THE HIGH COURT

[2005 No. 1174 SS]

IN THE MATTER OF SECTION 52(1) OF THE COURTS (SUPPLEMENTAL PROVISONS) ACT, 1961

BETWEEN

PAUL THORPE

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

Judgment of Mr. Justice Roderick Murphy delivered on the 17th day of February, 2006

1. Case Stated

On 28th July, 2005, Judge Catherine Murphy, judge of the District Court assigned to the Dublin Metropolitan District stated a case on the point of law for the opinion of the High Court in relation to breach of the peace.

The facts prompting the case stated were as follows.

On 20th September, 2004, at Swords District Court, the applicant appeared on charge that on 20th February, 2004, he used threatening and abusive language and became very aggressive when asked to leave 36 Clonshaugh Glen, Priorswood, Dublin and refused to return a key thereby causing a breach of the peace contrary to common law.

Before entering upon the hearing of evidence the matter, counsel for the accused made an application to have the matter dismissed on the basis that the charge before the learned trial judge showed no offence known to law or alternatively that the District Court had no specific jurisdiction to impose a penalty in respect of such a charge. It was submitted that a breach of the peace contrary to common law was a power of entry and arrest but was not, of itself, an offence as would be, for example, an offence under the Criminal Justice (Public Order) Act, 1994. No specific penalty was known in respect of the charge of breach of the peace contrary to common law.

The prosecuting sergeant submitted that a person may be arrested and charged with breach of the peace contrary to common law in circumstances where the provisions of the Criminal Justice (Public Order) Act, do not apply, namely in private and not public places.

The question upon which the opinion of the High Court sought in relation to those facts and submissions is as follows:-

> "Is the offence of the breach of the peace contrary to common law known to law?
>
> > If the answer to that is yes, may the offence be prosecuted in the District Court and, if so, what is the available penalty."

2. Submissions on behalf of the Applicant

2.1 George Birmingham, S.C., with Cathal McGreal, submitted that the formula of words "breach of the peace contrary to common law," connotated a power of arrest. It is a means of enforcing the appearance before court of a person whom a garda, or indeed any one citizen, finds committing a breach of the peace. He referred to Glanville Williams, *Textbook on Criminal Law*, 2nd edition (1983) at 487 where the various powers of summary arrest are referred to –

> "Any one can arrest at common law for a breach of the peace. 'Breach of the peace' is a traditional legal expression and is a ground of arrest though it is not the name of an offence."

Holdsworth, *A History of English Law*, Volume III, 5th Edition at 603 says:-

> "…A constable may arrest anyone who in his presence commits a mere breach of the peace."

That power was made statutory by the passing of the Justices of the Peace Act 1360 (34 Edw. III).

At p. 600 the author explains that:-

> "A constable (as opposed to the private citizen) had by statute or common law certain powers to arrest on suspicion or to prevent breaches of the peace, or to stop immoral conduct, which citizens had not got."

Lord Goddard C.J. expressed the view in his judgment in *R. v. County Court Recession Appeals Committee* [1948] 1 K.B. 670 at 673 in relation to the Justice of the Peace Act, 1360, (34 Edw. 3) which applies in Ireland by virtue of Poynings' Act, 10 Hen. 7 (Ir), C 22 [1495], that:-

> "In my opinion the act of Edward III does not create any offence at all, it deals with people who break or are likely to break the peace or cause a breach of the peace."

Lord Goddard referred to descriptions by both Cooke and Blackstone who described the Act as an Act for *preventative justice* which enabled Justices at their discretion "to bind over a man, not because he has committed an offence, but because they think from his behaviour he may himself commit or cause others to commit offences against the King's peace. It is abundantly clear that for several centuries Justices have bound by recognisances persons whose conduct they consider mischievous or suspicious, but could not, by any stretch of the imagination, amount to a criminal offence for which they could have been indicted".

Lord Goddard continued later by saying:-

> "There is no suggestion to be found (in any case) that before sureties can be required, a person must have committed a criminal offence, or that by ordering him to enter into sureties the court either expressly or impliedly convicts him of a criminal offence. There is no pretence for saying, where a magistrate merely requires a person brought before him, not for having committed a criminal offence, but for having acted in a way that may cause a breach of peace, to give a recognisance, that he has convicted him of anything. He is merely taking a precaution against the defendant committing

an offence."

