the clerk to the justices can make policy for a court, and carry that policy into effect.

In the chapters which considered the relationship between the clerk and other groups using the court there were numerous examples of the clerk's policy making role. In Chapter Three it was demonstrated that the balance between the clerk and the magistrates in court varies very considerably from court to court. There are some courts where the clerk takes a very prominent role in court and the magistrate in the chair very rarely speaks. Such variations in the balance between clerk and bench are not fortuitous. They are the result of policy decisions by that court about what is proper conduct in court. Such policies may have been formulated over a very long period of time, and it may be impossible to locate a particular decision which prompted the arrangements current at any court. However the clerk as legal adviser to the magistrates is responsible for interpreting to them the decisions of the courts so far as they define the proper balance between clerk and bench, and will probably also play a decisive role in defining what is to be done within the guidance arising from these decisions. The clerk is not the only person who will contribute to such policy decisions - the magistrates will have an important voice. However, the clerk's role as lawyer places her/him in a very influential position. One of the clerks in Burney's study commented of her/his bench

"The clerks tend to do more here than they would in many courts because my predecessor trained them ... he was a bit old fashioned and in his view the less said by the chairman the

It is very dangerous if you open your mouth in court so a number of the senior magistrates are afraid to say anything."¹

Through training therefore the clerk can influence considerably the policies of the court.

In Chapter Five the role of the police in court was examined and a wide variation in the extent of police participation in court was demonstrated. It was argued that where the clerk to the justices chose to do so, s/he could minimise police presence in court. The example of court B was given, where the clerk was, at the time of the study, pursuing a policy of training court ushers and ensuring that clerks called the list so as to take these jobs out of the hands of the police warrant officers and minimise police power in court.

In Chapter Seven the attitude of the clerk to probation officers and social workers was shown to have a significant impact on the effectiveness of liaison between probation and social services, and the court.

In the preceding chapter the example was given of the clerk who produced a paper on the problem of prison overcrowding and the effect of magistrates' sentencing patterns on overcrowding. The paper expressed the clerk's views on such measures as suspended sentences in a frank and forthright way, and it is fair to assume that the clerk's paper and the clerk's opinions provoked discussion and perhaps decisions about sentencing policy in court.

The clerk will not be the only person to raise issues like this for the consideration of the magistrates. Senior magistrates particularly will have a role, especially in relation to sentencing matters. But however enthusiastic the magistrates may be they are

1. Burney 1979 p.156.

part-timers, and they are not lawyers. The clerk to the justices is involved full time with the problems and issues of the court and the bench, and is experienced in and knowledgeable about the legal rules relevant to policy problems. S/he should also be familiar with relevant research and writing.

The potential for clerks to raise issues relating to the conduct of the court or the functioning of the court organisation is limited only by the intelligence, enthusiasm and courage of the clerk and her/his perception of the role. Some clerks obviously do not consider it appropriate to be pressing questions of policy. Others certainly do - for instance the clerk who said

"I support strong clerks. I'm not talking about a dominant clerk in court, I'm talking about a clerk who believes that the job he is doing is important, and is prepared to spend a lot of time and trouble with his magistrates, with the local Law Society and with his court clerks telling them how he believes the system ought to operate."

The clerk gave an illustration of the way in which he might raise a problem for a policy decision.

"Say in a particular court area you have got a problem about violence in a shopping centre... Now it's the clerk's job to say to the bench 'Do you realise that this problem is constantly recurring?' - perhaps getting an input from the police as to the extent the problem, discussing it perhaps with the chairman, then making sure that it is on the agenda of a bench meeting - and perhaps putting to that bench meeting a set of proposals which can be discussed, modified, improved and acted upon by the rest of the bench. Now that should be part of the function of the clerk. It doesn't stop the magistrates doing the same thing - but it does mean that somebody should be alert all the time for problems of a local nature."

Such policy decisions by clerks can be very influential on the experience of justice of the local population. Very occasionally, court policy decisions also have a national impact, as was the case with the court policy decision which resulted in R v.

Nottingham Justices ex parte Davies.² The City of Nottingham is, in the understatement of Lord Justice Donaldson,³ not short of criminal business. In 1980 it had 320 justices and sat up to 25 half day courts on every working day. One entire day of court time was occupied by applications for remands. The Nottingham court discussed and agreed as policy that on and after the third successive application for bail where the previous applications had been refused the justices would refuse to hear full argument in support of an application for bail unless there were new circumstances which would justify hearing full argument. This policy was not plucked from the air. It arose from certain remarks made by Lord Justice Ackner, and reported in the journal 'The Magistrate'.⁴ It was reported that Lord Justice Ackner, when Presiding Judge of the Western Circuit, had said that where a decision to refuse bail had been taken after a full enquiry, it was desirable that the second bench should stick to that decision unless circumstances had changed and that if any advocate persisted in seeking a review of the decision, the correct course was to direct the advocate to apply to a judge in chambers.

The process whereby these remarks were translated into a policy of the Nottingham bench is nowhere revealed. The impetus could have come from a member of the bench, but it is perhaps more likely to have come from the clerk who has the overall responsibility for processing the formidable number of cases every day. Certainly the clerk must have been initially involved in determining the policy. The provisions of the Bail Act 1976 s.4 impose a duty on the court to consider bail whenever a defendant appears before the court accused of

2. [1980] 3 W.L.R. 18.

3. Ibid, at p.18.

4. Editorial Vol.36 No.3. Page 34 (1980)

an offence. It is not an easy question of law to decide whether the policy of the Nottingham Justices described above complies with the requirements of s.4 of the 1976 Act and the advice of the clerk on this point must have been invaluable. The possibility of the practice being referred to the Divisional Court must also have been in the minds of those who formulated the policy.

Whoever instigated the policy, it was put into effect and it caused some consternation amongst those Nottingham solicitors representing defendants in the magistrates' court. Mr. C.E. Davies, one of their number became the nominal applicant to the Divisional Court in an attempt to question the legality of the practice. Lord Justice Donaldson upheld the practice of the Nottingham court holding that the justices, when considering a renewed application for bail, had no duty to reconsider matters previously considered but should confine themselves to circumstances arising since the last court appearance, or matters not brought to the attention of the court on a previous occasion.

From the point of view of the courts a great deal of time has been saved by the decision in R v. Nottingham Justices ex parte Davies. From the point of view of defence advocates throughout the country the decision has been less welcome, especially since its effect has been heightened by a more recent decision that committal for trial does not necessarily constitute a change of circumstances requiring the justices to hear a fresh application.⁵

A policy decision for one court can, exceptionally, have very far reaching effects, therefore. Usually, however, such decisions will

5. R v. Slough Justices ex parte Duncan and Embling. 1982 The Times July 24th

influence only what happens in the individual court. The effect however may be very marked, and all courts have reputations amongst police, defence advocates, social workers.

Of the many areas in which the clerk's influence on the court policy could be discovered there are two in particular that have been the subject of recent comment. One is the area of delay in hearing cases in magistrates' courts. The other is the area of enforcement of fines. In examining these two areas in detail the nature and extent of the clerk's influence through policy decisions will be more clear.

Changing the practice of the court organisation - the problem of delay

Concern about delay in trying cases is not a new phenomenon,⁶ but it is one which has recently been the subject of concern.

In 1975 the Report of the Interdepartmental Committee on the Distribution of Business between the Crown Court and Magistrates' Courts⁷ addressed itself to the problem. Responses to that report, and discussions which developed in its wake debated the causes of delay.⁸ Defence lawyers working in magistrates' courts were apt to blame the court organisation and to press for measures such as an appointment system for listing cases. The courts in turn blamed defence advocates for taking on too much work and for requesting adjournments unnecessarily.⁹

6. For instance the Report of the Departmental Committee on Courts of Summary Jurisdiction in the Metropolitan Area of June 1937 (printed by HMSO in 1959) was concerned with problems of delay.

7. (James Committee) Cmnd 6323 1975.

8. e.g. see N.C.C.L. 'Trial or Error; A reply to the James Committee'. See also 'Legal Services in Criminal Cases', Legal Action Group, January 1976.

9. See articles in L.A.G. Bulletin March 1980, and 143 JPN 646, 143 JPN 661, 144 JPN 638, 144 JPN 700.

Discussion about the causes of delay and measures likely to alleviate it took place against a background of very little concrete information. Hardly any research had been done to discover, for instance, how long cases took to be dealt with, which types of case took unacceptably long to be processed, or what measures might be tried to alleviate long waiting times.

Two recent studies have, however, begun to elucidate the problem and whilst neither lays blame for delay at the door of any agency in particular, both studies point to the key role which the court organisation can play in reducing waiting times.

The Vera Institute of Justice published in 1979 the results of an exploratory study on waiting times in magistrates' courts.¹⁰ This study gave some indications of the nature of the problem, outlined factors which affect waiting time, and pointed to the further research needed on this subject. The factors which the Vera Institute study identified as affecting the length of waiting time are particularly interesting for our purposes, they were

- (1) The size and nature of the court's workload;
- (2) The availability of resources, especially courtroom space but including other accommodation, court staff, magistrates, equipment and other resources;
- (3) The practices of police and prosecuting solicitors which affect the volume and nature of the cases that come to the court;
- (4) The availability of defence services - including in particular the way the legal aid system works;

10. Barry Mahoney et al. 'Waiting Times in Magistrates' Courts - an exploratory Study.' Vera Institute of Justice, London Office, December 1979.

- (5) The manner in which available courtroom time is utilized, including the times that magistrates actually sit, the efficiency with which cases are handled, scheduling practices, and transferring of cases between different courts;
- (6) Adjournment practices;
- (7) Adequacy of communication within the court and between the court and the parties or their legal representatives;
- (8) The record keeping practices of the court - both in relation to the progress of individual cases, and in relation to the total workload of the court;
- (9) Lack of any external pressures to process cases speedily, and the fact that some participants in the court process benefit from adjournments;
- (10) Unforeseen and unavoidable events such as illness which disrupt court schedules.

Although it is clear from these factors that any solution to the problem of delay in magistrates' courts must involve all the agencies participating in the criminal justice process, nevertheless the clerk to the justices has perhaps the most important role to play. S/he has a potential to influence if not actually determine the availability of court resources, the availability of defence services, the use of courtroom time, adjournment practices, communication with other agencies, and record keeping practices (Factors (2), (4), (5), (6), (7) and (8) above). The possibility of the clerk influencing the policies of police and prosecution departments should also not be ignored.

The Vera Institute report itself identifies the role of the court as being particularly important.

"... problems of delay are integrally related to fundamental problems of court administration. It is clear from the interviews conducted during the feasibility study that many persons involved in the work of magistrates' courts are highly sensitive to the administrative pressures and strains caused by rising workloads and increased complexity of court proceedings. These factors not only affect waiting times they affect every other aspect of court operation. The ways in which courts as institutions adapt to these pressures - what sort of steps they take to improve administrative capabilities generally, and how they integrate mechanisms for expeditious case processing into other aspects of their overall management - may have a major influence on the length of waiting times. Of particular importance in this connection is the extent to which the court itself assumes responsibility independent of the parties, for the expeditious resolution of cases."

When the report refers to "the court itself" assuming responsibility for dealing with cases as quickly as possible it means in effect the clerk, since it is the clerk to the justices who is responsible for running the court organisation. It is the clerk and her/his staff who will be responsible for initiating measures to alleviate delay and carrying them through.

The importance of the clerk's role was also recognised by the report of the Home Office Working Group on Magistrates Courts¹¹ which re-iterated the findings of the Vera Institute's study on the causes of delay.¹²

This report is particularly interesting in that the terms of reference of the Group directed it to review in particular what kind of help might most usefully be given to courts to reduce waiting times

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11. Report of the Working Group on Magistrates' Courts, London Home Office 1982.
 12. The Working Group identified the factors affecting waiting time as:
 - (1) the amount and nature of court business.
 - (2) Prosecution attitudes and practices.
 - (3) Defence attitudes and practices.
 - (4) Court attitudes and organisation.
 - (5) Resource problems.
 - (6) Special problems with contested cases.
 - (7) Factors outside the court's influence.

(and to improve fine enforcement procedures). The concern of the Group was thus with the court organisation in particular, and the remedies suggested by the Working Group were directed especially to changes in attitudes and practices on the part of the courts.

The Working Group recognised at the outset that whether or not the clerk to the justices perceives there to be a problem of delay, and the energy with which s/he goes about solving the problem where it is recognised are very important. The Group noted that

"... perceptions as to what might constitute unacceptably long waiting time differed: there is perhaps a tendency for certain time spans to come to be regarded as inevitable. Action taken by clerks to combat what they saw as unacceptable delay also varied, from the writing of exhortatory letters from time to time to local solicitors to the adoption of a special programme embodying several practical measures."

One of the special measures devised by clerks to deal with unacceptable waiting times is the introduction of provision for an early appearance of the defendant before the court. Agreement has been reached between some clerks and local police that where defendants are arrested and bailed they are bailed to appear before the court at as early a stage as possible - usually seven or eight days after arrest. The effect of this is that the case is brought within the court's management at an early stage and the court can then monitor its progress. If there is to be a not guilty plea then a date can be fixed for a hearing soon after arrest. Another aim of this scheme is to ensure that defendants seek legal advice as soon as possible, since many do not consult a solicitor until after their first court appearance.

The Working Group reported that where such fixed short bail periods had been adopted they had proved successful. However the operation of such a seemingly simple scheme is not an easy thing.

Consultation between the court and the police and defence advocates is necessary to set up the scheme in the first place. When it is in operation it has some dangers. If a defendant is brought before a court very soon after arrest s/he will probably not have had time to consult a solicitor, and may therefore feel pressurised to plead guilty inappropriately to get the case over and done with, rather than delay the hearing and seek legal advice. The clerks who reported to the Working Group suggested that this was not a real problem, since clerks would refuse to accept a guilty plea where a possible defence existed. However in Chapter Four we showed that although such care from clerks is often forthcoming it cannot be relied upon in all cases. If an early appearance scheme is to work justly it relies upon the clerk in court making a priority of the defendants due process rights and ignoring the temptation to press on with a convenient guilty plea in a long list of cases. The Working Group suggests that the defendant's rights would be best protected by a duty solicitor scheme. This may indeed be the case - but the establishment of duty solicitor schemes in the past depended not only on local solicitors, but also on the initiative of the clerk. Not all clerks took such an initiative.

Early appearance schemes appear to help reduce delay. If they are to be used at more courts the initiative must come from the clerks to the justices, the necessary liaison with other bodies needs to be set up by clerks, and the measures necessary to protect the defendants rights may also be in the hands of clerks.

Another measure to alleviate delay suggested by the Working Group is the appointment of a listing officer at each court - particularly big and busy courts. It is suggested that the listing officer be a person of status, operating an agreed policy and able to take

decisions about the listing of cases independantly of clerk and magistrates. Again the success of such a scheme depends on the clerk, who must liaise with prosecution and defence to set up the scheme, agree the policy on which it operates, and appoint a senior member of staff to the post, relieving her/him of other duties. During the court observation for the present study a court with such a listing officer scheme was observed. The scheme did not appear to be effective, since no-one could find the listing officer when he was wanted, and junior and inexperienced members of staff often filled in for him. The basic problem was that the listing officer had too many other jobs to do to operate effectively as a listing officer. The commitment of the clerk to the proper operation of all aspects of such a scheme is therefore vital to its success - as is the provison of resurces to allow her/him to instigate it.

Most of the suggestions which are made by the Working Group rely on the initiative of the clerk. These suggestions include using court ushers to control the calling of the list rather than police warrant officers - the dangers of which were analysed in Chapter Five; the use of "front sheets on case papers; the use of court assistants; the extension of court sittings; the use of sanctions against solicitors who waste court time."¹³ Some of the recommendations that the Working Group make are simplistic - for instance it is suggested that allocation of different types of cases to separate courts may help to save time.¹⁴ Clerks are unlikely to be excited by the information that some of their colleagues deal with crime cases in the mornings

13. The Working Group's recommendations in relation to delay are contained in Chapter Six of its Report.

14. See para. 5.34 and para. 6.17.

and traffic cases in the afternoons - or that some courts deal with adjournments at the beginning of a sitting and the rest of the cases in order of their forecast length! The problems of listing, which we have examined in Chapter Five and elsewhere, are far too complicated to be solved by such measures. The real issue for debate concerning listing is whether or not magistrates' courts can operate an appointments system. In other words whether instead of scheduling all cases for 10.00 a.m. or 10.30 a.m., cases could be given appointments at intervals during the day. Some of the problems associated with such an idea have been touched on in Chapter Six when we examined the relationship between the clerk and the legal profession. The problems of an appointments system are glossed over by the report which simply comments that few have tried such a system and none successfully. It might have been useful if the benefits and problems of an appointment system had been canvassed, and either an experimental system for monitoring suggested, or the idea rejected. Then at least one of the sources of disagreement and tension between clerks and advocates appearing in magistrates' courts would have been confronted and the idea taken a little further. If the Home Office is to recommend that clerks adopt measure after measure to help reduce delay there are also things that can be done by the Home Office. Researching problems such as appointment systems for court proceedings is perhaps one of those things.

The Working Group asserts that delay can be alleviated and that what is needed is

"... not so much extra resources or wholesale re-organisation as the adoption of new attitudes and the making of an effort of will."¹⁵

15. Para. 6.1.

Clerks do recognise the problems of delay and the Working Group says that what is needed is "initiative from the court" to combat them.

Whilst a report that gives some recognition to the importance of their role must be welcome to clerks, their response to the Working Group's report has been mixed. Mr. Cliff Moiser, clerk to the justices at Plymouth is of the opinion that

"There is nothing in the Report which any reasonably competent Justices' Clerk of five or six years standing does not know..."¹⁶

The Justices' Clerks' Society is rather coy, protesting that

"...where there is delay or inefficient practice these are unlikely to be put right solely by the activities of the Justices' Clerk, the active and interested participation of other court users is needed."¹⁷

However the Society's response to the Working Group's report does accept and expand upon many of the Report's suggestions. The Society's response demonstrates a depth of understanding of the problems, and a willingness to be critical of clerks' own shortcomings which is most laudable. It also points to a number of problems where commitment to change on the part of the Home Office is required. It is presently the case, for instance, that a clerk to the justices who needs money for more staff has to surmount the hurdles of both the Magistrates' Courts' Committee and the Local Authority, when some clerks are not even entitled to attend the meetings of the Magistrates' Courts' Committee! The recommendations of the Working Party on management do not approach a solution to the problems faced by clerks who want adequate financing to carry out their roles.¹⁸

16. 'Comments on the report of the Home Office Working Group on Magistrates' Courts' 133 N.L.J. 149 and 157.