Mr. Birmingham further submitted that a complainant wishing to prosecute a breach of the peace may not have a summons issued under The Courts (No. 3) Act, 1986, in respect of such a complaint because breach of peace is not a criminal offence. Only a District Court judge may summons a person alleged of such misconduct under s. 10 of the Petty Sessions (Ireland) Act, 1851, which is far broader in its application and would not appear to be confined to criminal offences *per se*.

The Oireachtas had made provision by way of statute for a modern offence of threatening, abusive or insulting behaviour in a public place in s. 6 of The Criminal Justice (Public Order) Act, 1994. The power of arrest provided for in s. 24 is vested in a police officer. Section 26, significantly, does not repeal the existing garda power of arrest and charge at common law. The powers conferred by the 1994 Act are in addition to and not in substitution for earlier legislation and include powers of common law such as the power to arrest without warrant in respect of an apprehended breach of the peace. (See s. 25)

Where there does not appear to be a specific penalty in respect of a breach of the peace contrary to common law the power of the District Court to bind over (whether to the peace, or to be of good behaviour) would appear to be the appropriate manner of dealing with the breach.

O'Connor's Irish Justice of the Peace refers to *R (Feenan) v. Queens County* J.J. 10 L.R. Ireland at 301 and 2, and to Pallas C.B.'s decision in ex parte Tanner. Chief Barron Pallas stated:-

> "The jurisdiction to bind the peace has been applied to cases in which the defendant was acquitted… two cases in which the party had no opportunity of saying a word to object to it… in cases in which there was no information that a repetition of the events was likely or was apprehended… and lastly, it has been applied in cases that statutable misdemeanour, over and above the maximum penalty imposed by statute, all showing that it is something ordered by way of prevention, and not as punishment."

Woods' *District Court Practice and Procedure in Criminal Cases* at p. 412 refers to a dictum of Blackburn J. in *ex parte Davis* [1871] 35 J.P. 551 that:-

> "An order binding over is not by way of punishment, but is a precautionary measure designed to prevent a future breach of the peace."

Counsel submitted that there was no need for a charge before the court in order that a District Court judge may exercise the power on his own initiative.

He referred to the statutory jurisdiction contained in s. 54 of the Courts (Supplemental Provisions) Act, 1961, which provides that:-

> "The jurisdiction formerly exercisable by Justices of the Peace to make an order binding a person to the peace or to good behaviour or to both the peace and good behaviour and requiring him to enter into recognisance in that behalf may be exercised by -
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> (a) A judge of the Supreme Court or the High Court, or
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> (b) A judge of the Circuit Court within the circuit to which he is for the time being assigned, or
>
> (c) A (judge) of the District Court within the district to which he is for the time being assigned."

The common law power to bind a person to the peace has been carried over on the enactment of the Constitution (*Gregory v. Windle* [1995] 1 I.L.R.M. 131).

2.2 Moreover the *European Court of Human Rights in Steel v. U.K.* [1998] E.C.H.R. 603 (see below 5.6) acknowledges that an order binding someone over is not a conviction. That case arose where Ms. Steel was a protestor at a grouse shoot where she prevented participants from firing. She was charged with a breach of the peace contrary to common law and later with additional charge of using "threatening, abusive or insulting words or behaviour within the hearing or sight of a person likely to be caused harassment, alarm or distress", the equivalent to s. 6 of the Irish Public Order Act.

The European Court of Human Rights has also noted that breach of the peace does not constitute a criminal offence in English law notwithstanding that they encountered a difficulty in finding a definition of the concept.

Article 5(1) of the European Convention for Human Rights states:-

> "Every one has a right to liberty and security of person. No one should be deprived of his liberty save in the following cases in accordance with a procedure prescribed by law:
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> (a) The lawful detention of a person after conviction by a competent court;
>
> (b) The lawful arrest or detention of a person for non compliance with the lawful order of a court or an order to secure the fulfilment of any obligation prescribed by law;
>
> (c) The lawful arrest or detention of a person affected for the purpose of bringing him before a competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence of fleeing after having done so;…"

In *Steel* it was submitted that breach of peace and the power to bind over were not sufficiently clearly defined to be "prescribed by law" under Article 5 of the European Convention on Human Rights.

Given the restriction on civil proceedings against magistrates, an applicant would be denied a right to compensation where there was a breach of Article 5(5).

The court had found that the binding over orders applied to the applicants were specific enough properly to be described as "lawful orders of the court" despite the rather vague and general terms and the imprecise definition "to be of good behaviour".

The applicant submitted that the decision in Steel is authority only for the consistency of the procedure of arrest for breach of the peace and subsequent binding over with Articles 5(1) and Article 6(3) of the European Convention on Human Rights. In Ireland there is no Magistrates Courts Act, even if the power to bind over is undoubtedly part of Irish Statutory Law under s. 16 of the Courts (Supplemental Provisions) Act, 1961.

It was submitted that the court must have regard to the fundamental doctrine recognised in the courts the criminal law must be certain and specified it seems that the breach of the peace is not an offence but rather a preventative law.

The phrases such as "suspected person" and "reputed thief" were held to be so uncertain that they could not form the foundation for a criminal offence (*King v. Attorney General* [1981] I.R. 223).

In conclusion, although the English courts have considered the meaning of the concept of "breach of the peace" and have defined the concept of an extent which, despite the misgivings of some, had satisfied the European Court of Human Rights that the concept is sufficiently clear in the light of Article 5 of the Convention of Human Rights. The concept of breach of the peace was not the subject of argument before the European Court of Human Rights in *Steel v. United Kingdom*. Even if it was, that case concerned only the provisions of Article 5(1) and Article 6(3). The European Court was quite specific in deeming the concept of breach of the peace analogous to an offence for the purposes of those provisions only.

It does not follow that it is consistent with the Irish Constitution. The most significant factor, however, is that no penalty is specified in our law to deal with breach of the peace. Accordingly it cannot be a criminal offence. While there is some qualification in the Criminal Justice (Public Order) Act, 1994, the legislature chose to retain the common law power of arrest.

Counsel for the applicant submitted that the answer to the case stated is that breach of the peace contrary to common law cannot, in any constitutional sense, be called a criminal offence. It is not, other than in the context of Articles 5(1) and 6(3) of the Convention, an offence known to Irish law.

3. Submissions on behalf of the Respondent

3.1 Paul Anthony McDermott, on behalf of the Director, referred to *A.G. v. Cunningham* [1932] I.R. 28 where the accused was found guilty on indictment of "firing into a dwelling house". The Court of Criminal Appeal held that it was a breach of the peace and, as such, an offence.

It was submitted that finding that the accused was guilty of having committed a breach of peace was in respect of an indictable office in that case and was different from the binding over by a peace commissioner. The court held that such an offence exists alongside its holding that the criminal law must be certain and specific.

Counsel referred to *Kelly v. District Justice O'Sullivan* unreported, High Court, 11th July, 1990 where Gannon J. observed that the proceedings were instituted by summons in respect of a complaint that the applicant engaged in conduct of an offensive and threatening kind likely to lead to a breach of the peace. If there were no such offence the court would have adverted to that fact.

O'Connor: *Justice of the Peace* at Vol. 1, p. 31 refers to a conviction for breach of the peace Walsh, *Criminal Procedure*, 4-10 at 157 refers to the range of behaviour that comes under the heading of breach of the peace and that, unfortunately, there is no precise definition of "*this offence*".

3.2 The offence at common law has also been recognised in *Cantwell v. State of Connecticut* 310 U.S. 296 [1940] which concerned the behaviour of Jehovah's Witnesses in a predominantly Roman Catholic area. That case held that the "offence known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquillity. It includes not only violent acts but acts and words likely to produce violence in others" (at 308). Counsel added that the court expressed concern at the potentially broad nature of the offence.

Counsel also referred to *Saice v. Mid-America* [1999] U.S. Dist. Lexus 20845 *and Garner v. Louisiana* U.S. 157 [1961] where breach of the peace was described as an offence at common law.