17. Justices' Clerks' Society. 'The Work of the Magistrates' Courts. Response to the Report of the Home Office Working Group and additional comments.' Ref. 9S 6310 March 1983.

18. See recommendations 45 - 57 of the Working Group Report.

"Efforts of will" cannot solve all the problems of magistrates' courts. Even the most willing clerk needs resources to combat delay effectively.

Whilst commitment to reducing delay from all court users is needed the clerk to the justices has a key role to play. Many of the factors identified as affecting delay are under the control or influence of clerks, and clerks are best placed to instigate the liaison between court users which could approach a total solution to the problem. The Home Office has correctly identified the clerks as having the most important role to play in reducing delay in magistrates' courts, but it has failed to do much that is constructive to help them to play it effectively. Most importantly it has not confronted the question of resources and the financing of the courts.

The Court Organisation - fine enforcement

A further area of court organisation which the Working Party examined was fine enforcement. The Working Party stressed the importance of fine enforcement because of two factors.¹⁹ Loss of revenue to the exchequer was seen as the least important of these factors.²⁰ The credibility of the fine as a penalty was particularly stressed. Magistrates' Courts make wide use of the fine as a penalty - for 1979 57% of all persons sentenced for indictable/hybrid offences were fined, 89% of those dealt with for summary offences and 99% of those sentenced for motoring offences.²¹ The argument is that if

19. Para. 7.1. *ibid.*

20. Clerks would certainly endorse such an assessment. Cliff Moiser has pointed out that magistrates' courts are self financing on fines and fees. Bristol Magistrates' Court collected over one million pounds in fines and fees in 1980. (See Annual Report for that year.)

21. Para. 7.1. Working Group Report.

such fines are not enforced, fines will become less useful as a penalty.

There are also other reasons why enforcement is an important area for attention. Although the present study did not set out to collect evidence in relation to magistrates' sentencing patterns several months observation in many different courts seemed to show that the magistrates observed very rarely imposed a sentence of immediate imprisonment on an offender. However, when the courts came to deal with fine defaulters, immediate committal (and suspended committal) to prison became much more frequent. Court observation alone cannot show how many of these defaulters actually went to prison since some of them, having been taken to the cells, would pay their outstanding debts and be released very quickly. However, the impressionistic evidence from court observation is supported by a study by N.A.C.R.O. of fine defaulters, civil prisoners and petty offenders in local prisons.²² This study examined prisoners in Winson Green Prison who had been sentenced to short periods of imprisonment. Of those prisoners serving six months or less 26.5% were fine defaulters, and 16.5% were civil prisoners, nearly all of whom were imprisoned for non payment of wife maintenance. A total of 43% of the population of short stay prisoners of that local prison were there for failure to make money payments.

Enforcement becomes important therefore, not simply because of the credibility of the fine as a penalty, but also in relation to the currently important subject of prison overcrowding. The question of the methods used by magistrates to enforce fines are important as well as the question of how efficiently they collect the money.

22. Geoff Wilkins, 'Making Them Pay', NACRO. 1979.

We have already noted the influence of the clerk in court in relation to fine enforcement, and discussed the problematic situation of the clerk acting as legal adviser to the magistrate, and acting - or appearing to act - as a prosecutor of the fine defaulter at the same time.²³ There also seems to be a tendency for the clerk to be willing to take a more directive role on disposal of fine defaulters. One clerk remarked

"Say, for instance if you get an unpaid fine who you know is a notoriously bad payer and he comes up before a fresh bench who don't know him, then I usually put the boot in ... I wouldn't presume to tell them how to deal with him, I'd just put that 'he's a bad payer - this and this and this happened - you might consider sending him down, but its up to you', and I'll leave it at that."

The N.A.C.R.O. report commented on the substantial role of the clerk, and the problems of the defendants in the courtroom.²⁴

Outside the court, the clerk and her/his staff are also important. The attitude of the clerk to the justices on fine enforcement, as on anything else, will influence the attitude of the bench. The N.A.C.R.O. study quotes from the Annual Report of the Birmingham Justices which says

"Justices will recall that in August 1977 the Clerk drew attention to the consequences of the Court's failing to fix immediate prison alternatives in cases where it is thought appropriate to impose fines on defendants who have no settled address at the time of the conviction ... Regrettably indications are that there are still many cases in which Courts seem to be unaware of the likely avoidance of penalties by arrested persons."

This is just one example of a clerk educating his bench on fine enforcement issues, an example of what is an ongoing process at most courts. Some of the clerks observed for the present study passed

23. Chapter Four.

24. Wilkins, supra Chapter Two.

comment on the aptitude of particular members of their bench for fine enforcement courts. Especially where a particular effort was being made to reduce the amount of outstanding fines, discussion and involvement of the bench was seen as a priority. The views of the clerk as to the most effective way of dealing with defaulters has its effect on the attitudes of the bench.

The priority given to fine enforcement and the methods used to enforce fines also depend to a great extent on the clerk. The opinions of clerks as to the best way to go about enforcement varies very widely. One of the clerks studied took the view that the more steps there were in the enforcement process, the more money would be collected before court appearance or imprisonment became necessary. He had therefore devised a system whereby a series of reminders, requests and threats of action were sent to defaulters before they were, if necessary, brought to court.

Another of the clerks studied was of the opinion that the more substantial the threat the greater the likelihood of payment. He therefore sought to bring defaulters before the court at the earliest opportunity, and to repeat such appearances at regular intervals if payments were not absolutely regular and full. He favoured suspended committal at an early stage since he believed that the threat of imprisonment was the most effective way to induce payment. The experience of fine defaulters dealt with by these two courts is likely to have been very different.

Not only does the attitude of the clerk to the fine enforcement process affect defaulters, but also the attitudes and practices of staff in the court office who administer the process is important. The influence of these court staff has been noted by several studies. Sparks' research in 1973 noted the degree of discretion of the officer

in charge of the fines section at Birmingham court.²⁵ Wilkins' study for N.A.C.R.O.²⁶ also noted the discretion of court staff informally to allow further time for payment or to vary the amount paid. The Home Office Working Group also discussed this use of discretion at some courts, and acknowledged that it may be useful,

"... in that over rigid adherence to the exact terms of court orders would simply result in more defaulters being brought before enforcement courts and not in greater receipts of fines."²⁷

The concern of the Working Group was not that such discretion was being exercised, but that no guidelines for its exercise were set down by the clerks to the justices at individual courts, or nationally. The Working Party recommended that the Home Office should examine the implications of the practice with a view to regulating it.²⁸

The main concern of the Home Office Report was with the administrative measures used to collect fines and fees, and with their efficiency. Various methods for streamlining the process were suggested, along with the pious hope that problems could be solved by changing attitudes and redirection of effort rather than in increase in effort.²⁹

Rather more usefully the Report stressed the role of the Justices' Clerks' Society at a national level in emphasising the importance of fine enforcement, encouraging its members to take appropriate steps and in disseminating information about good enforcement practices.

25. R.F. Sparks. 'The Enforcement of Fines. The Process from Sentence to Committal' (1973) 13 Brit. J. Criminol. 92.

26. See supra.

27. Report of the Working Group, Para. 9.24.

28. Para. 9.26.

29. Para. 9.10.

Given the importance of the clerk in the fine enforcement process, a greater role for the clerks' professional organisation makes very good sense. The response of the Society to the Working Group's proposals has been a measured and sensible response. It avoided the more anguished protests of individual clerks,³⁰ with considerable restraint. Since the members of the Society know more than anyone else about the problems of fine enforcement, it would make sense if the Society were to be centrally involved in taking the question of fine enforcement further by working out possible reforms in detail, and monitoring trials of new systems and methods.

At all stages of the fine enforcement process the clerk and her/his staff either define or influence events. The number of reminders or chances to pay that each defendant receives before being brought to court is determined by the clerk. The degree of sympathy and the extent of a formal discretion that defaulters find when they have problems in paying depends on the clerk and his/her staff. The efficiency with which the defaulter is reminded of default and encouraged to pay before the matter is forgotten by the defaulter, is a matter for the clerk.

In court, the severity of the reception that the defaulter receives will usually depend on the clerk who examines him/her about means. Even the policy of the bench who decide how to deal with the defaulter will have been influenced by the clerk. It would be ridiculous to underestimate the clerk's influence, and it seems obvious to focus on the clerk when considering how best to improve the system

30. For instance C. Moiser 133 NLJ 149 and 517.

The Clerk and the Character of the Court

The Home Office Report has given some welcome recognition of the important role played by the clerk in just two areas of the administration of justice. The recommendations of that Report recognise the need for information to be spread throughout the many courts in the country so that new ideas and experiments will come to the attention of all clerks. They also recognise the need for the training of clerks to the justices and their staff in management and administrative skills. A centre for magistrates' courts is proposed, together with an inspectorate for magistrates' courts.³¹

At least some of these measures will be welcomed by clerks. But, as usual clerks are asked to produce improvements to their courts without money being spent on them. The Working Party Report does very little to confront the problems of funding of magistrates' courts, and it expects great improvements in management and administration without staff to carry them out. One clerk interviewed said of this type of attitude

"I feel that the administration of justice by magistrates - which is 97-98% of the whole of the criminal law - is not given the governmental respect that it ought to be ... I think the government is very niggardly financially in the way it does deal with magistrates' courts. It is the only contact many members of the public will have with democracy in action. It is therefore absolutely vital they should leave the court - whatever they think about the decision - with a certain respect for the way it was reached. And as you have got laymen as the judicial element, it is very very important that you get the highest possible standard of professional advice for them ... I think the last figures showed that the Home Office received eighty four million pounds in fines, and paid out sixty million to local authorities - they were not even prepared to say that justice should break even."

So far as it goes the attention, (even if belated) now given to the importance of the clerk's job outside the courtroom must be welcome to

31. See the Report of the Working Group, Chapter 13.

clerks. Those interviewed were all too conscious of the importance of the job they do for the administration of justice, and frustrated at the lack of recognition accorded to their role.

"The role of the clerk has been not undervalued, but totally ignored in the past, and people pretended that the clerk does not exist."

Clerks did not however lay the blame totally at the door of the government, but recognised that their own standards needed to be improved and looked forward to a more robust role for the clerk.

"In some courts I accept that the clerk does not exist as a power in the land, and those courts are bad courts and don't do justice. What I maintain is that a court of lay magistrates is incompetent without a lawyer adequately to do justice. We need to build on this, not destroy it."

The influence of the clerk is pervasive - so much so that many clerks were prepared to say that they influenced the whole character of their court.

"I think the clerk is responsible - it is down to him ... you can tell by looking at a court what the clerk is like."

"Every Court will have the stamp of its clerk in some way."

"I think nowadays more so than it used to be, the clerk has a very strong influence on the way the court is conducted by the magistrates themselves."

Some clerks felt that their influence was inevitable, but should be exercised quietly. Others felt that it was desirable and should be openly acknowledged. It will be to the benefit of those clerks who wish to see their job recognised and their status increased if there can be greater openness about the clerk's role, and if clerks themselves are more assertive.

CHAPTER TEN

QUASI-JUDICIAL POWERS AND THE FUTURE OF THE CLERK'S ROLE

Origins and development of the clerk's quasi-judicial powers

Quasi-judicial powers in operation - the power to issue process and the power to grant legal aid

Should the quasi-judicial powers of the clerk be increased?

Expanding the legal role of the clerk

Future extensions of the clerk's powers

The key to future development - qualifications of justices' clerks and court clerks

Pay and promotion

Quasi-judicial powers and the Future of the Clerk's role

Origins and development of the clerk's quasi judicial powers.

For some time clerks have been pressing for their administrative responsibilities to be extended and suggesting that they should be empowered to perform certain quasi-judicial functions. As early as the 1940's clerks suggested to the Departmental Committee on Justices' Clerks that their powers might be increased. Their initial ambitions were modest and limited to a request that they be empowered to issue process and witness summonses.¹ The Committee rejected even this idea, but conceded that the actual signing of all summonses by a justice might be burdensome and therefore recommended that the clerk should be authorised to authenticate process.

Although even this recommendation of the committee was not immediately acted upon, the effect of the reforms consequent on the Report was such as to make extension of the clerk's powers more feasible. The amalgamation of divisions and the phasing out of the part time clerk created a body of professional full time clerks enthusiastic to increase their responsibilities and able to point to their qualifications and expertise when petitioning for reform. (See above Chapter One).

It was during the 1960's when these changes had been consolidated that further suggestions for extension of the clerk's role began to be made and pressure for more powers for clerks grew. Glanville Williams in 'The Proof of Guilt'² pointed to improvements in the standards of clerks to the justices in the context of his prediction

1. Cmnd 6507 para. 56.

2. Stevens 3rd edition 1963

that it would soon be anomalous for the clerk not to be on the bench. In 1963 a significant article appeared in the Justice of the Peace Journal entitled 'The Future of Justices' Clerks'.³ It assessed the developments since the Departmental Committee's report, and recommended that the powers of clerks be significantly extended. It argued that, although the law will always require that a trial be by a properly constituted court, nevertheless

"...there is a vast field of quasi-administrative or even executive law with which the solicitor or barrister clerk of the future might be entrusted, to the advantage of the public and the administration of the law, if only because it could be done much more expeditiously than under the present system."⁴

The author of the article (unidentified) suggested that clerks should be responsible for the enforcement and variation of maintenance orders and the enforcement of fines, the issuing of process, uncontested committal proceedings, and the grant of certain permits and licenses. The arrival of an extended fixed penalty system for motoring offences was predicted in this article and it was recommended that clerks alone should be empowered to deal with such offences.

The desire to increase the powers of the clerk was taken up at about the same time by the Justices' Clerks' Society. In 1965 the President of the Society told the Conference of the National Association of Justices' Clerks' Assistants that the Society was having talks with 'high judicial officers' concerning the future of clerks.⁵ The Society's proposals to those officers were concerned to remove the negative approach of East Kerrier, to improve training for clerks and their assistants and to empower clerks to perform certain semi-

3. 127 JPN 633

4. Ibid

5. The Conference is reported at 129 JPN 452.

judicial functions including the issuing of summonses and the extension of time to pay fines.

This linking of the problems of East Kerrier with proposals for future change takes us back to the theme identified in the earlier chapter on the law relating to the clerk in court. The decision in the East Kerrier case was resented so much by clerks because it displayed a lack of trust in them at a time when they were anxious to improve their standards, their status and their responsibilities. However, whilst all clerks were united in their dislike of the decision in East Kerrier, they did not all see their future in terms of extension of quasi-judicial functions. The Council of the Society favoured it, arguing that the justices could be relieved of a great deal of routine work, and that a more appropriate division of labour between the magistrates and their clerk could be achieved. However there were clerks who had doubts about the desirability of taking on anything but purely administrative functions.⁶

Despite lack of unanimity amongst clerks, some extension of powers has been achieved in a somewhat piecemeal fashion over a number of years. In 1967 the provisions of the Criminal Justice Act relating to legal aid contained a rule making power⁷ which specified that regulations under the act could provide for the exercise of powers under that part of the Act by 'a person entitled to sit as a member of the court or any officer of the court'. The effect of the Regulations⁸ was to enable the clerk to the justices to grant legal

6. See the report of the Annual Meeting of the Justices' Clerks' Society at 129 JPN 335.

7. In Section 83.

8. The Legal Aid in Criminal Proceedings (General) Regulations 1968 S.I. No 1231 as amended by SI 1970 No.1980, SI 1976 No.790 and SI 1980 No's 705 and 1651

aid, to grant legal aid subject to a downpayment, or to refer the application to a court or a justice (in other words to grant, but not to refuse legal aid).

Soon afterwards, in 1968, the Justices of the Peace Act, as well as defining the role of the clerk for the first time, provided a rule making power in relation to clerks to the justices. Section 5 (1) of the Act authorised rules to be made enabling a justices clerk to do those things which are the province of a single justice. The rules themselves - the Justices' Clerks' Rules - did not appear until 1970.

The rule making power of the 1968 Act was seen as a great advance, and prompted some to predict considerable development in the clerk's role. Alec Samuels, in an article in the Criminal Law Review of 1968⁹ envisaged clerks taking uncontested committal proceedings, and in time having their responsibilities increased until they would be on the Commission and performing a role similar to that of a judge-advocate, ruling on points of law and summing up for the bench.

When the 1970 Rules were actually made, however, there was no startling extension of the clerk's role. The Justice of the Peace commented bitterly

"Seldom can there have been such a forensic anti-climax as the making of S.I. No.231 of 1970 ... We find it difficult to believe that the Lord Chancellor is really unaware that, with a couple of exceptions, clerks to the justices have for many years exercised all (and more) of their new powers, albeit in a de facto rather than a de jure manner."¹⁰

The Rules specified eleven functions which the clerk was thenceforth entitled to perform. Most of these are indeed of very

9. (1968) Crim L.R. 662. 'Magistrates: The Justices of the Peace Act 1968.'

10. 134 JPN 288.

little judicial significance.¹¹ For instance, Rule 7 empowers the clerk to make a transfer of fine order - changing the court to which an offender should pay a fine. Rule 11 empowers the clerk to amend a probation order so that where a probationer over the age of 17 moves to a new petty sessions area, this can be reflected on the order. Such powers are undoubtedly useful for the clerk to possess, but they can hardly be regarded as significant extensions of the clerk's role.

The 1970 rules did however give clerks two powers which were of more substantial effect. Rule 2 empowers the clerk to issue process, and this was a departure even though clerks had been asking for it for thirty years. Also Rules 3 and 4 empower the clerk to deal with agreed adjournments and agreed remands where the defendant is on bail and the remand is on the same terms and conditions of bail. The clerk cannot, however, remand in custody, nor can the clerk grant bail initially - which prompted the Justice of the Peace to comment that it could not see why the clerk to the justices should have less powers than a police sergeant who can grant bail from a police station.¹²

The rules were added to in 1975, 1976 and 1978.¹³ The additions were not matters of any great moment. Many of the powers which it had been suggested that the clerk might be given, such as the power to deal with uncontested committal proceedings, have not been added. Certainly there seem to be no indications from the present rules that the clerk can soon expect to be given any true judicial role or be translated into the judge-advocate of magistrates' court.

11. For the text of the Rules see Appendix Five.

12. At 134 JPN 288.

13. By S.I. 1975 No. 300, S.I. 1976 No. 1767 and S.I. 1978 No.754.

'Brougham', a regular commentator in *The Justice of the Peace* on the magistrates' courts scene examined the rules, and recollected with amusement the seriousness of the campaign of the Justices' Clerks' Society for the rules to be made. He referred to the apparently heated disputes about the rules between clerks themselves, and between clerks and magistrates.¹⁴ The drama of the Society's campaign had, 'Brougham' pointed out, been succeeded by an anti-climax. The feeling of clerks was that what had been given was a small recognition of the tasks in fact performed by the clerk, but certainly not an acknowledgement of what they were capable of or aspired to.