Counsel submitted that the English courts have held that at common law a breach of peace can occur on private premises (*McConnell v. Chief Constable* [1990] 1 All ER 423).

Russell on Crime (12th ed., 1964) at 660 states, in respect of powers of arrest that:-

> "A constable is not as a general rule entitled to arrest for misdemeanour after it has been committed, *whether the offence be fraud, breach of the peace, etc*. nor to arrest on suspicion of misdemeanour. He may arrest any person who in his presence commits a misdemeanour or breach of the peace if the arrest is effected at the time when, or immediately after, *the offence* is committed, or while there is a danger of its renewal, but not after the breach, or danger of its renewal has ceased." (Emphasis added).

The Scottish courts in *Smyth v. Donnelly* [2002] S.C. (J.C.) 65/[2001] S.L.T. 1007 held that there was such a crime as breach of the peace (para. 16) and that it was a "relatively minor crime", (para. 17) in relation to its compatibility with Article 7 of the European Convention on Human Rights.

The matter had come before the European Court of Human Rights in L*ucas v. United Kingdom* [ECt. HR, 18th March, 2003] which stated that "in general, the offence covers all behaviour which causes or is likely to cause fear, alarm, upset or annoyance". The court was of the view that the definition of the offence was sufficiently precise to provide reasonable foreseeability of the actions which might fall within the remit of the offence.

The Canadian courts in *R. v. Lefebvre* [1982] 1 C.C.C. (3d) 241 referred to the common law offence of breach of the peace which was excluded from the criminal statutes of Canada by virtue of s. 8(a) of the Canadian Criminal Code which provided that "no person shall be convicted (a) of an offence at common law" which is the opposite to the position of this jurisdiction where, subject to specific statutory abolition, common law offences may be prosecuted (*Doolin v. D.P.P.* [1992] 2 I.R. 399). There is, however, no abolition of the offence of breach of the peace in the Criminal Justice (Public Order) Act, 1994.

3.3 In relation to the second part of the case stated (may the offence be presented in the District Court and, if so, what is the available penalty?) Counsel submitted that it was clear from the above case law that the offence of breach of the peace was a minor one that could be prosecuted in the District Court as in *Kelly v. District Justice O'Sullivan* (Unreported, High Court, Gannon J. 11th

July, 1990). As a common law offence it is subject to the sentencing limits of the District Court.

Counsel referred to the extension of the jurisdiction from Justices of the Peace to all judges pursuant to s. 54 of the Courts (Supplemental Provisions) Act, 1961. The constitutionality of that section was upheld in *Gregory v. Windle* [1995] 1 I.L.R.M 131.

In *Lucas v. United Kingdom* referred to above, the court noted the position in Scotland as follows:-

> "The penalty for the offence of breach of the peace is dependant on the court which hears the case. The maximum penalty is life imprisonment following the conviction on indictment in the High Court. According to statistics from 1998, the majority (76%) of persons convicted of breach of the peace by a Justice of the Peace in the District Court received a fine."

It was submitted that the same principle applied in this jurisdiction. It would be absurd if a trivial offence could only be tried before a jury.

Counsel concluded by submitting that there was an offence of breach of the peace contrary to common law known to the law and that it might be tried in a summary manner. The penalty resultant in conviction was a matter for the District judge acting within the sentencing limits of the District Court.

5. Decision of the Court
5.1 Historical prospective
Glanville Williams: Arrest for Breach of the Peace (1954) Crim. L.R. 578 pointed out that, apart from arrest for felony, the only power of arrest at common law is in respect of breach of the peace. However, there was a surprising lack of authoritative definition of what one would suppose to be a fundamental concept in criminal law. While a breach of the peace is supposed to underlie every crime, the narrower meaning encompasses a riot or an unlawful assembly which has not yet become a riot. There may also be a breach of the peace without any general disorder where a unilateral battery or an assault is committed.

Each of the instances involves some danger to the person, and it is submitted that this is the general meaning of a breach of the peace in criminal law.

In English law, if there is no threat to the person it seems that a threat to property should generally be regarded as insufficient though it may well be that a threat to attack a dwelling house is looked upon with special severity and so is always a breach of the peace if the attack is imminent.