Indeed not only did the powers given to clerks not realise their ambitions for extension of their role they did not, in some cases, even give the clerks sufficient freedom, as they saw it, to operate their courts efficiently. This was so especially in relation to the issuing of process.

Quasi-judicial powers in operation - the power to issue process and the power to grant legal aid.

Rule 2 of the 1970 Rules empowered the clerk to issue process. This was initially very welcome to clerks, since issuing process involves scrutinising large numbers of informations every day. The aim of the scrutiny is to determine whether the informant has any necessary authority to prosecute, whether or not the summons is within time, whether the court has jurisdiction, and whether the information discloses an offence known to law. These are matters upon which most lay magistrates will require advice so that, before the rules, a double scrutiny was needed by both clerk and magistrate. Allowing the clerk to the justices to perform the task alone relieved the

14. (1970) 134 J.P.N. 253.

magistrates of a burden which had little point to it, in that the effective scrutiny was being done by the clerk anyway.

However most courts have only one clerk to the justices and a busy court will issue many hundreds of summonses every week. To use the time of the legal adviser to the magistrates and manager of the court organisation in reading several hundred summonses a week is to restrict considerably the attention s/he has to direct to other aspects of the job. Very many applications for summonses come in standard form from responsible prosecuting authorities and are highly unlikely to contain anything contentious. Whilst scrutiny of such applications may technically be a judicial task, it is not a difficult one. It requires technical expertise, but hardly the exercise of a great degree of judicial discretion.

This fact, and the pressure of work, led many courts to adopt the practice of designating certain senior members of the clerk's staff to scrutinise informations afterwards affixing the facsimile signature of the clerk to the justices. This practice was in accordance with a circular issued in 1975 by the Council of the Justices' Clerks' Society. The practice was noted and, in effect, endorsed by the Royal Commission on Criminal Procedure¹⁵ which proposed a removal of the requirement that informations issued by the police should be scrutinised by a magistrate or clerk to the justices. It noted that "this has become a virtual dead letter in practice and should be removed from the law"¹⁶. The Royal Commission's proposal was that instead of the present system there should be a single procedure for initiating proceedings, called 'the making of an accusation'.

15. Cmnd 8092 1981.

16. See Ch.8 p.171.

Accusations by the police or other government agencies should, the Commission proposed, be on their own responsibility and they should be accountable. Accusations by other agencies should be referred to the Prosecution Agencies proposed by the Commission. Only if the Prosecution Agency declined to take the accusation would the matter be referred to the magistrates' court. The importance of this is that the Commission did not see the issuing of process as a judicial act, but as an administrative one, to be subject to scrutiny in the way other administrative acts can be scrutinised by the courts.

The courts, however, have not agreed that the issuing of process is an administrative task which can be delegated, and have held that it is a judicial act only to be done by persons authorised, and thus that either the magistrates or the clerk to the justices must scrutinise every application for a summons. The legality of the use of senior staff to issue process was tested in 1981 in R v Gateshead Justices, Ex parte Tesco Stores Ltd and R v Birmingham Justices Ex parte D.W. Parkin Construction Ltd¹⁷ Lord Justice Donaldson in that case commented that although it may be rare for the issue of a summons to be withheld it nevertheless happens, and that although most prosecutions are brought by experienced and responsible prosecutors, not all are so brought. He held that

"... the requirement that a justice of the peace or a clerk to the justices acting as justice of the peace shall take personal responsibility for the propriety of taking as serious a step as to require the attendance of a citizen before a criminal court is a constitutional safeguard of fundamental importance. We have no doubt that this function is judicial."¹⁸

Nor was he impressed by the argument that clerks to the justices alone

17. [1981] QB 470

18. At page 486.

could not deal with the volume of work - "the short answer to this is that if the practice is unlawful, expedience will not make it lawful".

The consequences of this decision in practice were dramatic. In courts all over the country summonses had been issued after scrutiny by court staff, not the clerk to the justices. Large numbers of people thus came to court to answer summonses, only to discover that the summonses were not valid. In such cases where the prosecution was within time a fresh information was laid, and the matter proceeded with. Where the offence was out of time when the defendant appeared in court, the defendant was told that the summons against her/him was invalid and that s/he could go. There was enormous confusion amongst defendants appearing at court to answer summonses who did not understand why some were being 'let off' - as they saw it - and some were not.¹⁹

The reaction of the clerks who had to deal with this confusion is probably best described as resigned indignation. They saw the decision in the Birmingham and Gateshead cases as further confirmation that the Divisional Court did not understand the realities of their job. The reaction of one clerk sums up their attitude. He said

19. The decision in the Gateshead case also raised the question of what constitutes the laying of an information. Certain obiter remarks of Donaldson L.J. seemed to imply that even if an information had not been considered by a justice of the peace or a justices clerk, this deficiency could be remedied by the timely appearance of the defendant before the court. The question of what constitutes the laying of an information was referred to the House of Lords in Hill v. Alderton & others 75 Cr. App. R. 346 (which case is referred to as Hill v. Alderton in [1982] 2 All E.R. 963, and as R v. Manchester Stipendiary Magistrate Ex Parte Hill in [1982] 3 WLR 331). This case decided that all that is required for a written information to be laid is the delivery of the document to the office of the justices' clerk. If a summons or warrant is to be issued, then the information must subsequently be laid before a magistrate or the clerk to the justices, since the function of issuing a summons or warrant is a judicial function. The decision in the Gateshead case was thus overruled in part.

"I can't see why we had to suffer the indignities of that last decision by Donaldson".

So far as the substance of the decision was concerned, some clerks agreed that the issuing of a summons is a judicial act - but nevertheless felt that it was one which court staff could be empowered to carry out.

As another clerk put it

"... I feel that the clerk, especially recently, has been put under great strain by the Divisional Court in one way or another. I think that the decision to issue a summons, for one example, is definitely a judicial task, but to compare that with a police officer who arrests and charges a person, and bails them - who may have far less experience than one of the senior clerks in court - is a bit ridiculous."

Other clerks felt that calling the issuing of summonses judicial was wrong.

"Clearly there are jobs that a clerk can do just as well as a magistrate, and it would be useful if a clerk could do those jobs, but calling them quasi-judicial jobs confuses the role of the justice and the clerk. It would be better if they were reclassified into administrative powers of a justice or clerk ... I think that, in reality, to continue calling that (the issue of summonses) a judicial decision is very foolish."

None of the clerks interviewed dealt with the point made by Lord Justice Donaldson that scrutiny by a justice or by the clerk to the justices was a constitutional safeguard in the sense that scrutiny by the court safeguards against people being wrongly brought before the court. The point was taken up, however by the Justices' Clerks' Society which has argued that the 'constitutional safeguard' argument is weak in that no such safeguard exists in relation to charges. A charge, the society says is simply communicated to the court which has no discretion but to deal with the matter.²⁰

20. In their Response to the Report of the Home Office Working Group.

However, safeguards do exist in relation to charges. There is a requirement that the defendant be brought before a court speedily. The court can then amend the charge under Section 123 of the Magistrates' Courts Act 1980, or under the same section adjourn the case, or in a proper case dismiss the charge. However the provisions of Section 123 apply equally to summonses. The safeguard of scrutiny of summonses at the earlier stage of laying the information can therefore only be justified in terms of the likely longer period before a defendant who is summonsed can appear before a court to contest the validity of the summons. This argument becomes weaker when one compares the procedure on summons with the procedure on charge where the defendant is bailed from a police station under S43 Magistrates' Courts' Act 1980. There the defendant will be charged and bailed to appear before the court some time hence, in the same way that a defendant will receive a summons with a return date some time in the future.

The Justices' Clerks' Society recommends that there be no requirement of scrutiny by the court in relation to summonses until proceedings start, or alternatively that if reference to the court before the commencement of proceedings is thought necessary that it should become an administrative matter which could be delegated to members of the justices' clerk's staff.²¹ (They do not argue that if scrutiny of informations is thought to be a judicial act it should nevertheless still be able to be delegated to their deputies.) Clerks are not convinced that there are constitutional safeguards in the scrutiny of informations by themselves or the magistrates. They see change in the system as necessary to ensure that it functions

21. Ibid.

efficiently. In taking this position they are moving away from a due process model (which would stress the necessity of safeguards in the system) and towards a crime control model, emphasising the need for the speedy and efficient processing of cases. However, it is fair to add that they are not exceptional in taking this view. Their position is substantially that taken by the Royal Commission which saw issuing of process as an administrative task, and the rights of defendants as sufficiently safeguarded by the scrutiny of the courts over administrative action.

None of the powers given under the Justices' Clerks' Rules of 1970 are particularly significant, in that they do not give the clerk a great deal of power in themselves. They have a symbolic significance, however, which is very important. They point the way towards one possible area of future extension of the clerk's role.

Although the rules themselves do not particularly enhance the clerk's power, there is another area where the clerk has been given functions which carry a great deal of effective power to influence the experience of criminal justice for those who come into contact with it. This is the area of legal aid.

Under the Legal Aid in Criminal Proceedings (General) Regulations 1968 the clerk can consider an application for legal aid. (Regulation 4) When doing so the clerk must either make an order, make an order subject to a downpayment, or refer the application to the court or a justice of the peace.

Apart from applications made in court, the general practice is for an application for legal aid to be assessed in the clerk's office and if it is to be granted, dealt with by the office. If the clerk is minded to refuse legal aid he will refer the application to a

magistrate. The magistrate will therefore usually see only those applications which s/he knows would be refused by the clerk.

The question of whether legal aid should be granted or refused is governed by a number of factors. The basic rules are contained in the Legal Aid Act 1974, Section 29 of which provides that the power to make a legal aid order shall be exercisable "where it appears desirable in the interests of justice" and if the means of the defendant are such that he requires assistance in meeting the costs of a defence. Further guidance is given by the Widgery Criteria.²² These criteria specify that legal aid should be granted if the charge is a grave one in the sense that the accused is in real jeopardy of losing his liberty or livelihood or suffering serious damage to his reputation; if the charge raises a substantial question of law or the accused is unable to follow the proceedings or present a case because of language problems, mental illness or mental or physical disability; or representation is desirable in the interests of someone other than the accused - for instance in the case of sexual offences against young children when it is undesirable that the accused should cross examine the witness in person.

As well as these criteria clerks are, from time to time, in receipt of exhortations from the Home Office in relation to legal aid. For instance Home Office Circular 97/1978 contained guidance to clerks on legal aid. It pointed out the large amount of public money spent on legal aid, and referred to a recent increase in legal aid spending (the circular was issued on 25.7.78). Clerks were to cut back the money spent on legal aid - without of course depriving anybody who

22. Criteria of the Departmental Committee on Legal Aid in Criminal Proceedings, Cmnd. 2934 approved by the Lord Chancellor and the Home Secretary in 1972.

who needed it and complying still with the Widgery criteria. In 1981 the Lord Chancellor's Department issued a circular (L.C.D. 81 (3)) which told clerks to eradicate waste in legal aid, refuse premature applications and be more stringent in requiring information from applicants.

Within the legislation the criteria and the policy, there is still considerable scope for variation in grant of legal aid. Many courts will have worked out criteria of their own in more detail than the Widgery criteria. Here magistrates and clerk will have an influence on court policy, and one which seems to have a profound impact on refusal rates. Examination of the variation in refusal of legal aid indicates differences which are very wide indeed, even where petty sessional divisions with similar sized workloads within the same areas are compared.²³

It can be argued that the influence of the clerk is the most significant one here. It is the clerk who processes the applications and decides which are to be granted. Those the clerk feels inclined to refuse he refers to the magistrates. The magistrate therefore receives applications which s/he knows that the clerk to the justices would refuse, and the likelihood that that magistrate - who has probably been trained by the clerk and who respects the clerk's judgement and expertise - will then grant legal aid is not high. Ole Hanson, investigating the influence of the clerk on the grant of legal aid cited the clerk at one court who wrote an article in the court newsletter in which he said

23. See H. Levenson 'Uneven Justice - Refusal of Criminal Legal Aid in 1979'. L.A.G. Bulletin May 1981.

"Under the relevant legislation I am not entitled to refuse an application outright. If, having considered an application, I think that legal aid should be refused, I am obliged to refer it to a magistrate for refusal. Whilst such a magistrate is in no way bound by my reaction to the application and can in fact overrule me and grant it, I would submit that it is not a decision that should be taken lightly."²⁴

It appears that the clerk's decision on legal aid is the effective decision. This is supported by Hanson's study which indicates that a change of clerk can effect a significant change in the refusal rate for legal aid. Hanson investigated Waltham Forest Magistrates Court, and showed that where there was no change in the bench or bench policy the refusal rate for legal aid nevertheless increased from 5.1% to 23.2% over a three month period. The changes that had taken place at the court were the appointment of a new clerk to the justices, and the issuing of the Lord Chancellor's circular of 1981 already referred to. The quotation above was from that new clerk at Waltham Forest, and his contribution in the court newsletter was a part of the efforts he saw as necessary to implement the Lord Chancellor's Circular.

It would seem that a very significant change in refusal rate was achieved by his own actions and by his influence on the magistrates. The attitudes and actions of the clerk to the justices can therefore have a considerable effect on the grant of legal aid, and indeed it would appear that the clerk has more influence than anyone else in the court, including the magistrates, on the grant of legal aid.

The power that the clerk has, here, is not symbolic. It is real. The real decisions about the grant of legal aid are almost always made by the clerk to the justices. It is important to bear

24. Cited in Ole Hansen. "What a Difference a Clerk Makes". LAG Bulletin March 1982.

in mind in relation to any future powers given to clerks. Clerks inevitably influence their magistrates. The clerk is the expert who can protect the magistrate from error, and who has trained the magistrate. If a process is set up where the views of the clerk are patently obvious to the magistrate, very few magistrates will see good reason to go against the clerks view.

Society may be content that clerks take decisions about the refusal of legal aid. Clerks think, on the whole, that they should deal with the whole process, including refusal. If clerks are to do it, they should have their power openly acknowledged, for it is little more than a pretence to say that the magistrates have any effective discretion at the moment. (*See addendum page 456a.)

Should the quasi-judicial powers of the clerk be increased?

We have seen that the powers that clerks now possess have been fought for, and that clerks are ambitious for more than they were given under the 1970 Rules. It has also been argued that clerks are looking, in general, to extend their role in the courts. It is therefore instructive to see what clerks at all levels think about the possibility of extension of their quasi-judicial role.

There was no agreement amongst the clerks interviewed for this study as to whether their quasi judicial powers should be increased. 36% of clerks thought that their powers were appropriate as they are now. A few of them were concerned about whether it was inappropriate for the clerk to have a more judicial role, and one commented

"If you start giving clerks those powers, where will it all end?"

However this was not the predominant worry of this 36% of clerks. They felt that if the clerk's powers were increased it would only be to give her/him a number of minor judicial functions and they argued

that the clerk to the justices has enough to do in running the court, without performing minor judicial functions. One clerk to the justices commented.

"... if you are going to bulk him down (sic) with elementary minor powers I think this will be to the detriment of him doing the proper work and also to his status. I mean if for example he was allowed to remand people and do Section One Committals and written pleas of guilty by post, all this would speed things up but it would put him in court where he was dealing with trivia and his own deputy would be in a court probably with the senior magistrate doing important things. I think you've got to be very careful you don't get carried away with matters of expediency."

The lesson of the Birmingham and Gateshead cases has been well and truly learned by some clerks!

62% of the clerks interviewed, however, did think that their present powers should be increased. The list of powers that they thought clerks to magistrates could be given was long. It was suggested that they could do Section One committals, non-contentious licensing matters, remanding defendants where there is no dispute about bail, refusing of legal aid, postal pleas of guilty in or outside a fixed penalty system, granting of warrants and also, in emergency applications out of hours, the granting of place of safety orders. One clerk said

"I think the clerk should have all the powers of a single justice..."

Perhaps the most frequently expressed desire for increased power, possibly resulting from the fact that many of the interviews took place not long after the decision in the Gateshead case, was the desire that the clerks to the justices be able to delegate the powers they have already to their deputies or to senior staff.

Clerks at all levels expressed frustration at the Gateshead decision, and were in favour of deputies and senior clerks being able

to issue summonses, and perform other functions presently only the province of the clerk to the justices.

The clerk's approach to increases in their powers was often pragmatic. Whilst they recognised, for instance, that committal to the Crown Court might essentially be a judicial act, they argued that the Section One procedure has created a situation where there is no dispute between the parties, no necessity to do anything beyond securing that the correct pieces of paper are collected and forwarded and the defendant (already represented by law) is warned of her/his rights.

Some clerks therefore felt that

"... anything in a magistrates' court that is going to boil down for practical purposes to a rubber stamping procedure could effectively be dealt with by a clerk."

and the actual example given by this clerk was of a Section One Committal.

Some of the powers desired by other clerks were much closer to true judicial role. Pleas of guilty outside a fixed penalty system for instance may be routine and a rather boring aspect of magistrates court work, but they do call for the exercise of some sentencing discretion. The issuing of warrants and the granting of place of safety orders would also be difficult to describe as other than plainly judicial acts. One can understand the concern of clerks that magistrates are disturbed, sometimes at night, by applications for warrants or orders when a clerk must also be disturbed to advise the magistrate whether the application can, in law, be granted. However this is not necessarily a sufficient argument for giving clerks the power to do the job alone. Only one clerk sounded a warning note when he said clerks could be given the power to issue warrants yet

"It's alright provided it's done properly, but the problem is if you get a weak clerk who can be pushed. That's the difficulty in those circumstances."

The same reasoning, of course, applies to magistrates, which fact means that a combination of the two may be desirable! Most of the clerks interviewed thought first of the practical problems of their jobs, and their ideas for an increase of the clerk's powers were aimed at solving those practical problems. Few immediately saw the issue as one of principle - as the issue of the proper difference between their own role and that of the magistrates. When the issue was presented to them starkly, however, and they were asked if the clerk should be "on the bench" they all reacted strongly against the idea. Every single clerk rejected the idea, most of them in strong terms.

"My first reaction is that it's quite absurd!"

"Totally wrong".

"I reject the suggestion completely".

Their reasons were support for the lay system -

"I think the system works because you've got lay magistrates who bring a certain ordinary outlook to things."

- and more predominately, the knowledge that if the clerk were on the bench, s/he would dominate the tribunal.

"...I think by the fact of his training he would be in a very strong position to dictate to the magistrates."

"If I was asked to be a Justice of the Peace I wouldn't want to be one. I wouldn't be in their shoes for anything ... You wouldn't need Justices of the Peace if Justices' Clerks were on the bench - you might as well do away with the system, have a system of stipendiaries."