Williams refers to the instance where a person to whom a complaint is made has lawfully entered the house of another, his refusal to leave on the request of the occupier is not a breach of the peace. Such refusal gives cause to ejecting him but not for his arrest (*Green v. Bartram* [1830] 4 C.M.P.A. 308; *Reece v. Taylor* [1835] 4 N.E.V. and M.K.B. 469 and *Jordan v. Gibbon* [1863] 8 L.T. 391). Persons who are quarrelling by words only, without any threat, cannot be arrested without warrant at common law nor is mere disorderliness like swearing sufficient to justify arrest; the arrester must suppose the person to be on the point of committing or actually committing a breach of the peace (*Lockley* [1864] 4 F&F 155).

Where an arrest is made for a breach of the peace that has already taken place, or is continuing, the breach must occur in the presence of the arrester. Evidently the rule is designed to exclude the case where the arrester is not on the scene at the time, and obtains his information of the breach of the peace only by hearsay.

Cases decided under statutes allow the arrest of persons "found" offending. ("Found" meaning "perceived through the senses").

A stale arrest is unjustifiable, for there is no reason why a warrant should not be obtained.

At common law the police may interfere in some limited ways, even with an innocent person, for the preservation of order. The leading case cited by Williams is *Humphrey v. Connor* [1864] 17 Ir.R. 1, a decision that won approbation in English books. It was there held that a constable could commit what would otherwise have been assault upon an innocent person (taking an orange lily from her, which was causing offence to others), if that were the only way of preserving the peace. Referring to another Irish case, *O'Kelly v. Harvey* [1883] 14 L.R. Ir. 105, Williams states that where a magistrate reasonably believes that the peace cannot otherwise be preserved than by dispersing a meeting, he is entitled to do so, even though no case for arrest has yet arisen.

Over 50 years after Glanville Williams' observations the power of arrest at common law in respect of breach of the peace still lacks an authoritative definition of what one would suppose to be a fundamental concept in criminal law.

While he does not categorise breach of the peace as an offence despite its being subject to a power of arrest, it is understandable that some decisions categorise serious breaches of the peace as offences. Glanville Williams: *Text on Criminal Law* (1983) (See 5.3 below) is clear that, while breach of the peace is a ground for arrest, it is not the name of an offence.

5.2 That power to arrest for breach of the peace had existed since the 10th century at common law and was made statutory with the passing of the Justice of the Peace Act, 1360 (34 EDW. III which applied to Ireland by virtue of Poynings' Act, 10 Hen 7 (Ir) C 22 (1495)).

Dalton: Country Justice, 1655, at p. 4 (www.commonlaw.com/CoJust.html) refers to the first ordaining of Justices of the Peace by Edward I, Cap. 1 in the third year of his reign. Such Justices of the Peace had power not only to determine all manner of quarrels (as well real as personal) but also all *offences* against the peace etc. "as may appear in our law books". (italics added)

Those appointed were established and commanded that the peace of the holy Church and of the land "shall be well kept and maintained". The peace of the Church is protected and conserved by the King, the Archbishops, and Bishops of the realm. The peace of the land is defended and maintained by the same King and the Temporal Justices or officers lawfully appointed for the same who were the conservators of the peace.

Dalton describes three categories of offenders:

> (1) disturbers of the peace, such as are either common quarrellers or fighters in their own cause; or common movers or maintainers of quarrels and defrays between others: *communis pacis per turbator, calumniator, et malefactor*;

(2) common takers or detainers (by force, or subtlety) of the possession of houses, lands, or goods which have been in question or controversy*: communis oppressor vicinorum*; and

(3) inventors and sowers of faulse reports, whereby discord ariseth, or may arise between neighbours: *communis seminator litium*.

> "Any one Justice of Peace may compel such as are between the ages of fifteen and three score, to be sworn to keep the peace. Every Justice of Peace has authority and power given him to keep and cause to be kept the King's Majesty's peace; by force of which words they have the ancient power touching the keeping of the peace, which the ancient conservators of the peace had by the common law; and also all authority which the statutes since have added thereto: and so they may cause to be kept al the statutes and laws now in force; which have been made for the peace, or the keeping thereof: and more especially they may arrest, or cause to be arrested and sent to gaol, all murderers, robbers and felons, and all persons suspected of such things." (p. 14)

It seems that, at least in the middle of the 17th century, the distinction was recognised between the common law powers that the Justices of the Peace inherited from the conversators of the peace and the statutory powers given to Justices of the Peace ("as may appear in our law books").

5.3 Nature of jurisdiction
Although it is common practice to join both the peace and good behaviour in the order to give security, there are inherent differences between the two sureties. Surety for good behaviour includes surety to keep the peace, but is much more comprehensive, extending to ill fame and misbehaviour of a character which, although not criminal, was likely to be dangerous to the peace and order of the community, including words disparaging and insulting to magistrates, or lewdness of life *per* Gibson J. in *Halpin v. Rice* [1901] 2 I.R. 593 at 604.

A person who is bound to good behaviour is, accordingly, more strictly bound. It was held in *ex p. Harkin* [1889] 2 L.R. 1 427, that being bound to good behaviour:

> "May be described as a breach of preventative justice in the exercise of which magistrates are invested with large judicial discretionary powers for the maintenance of order in the preservation of the public peace … it rests on the maxim or principle*, salus populi suprema lex*, in pursuance of which it sometime happens that individual liberty may be sacrificed or abridged for the public good (*per* Fitzgerald in *R v. Queens Co.JJ*. [1882] L.R.I. 294, 'an order binding over is not by way of punishment, but is a precautionary measure designed to prevent a future breach of the peace' (per Blackburn J. in *ex parte Davis* [1871] 3 J.P. 551). However, 'it certainly imports an imputation of character' (per Gibson J. in *Halpin v. Rice, supra*)."

Woods: *District Court Practice and Procedure in Criminal Cases* at 412, having cited the above cases, says that an order binding over may be made on conviction for any misdemeanour in addition to any other punishment imposed.

Moreover, an order binding over for good behaviour may be made in addition to or substitution for any other penalty, on conviction of certain licensing acts, the Dublin Police Act, 1842, Town Police Clauses Act, 1847, Merchant Shipping Acts, 1894 and Summary Jurisdiction Act, 1908.

Accordingly, there would seem to be three categories which can lead to an order to bind over a person to be of good behaviour or, to be more strictly bound over to the peace. These are the statutory matters mentioned by Woods; the additional order on conviction for any misdemeanour and, thirdly an order in relation to preventative justice where there is no statutory breach or misdemeanour. This is, of course, the common law breach of the peace.

5.4.1. Breach of the peace may be an offence
It would seem that category of common law breach of the peace may, in this jurisdiction, be subdivided into a breach of the peace which is an offence and a breach which is not. In *A.G. v. Cunningham* [1932] I.R. 28, at 30, where it was held on appeal that firing into a dwelling house, while not an indictable offence at common law, was unquestionably a breach of the peace which was indictable at common law. O'Byrne J. considered that a jury not only might but must, unless it acted perversely, find the accused guilty of having committed a breach of the peace (given that there were persons in the house at the time into which the accused had fired a shot). The court held that such an offence existed, as well as holding that "the criminal law must be certain and specific".

O'Byrne J. for the Court of Criminal Appeal said:-

> "The offences charged and the indictment is one of maliciously firing into (a) dwelling house… and it seems to us that the proper question for our determination is whether that is, common law, an indictable offence. In considering that question the court must have regard to the fundamental doctrine recognised in these courts that the criminal law must be certain and specified, and that no person is to be punished unless and until he has been convicted of an offence recognised by law as a crime and punishable as such."

It was admitted by the Attorney General that firing into a dwelling house was not an indictable offence at common law but it was argued that it was "unquestionably a breach of the peace, which is indictable at common law" (at p. 30).