"Really I think you've got to decide what sort of magisterial system you want, this is the difficulty. Either you have the justices who decide matters or you have the lawyers. If you are going to have lawyers you might as well make the clerk a stipendiary magistrate."

Clerks were not lacking in ambition, or complacent about the present magisterial system, but they did not see a combination of lawyers and

laid on the bench as workable. An ambitious young barrister clerk said

"I would be delighted to be made a stipendary, quite honestly, feeling the way I do about magistrates' courts at the moment. On the other hand, I wouldn't want to be a hybrid - neither one nor the other."

The clerks interviewed were overwhelmingly against being let in at the front door - being placed on the bench with a full judicial role. They were very much less precise about how far they should enter at the back door by being given quasi-judicial or limited judicial powers.

They may perhaps be forgiven for this - precision about what is and what is not a judicial act is far from easy. When the Royal Commission on Criminal Procedure considers that the issue of process is not a judicial act and the Divisional Court thinks that it is, perhaps some indecision amongst ordinary court clerks is understandable.

In contrast to the opinions of the clerks interviewed, the Justices' Clerks' Society is fairly modest in the proposals it presently makes for extension of the clerk's role. It has asked²⁵ that any decision to adjourn a case, where there is not to be a remand, should be capable of being taken by the justices' clerk, and that it should not be dependant on the consent of the parties, or there having been a previous decision to adjourn by a justice of the peace. The Society is not asking for the power to determine bail or custody, which they say "must remain a prime judicial decision".²⁶

25. In its response to the Home Office Working Group Report.

26. Ibid at p.56.

However, it is asking for the power to deal with adjournments in the context of its comments that it is comparatively easy for a determined advocate to achieve an adjournment from a bench of lay magistrates who do not know what was said in previous applications for adjournment. The implication of this is that if the clerk was taking the decision, consistency on the part of advocates would be necessary and adjournments possibly less easy to achieve.

The Society also asks for wider powers for staff in the fines office to vary orders to pay, to transfer fines from court to court, and to require statements of means. These powers are powers which can now be exercised by the clerk or by a magistrate. The request is thus a request for delegation. The Society believes the functions it asks for to be administrative, even though they "flow from judicial functions". It asks that, should these powers be regarded themselves as judicial, the clerk at least be allowed to delegate to a deputy.

The Society's paper also requests several powers of the same type as those presently contained in the Justices' Clerks' Rules of 1970²⁷. Their main comment in relation to these powers is that at the present time they believe there to be too great an emphasis on the judicial nature of their powers, and a nervous regard for safeguards - the concern of justices' clerks is with swift disposal of cases by economical and simple means, thus serving the interests of the parties and the administration of justice.

The Society is, therefore, not asking for any radical changes in the clerk's role. Rather it is continuing along the road of piecemeal extension of the clerk's powers. However, whilst the

27. Ibid p.9.

changes requested may be piecemeal they are not insignificant. We have seen the effect that exercise of power by the clerks can have on legal aid. A clerk with, for instance, the power to grant or refuse adjournments would be in a strong position to impose a coherent court policy on the granting of adjournments. Clerks would see this as a good move. Possibly defence advocates, who have protested against the clerk's exercise of power in relation to legal aid, would be less happy. Also the Justices' Clerks' Society's justification for requesting extension of their powers is almost a classic statement of the tenets of the crime control model. There is a great deal of the bureaucrat, and little of the liberal, in their desire for the most efficient and speedy disposal of cases and their criticism of too anxious a regard for safeguards to be contained in the system.

Expanding the legal role of the clerk

Although the question of whether the clerk ought to be given more judicial powers is very contentious, both amongst clerks and others, there is rather more support for the idea that the legal role of the clerk could be expanded.

A number of measures have been suggested. One of them is that the clerk in court should be empowered to rule on matters of evidence.²⁸ Since the magistrates are the tribunal of fact and law, it is presently the bench who should rule on the question of the admissibility of evidence. In practice of course they will usually be following the advice of their clerk but, even so, the identity of the tribunal of fact and law can give rise to real problems in a magistrates' court which do not arise in the Crown Court. One of the

28. The suggestion has been made by M. Burton at 127 NLJ 728, by N. Crampton at 129 NLJ 208, by Brian Harris at 123 NLJ 360 & 384, and at 145 JPN 403 and by P. Darbyshire 144 JPN 233.

clerks in the sample gave an illustration.

"... you get the stupid situation at times where magistrates are asked to rule on, say, the admissibility of a statement that contains a confession, and really in order to do that they must know what the statement contains. So they then having seen the statement and heard evidence of how it was taken decide "No - we'll rule that inadmissible!" How can they then dismiss that confession completely from their minds? They may be able to do so, but there must always be a doubt, I would say, with the defendant who is then ultimately convicted. It would be far easier in those circumstances to say 'Right' - to the bench - 'You retire', for the clerk to decide whether or not the statement goes in, and if it doesn't go in the bench don't know what it's contents are."

The argument essentially is that it is unjust to the defendant if the bench rules an admissibility. Crampton in an article commenting on this problem, has argued that presently justice is not done or seen to be done and that the present tradition of the court should not be allowed to prevail any longer.²⁹

Darbyshire has suggested that it may in fact not prevail. She has described half of the clerks she interviewed as preferring to "deal with certain legal technicalities in the absence of the bench, especially on issues over the admissibility of evidence".³⁰ She alleges that these clerks knew that they were acting illegally, but that they justified what they did on the grounds of expediency. Of the clerks interviewed for the present survey, rather less than half wanted the power to rule on questions of evidence, and none admitted to actually doing so. Whilst many said that their advice to the bench would always be followed, none admitted to dismissing the bench and taking a decision in their absence. It would of course be quite

29. N. Crampton.'Changes in the role of Magistrates' Clerk' 129 NLJ 208 at 209.

30. P. Darbyshire 144 JPN 201. Darbyshire asked clerks if they would ask the magistrates to retire whilst clerk and advocates dealt with "a legal or evidential point".

wrong to do so, and it seems astonishing that over 30 of the 61 clerks interviewed by Darbyshire admitted to doing so.

A related problem - in the sense that it involves the difficulty of magistrates hearing what they should not hear - arises when an unrepresented defendant puts his character at risk by attacking prosecution witnesses. In R v Weston-super-Mare Justices ex parte Townsend³⁰ Lord Parker suggested that the way to deal with this situation is for the prosecutor to ask for an adjournment and then, in the absence of the justices, to enlist the help of the clerk in warning the defendant of the risk he runs.

Harris³¹ has suggested that this approach might be capable of extension to include issues of admissibility of evidence. It would of course be a considerable extension. Warning the defendant of the risks he runs in attacking prosecution witnesses does not involve exercising discretion. Ruling on admissibility of evidence does. That is not to say that in theory clerks are incapable of ruling on admissibility of evidence, but there is an issue of principle involved, and the decision as to whether or not the clerks' powers should be extended in this respect should be taken on that basis.

Another suggestion for extension of the clerks' powers which has been canvassed is that the clerk should sum up in a contested case for the bench. Again this is a proposal suggested by Crampton³², who comments that in simple cases it will not be necessary for the clerk to sum up, and that in other cases the advocates will do it efficiently

30. [1968] 3 All E.R. 225.

31. Brian Harris. 'The Role of the Clerk. A New Direction.' 145 J.P.N. 403 at 404.

32. At 129 NLJ 208.

However he suggests that in other cases, without commenting on the evidence, the clerk should review the burden and standard of proof and the elements of the offence. This suggestion is rather closer to the practice referred to by Harris³³ of the clerk advising the bench in open court than the summing up of a judge to a jury, which does review the evidence. Harris comments that the practice of the clerk giving advice in open court is increasing, and he welcomes it since it ensures that the parties know the legal basis on which the court is acting and thus enables them to challenge it. It does not, however, obviate the necessity for the clerk sometimes to retire with the magistrates, because the nature of the legal advice required by the bench will sometimes depend upon their findings on the facts.

The trend of these suggestions is towards the relationship between clerk and magistrates becoming much more like that of judge and jury, with the clerk becoming the tribunal of law. The possibility, hinted at by Harris³⁴, is that the clerk could decide whether or not there is a case to answer, or whether or not there is sufficient evidence for committal for trial. The clerk would also rule, rather than advise on questions of law were the clerk to become the tribunal of law.

The clerks in the sample were asked whether or not they would support such a development of their role. Some of them were satisfied with their present situation on the basis that they had the power to rule on questions of law in reality, if not in theory. Characteristic of these clerks was the one who said

33. 145 J.P.N. 463

34. Ibid.

"I think perhaps this is going to be an alteration without very much difference."

Other clerks felt very strongly that they should openly be given the power to rule on matter of law. One said

"Unquestionably. Any other situation is really intolerable. It's absurd that a clerk shouldn't rule on matters within his professional competence."

There was, however, a substantial minority who were unwilling to see their powers extended. They made comments such as

"That would be putting too much power in the clerk's hands."

"... I think the appearance of the fact that the magistrates are the ones in authority, and that there's one centre of authority in the court is very important. To start splitting it up I think would cause great problems."

Perhaps the most frequent comment made in response to the suggestion that the clerk should be able to rule on questions of law was the comment that such an extension of the clerk's role must depend on the qualifications of the clerk.

The development of the quasi-judicial role of the clerk and the legal role of the clerk were both seen to be linked inextricably with the issue of the professional qualification of clerks.

Future extension of the clerk's powers.

Two possible areas where clerks might seek extension of their powers have been examined. One of these is the area of their quasi-judicial powers. We have identified several problems, not the least of which is that there is the possibility that clerks to the justices may become occupied with routine tasks which are nevertheless regarded as having a judicial element to them - the obvious example being the issuing of summonses. We have demonstrated that the role that the clerk plays in court, the role that s/he plays in the court organisation, and the role that the clerk plays in the education and policy decisions of the bench are extremely important. Given this,

it makes little sense for the clerk to the justices to spend time scrutinising summonses or even, were the clerk's powers to be extended further, to spend time sitting in court dealing with Section One committals and adjournments. The clerk has better things to do with her/his time.

Another problem is that, in the way that they have been arguing for the extension of their quasi judicial powers, clerks seem to emphasise the crime control aspects of their job. It has been argued that the clerk is a Liberal Bureaucrat who steers a variable course between the demands of the court organisation with its pressures to process cases quickly, and the demands of their role as guardian of legality in the court and protector of the rights of the unrepresented. In seeking to extend their quasi-judicial role clerks have emphasised the demands of the court organisation and have been critical of the Divisional Court's emphasis on constitutional safeguards. The clerks interviewed for the present study when discussing extension of their quasi-judicial powers also tended to think in terms of the practicalities of their jobs rather than in terms of the principles which might be at stake. Given the power that clerks have in the criminal justice system, any moves away from the due process aspects of their role towards a crime control model are to be regretted, and should be discouraged.

It is very easy to understand the frustration of clerks, however. The aspects of their job which are in fact crucially important to the 'consumers' of, and participants in, the criminal justice system are not accorded any recognition, and it is thus natural that clerks who are ambitious should seek to expand other aspects of their role.

The other area of the clerks job which some have suggested might

be extended is their legal role. We have examined the arguments and clerks' reactions to the idea that the clerk might become, in effect, the tribunal of law, that the clerk might rule rather than advise on points of law and evidence, and that the clerk might offer more advice in open court, possibly summing up for the magistrates.

Extension of this aspect of the clerk's role makes a great deal of good sense in many ways. It would be an extension of the things that all clerks already do, rather than a departure from their usual role. It would acknowledge what is in fact the reality in some cases, in that where points of law arise there are likely to be few cases where the bench will not follow the advice of their clerk. It would also solve some of the difficult evidential problems we have mentioned, since there would be a separation of the tribunal of fact and law. Such an extension of the clerk's role would also not carry with it the danger of the clerk moving towards a crime control view of the system. It would emphasise the clerk's role as guardian of legality in the courtroom, rather than her/his role as controller of the court organisation.

However extension of the clerk's legal role would mean an extension of power not just for the clerk to the justices, but for all court clerks. This raises as an immediate problem the question of the qualifications of court clerks. Court clerks are extremely unlikely to be given any of the powers we have discussed unless they are all legally qualified.

The key to future development -

Qualifications of Justices' Clerks and Court Clerks

There has been a statutory requirement that the clerk to the justices be qualified in some way since 1877. The Justices' Clerks' Act of that year required that to be a clerk it was necessary to be a

barrister of 14 years standing or to be a solicitor (without any requirement of years' standing), or to have worked as a clerk for seven years, or, exceptionally, to have been an assistant to a clerk for 14 years.³⁵

This provision did not in fact secure professional qualification for most clerks. As we noted in Chapter One it perpetuated the situation where very many clerks were not professionally qualified, since clerks who were qualified by experience under the Act were succeeded by their deputies who were in turn qualified by 14 years as their assistants.

The Justices of the Peace Act 1949 improved the situation somewhat. Section 20 provides that no person can be appointed a justices' clerk unless he is a barrister of not less than five years standing, or a solicitor of the like standing. There were, however, certain transitional provisions in the section allowing clerks in service to remain in their posts. As a result there are still some clerks to the justices who are not professionally qualified. In 1979 there were 362 clerks in England and Wales. 339 of them were members of the Justices' Clerks' Society and of these 205 were solicitors, 76 were barristers, and 58 were appointed or held office by virtue of years of experience or special qualifications.³⁶ Of the eight justices' clerks interviewed for this research, four were solicitors, three barristers and one was qualified by experience.

However the task of advising the magistrates on the law is not carried out by the clerk to the justices alone. In many courts, of

35. Justices' Clerks' Act 1877. Section 7.

36. The Magistrate. Editorial. Vol.35 No.5 (1979).

allthose clerks who take courts, the justices clerk will probably do so the least often, because of her/his other responsibilities. However court clerks (by which is meant all those clerks who take courts except the justices clerk) were not required to have any qualifications at all until the Justices' Clerks (Qualification of Assistants) Rules 1979.

Prior to these rules very many clerks taking a court had no formal qualifications. They were qualified solely by their experience in magistrates' courts. This situation was commented on adversely by those who felt that to have an unqualified clerk advising lay magistrates on law was tantamount to the blind leading the blind. For instance in 1963 the Committee of 'Justice' reported on Matrimonial Cases in Magistrates' Courts.³⁷ The Committee pointed out that the law applied in magistrates' courts is complex and that legal issues arise frequently, as do difficult evidential points. The necessity of having properly qualified staff was stressed, and the report concluded that

"The Committee is of the opinion that no one of the problems emerging from its investigation is more important than the staffing problem. Unless it is solved urgently, at best the standard of justice in magistrates' courts will seriously deteriorate, and at worst the structure of these courts will break down."³⁸

Within the magistrates' courts service itself there has been considerable debate and discussion about this issue. The post war rationalisation of courts, the creation of new petty sessional divisions with full time clerks, and the increase in work load had its

37. Report of the Justice Committee on Matrimonial Cases and Magistrates' Courts. 1963.

38. Ibid at para.66.

effect not just on justices' clerks, but also on their staff. A clearer career structure developed and it fuelled moves towards some sort of qualification for clerks.

Some clerks favoured professional qualification, and this was now necessary for a clerk with ambitions to become a clerk to the justices. There were however very real problems for clerks in service who wished to acquire qualifications. Many were older, established in their jobs and with family responsibilities. Some found that their Magistrates' Courts' Committees were unsympathetic about funding and time off to qualify³⁹. There were difficulties, therefore for some clerks. There was also resistance from others, who stressed the value of experience against paper qualification.

A three year diploma course for court clerks was started in September 1968. This course, largely a correspondence course, is aimed specifically at subjects relevant to the magisterial service. It is not a professional qualification, although it does provide some exemptions from professional examinations.

The debate about the appropriate qualifications for clerks continued⁴⁰ during the 1960's and early 1970's until it was resolved - at least in part - by the Justices' Clerks (Qualification of Assistants) Rules 1979.⁴¹ The rules provide that a person shall not be employed as a clerk in court unless s/he is qualified as a solicitor or barrister or has completed the Diploma Course, or has Part One of

39. See the reports of the Conference of the National Association of Justices' Clerks' Assistants for 1964 at 128 JPN 414 and for 1965 at 129 J.P.N. 452.

40. For instance see 134 JPN 10, 135 JPN 386, 136 JPN 123 and 198, 139 JPN 301.

41. S.I. 1979 No.570 amended by SI 1980 No.1897. For text of rules see Appendix Six.

the professional examinations and two years experience, or has been granted a certificate of competence by a Magistrates' Courts' Committee.

The aim of those who believe that lay magistrates should have professionally qualified advisers are still far from complete. One of the courts surveyed for the present research had a clerk to the justices who was qualified by experience. His deputy had only Part One of the Law Society's qualifications and no intention of taking Part Two. The Principal Assistant and the court clerk had diplomas, but only the court clerk intended to go on to take professional qualifications. Another clerk employed at the courts was, at the time of the interviews, away taking the Law Society's examinations and intended to qualify. This court therefore had no clerk who was professionally qualified. At another court surveyed only the clerk to the justices was professionally qualified.

These courts were, however, a minority. Most courts had several professionally qualified staff. Of the total of 50 clerks interviewed, fifteen were barristers and fourteen were solicitors. Over half (58%) therefore were professionally qualified. Of the rest, fifteen had the Diploma, one was qualified by having Part One of the Law Society's examinations and experience and there were two trainees who were studying for the Diploma course. Although the sample size of fifty is not high, the results are still valuable since all types of courts spread over England and Wales are represented in the sample. A larger sample which concentrated for instance on London, or on all metropolitan courts would give a false picture - probably weighted towards a larger percentage of professional qualifications.

The opinions of these clerks about the Qualification of Assistants Rules were interesting. Almost all welcomed them on one basis or another. Some thought that the Rules were right in their present form

"I think they're fairly satisfactory. Clearly the totally unqualified clerk doesn't have a place in the modern judicial system at all, and the three alternatives of qualification seem between them to cover all the necessary heads."

A few clerks saw them as "necessary evil". They recognised that the present climate demanded some qualification, but there were nevertheless resentments - about the difficulty of qualifying, the irrelevance of some heads of the professional examinations and the value of experience as opposed to qualification. These sentiments are typified by the reply of one clerk, who when asked for his opinion on the Rules said.

"What does, and always has, annoyed me is that I think for many years the magisterial service has been the poor relation, that the courts have been run on a shoe string. The government - I feel because of the Law Society - haven't done as much as they could over the years to ensure that clerks receive proper training courses and to set up recognised legal qualifications for court clerks... The unqualified clerks - and I don't think it's a chip on their shoulder - have done far more for magistrates' courts than many people have with a legal qualification, be it solicitor or barrister. So - I accept the need for court clerks to qualify. I just argue at times that there ought to be an examination which is on the work that we do at these courts, and not on things that don't affect us at all."

The most frequent comment about the Rules was, however, that they do not go far enough. The Justices' Clerk's Society is in favour of all clerks being professionally qualified. There are some courts which now advertise for professionally qualified applicants for clerk's jobs. The pressure is towards an all professional service.

Clerks themselves are rather half hearted about this, however. Only 60% of them were in favour of professional qualification for all clerks. 40% were against it.

Those clerks who were opposed to a requirement of professional qualification gave a number of reasons. Many challenged the relevance of the subjects studied.

"I think it's a complete waste of time to be quite honest, because I started the C.P.E. and it's totally irrelevant to the job I do."

Others stressed the value of experience

"I am a firm believer in in service training, of coming in at the bottom and learning the jobs on the factory floor - and going on from there to qualify rather than somebody already qualifying outside of the service and coming in at court clerk level."

"There are a lot of 40, 45, 50 year old clerks - clerks in that age bracket - who are darned good clerks who have learned right from grass roots level ... their experience is a lot more valuable than any upstart solicitor who wants to become a court clerk."

These clerks were a large minority. The division of opinion roughly corresponded to the qualification of the clerks - those clerks with professional qualifications thought they were necessary, those without did not. But the split was not entirely predictable. There were six professionally qualified clerks who nevertheless did not believe that all court clerks should be professionally qualified. There were four clerks who were not professionally qualified who thought all clerks should be so qualified. Of these four clerks one was a very young trainee just starting the diploma course. She would thus be considering eventual qualification. The other three had 90 years experience between them! All were older men in senior positions whose opinions reflected their assessment that times had changed and that the pressure towards professional qualifications needed to be recognised.

Those clerks who were critical of the idea of professional qualification did make some valid points - for instance that, if the court organisation is to be managed effectively, a knowledge of the

way it operates in practice is necessary. 'Grassroots' experience does have value. However this argument is not quite convincing in that knowledge of office practice and procedure does not have to be acquired before, or instead of, professional qualifications. If the courts operated under less pressure, adequate training in these matters could be provided for all new clerks, professionally qualified or not.

Another comment made by some clerks is also true - that legal education suffers from a pre-occupation with the decisions of the appeal courts, and that the level of knowledge of the average solicitor or barrister about magistrates' courts is woefully inadequate. This point was made many times by clerks who were professionally qualified and who lamented that they knew almost nothing about magistrates' courts before they started to work in one. This is something which should be rectified by legal education. However clerks who reject a professional qualification because it is not directly about magistrates' courts do fall into the trap of assuming that legal education is simply about learning an appropriate set of rules. Clerks said that the most important thing they taught to magistrates was "the judicial approach". If they believe it necessary to teach it to magistrates, do they believe that they themselves acquire it unconsciously and without study or effort?

As one clerk put it

"It's not just doing the job, it's a question of being trained to recognise what justice really is."

A legal education is of course, about very much more than learning rules. It is about the principles behind them, about their origins and contents and the interests they serve. It should provide the opportunity and foster the intellectual ability to criticise the

rules. Further, it is wrong of clerks to assume that much of legal education is irrelevant to their job. Issues of, for instance, contract or tort may arise irregularly in a magistrates' court, but they do arise and clerks need to be prepared for them.

The arguments in favour of professional qualification are strong. The clerk is required to know a great deal of law and procedure. Clerks have to advise on difficult legal points, often without time for preparation. Clerks are also dealing with professionally qualified prosecutors and defence advocates daily.

The question of the future development of the clerk's role is also bound up with the question of professional qualification. A member of the Council of the Justices' Clerks' Society which passed the resolution that all clerks be professionally qualified said

"One is looking to the day when one will have court clerks who are all professionally qualified - which will increase their status ... I think it increases their ability as well."

Many other clerks commented that their desire for professional qualifications was essentially a matter of status.

Certainly if clerks are aiming to acquire increased quasi-judicial powers, or to develop their role as legal adviser in the ways we have discussed they must stress the necessity of an all professional service. They are not likely to be allowed to make essentially judicial decisions or to rule on matters of law unless they are qualified. Clerks to the justices have been asking for their powers to be extended, and to be able to delegate responsibility for certain tasks to their staff. Whilst the vast majority of clerks are qualified, this is not true of their staff. The Qualification of Assistants Rules of 1979 do not go far enough if clerks' ambitions to extend their role are to be realised. Whilst the Justices' Clerks'

Society seem to realise this and is pressing for an all professional service, they appear to have still some work to do to convince some clerks of the necessity of the step. There are many clerks who are not convinced of the desirability of extending their powers and many who are not convinced of the need for professional qualification. Clerks who are ambitious for change need to conduct a campaign within their ranks, as well as outside them.

Pay and promotion

One of the questions which aroused the strongest feelings amongst clerks - as it probably does amongst most groups of workers - was the question of their pay. Clerks were asked if they thought that they were properly paid for the job they do. A total of 34% said that they were satisfied with the money they received, but 10% of these clerks had reservations about their answer. Several senior clerks and clerks to the justices said that their own pay was fair but that that of their junior colleagues was not. This arises because the pay of the clerk to the justices varies with the size of the court, and the pay of deputies and, it seems, sometimes a principal assistant is calculated as a percentage of the clerk's salary. Even within the 34% of clerks satisfied with their own salaries, there were those who were critical of the general level of pay for court clerks.

The majority of clerks - 66% - were not satisfied with their pay. This was so even though the interviews took place just after clerks had received a pay award. In 1979 clerks had felt so strongly about their pay that they had threatened industrial action. This was a very strong line for a group of professionals in the public service to take. The pay offer that was made to clerks in 1979 by the Joint Negotiating Committee for justices' clerks' assistants was based on comparisons between clerks and local authority workers. Clerks were

not satisfied either with the amount which was offered, or the nature of the comparison. They refused to accept the offer, and the matter was referred to the Comparability Commission. Magistrates court clerks felt that a fair comparison would be between themselves and Crown Court Clerks on comparable grades. However the Commission disagreed, and although clerks got pay rises, they did not get what they had asked for. There was a great deal of resentment.

"I think the result of the recent pay scheme was unsatisfactory to say the least."

"There's obviously a big bone of contention between magistrates' clerks and Crown Court Clerks. I think the differential between their salary and ours is absolutely ridiculous - preposterous actually!"

"... look at the comparable clerk in the Crown Court, who needs no legal qualification at all, needs to give no advice and in fact is just another note taker in court ... then obviously they shouldn't be paid as much as someone who has to give advice and be qualified. But of course they are paid quite a lot more, plus more holidays and more benefits by being civil servants."

Clerks who were legally qualified also naturally compared themselves with local practitioners. One clerk to the justices said he thought his salary was good, but

"... compare that with somebody who is doing their work in a little cubby hole conveyancing, they ought to be able to make much more than that."

Other clerks compared their pay unfavourably with solicitors' legal aid rates. One set his comparison even lower

"I think that considering even what police officers are paid, well clerking in comparison to that is a low paid job!"

Whatever comparison clerks chose, they came up with the same answer. Even after a very recent pay rise they were dissatisfied with their pay. They felt that they carried a great deal of responsibility but that it was not recognised in their remuneration.

Several clerks emphasised the necessity to attract "the right

calibre of person" to the job, and felt that the present levels of pay did not give sufficient incentive. Here again we have the problem of professionalising the clerks job. Those who were keen to attract professionally qualified clerks and, perhaps more importantly, to keep them in the service knew that levels of pay needed to be raised. A clerk to the justices commented

"One of the problems with court clerks is, of course, that they are not all lawyers at present, so they can't really claim comparison with lawyers. This is extremely irksome to those that happen to be lawyers and beneficial to those that don't happen to be - so probably one set is overpaid and one set is underpaid at present. That's another good reason why we should move to a more uniform profession where everybody has the same qualification - and then they can reasonably claim parity of pay with lawyers in outside industry."

The unqualified clerks did not agree with him - they felt that they were not well paid. Nevertheless the question of pay is bound up with the question of professional qualification which is bound up with the question of the future of the job.

The job of the magistrates' clerk is in the process of change. It is developing towards becoming a legal professional job and clerks are anxious to increase their status. In the job are some who are content to leave things as they are, who are not anxious to acquire more power and influence, and are not working for any of the things that go with an enhancement of their role. In contrast there are others - often young professionals - who are ambitious and who want the job to develop. One way in which their desire for advancement can be realised is to increase the status of the job. However, there are now many clerks who are being appointed clerks to the justices in their late twenties and early thirties.

These are people who aspire to further responsibility, and they have reached the top of the magistrates' courts' hierarchy. They might look for another justices' clerk's job in a bigger division, but

they will be looking for further promotion as well.

It has been suggested⁴² that such clerks go on into the Crown Court Service.

Clerks are definitely not impressed by this idea. Whilst they would not mind parity of pay with Crown Court clerks, they regard Crown Court jobs as boring. Magistrates' court's clerks see their job as essentially that of a legal adviser - they would not wish to exchange this for a job which they perceive as essentially clerical and administrative.

The other possible channel of promotion for ambitious clerks to the justices is promotion to a judicial role. A number of clerks to the justices have been promoted to stipendiary magistrate, a smaller number thence to recorder, and a very small number to Circuit Judge. There is thus the possibility of promotion. However, the demand for it is shortly going to escalate. One clerk to the justices said

"Well I think you've got a lot of young men and women coming in now who are exceptionally well qualified and able people. They are coming in at an age at which people used not to become clerks to the justices. When they get to my age they will want to go on and do something more than they are doing at present, so I think ... in a few years time there will be a very strong demand for this."

The clerks interviewed were asked whether there ought to be an accepted channel of promotion from clerk to the justices to judicial posts. 22% were opposed to the idea, 10% of them because they thought that the present situation was satisfactory, and that only exceptionally should a clerk be promoted. One said

"... I think it's perfectly clear that some should be appointed. On the other hand, what I deprecate is the person who is the magistrates' clerk who has continually got his eye on advancement to the bench."

42. For instance by "Brougham" - indefatigable commentator on the

magistrates' courts scene - at 145 J.P.N. 657.

6% were not sure if it was a good idea simply because they had not thought about it. 78% were, however, in favour of the idea. Whilst none were in favour of automatic promotion, most were in favour of there being an accepted channel of promotion for good clerks.

"Whilst I would like, obviously, myself to be considered for such an appointment at some stage I don't think it would enhance the bench to have every justices' clerk promoted to the bench by virtue of so many years service ... but I would certainly like to see a larger number of clerks having opportunities of serving on the bench by virtue of their experience as clerks."

"A magistrates' clerk with numerous years experience I would have thought, is the ideal person to progress to stipendiary magistrate and possibly higher."

"... if they've got the experience they are far better qualified to become recorders than some of the people who are appointed at the present time."

The problem which arises very quickly if more clerks are going to look towards promotion to stipendiary magistrate is that there are a large number of clerks to the justices, and few stipendiary magistrates. Very few clerks could expect to follow this channel of promotion. The question is then raised as to whether clerks could be made recorders directly. Some clerks are of the opinion that they could. One clerk to the justices commented

"The Lord Chancellor has acknowledged publicly that the avenue for promotion for justices' clerks who do not wish to seek other clerkships is to the stipendiary bench. Why he will not appoint, as a matter of policy, clerks to the judicial bench I hesitate to understand. He appoints solicitors in private practice who have never considered a question of sentencing in their life, to whom the whole subject of sentencing - which is 90% of the work of a magistrates' court - is totally strange and unfamiliar. He appoints them to the judicial bench but he won't appoint justices' clerks. That I fail to understand."

This is a good point, although it is also true to say that many clerks do lack one experience which is very important for a judge to have had, which is the experience of acting as an advocate. Certainly there are clerks presently in service who are not content to

set their sights simply on one day becoming a stipendiary magistrate. The man quoted above was a clerk to the justices looking to his immediate future. A young barrister - clerk, who had been a clerk for only a little over two years said

"My view is that if I ever were to become bored with this job the obvious temptation is to go back into private practice. However, the knowledge that it would appear now that I might become a chief clerk at say 33 or 34, and then a stipe at about 40 gives you somewhere to go ... I mean you would want about four or five years as chief clerk I should imagine. If you can hold a division, get it to run smoothly, I can't see why you should not then be able to put in for stipendiary magistrate as the next step up - and of course circuit bench from then on. Of course one looks forward to the day when one of those circuit judges is made up to a red dressing gown...!"

The question of promotion is about to become a pressing problem. Patterns of service in magistrates' courts have changed. Clerks to the justices who are now around retiring age often qualified after they had been in the job for many years. Rapid promotion was not expected, and only a few clerks were looking to go on beyond appointment as clerk to the justices. This is no longer the situation. Young ambitious professionals are coming into the service. They are being appointed clerks to the justices in their early thirties and, like the clerk quoted above, they want to go on. They will have an impact on the service, on the expectations of all clerks, and they will have an impact outside the magistrates' courts service when they move on.

So far the system has coped by filtering off a few of the most eminent clerks into the judicial hierarchy. But the trickle of clerks with ambitions to go on to judicial posts is likely to become a stream, and is likely to require policy decisions rather than simply promotion decisions about individuals.

There is, however, a certain reticence amongst clerks about

discussing this issue. There are clerks who are not eager to publicly claim that they have ambitions to a judicial post. Similarly there are some clerks who are reticent about seeking extension of their role. Their reason is that many clerks are politically shrewd, and do not wish to be seen to be threatening the lay system. More than one clerk to the justices commented that although the question of his ambitions was posed by the magistrates interviewing him for his post, it would have been unwise of him to have admitted to a desire for judicial appointment. Clerks believe that lay magistrates feel threatened by their ambitions - they believe that if magistrates up and down the country saw their clerks seeking judicial appointment those magistrates might begin to wonder if their clerks would like to be in their position, doing their job.

Magistrates' fears are, however, unfounded. Clerks are, on the whole, very committed to the lay system. They do not wish to be on the bench with, or instead of, their magistrates. They support lay participation in the legal system. Clerks' desires to increase their powers and clerks' anxiety that the rules be followed were not posed as a threat to lay justice but as a route to better lay justice. Clerks do not wish to arrogate to themselves the key judicial decisions in the court - they expressly support these being taken by lay magistrates. The judicial roles to which they aspire are those of the existing stipendiary magistrates, and Crown Court Recorders.

If the quality of magistrates' justice is to be improved, an important contribution must be made by magistrates' clerks. The courts should be run and the magistrates trained and advised by imaginative, innovative and intelligent lawyers. Such people will not be attracted into the service if it is a job without promotion prospects for its best performers.

Addendum (refers to page 429)

- * The points made in this section, emphasising the extent of the clerk's power in relation to legal aid are likely to be made more important by regulations made under the Legal Aid Act 1982. Account has not been taken of these, as they are very recent developments of the law.

CONCLUSIONS

The clerk and the court organisation

The clerk and the magistrates

The clerk as guardian of due process

The future

Conclusions

This study of clerks has been made at a time when there is considerable pressure for the clerk's role to change. There have always been clerks who were ambitious and forward looking, but today's clerks are the product of a process started by the reforms of the Roche Committee which has not yet worked itself out.

Only fifty years ago the majority of clerks were either unqualified, or were local solicitors who advised the magistrates part-time. Before the Roche Report the full time qualified clerk was not quite a rarity but certainly one of a minority.¹

The implementation of the Roche Committee's recommendations for amalgamation of divisions was probably the most significant development which has ever occurred in the long history of magistrates' clerks. Its effect was to create a situation where most clerks to the justices were full time and qualified. It also ensured that those clerks to the justices now administer divisions, or groups of divisions, large enough to necessitate their employing a number of court clerks for whom a career structure has had to develop. Since almost the same objections apply to unqualified court clerks advising the justices as apply to unqualified clerks to the justices doing it, the demand for qualification, and latterly professional qualification for all clerks has arisen.

The clerks to the justices who manage magistrates' courts are now full time professionals. They are to a certain extent organised through the Justices' Clerks' Society, and some of them are ambitious. Their desire to consolidate and extend their role is being fuelled by

1. The Departmental Committee on Justices' Clerks, 1944, Cmnd, 6507 discovered 822 clerks, 90 whole time, and 732 part time. The survey excluded what the report called the "Metropolitan Police Courts".

the entry of more professional lawyers into the service as court clerks with expectations of rapid promotion.

The clerks who were interviewed for the present research are representative of clerks all over the country. There were some who were lacking in ambition and who had given little thought to the proper limits of their role. There were some - usually, but not always, older men - who could see that change was taking place, but who felt that they themselves were fixed in an earlier era and could not become part of it. There were others who were ambitious, who were looking critically at the nature of their role and who were wondering where their ambitions would take them after they had become clerk to the justices or run a division for a few years.

If changes are to take place, decisions about the future of the clerk's job should be taken on the basis of a thorough understanding of the nature of the clerk's role and a proper appreciation of the extent of the clerk's power. Indeed not only should decisions about the future of the clerk's role be taken on this basis but any reforms which apply to magistrates' courts need to be made with the influence of the clerk in mind.

There are three areas in particular which we have identified as important - the role of the clerk in running the court organisation, the influence of the clerk on the magistrates and the clerk's role as guardian of due process.

The clerk and the court organisation

It is the clerk who is responsible for running the court organisation, and this is a role that carries with it a great deal of power.

The policies and practices that the court follows in its day to day operation have a considerable influence on those who work in the

criminal justice process. We have shown, for instance, (in Chapter Six) that the attitude of clerks to the legal profession varies widely from court to court. The conflict between the needs of the legal profession to deal with several cases in each court session and to get away from court early, and the needs of the court for flexibility in listing cases between courts and for a listing policy that allows short cases to be dealt with first is a conflict which is resolved in different ways. Some courts accommodate the legal profession to the extent of operating an informal appointments system. Others are much less sympathetic.

Probation officers and social workers also are affected by the management of the court. Some courts having a close and sympathetic relationship with probation officers and social workers and others have a much more distant and formal attitude. Particularly problematic are the attitudes of clerks to social workers, many of which are unsympathetic and cannot fail to have an effect on the effectiveness of social workers in the court.

The part played in court by the police also varies from court to court, so that at some courts Carlen's analysis of the police controlling the listing, the timing and the movement of persons, in court is only too true. At other courts, however, all of these things are in the hands of the clerk, and the police play a very minimal role. The extent of the police presence in court and therefore their power to influence events according to their own priorities can be affected radically by the attitude of the clerk to the police presence in court, and the energy with which the clerk pursues a policy of civilianising the court. Also, outside the courtroom, we have shown that the police expect advice from clerks, and that they sometimes get it - even in situations where this may be

improper. The clerk has a legitimate role in helping all agencies and individuals with advice in matters of magistrates' courts' procedure, because the clerk is the expert on this subject. But the police should neither expect nor receive from clerks advice on the substance of their cases such as might be given by an advocate for the prosecution. The need for adequate police prosecution agencies is thus emphasised. Clerks who take a view of their role which favours a 'crime control' model will see an identity in their task and that of the police, and fail to see anything wrong in giving advice to police. Those who favour a due process model will emphasise the need for a separation between the court and the police.