O'Byrne J., giving the judgment of the court, stated at p. 33:-

> "In order to constitute a breach of the peace an act must be such as to cause reasonable alarm and apprehension to members of the public, and it seems to us that this is the substantial element of the offence. There is nothing of the charge as framed to allege, nor is there anything in the finding of the jury to show, that there was any person in the vicinity who could be alarmed by the firing…in the circumstances the court is of the opinion that count 4 of the indictment does not contain a statement of having committed a breach of the peace…
>
> (W)e must not be taken as deciding that the accused could not have been properly convicted on an indictment aptly framed. On the contrary, having regard to the finding of the jury that the accused did fire a shot into the house, and to the clear and uncontradicted evidence that there were persons in the house at the time, we consider that a jury not only might but must, unless it acted perversely, find the accused guilty of having committed a breach of the peace."

Counsel for the respondent in his submissions, said that this clearly showed that there was an indictable offence of breach of the peace. What constituted the offence was an act such as to cause reasonable alarm and apprehension to members of the public. *Cunningham* was, of course, decided in the context of a question as to whether an *indictable* offence existed. This is central to the ruling the ratio which was that the jury could have convicted of the indictable offence of a breach of the peace. The court held that such an offence exists, as well as holding, at p. 32 of the judgment, that "the criminal law must be certain and specific". The question as to whether a breach of the peace could also be tried summarily did not arise for decision in that case.

Counsel for the respondent referred to *Kelly v. District Justice O'Sullivan* (Unreported, High Court, 11th July, 1990) a summons was issued in respect of breach of the peace. Gannon J. observed:-

> "The proceedings were instituted in each case by summons. In the first of the summonses it is recited that…a complaint in writing that the applicant 'did on the 7th day of May, 1989, at Lough Ree, a public place…did use towards persons… language including threats and did engage in conduct of an offensive and threatening kind, which language and conduct was likely to lead to a breach of the peace'."

If there was no such offence as breach of the peace it is surprising that Gannon J. did not advert to that fact. Indeed O'Connor's *Justice of the Peace states* that where:-

> "…There has been a *conviction* for breach of the peace… these are circumstances warranting an order to bind to the peace", (Volume 1 at 31). (italics added)

The decision in *Cantwell v. State of Connecticut* 310 US (1940), that of *Saice v. Mid-America* [1999] U.S. Dist. Lexus 20845 and *Garner v. Louisiana* U.S. 157 [1961] describe breach of the peace as an offence at common law.

The decision of the Court of Human Rights is also relevant. (See 5.6 below)

5.4.2 Breach of the peace not an offence
Glanville Williams: *Text on Criminal Law* (1983) states that breach of the peace is a traditional legal expression and is a ground for arrest though it is not the name of an offence. The author cites Lord Goddard C.J. in *R. v. County Court Recession Appeals Committee* [1948] 1 K.B. 670 at 673 where Lord Goddard was of the opinion that the Justice of the Peace Act, 1360, which was applied to Ireland by virtue of Poynings' Act, did not create any offence at all. It deals with people who break or are likely to break the peace or cause a breach of the peace and, referring to the descriptions by both Cook and Blackstone who describe the Act as being an Act for preventative justice. That enabled the justices to bind over a man, not because he has committed an offence, but because they think from his behaviour he may commit or cause to commit offences against the King's peace. Lord Goddard continued:

> "It is abundantly clear that for seven centuries justices have bound by recognisances persons whose conduct they consider mischievous or suspicious, but could not, by any stretch of the imagination, amount to a criminal offence for which they could have been indicted.
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> …
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> There is no suggestion to be found (in any case) that before sureties can be required, a person must have committed a criminal offence, or that by ordering him to enter into sureties the court either expressly or impliedly convicts him of a criminal offence.
>
> …
>
> He is merely taking a precaution against the defendant committing an offence."

Lord Goddard refers to mischievous or suspicious conduct which could not amount to a criminal offence. It would appear that Lord Goddard did not include more serious breaches of the peace as not amounting to a criminal offence..

5.5 It is instructive to contrast the English antisocial behaviour order with an order in relation to breach of the peace.

Lord Craig in *McCann* [2001] 1 WLR 1084 at para. 103 considered that the making of an antisocial behaviour order did not constitute a punishment or penalty imposed on the defendant in circumstances where there was an imposition of such measures of restraint as the court might find necessary to protect members of the public from his misbehaviour. In contrast to breach of the peace there is no power of arrest.