The efficiency with which the court is run is also in the hands of the clerk. A problem which is of contemporary concern is that of delay. We have shown (in Chapter Nine) that the imagination and energy of the clerk must be a key factor in measures which will effectively reduce waiting times. Although clerks cannot be expected to deal with all of the problems without resources (as the Home Office would appear to wish them to) the likelihood that defendants will have their cases dealt with promptly depends to a large extent on the clerks. The likelihood that defendants will be granted legal aid also depends on the clerk, as does the vigour with which those defendants who are fined will be pursued. The sympathy with which defendants without representation are received in court will also be affected by the attitudes of the clerks as well as by the attitudes of the magistrates.

The potential for the clerk to the justices to influence the character of the court is very great. Some clerks exploit this potential - others do not. Brian Harris has expressed concern about the supine clerk in court - the court clerk who does not do enough.

There may well also be supine clerks to the justices who do not exploit their potential for influence in the management of the court and who are not innovative.

The clerk, however good, does not dictate the policies of the court alone. S/he is affected by the Magistrates' Courts' Committee which holds the purse strings, and s/he must also work with the magistrates in many of the decisions about the running of the court. Nevertheless the clerk has some degree of autonomy, and for the magistrates s/he is usually a respected expert whose views carry a great deal of weight.

The clerk and the magistrates

Magistrates are lay people who do their job with little training. They are called upon to deal with a formidable quantity of legal and procedural rules which which must be daunting even to the most experienced of them. In these circumstances they rely heavily on their clerk for guidance. We have shown that in some courts the dependence of magistrates is such that they are almost mute in court, and may even be incapable of announcing their own decisions. In all courts magistrates sometimes seek to resolve their ambivalence about difficult decisions by involving their clerks in decisions on fact.

Clerks claim not to become involved in decisions on fact, and they insist that they make a scrupulous distinction between matters upon which they can properly comment and matters which they should leave to the magistrates. They do not wish to be involved in decisions on fact, and do not have ambitions to become part of the tribunal of fact.

Nevertheless clerks can, and do, influence the decisions of the magistrates. First their legitimate area of influence is large. By their involvement in advising on law, and particularly by drawing

magistrates' attention to evidence clerks do affect decisions. Their role in sentencing is also extensive since they not only present magistrates with the available options, but also advise about decisions of appeal courts and the sentencing norms of the bench as a whole.

Secondly, outside their legitimate role, some clerks are aware that they can influence the magistrates without directly commenting on a case - by inflection, gesture or by the way they frame their advice. It is perhaps more disturbing that there are some clerks who are not aware that they do this. Clerks were clear that if they wished to exceed the proper limits of their role they could do so, although improper behaviour would not be possible with all benches. Clerks insisted that their integrity in maintaining a scrupulous regard for the limits of their role was to be relied upon.

The effect which clerks to the justices have on magistrates through training is especially important. Clerks clearly understand that they can influence the model of the criminal justice system which their magistrates employ by the content of the training offered to new magistrates, and this will affect the attitude of those magistrates to defendants, to the police, and to the whole criminal justice process and their role in it. The level of dependence of magistrates on the clerk in court is also to a great extent a function of training, and this is shown particularly in the uneven enthusiasm amongst clerks for courses for magistrates taking the chair in court. Clerks in some courts will continue to appear to take a dominant role in court until they can educate their magistrates to a level of competence where the chairperson in court can take more responsibility.

All clerks stressed the necessity for them to take a prominent role in court because of the tendency for magistrates to make

mistakes. Magistrates would make fewer mistakes if they were better trained, especially in the art of taking the chair in court. However the good point was made by clerks that there is a limit to the obligations to train that can be placed on volunteers who are also busy people.

Clerks' desires to protect magistrates from error has also led them to protest against the rules which limit their presence in the retiring room. Although clerks' concern arises from quite proper motives and not from any desire to become involved in matters of fact, nevertheless we have seen that magistrates do ask advice on fact, and that clerks can unintentionally communicate their opinions to the bench. The conduct of some of the clerks who were censured by the Divisional Court would surely be frowned upon by their colleagues. The statement of correct practice in the latest Practice Direction is phrased positively, and clerks should recognise the need for such statements. A greater willingness on the part of clerks to give advice in open court may do something to reduce the problems relating to the retirement of the clerk. It would assist particularly in improving trust between the legal profession in court and court clerks, given that it is advocates in court who are responsible for referring the clerk's behaviour to the Divisional Court. However it may be that the tensions between clerks and advocates analysed in Chapter Six are not assisting any process of improving the relationship between clerks and advocates.

The clerk as guardian of due process

The clerk in court has to play two conflicting roles. One of them is the role of lawyer; the clerk is the legal adviser to the magistrates and is thus responsible for ensuring that legal and procedural rules are followed. This aspect of the clerk's role

includes seeing that those legal and procedural rules which are designed to safeguard the defendant are followed. Thus the clerk becomes a guardian of due process in court. The other role that the clerk plays is that of manager of, or worker in, the court organisation. This role requires the clerk to arrange the business of the court so that it proceeds smoothly and quickly and that all cases are dealt with in the court's session. These two roles conflict. Protection of the defendant's rights, and ensuring the defendant's full participation in the court procedure when that defendant has no advocate is a very time consuming process. It holds up court proceedings and makes it difficult to get through the cases on time. The reality of justice for the many unrepresented defendants in magistrates' courts will be crucially affected by the sort of compromise made by the clerk between these two conflicting aspects of his/her role.

One might have expected that clerks would make their compromise almost entirely in favour of the court organisation, since that would give them personal bonuses in increased time out of court to deal with other work, or simply the ability to get away from the office on time. However they do not do so. Clerks are very insistent on the importance of their role as the court's lawyer, the preserver of right conduct in court, and the protector of the unrepresented. Some clerks see themselves as frustrated advocates, who are given a chance to exercise their talents in favour of "the underdog" unrepresented person. Many clerks emphasise the importance of this aspect of their role, and gain particular enjoyment from it.

Also, in their relationship with the magistrates clerks stress their role as protector of fair play. Their wish to be in the retiring room is motivated not by a desire to take over the judicial

functions of the bench, but by the desire to ensure that the rules (of law, procedure and evidence) are followed. Their fears in court are that the bench will make a mistake, and their concern is to protect the bench from this possibility. However clerks will withdraw their protection and abandon their magistrates, even consigning them intentionally to the reprimands of the Divisional Court if those magistrates flout the rules wilfully.

The enthusiasm and effectiveness with which clerks protect due process rights in court is influenced by many factors. The attitude of the individual clerk is important and personality and training must play a part. But particularly influential is the position of the clerk in the court organisation. Pressures on the clerk to hurry through the list can come from many sources - particularly from the police where police call the list and/or act as ushers in court. Senior and experienced clerks will be much less susceptible to these pressures than junior or less experienced clerks. However another very important factor is the availability of resources to the court. If there are enough qualified staff, enough magistrates, enough courtrooms, enough administrators, the demands of the court organisation are reduced and there is more time for the unrepresented defendant. Government measures which place greater stress on an already overworked court organisation, reduce the chances of the rights of unrepresented defendants will be protected.

However, although the 'due process' aspects of the clerk's role should not be forgotten because they are important to explain the clerk's behaviour in court, we should not be carried away by enthusiasm for them. There are a number of problems.

First, some clerks operate a model of the criminal justice process which is much closer to a crime control model than a due

process model. The clerk is unreliable as a protector of the defendant's rights. The interviews for this research revealed clerks who were apathetic about helping the unrepresented, and a few who actively disliked doing it. The court observations also revealed clerks who did not help unrepresented defendants and who bypassed their needs and their lack of understanding of the court's proceedings.

Secondly, those clerks who placed great emphasis on the due process aspects of their role sometimes had an inflated idea of their own effectiveness. They believed that they could be as effective as a defence advocate, despite the fact that they had not taken instruction from the defendant, and were restricted by their position from pursuing an aggressive defence. Other clerks, whilst admitting that they could not be as effective as a defence advocate thought that they could be "good enough". They used an idea of "good enough" justice which is characteristic of Bottom's and McClean's Liberal Bureaucrat who is "a practical man who realises that things have got to get done" and who believes that "the system must not become so bogged it does not operate".²

This concept of "good enough" justice can distort the clerk's perceptions of the need for legal representation of defendants. If the clerk believes that s/he or her/his staff, can usually do a good enough job in protecting the rights of defendants, then the defendant in a simple case does not need an advocate. Given the enormous influence clerks have on the grant of legal aid, this could actually affect whether or not the defendant gets a legal representative. It

2. Bottoms and McLean. 'Defendants in the Criminal Process' R. & K. Paul 1976. p.229.

may go some way to explaining the differences in levels of legal aid orders at different courts.

Thirdly it must also be admitted that the Justices' Clerks' Society has scarcely been vocal in its demands for more resources to improve the protections it can offer to unrepresented defendants - the Society has asserted that magistrates' justice is much improved and has urged that magistrates be given increased responsibility,³ but its emphasis has not been with the problems of unrepresented defendants.

Nevertheless the assistance given by the clerk to unrepresented defendants is sometimes good and often the only assistance such defendants are likely to get. When demands for more legal representation for defendants in magistrates' courts seem unlikely to be met, there is temptation to turn instead to measures which might improve the assistance given to defendants by the clerk. However it should remain clear that by settling for the help given by the clerk society is settling for the compromise of the Liberal Bureaucrat - "good enough" justice.

The future

The extent of the clerk's power in the criminal justice process and the nature of the clerk's role as an ambivalent protector of due process should influence the pattern of future reforms.

One way in which clerks have sought to develop their role is by looking for an increase in the jurisdiction of magistrates' courts. The Justices' Clerks' Society in its paper 'A case for summary trial' (referred to above) has argued that magistrates' powers should be

3. See especially "A case for summary trial: proposals for redistribution of Criminal Business" by the Justices' Clerks' Society.

extended. This has prompted criticism from some lawyers⁴ who point to the problems of magistrates' justice, including delay, lack of facilities, procedural disadvantages compared with jury trial, and the unrepresentative nature of many benches of magistrates. Certainly the emphasis on speed, efficiency and cost which mark so many of the Justices' Clerks' Society's requests for change are unlikely to reassure those advocates who represent defendants in magistrates' courts. A greater emphasis by clerks on the quality of magistrates' justice and the problems of defendants might secure more support from the rather vocal lawyers who both experience magistrates' justice and write about it.

Another way in which clerks have sought to develop their role is through the acquisition of quasi-judicial powers. Those powers which they have been granted in the last decade or so have, however, only tended to load the clerk to the justices down with some trivial, if convenient minor powers. There does not seem to be any indication that the clerk might be given more extensive judicial powers. Although the clerks who were interviewed for the present research wanted sometimes quite substantial increases in their powers the request which has recently come from the Justices' Clerks' Society is for the power to adjourn cases without the necessity for the agreement of the parties or for a previous adjournment by a magistrate.⁵

This request for an increase in powers is made on the context of an implied criticism by the Justices' Clerks' Society of advocates who ask for adjournments unnecessarily. It is again not a request likely

4. See M. King "Against Summary Trial" in L.A.G. Bulletin April 1982 and J. Morton "Forceable consent to Summary Trial" 132 NLJ 579.

5. See the response of the Justices' Clerks' Society to the report of the Home Office Working Group, *supra*.

to receive the support of the legal profession as a whole. Given that there have been criticisms of the way in which clerks have used their power to grant legal aid (discussed in Chapter Ten supra) and criticisms of the policy which resulted in the Nottingham Justices case (discussed in Chapter Nine supra), advocates are perhaps unlikely to be sympathetic to proposals to give the clerk greater power to deal with adjournments when the indications are that it will be used substantially to refuse their requests for adjournments.⁶

There may be rather more support for the idea that the legal role of the clerk be extended. We have argued that allowing the clerk to rule on evidence, rule on matters of law and perhaps 'sum up', for the magistrates would be a more logical extension of their role. It would extend the things that clerks already do, rather than altering their role. It would acknowledge the reality, which is that magistrates are unlikely to go against the legal advice of their clerk, and it would solve some difficult evidential problems. Such an extension of the clerk's job would also emphasise the clerk's role as guardian of legality in the courtroom, rather than her/his role as controller of the court organisation. Such measures would be aimed at protecting defendants, rather than increasing efficiency in court.

Extension of the legal role of the clerk also coincides with moves towards an all professional service. Also for those clerks

6. Ibid. para. 5.6, the document says "One of our colleagues had made the following comments with which we agree. 'The refusal of an adjournment is a theoretical step which the court may take, but it is of very limited practical value. If there is any dispute, hardly anyone champions the shortening of adjournments or the refusal of adjournments. A court can exert some pressure, but if it presses too hard the parties will allege the denial of justice, the hostility of the bench ... A stipendiary magistrate who remembers what is said on each occasion may be able to exert more control, but a bench of lay magistrates with ever changing composition is no mark for a determined advocate who wants an adjournment.'"

with ambitions towards judicial posts a demonstration that clerks are capable of taking good decisions on law is likely to be more useful than proof that magistrates can deal with bigger and better offences.

Magistrates may feel that this would be a diminution of their powers - and it would in fact be so. However there are sound reasons for allowing clerks to rule on evidence quite apart from any pressure to increase the clerk's role. Also the occasions when lay magistrates would legitimately wish to go against the considered legal advice of their clerks will be very few, so that if clerks were to be allowed to rule on law the real encroachment on magistrates' powers would be small, although its symbolic significance might be large. Whether or not the role of the clerk is increased, there remains the fact that clerks will be looking for avenues of promotion from clerk to the justices to judicial roles in larger numbers in the near future. Some consideration should therefore be given to the role of the clerk as a whole.

Bottoms and McLean found the values of the Liberal Bureaucrat everywhere in the criminal justice system. They also felt that the system needed to be given a decisive push in the direction of due process. Given the position occupied by the clerk in magistrates courts, perhaps the opportunity could be taken to give the clerk a decisive push towards those aspects of her/his role.

Appendix One	Questionnaire
Appendix Two	Practice Direction [1953] 1 W.L.R. 1416
Appendix Three	Practice Direction [1954] 1 W.L.R. 213
Appendix Four	Practice Direction [1981] 1 W.L.R. 1163.
Appendix Five	Justices' Clerks Rules 1970.
Appendix Six	Justices' Clerks (Qualification of Assistants) Rules 1979.
Appendix Seven	Description of the job of clerks.
Appendix Eight	Table of courts observed.
Appendix Nine	Table of clerks interviewed.

APPENDIX ONE

QUESTIONNAIRE

Preliminary

Before we begin the questions perhaps I should explain that I am doing research for a doctoral thesis on the role of the clerk in magistrates' courts. I am looking at the nature of the clerk's job, and, as part of that, at the way in which the clerk relates to other people who work in or appear in magistrates' courts. Perhaps I should also say that I have worked as a court clerk myself.

Some of the questions which I will ask may seem rather obvious to you, but I ask you to bear with me in this. The reason I must ask such questions is because I am not allowed to assume the answers, and because the state of knowledge about what clerks actually do is regrettably very limited.

The answers you give me will be strictly confidential. You will not be referred to by name or identified in anything that I write. Your name and place of employment will be recorded on this separate list, and your questionnaire will be identified only by number.

QUESTIONNAIRE NUMBER _____

POSITION HELD _____

SECTION 1 - QUALIFICATIONS

- 1.1 What qualifications for your job do you have?
- 1.2 When did you acquire these qualifications?
IF ANSWER TO 1.1 = SOLR. OR BARRISTER PROCEED TO 1.6
- 1.3 Are you in the process of acquiring any other qualifications?
IF YES PROCEED TO 1.4 - 1.5. IF NO PROCEED TO 1.6.
- 1.4 What qualifications are they?
- 1.5 When do you expect to complete them?
- 1.6 Can you tell me for how long you have been taking courts?

SECTION 2 - THE CLERK RETIRING WITH THE BENCH

- 2.1 What practice do you usually adopt in court so far as retiring with the bench is concerned?
- 2.2 On what sort of issues do you find that benches ask you to retire with them most often?
- 2.3 What is your opinion of the present state of the law on the clerk retiring with the bench?
- 2.4 Do you think that the law needs to be altered in any way?

SECTION 3 - RELATIONSHIP WITH MAGISTRATES

- 3.1 I am interested in how the clerk and the chairman divide up the "speaking parts" in court. Can you explain what the division of work is in your court?
- 3.2 Looking at some specific examples, who explains about the right to trial to the defendant?
- 3.3 And who would explain to an unrepresented defendant the courses open to him in making his defence?
- 3.4 Who would explain the meaning and effect of a decision about bail?
- 3.5 It has been suggested that there is a tendency for clerks to dominate the bench in court. Do you think that this is so?
- 3.6 If the bench called you out to the retiring room to advise them, and you thought that they were going seriously wrong in their

decision as to the guilt or innocence of a defendant, what, if anything would you do?

- 3.7 If you had been called out by the bench to advise them on sentence, and you thought they were going seriously wrong in their decision, what would you do?
- 3.8 If you wished to influence the decisions of the bench on matters which strictly would be outside your proper role, could you do so? (Probe: Can you give an illustration of the way in which it could be done?)
- 3.9 If the bench announce a decision in court which is wrong in law, what do you do?
- 3.10 Has a bench ever disagreed with your advice on the law?
IF YES GO TO 3.11, IF NO GO TO 3.12
- 3.11 How did you deal with this situation?
- 3.12 How would you describe your relationship with the magistrates outside the court?
- 3.13 Does your relationship with the magistrates out of court affect the way you relate to them in court?
- 3.14 How is the magistrates' rota drawn up at your court?
- 3.15 Do any problems arise in relation to the drawing up of the rota?

SECTION 4 - RELATIONSHIP WITH UNREPRESENTED DEFENDANTS

- 4.1 It has been said that unrepresented defendants are nervous and afraid in court. Do you agree?
- 4.2 Do you find that unrepresented defendants have difficulty in understanding the language and procedure in court?
- 4.3 What are the things which you find most difficult to explain to unrepresented defendants?
- 4.4 Do you think that the clerk can help an unrepresented defendant to present her/his case as effectively as if the defendant were represented by a solicitor or barrister?
- 4.5 Do you enjoy helping unrepresented defendants?
- 4.6 Do you have any experience of a duty solicitor scheme?
IF YES PROCEED WITH 4.7 - 4.8. IF NO GO TO SECTION 5.
- 4.7 Do you/did you find the scheme successful?
- 4.8 Did the scheme make the clerk's job easier?

SECTION 5 - RELATIONSHIP WITH POLICE

- 5.1 What tasks if any do the police officers from the court office perform in court?
IF THEY HAVE A ROLE IN COURT GO TO 5.2 - 5.3
IF NOT GO TO 5.4
- 5.2 Do these officers wear uniform in court?
- 5.3 Do any problems arise from this?
- 5.4 Who controls the order in which cases are called on?
- 5.5 When you are sitting in court how do you get information as to which cases are ready to be heard?
- 5.6 Are there ever any conflicts or problems about the order in which cases are called?
- 5.7 Local police officers must appear regularly in your court. Do they ever attempt to take any advantage of their familiarity with the court?
- 5.8 Is there a police prosecuting solicitor's department in your area?
IF YES GO TO 5.9, IF NO GO TO 5.10
- 5.9 What is the division of cases between the prosecutor's department and the police themselves?
- 5.10 If police are not legally represented who advises and assists them to present their case?
- 5.11 Do the police ever come to you for legal advice?
IF YES GO TO 5.12, IF NO GO TO 5.13
- 5.12 Do any problems arise in this respect?
- 5.13 How would you describe your relationship with the local police outside court?

SECTION 6 - RELATIONSHIP WITH THE LEGAL PROFESSION

- 6.1 On a scale of very good, good, average, poor, very poor, how would you rate the standard of advocacy of the following:
(a) Prosecuting solicitors
(b) Local solicitors
(c) Members of the Bar
- 6.2 Approximately how many firms of local solicitors operate in your court?
- 6.3 Does any firm (or firms) do a particularly large part of the work?

- 6.4 Do you regularly run more than one court at once?
IF YES GO TO 6.5 - 6.7, IF NO, GO TO 6.8
- 6.5 Do some solicitors represent more than one client in one court session?
IF YES GO TO 6.6
- 6.6 Do any problems arise from this?
IF YES GO TO 6.7
- 6.7 How are such problems resolved?
- 6.8 Do defendants who are legally represented have any priority in the court list?
IF YES GO TO 6.9, IF NO GO TO 6.10
- 6.9 Does this cause any conflicts or problems?
- 6.10 Do you think that members of the legal profession who appear in your court regard court clerks as being of equal status to themselves?
- 6.11 Do local solicitors come to you for legal advice?
- 6.12 Do you find any problems in this respect?

SECTION 7 - RELATIONSHIP WITH PROBATION AND SOCIAL SERVICES

- 7.1 How would you describe your relationship with the Probation Officers who work at your court?
- 7.2 Do probation officers come to the clerks for legal advice?
- 7.3 In what ways if any do you find that probation officers are useful or helpful to clerks?
- 7.4 Do you find differences in the way in which you relate to social workers as opposed to probation officers?

SECTION 8 - STATUS AND JUDICIAL ROLE OF CLERK

- 8.1 What is your opinion of the "1980 Regulations" (The Justices Clerks (Qualification of Assistants) Rules 1979?)
- 8.2 Do you think that all court clerks should be qualified as either solicitors or barristers?
- 8.3 Do you think that clerks are properly paid for the work they do?
- 8.4 Should clerks be able to rule - rather than advise - on questions of law?
- 8.5 Should the judicial or quasi-judicial powers of the justices' clerk - for example the powers given under the Justices' Clerks' Rules 1970 - be increased?

- 8.6 What is your opinion of the suggestion that the clerk should be on the bench?
- 8.7 Should there be an accepted channel of promotion for Clerks to the Justices, for example to stipendiary magistrate or to other branches of the judiciary?

SECTION 9 - QUESTIONS FOR JUSTICES CLERKS

- 9.1 What part do you play in the training of magistrates?
- 9.2 What is your opinion of the present training syllabus?
- 9.3 Do you have any special training for magistrates who take the chair in court?
- 9.4 What are the most important things that you teach new magistrates?
- 9.5 How influential do you think their training is on magistrates?
- 9.6 Do you have any staff training programmes here?
- 9.7 To what extent do you influence the attitudes and practices of clerks working in your court?
- 9.8 What do you think are the most important attributes for a court clerk to possess.
- 9.9 To what extent do you think that a Clerk to the Justices should define the character of his/her court?

SECTION 10 - CONCLUSION

- 10.1 Have you any comments on the questions I have asked?
- 10.2 Is there anything else you would like to say?

APPENDIX TWO

PRACTICE DIRECTION [1953] 1 W.L.R. 1416

[Queen's Bench Division (Lord Goddard, C.J.), November 16, 1953]

Justices-Clerk - Presence in retiring room while justices consider decision.

Lord Goddard, C.J.: In three recent cases* this court has had to consider the question when, and for what purposes, it is proper for a clerk to justices to accompany them when they retire to consider their decision, or to remain in their room while the case is under consideration. It is evident from letters received both by the Lord Chancellor and myself, and from correspondence in newspapers, that there is uncertainty in the minds of magistrates on this subject and, indeed, some degree of misunderstanding as to the effect of what was said in the cases to which I have referred. They are the cases concerning the East Kerrier justices (1), the Welshpool justices (2) and the Barry justices (3). I propose, therefore, to endeavour to clear up this matter, and have the authority of the Lord Chancellor to say that he concurs in the statement I am about to make, as do all the judges who were parties to the decisions I have mentioned.

There are two questions which arise in this connection. The first is: On what matters may magistrates consult their clerk? The second, and one of equal importance, is: In what manner should they consult him?

On the first question, it is clear that they may seek his advice on questions of law, or of mixed law and fact, and also on questions regarding the practice and procedure of the court. The latter are, indeed, questions of law. There are other matters on which justices may require the assistance of their clerk and on which they are entitled to ask his advice. They may, for instance ask him for information as to the sentences which have been imposed by their bench, or by neighbouring benches in respect of similar offences to that which they are trying. It is, indeed, most desirable that penalties for such matters as obstruction by vehicles, lack of lights and other what may be called public order offences should have some degree of uniformity. Moreover, it would be proper for the clerk himself to call the justices' attention to the fact that a question of law does, or may, arise if they do not appear to be already aware of it. It would then be for them to consider whether they wanted his further advice on that question. In no circumstances however, may justices consult their clerk as to the guilt or innocence of the accused, so far as it is simply a question of fact, but, if a question arises as to the construction of a statute or regulation, they may consult him on whether the facts found by them constitute an offence,

* (1) R. v. East Kerrier JJ. Ex. parte Mundy, [1952] 2 All E.R. 144; [1952] 2 Q.B. 719; 116 J.P. 339; 3rd Digest Supp.

(2) R. v. Welshpool JJ. Ex. parte Holley, ante, p.807; 117 J.P. 511.

(3) R. v. Barry (Glamorgan) JJ. Ex. parte Kashim, ante, p.1005.

because that would be a question of mixed law and fact. They may also properly ask the clerk to refresh their memory as to any matter of evidence which has been given. They can take with them, or send for, any note the clerk may have taken, and if there is anything in the note which needs elucidation, or if they think something has been omitted or wrongly taken down, it would be perfectly proper for them to consult him. They must not ask his opinion as to the sentence which they ought to impose, but they may, as I have said, ask for information as to the sentences imposed for comparable offences, and they most certainly may consult him on what penalties the law allows in any particular case if they already do not know it, and on any consequential matters that may follow on conviction. One obvious instance would be with regard to certain motoring offences, whether reasons which they are prepared to give can amount to special reasons for not disqualifying a driver according to the decision of this court on that subject. They may also want to know whether it is a case in which they can require sureties for good behaviour in addition to imposing a penalty.

As regards the manner in which justices may consult their clerk, the court, I think, made it clear in the East Kerrier case (1) that the decision of the court must be the decision of the justices, and not that of the justices and their clerk, and that, if the clerk retires with the justices as a matter of course, it is inevitable that the impression will be given that he may influence the justices as to the decision, or sentence, or both. A clerk should not retire with his justices as a matter of course, nor should they attempt to get round the decisions to which I have referred merely by asking him in every case to retire with them, or by pretending that they require his advice on a point of law. Subject to this, it is in the discretion of the justices to ask their clerk to retire with them if, in any particular case, it has become clear that they will need his advice. If, in the course of their deliberations, they find that they need him, they can send for him. On this matter I would stress one further point, and that is, that if the clerk does retire with the justices, or is sent for by them, he should return to his place in court as soon as he is released by the justices, leaving them to complete their deliberations in his absence and come back into court in their turn. I wish to add that the rulings this court has given on the subject derive from, and are really part of, the rule so often emphasised that justice must not only be done but must manifestly appear to be done, and, if justices bear that in mind, I feel sure they will have no difficulty in loyally following the decisions of this court.

I should add that the rulings of this court do not apply to justices when exercising jurisdiction in matrimonial cases as they are then subject to the directions and control of the Probate, Divorce and Admiralty Division.

APPENDIX THREE

PRACTICE NOTE (JUSTICES' CLERKS) [1954] 1 W.L.R. 213

Husband and Wife - Justices - Retirement of justices - Presence of clerk. Justices - Clerk - Retirement with justices - Matrimonial case.

Lord Merriman P. In a statement made in the Divisional Court of the Queen's Bench Division on November 16, 1953, about clerks to justices being present when the justices have retired to consider their decision, Lord Goddard C.J. said that the ruling of that court did not apply to justices when exercising jurisdiction in matrimonial cases, as they were then subject to the directions and control of this Division. Before making any pronouncement in response to several requests for a ruling by this court on the subject, I wished to consult the judges of this Division. I now have their authority to say that they agree with the statement I am about to make. I am also authorised by the Lord Chancellor to say that he approves of it. Vaisey J. also asks me to say that he agrees with it.

I wish to say at the outset that it rarely happens that an allegation of undue interference by the clerk in the decision of a complaint under the Summary Jurisdiction (Married Women) Acts is made a ground of appeal to this Divisional Court. Nevertheless, it is at least as important in cases of this class as in other cases dealt with by magistrates' courts that the decision should be that of the justices themselves, and not that of the justices and their clerk; and that not only should this be so in fact, but that nothing should be done to give the parties or the public the impression that the clerk is influencing the decision. I am, therefore, in complete agreement with the Lord Chief Justice that it should not be regarded as a matter of course that, if justices retire to consider their decision, the clerk should retire with them; moreover, whether the justices invite the clerk to retire with them, or send for him in the course of their deliberations, I agree that the clerk should always return to his place in court as soon as the justices release him, leaving them to complete their deliberations alone.

Bearing in mind that domestic proceedings are often lengthy and may involve points of law in relation to the complaint itself or to the amount of maintenance, and that this court insists that a proper note of the evidence must be kept, and that, in the event of an appeal, justices must be prepared to state the reasons for their decision, I recognise that more often than not magistrates may properly wish to refresh their recollection of the evidence by recourse to the clerk's note, or to seek his advice about the law, before coming to their decision. Having regard to the high standard of care which is generally shown by magistrates' courts in dealing with these domestic proceedings, I do not think it is necessary for me to say more than that I am confident that justices taking part in them may be trusted to act, and to ensure that they appear to act, on the fundamental principle that they alone are the judges.

J.B.G.

APPENDIX FOUR

PRACTICE DIRECTION [1981] 1 W.L.R. 1163

Magistrates-Clerk - Functions - Advice on questions of law, mixed law practice and procedure - Evidence and issues - Penalties - Manner of performance of functions.

1. A justices' clerk is responsible to the justices for the performance of any of the functions set out below by any member of his staff acting as court clerk and may be called in to advise the justices even when he is not personally sitting with the justices as clerk to the court.
2. It shall be the responsibility of the justices' clerk to advise the justices as follows:
 - (a) on questions of law or of mixed law and fact;
 - (b) as to matters of practice and procedure.
3. If it appears to him necessary to do so, or he is so requested by the justices, the justices' clerk has the responsibility to
 - (a) refresh the justices' memory as to any matter of evidence and to draw attention to any issues involved in the matters before the court,
 - (b) advise the justices generally on the range of penalties which the law allows them to impose and on any guidance relevant to the choice of penalty provided by the law, the decisions of the superior courts or other authorities. If no request for advice has been made by the justices, the justices' clerk shall discharge his responsibility in court in the presence of the parties.
4. The way in which the justices' clerk should perform his function should be stated as follows
 - (a) The justices are entitled to the advice of their clerk when they retire in order that the clerk may fulfil his responsibility outlined above.
 - (b) Some justices may prefer to take their own notes of evidence. There is, however, no obligation on them to do so. Whether they do so or not, there is nothing to prevent them from enlisting the aid of their clerk and his notes if they are in any doubt as to the evidence which has been given.
 - (c) If the justices wish to consult their clerk solely about the evidence or his notes of it, this should ordinarily, and certainly in simple cases, be done in open court. The object is to avoid any suspicion that the clerk has been involved in deciding issues of fact.
5. For the reasons stated in the Practice Direction of 15 January 1954 ([1954] 1 All E.R. 230, [1954] 1 WLR 213), which remains in

full force and effect, in domestic proceedings it is more likely than not that the justices will wish to consult their clerk. In particular, where rules of court require the reasons for their decision to be drawn up in consultation with the clerk, they will need to receive his advice for this purpose.

6. This Practice Direction is issued with the concurrence of the President of the Family Division.

2nd July 1981

Lane C.J.

APPENDIX FIVE

JUSTICES' CLERKS RULES 1970

(S.I. 1970 No.231 as amended by S.I. 1975 No.1767, and S.I. 1978 No.754)

1. These rules may be cited as the Justices' Clerks Rules 1970 and shall come into operation on 1st April 1970.
2. The Interpretation Act [1978] shall apply for the interpretation of these Rules as it applies for the interpretation of an Act of Parliament.
3. The things specified in the Schedule to these Rules, being things authorised to be done by, to or before a single justice of the peace for a petty sessions area may be done by, to or before the justices' clerk for that area.

SCHEDULE

1. The laying of an information or the making of a complaint, other than an information or complaint substantiated on oath.
2. The issue of any summons, including a witness summons.
3. The adjournment of the hearing of a complaint if the parties to the complaint consent to the complaint being adjourned.
4. (1) The further adjournment of criminal proceedings with the consent of the prosecutor and the accused if, but only if,
 - (a) the accused, not having been remanded on the previous adjournment, is not remanded on the further adjournment; or
 - (b) the accused, having been remanded on bail on the previous adjournment, is remanded on bail on the like terms and conditions.(2) The remand of the accused on bail at the time of further adjourning the proceedings in pursuance of sub-paragraph (1) (b) above.
5. The determination that a complaint for the revocation, discharge, revival, alteration, variation or enforcement of an affiliation order or an order enforceable as an affiliation order be dealt with by a magistrates' court acting for another petty sessions area in accordance with the provisions of Rule 34 or 49 of the Magistrates' Courts Rules 1968.
6. The allowing of further time for payment of a sum enforceable by a magistrates' court.

7. The making of a transfer of fine order, that is to say an order making payment by a person of a sum adjudged to be paid by a conviction enforceable in the petty session area in which he is residing.
8. The making of an order before an inquiry into the means of a person under section 44 of the Criminal Justice Act 1967 that that person shall furnish to the court a statement of his means in accordance with section 44(8).
9. (Repealed).
10. The giving of consent for another magistrates' court to deal with an offender for an earlier offence in respect of which, after the offender had attained the age of seventeen years, a court had made a probation order or an order for conditional discharge, where the justices' clerk is the clerk of the court which made the order or, in the case of a probation order, of that court or of the supervising court.
11. The amending, in accordance with paragraph (2) (1) of Schedule 1 to the Criminal Justice Act 1948 (h), of a probation order made after the probationer had attained the age of seventeen years by substituting for the petty sessions area named in the order the area in which the probationer proposes to reside or is residing.
12. The signing of a certificate given to the Crown Court under section 16(4) of the Powers of Criminal Courts Act 1973 as to non-compliance with a community service order.
13. The making of an order under section 32A of the Children and Young Persons Act 1969 for the purposes of an application within subsection (1) (a), (b) or (c) of that section before the hearing of the application.
14. The appointing of a guardian ad litem of a child or young person under section 32B (1) of the Children and Young Persons Act 1969.
15. The requesting under subsection (1) of section 6 of the Guardianship Act 1973 of a report on a matter relevant to an application to which that subsection applies before the hearing of the application.
16. The acceptance under subsection (4A) of section 24 of the Criminal Justice Act 1967 (i) (which relates to process for minor offences) of service of such a statutory declaration as is mentioned in subsection (3) of that section.
17. The fixing under section 44A(3) of the Criminal Justice Act 1967 (j) of a later day in substitution for a day previously fixed for the appearance of an offender to enable an inquiry into his means to be made under section 44 of that Act or to enable a hearing required by subsection (6) of the said section 44 to be held.

APPENDIX SIX

JUSTICES' CLERKS (QUALIFICATIONS OF ASSISTANTS) RULES
1979

(S.I. 1979 No. 570 amended by S.I. 1980 No. 1897)

1. These Rules may be cited as the Justices' Clerks (Qualifications of Assistants) Rules 1979 and shall come into operation on 1st October 1980 except that for the purposes of rule 4(2) below these Rules shall come into operation on 1st July 1979.

2. - (1) In these Rules -

"assistant" means a person employed to assist a justices' clerk;
"certificate of competence" means a certificate granted in accordance with the provisions of Schedule 1 to these Rules;
"employed as a clerk in court" means employed to assist a justices' clerk by acting in his place as a clerk in court in proceedings before a justice or justices;

"Joint Negotiating Committee" means the Joint Negotiating Committee for Justices' Clerks' Assistants;

"magistrates' courts committee" includes the committee of magistrates for the inner London area;

"preliminary professional examination" means -

(a) the Common Professional Examination recognised by the Council of Legal Education and the Law Society, or

(b) Part I of the Qualifying Examination of the Law Society, or

(c) Part I of the Bar Examinations of the Council of Legal Education;

"relevant course" means the course of an institution or body specified in Schedule 2 to these rules leading to an examination designed to qualify persons for the purposes of these Rules;

"training certificate" means a certificate granted in accordance with the provisions of Schedule 3 to these Rules.

(2) For the purposes of these Rules a person shall be deemed to have passed an examination if he has been granted an exemption in relation to it by the appropriate examining body.

3. Except as is provided by rule 5 or 6 below, a person shall not be employed as a clerk in court unless that person is -

(a) qualified (any age limits apart) to be appointed a justices' clerk by virtue of section 20 of the Justices of the Peace Act 1949, or

(b) qualified by virtue of the provisions of rule 4 below.