The Crime and Disorder Act, 1998, is the English provision for the making of antisocial behaviour orders against any person aged 10 years or over which came into force on 1st April, 1999. This social legislation was referred to by Lord Steyn, *in Clingham (formerly C, a minor) v. Royal Borough of Kensington and Chelsea*, as important social legislation designed to remedy a problem which the existing law failed to deal with satisfactorily.

Lord Steyn, at para. 32 referred to the closest case in support of the defendant's submissions being *Steel v. The United Kingdom* [1998] 28 E.C.H.R. 603, 636, paras. 48/49, which, he stated, was authority for the proposition that proceedings whereby in England and Wales a person may be bound over to keep the peace involve a determination of a criminal charge for the purposes of Article 6. Lord Steyn continued:-

> "This power goes back many centuries; see *Percy v. Director of Public Prosecutions* [1995] 1 W.L.R. 1382, 1389 H- 1390 H. It is in a very real sense that judicial power sui generis. The European Court found a punitive element in the fact that the magistrates may commit (a) to prison any person who refuses to be bound over not to breach the peace where there is evidence beyond reasonable doubt that his or her conduct caused or was likely to cause a breach of the peace and that he would otherwise cause a breach of the peace. … There was an immediate and obvious penal consequence."

5.6 In *Steel v. The United Kingdom* [1998] E.C.H.R., 603 where the applicants, who had refused to agree to be bound over to keep the peace, complained that their rights under the Convention had been violated. In considering the claims of the applicants both the Commission and the European Court expressed the opinion that, notwithstanding that breach of the peace is not classified as a criminal offence under English law, breach of the peace must be regarded as an "offence" within the meaning of Article 5(1)(c) of the English Public Order Act, 1986. The Commission had stated in its opinion at 615-616 that:-

> "The Commission notes that under the domestic legal system breach of the peace is not a criminal offence and binding over is a civil procedure. However, as the Court of Human Rights held in *Ozturk v. Germany* [1984] 6 E.C.H.R. 409, 423-424, para. 53:
>
> > (T)here generally comes within the ambit of the criminal law offences that make their perpetrator liable to penalties intended, inter alia, to be a deterrent and usually consisting of fines and of measures depriving the person of his liberty…(The rule at issue) prescribes conduct of a certain kind and makes the resultant requirement subject to a sanction that is punitive…The general character of the rule and the purpose of the penalty, being both deterrent and punitive, suffice to show that the offence was, in terms of Article 6 of the Convention, criminal in nature."

Proceedings whereby a person may be bound over to keep the peace involves a determination of a criminal charge for the purposes of article 6 of the Convention.

5.7 Conclusion
Proceedings whereby a person may be bound over to keep the peace involves a determination of a criminal charge.

It involves the exercise of a judicial power *sui juris*.

On the basis of *Cunningham* a breach of the peace contrary to common law is an offence known to common law. *Kelly v. District Justice O'Sullivan* offers some support.

In other jurisdictions it is recognised as an offence, and as a crime.

On the basis of *McConnell v. Chief Constable* [1990] 1 All E.R. 423, breach of the peace may arise in a private premises.

Moreover, the common law breach of the peace was not abolished by the Criminal Justice (Public Order) Act, (the provisions of which apply to public places).

There are more serious breaches of the peace which are offences under common law and others which are simply preventative in nature and not being an offence nor being susceptible to a penalty. Both are subject to a power of arrest. Given, indeed, that a breach of the peace may also be invoked against people who find themselves caught up within a riotous crowd or who have responded to violence against them, it seems necessary to conclude that there are breaches of the peace that are outside the category of an "offence".

It is anomalous, however, that breach of the peace is not prescribed by law, nor that there is no definition of the categories, nor of a dividing line between the serious and minor breaches.

Accordingly, the answer to the question posed in the case stated should be as follows:

> 1. Is the offence of breach of the peace contrary to common law known to law? Yes, there is authority in this jurisdiction for this statement.
>
> 2. If the answer the first question is yes, may the offence be prosecuted in the District Court and, if so, what is the available penalty? Yes. The penalty resultant on conviction is a matter for the District Court acting within the sentencing limits of the District Court.