4.- (1) A person is qualified for the purposes of rule (3)(b) above if he possesses one of the following qualifications, that is to say -

- (a) he is a barrister or solicitor of the Supreme Court or has passed the necessary examinations for either of those professions;
 - (b) he has successfully completed a relevant course;
 - (c) he has been employed as an assistant for not less than two years (whether or not continuously) and has passed a preliminary professional examination;
 - (d) he has been granted a certificate of competence by a magistrates' courts' committee.
- (2) Schedule 1 to these rules shall have effect in relation to the grant of a certificate of competence by a magistrates' courts' committee.
- 5.- (1) An assistant who is not qualified for the purposes of rule 3 above may be employed as a clerk in court if he holds a valid training certificate granted by a magistrates' courts' committee.
- (2) Schedule 3 to these Rules shall have effect in relation to the grant of a training certificate by a magistrates' courts' committee.
6. Notwithstanding the provisions of rules 3 to 5 above, the Secretary of State may grant authority for any such person as may be specified by him to be employed as a clerk in court for such period not exceeding six months as may be so specified if he is satisfied -
- (a) that the person so specified is, in the circumstances, a suitable person to be employed as a clerk in court, and
 - (b) that no other arrangements can reasonably be made for the hearing of proceedings before the court.

Rule 4 (2)

SCHEDULE 1

CERTIFICATES OF COMPETENCE

1. - (1) This Schedule applies to an assistant who -
- (a) is not qualified for the purposes of rule 3 of these Rules, and
 - (b) was born on or before 31st May 1950, and
 - (c) has, or if he continues to be employed as an assistant will have, been employed for five years (whether or not continuously) as an assistant prior to 1st January 1980.
- (2) A magistrates' courts' committee may, not later than 31st March 1981, grant an assistant to whom this Schedule applies a certificate of competence if it is satisfied that he has had, before 31st December 1979, experience employed as a clerk in court for not less than five years (whether or not

continuously) of all types of proceedings in a magistrates' court (including proceedings in domestic and juvenile courts) and is competent to be employed as a clerk in court.

- (3) Notification of the grant of a certificate of competence shall be sent by the magistrates' courts' committee to the Secretary of State.
2. Before refusing to grant a certificate of competence a magistrates' courts' committee shall give the assistant in question an opportunity of making representations in writing and orally to that committee.
3. (1) An assistant who is refused the grant of a certificate of competence by a magistrates' courts' committee may, within three months of that refusal, appeal against the refusal by notice in writing to the Joint Negotiating Committee who may determine the appeal.
(2) On an appeal under sub-paragraph (1) above the assistant and the magistrates' courts' committee shall be given an opportunity to make representations in writing and orally to the Joint Negotiating Committee and may be represented at the hearing of the appeal.
(3) If an appeal by an assistant under sub-paragraph (1) above is allowed by the Joint Negotiating Committee, the magistrates' courts' committee shall thereupon grant to that assistant a certificate of competence.
(4) In the case of an assistant employed in the inner London area this paragraph shall have effect as if for the references to the Joint Negotiating Committee there were substituted references to the Secretary of State.

Rule 2(1)

SCHEDULE 2

Institutions and Bodies with Courses

Bristol Polytechnic
Committee of Magistrates for the Inner London Area
Manchester Polytechnic
National Association of Justices' Clerks' Assistants
Polytechnic of Central London

Rule 5(2)

SCHEDULE 3

Training Certificates

1. A magistrates' courts' committee may, after consultation with the appropriate justices' clerk, grant a training certificate to any assistant who -
 - (a) has passed a preliminary professional examination and has been employed as an assistant for not less than six months (whether or not continuously), or

- (b) is attending a course leading to a preliminary professional examination (or to an examination which exempts the assistant from the requirement to pass a preliminary professional examination), has successfully completed the first year thereof and has been employed as an assistant for not less than one year (whether or not continuously), or
 - (c) is attending a relevant course and has successfully completed the first year thereof and has been employed as an assistant for not less than one year (whether or not continuously).
2. (1) A training certificate granted by virtue of attendance at any such course as is mentioned in paragraph 1 (b) or (c) above shall cease to be valid if the assistant ceases to attend the course or fails an examination to which the course leads or any part thereof:
- Provided that, if a magistrates' courts' committee is satisfied that an assistant who has failed such an examination intends to re-take the examination or any part thereof, it may, after consultation with the appropriate justices' clerk, renew the certificate.
- (2) A training certificate which has been renewed in pursuance of sub-paragraph (1) above shall be valid for a further period of 18 months from the date of the first examination which has been failed, except that it shall cease to be valid if the assistant fails the re-taken examination.
 - (3) A training certificate shall in any event cease to be valid if the assistant to whom it has been granted ceases for any reason, to be employed by the magistrates' courts' committee which granted him the certificate.
3. A magistrates' courts' committee may withdraw the certificate, after consultation with the appropriate justices' clerk, if it considers that it should no longer be continued.
4. Before withdrawing, or refusing to grant or renew, a training certificate a magistrates' courts' committee shall give the assistant in question an opportunity of making representations in writing and orally to the committee.

APPENDIX SEVEN

Description of the job of clerks

An outline of the job of the clerk can conveniently be divided, in the way that the body of this thesis is divided, into the clerk's tasks in court and the clerk's tasks out of court.

In Court

1. Advising the magistrates on law, procedure, evidence, and as to sentences available and sentencing norms.
(The law governing this is in Practice Direction [1981] 1 W.L.R. 1163 at Appendix Four).
2. Controlling the order of cases called.
Detailed discussion of the importance of this function is in Chapter Five. It is usually a task performed by the clerk, not the police.
3. Controlling the proceedings of the court.
This is formally for the magistrates, but is usually done by the clerk. (For detailed discussion of case law see Chapter Two, pp. 149-158.)
4. Assisting those who appear unrepresented.
(For detailed discussion see Chapter Four.)
5. Completion of documentation relevant to all cases - e.g. Bail forms, committal forms, warrants, collection of driving licences, witness statements etc.

Out of Court

The Clerk to the Justices

It is impossible to give a simple job description for a clerk to the justices, since the job varies very widely from clerk to clerk.

For instance, a clerk to the justices who holds a position with the Justices' Clerks' Society may spend a very great deal of her/his time on the Society's business and thus may have to delegate many functions to deputies and other staff. The clerk to a large busy city division may very rarely go into court, but will be concerned in the main with managerial, staff and policy matters. The clerk to a small division may go into court almost every day and be able to fit other commitments into the remaining hours. There were examples of all of these situations in the interview sample, and of other differing roles.

The Home Office booklet 'A Career in the Magistrates' Courts'¹ points to this variation in the clerk's job.

1. Home Office and the Central Office of Information.
H.M.S.O. 1979.

"In a large city the volume of administrative work handled by the Justices' Clerk may be so great that the Clerk himself rarely sits in court but is available as a point of reference should the Court Clerk deputising for him be in need of advice.

In most medium and small petty sessional districts, however, the Clerk to the Justices spends part of his time in court acting as Court Clerk and part in his office or attending Committees."²

Clerks have almost complete autonomy over how they define their own jobs, and over most aspects of the way they run their courts. Obviously the magistrates have an input, as do court staff and there are financial constraints from the Magistrates' Courts' Committee. However there is so much scope for individual variation within the constraints that it would be impossible to give a description of what the clerk to the justices does which would be true for all or even most clerks.

In a study of management in magistrates' courts John Raine has pointed out that

"... managerial responsibility for the administration of justice is left almost wholly to the justices' clerks, who, while appointed to the office by the Committee, enjoy a degree of autonomy of operation hardly matched in other public services."³

However, given the caveat that generalisation carries dangers, a number of areas can be indicated.

1. Legal adviser to the magistrates. This involves not only giving advice in court, but also acting as adviser to the court clerks since the clerk to the justices is formally responsible for court clerks' advice.
2. Training of magistrates. (Discussed in detail in Chapter Eight.)
3. Selection and training of staff. (Discussed in detail in Chapter Eight.)
4. Exercise of statutorily conferred powers. (For detailed discussion see Chapter Ten and see Appendix Five, the Justices' Clerks' Rules 1970.)
5. Managing the Court Organisation.
The type of decisions made by clerks varies from trivial (such as the purchase of a coffee making machine for the magistrates' retiring room) to significant (such as acquisition of a computer to deal with fines and fees.) The autonomy of the clerk is, as

2. p. 12.

3. John W. Raine 'Management Needs and Responsibilities in the Magistrates' Courts'. Mimeo. University of Birmingham, Institute of Local Government Studies. 1983.

Raine pointed out, very great. Some clerks see their role as essentially managerial, and pursue this aspect of their jobs actively and innovatively. Others do comparatively little.

The nature of the division affects the clerk's tasks here. For instance, at one court observed fines and fees were collected in an old tobacco tin to be taken back to the neighbouring division. Fines and fees at other courts observed were collected and recorded with the aid of a computer. One court visited employed 72 staff, another employed less than 20. The managerial role of the clerk will vary widely in these two courts. Some clerks take the view that they are primarily the legal adviser to the magistrates and that their place is in court, no matter how big their division. Others rarely go into court.

In Chapter Nine the importance of the decisions which the clerk to the justices takes on matters of policy is examined. But which policy decisions the clerk will take - and whether s/he will take many or any - is not susceptible to generalisation.

6. Acting as clerk to committees. Again this task is not one performed by all clerks. Some clerks act as clerk to the Magistrates' Courts' Committee. Others do not. Some clerks act as clerk to Probation Liaison Committees. Others delegate the task.

Court Clerks' duties out of court

The Home Office booklet referred to above points out that

"No two Magistrates' Courts are ever exactly alike, so generalisations about careers in the Magisterial Service are dangerous."⁴

It also says that

"When a court has very few staff they may all sit in the same room and the decisions between 'who does this' and 'who does that' may not be clearly cut... In large courts staff tend generally to specialise in a narrow range of work, whereas in small courts they may tackle a wider spread."⁵

These comments apply to court clerks as well as administrative staff.

Again, given this qualification a number of general areas may be indicated.

1. Completion of the court register. The register is the official record of the decisions of the court, and is usually completed by each clerk for the court they have taken after the court has finished for the day. However some clerks complete the register

4. Page 7.

5. Page 9.

in court. At a few courts the magistrates complete the register.

2. Processing of legal aid applications and payments.
3. Licensing work.
4. Betting and Gaming applications.
5. Registered Clubs.
6. Adoption applications.
7. Listing cases.
8. Liaison with probation and social services.
9. Maintaining the court library.
10. Compiling the magistrates' rota.
11. Collection of fines, fees and other money payments. Most of this work will be done by clerical and administrative staff, but a court clerk may have special responsibility for this area of work, or may do some of the work in smaller courts.
12. Dealing with enquiries from the public.
13. Processing applications for summonses and warrants.

APPENDIX EIGHT

TABLE OF COURTS OBSERVED

COURT	LOCATION	DESCRIPTION OF DIVISION	PATTERN OF SITTINGS	CASE LOAD	PERIOD OF OBSERVATION
A	London Sattelite town Population 87,000	Court serves moderately sized industrial town with a fairly large immigrant community.	3 morning courts twice weekly traffic courts in afternoon Weekly juvenile and domestic	Approx. 100 per day Traffic list 200+	One month
B	Outer London court. Division mainly in a Borough of pop. 232,500.	Busy division, with population augmented by many thousands of workers coming into division to work.	4 courts dealing with adult crime. Twice weekly juvenile and domestic courts.	Approx. 100 - 150 cases per day.	One month
C	A town in the North of England. Pop. 75,513	Northern industrial town in an area of high unemployment.	3 courts a day. 1 juvenile court a week. 2 domestic courts a week.	Approx. 50-60 cases per day.	Two weeks

COURT	LOCATION	DESCRIPTION OF DIVISION	PATTERN OF SITTINGS	CASE LOAD	PERIOD OF OBSERVATION
D	North of England. Two Divisions. <u>Division 1</u> covers two small industrial towns with total pop. 50,000.	Division covers two small towns and several country villages. Also an area of high unemp- loyment.	3 courts a day. One juvenile court a week. One domestic court a week.	Approx. 50 cases per day.	Two weeks
	<u>Division 2</u> Small market town and rural area. Pop. 13,000	Division covers a very small market town and a large sparsely populated rural area.	Two courts a week covering all cases. Small court over the local police station.	Approx. 10-20 cases each sitting.	Two weeks
E	Large city in West of England. Pop. 426,657.	Large city with very busy court.	Eight courts a day. 4-5 juvenile courts each week. 1-2 domestic courts each week.	High degree of specialisation in each court. 3-4 courts dealing with 50+ criminal cases. Other courts dealing with traffic cases, Local Authority cases, Fine defaulters, Listing court.	Two weeks

COURT	LOCATION	DESCRIPTION OF DIVISION	PATTERN OF SITTINGS	CASE LOAD	PERIOD OF OBSERVATION
F	Midlands manufacturing town. Pop. 107,095.	Medium sized manufacturing town in the Midlands.	3 courts dealing with adult criminal offences. 2 juvenile courts per week. 2 domestic courts a week.	Adult courts dealt with 50+ cases per day.	Two weeks
G	Large city in Wales. Pop. 279,111	Busy court, in a city with a port and university. One stipendiary magistrate.	6 courts a day dealing with adult cases. 2 juvenile courts a week. 2 domestic courts a week.	2,-300 cases per day	Two weeks

In addition to the courts described above two courts in Inner London (Courts H and I) were observed for periods of only a few days each, to gain greater experience of clerks sitting with stipendiary magistrates.

Also to increase the interview sample and to interview more senior and experienced clerks, clerks were interviewed at Court K, a court in a South coast town with a population of 107,000, and at Court L, another Outer London court.

APPENDIX NINE
Table of clerks interviewed

<u>Inter- view no.</u>	<u>Sex</u>	<u>Position Held</u>	<u>Qualifications</u>	<u>Acquiring more Qualifications</u>	<u>Type acquiring</u>	<u>Completion date</u>	<u>Length of time taking courts</u>
<u>Court C</u>							
1	M	Clerk to Justices	Experience	-	-	-	39 years
2	M	Principal Assistant	Diploma - 1976	No	-	-	10 years (1971).
3	M	Court Clerk	Diploma (?1979)	Yes	CPE + Law Soc	CPE 1981 Pt 1982	9 years (1972)
4	M	Deputy	Part 1 Law Soc.	No	-	-	18 years
<u>Court D</u>							
5	M	Principal Assistant	Diploma 1978	No	-	-	8 years
6	M	Court Clerk	Dip.1976 CPE 1980	Possibly	Solicitor	If pers.circs.ease	5 years
7	F	Trainee	0 levels	Diploma	Diploma	1982	6 months
8	M	Clerk to Justices	Solicitor 1967	-	-	-	17 years
9	M	Deputy	Diploma 1956	No	-	-	23 years
10	M	Trainee	-	Yes	Diploma	1983	18 months
<u>Court E</u>							
11	F	Court Clerk	Solicitor 1978	-	-	-	4 years 6 months
12	F	Court Clerk	Barrister	-	-	-	3 years
13	M	Deputy	Diploma	No	-	-	12 years - 23 years exper- ience of court service.
14	M	Court Clerk	Experience	-	-	-	15 years this court. Several years before.
15	M	Senior Court Clerk	Diploma 1978	-	-	-	5 years
16	M	Court Clerk	Solicitor 1976	-	-	-	3 years

<u>Inter- view no.</u>	<u>Sex</u>	<u>Position Held</u>	<u>Qualifications</u>	<u>Acquiring more Qualifications</u>	<u>Type acquiring</u>	<u>Completion date</u>	<u>Length of time taking courts</u>
<u>Court F</u>							
17	M	Court Clerk	Diploma 1980	Yes	Solicitor	Poss.3 yrs (1984)	3 years
18	M	Diploma 1974	Diploma 1974	No	-	-	10 - 15 years
19	M	Senior Clerk	Experience	No	-	-	14 years
20	M	Clerk to Justices	Solicitor 1966	-	-	-	13 years
21	M	Solicitor 1980	Solicitor 1980	-	-	-	3 years
22	M	Deputy	Solicitor 1970	-	-	-	13 years
23	M	Deputy	Diploma 1971	No	-	-	28 years
<u>Court G</u>							
24	M	Court Clerk	Diploma 1976	No	-	-	11 years
25	F	Court Clerk	Barrister 1977	-	-	-	1 month
26	M	Senior Clerk	Solicitor 1974	-	-	-	3 years
27	M	Court Clerk	Barrister 1977	-	-	-	2 years
28	M	Principal Assistant	Diploma 1967 app.	No	-	-	20 years
29	M	Deputy	Barrister 1975	-	-	-	11 years
30	M	Clerk to Justices	Solicitor 1939	-	-	-	35 years
31	M	Court Clerk	Barrister 1979	-	-	-	3 weeks
32	F	Senior Clerk	Barrister 1975	-	-	-	6 years
<u>Court H</u>							
33	M	Chief Clerk	Barrister 1958	-	-	-	21 years
34	F	Deputy Chief Clerk	Barrister 1958	-	-	-	10 years
35	M	Deputy Chief Clerk	Barrister 1954	-	-	-	13 years

<u>Inter- view no.</u>	<u>Sex</u>	<u>Position Held</u>	<u>Qualifications</u>	<u>Acquiring more Qualifications</u>	<u>Type acquiring</u>	<u>Completion date</u>	<u>Length of time taking court</u>
<u>Court K</u>							
36	M	Clerk to Justices	Solicitor 1934	-	-	-	51 years
37	M	Clerk to Justices	Barrister 1960	-	-	-	18 years
38	M	Principal Assistant	Barrister 1980	-	-	-	7 - 8 years
<u>Court B</u>							
39	F	Court Clerk	Diploma 1978	Yes	Bar	1982	6 years
40	F	Senior Court Clerk	Solicitor 1979	-	-	-	3 years
41	F	Court Clerk	Solicitor 1981	-	-	-	2 years
42	F	Senior Court Clerk	Barrister 1976	-	-	-	4 years
43	F	Court Clerk	Barrister 1979	-	-	-	1 year 6 months
44	M	Court Clerk	Diploma 1981	Thinking about it	-	-	5 - 6 years
45	M	Senior Clerk	Solicitor 1981	-	-	-	3 years 6 months
46	M	Deputy Clerk	Solicitor 1974	-	-	-	12 years
47	M	Trainee Clerk	Solicitor	Just started articles	-	-	6 weeks
<u>Court L</u>							
48	M	Clerk to Justices	Barrister 1974	-	-	-	1- years
49	M	Senior Clerk	Diploma 1981	Thinking about it	-	-	4 years
50	M	Senior Clerk	Barrister 1979	-	-	-	1 - 2 years

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