THE PRELIMINARY EXAMINATION

"The Magistrates will play safe: they will dismiss a charge only in weakest of cases, an commit for trial in the rest. It is not uncommon for Magistrates in committal proceedings to be lenient to both prosecution and defence in examination and cross examination on the often-stated grounds, "it is only an enquiry."" (1)

The nature of and the purpose of a Magistrate's examination of evidence to determine if such evidence is sufficient to put accused persons upon their trial for any indictable offence has, since the early 1970's been the subject of wide spread debate, increased litigation and in some quarters gross dissatisfaction. Comments similar to the above leave little doubt that the magistrate's examination of evidence and the decision to commit for trial is considered by some to be quite perfunctory.

The very language I use in the opening sentence "nature of" and "purpose of" immediately raises a fundamental problem encountered by any magistrate conducting such an examination. The problem is one caused by an opposition or tension that exists between a magistrate's administrative (nature of) and judicial (purpose of) functions. There is, I suggest, an inherent ambiguity in a magistrate's role and this is no better observed than in the expressions "preliminary enquiry" and "committal proceedings". The two are often used interchangeably and for most of us mean the same thing.

But do these two expressions have the same meaning?

In this paper then, I will consider the function of our present day preliminary examination (another expression!), the role of the

magistrate as well as a short discussion on the conversion of preliminary examination into a summary hearing.

HISTORY

To understand and appreciate the function of preliminary examination it is important to place the proceedings in the historical context. The preliminary examination of criminal offences has a long history which begins with the origin and development of the jury in England. Historians tell us that the system whereby members of any community where summonsed and made to supply any information desired by the King touching the administration of the Government was introduced from Europe by the Norman dukes. As Maitland says the jury, when first it makes its appearance in England, is, in essence, "a body of neighbours summonsed by some public officer to give, upon oath, a true answer to some question." (2)

Under the Assize of Claredon (1166) and Northhampton (1176) very comprehensive questions were to be addressed to juries. They were required to answer among other things as to persons suspected of crimes, as to escheats, as to outlaws, as to the misdoing of officials. These earliest recorded juries were employed to discover and present facts in answer to enquiries addressed to them by the King. The function of the jury of presentment is descended from these juries. It was summonsed to discover and present to the King's officials persons suspected of serious crimes. These juries could present either from their knowledge or from the information of others, just as the present day Grand Jury in the United States of America may present matters which they themselves have observed or as is more usual, may endorse the indictments or accusations made

by others. (3). The presentments made by the Grand Jury do not and never did amount to an assertion that the person presented is guilty. They merely asserted that he was suspected.

The Grand Jury proved too cumbersome for the task of criminal investigation and during the 14th century this duty passed largely to justices of the peace, whose role was originally that of "keeper of the peace". These "mediaeval police" carried out preliminary inquiries into indictable offences so that the role of the Grand Jury became advisory. It sat at the commencement of Assizes and Quarter sessions to determine whether the bills of indictment presented to it established a prima facie case. During the same period Coroners conducted investigations in certain cases by means of juries and their own examination of witnesses on oath. A person could be put on trial as a result of a Coroner's inquest. (4)

At first a person accused of a crime was arrested and kept in confinement until he could brought to trial. Then the Act 1 Richard III c.3 authorized justices to grant bail to persons accused of felony. If a prisoner be brought before a justice, expressly charged with the felony by the oath of a party, the justice cannot discharge him, but must bail or commit him (5). This power to grant bail was abused, and the Act 1 and 2 PH. and M. c.13 (1554) directed that before the justices' admitted accused or arrested persons to bail, they "shall take the examination of the said prisoner, and the information of them that bring in" before them and certify the examination to the Justices of Gaol Deliverys. This information having been found useful, the Act 2 and 3 PH. and M. c.10 was passed by which the provisions of the former Act were extended to cases in

which bail was refused, the object being to give assistance to judges.

These statutes continued to be in force till the year 1826, when they were appealed and reenacted and extended to misdemeanour by 7 Geo. 4. c.64 ss 2 and 3, and this Act was in its turn repealed and reenacted in a more elaborate form with some important variations by 11 and 12 Vic. c.42 (1848), which is known as Sir John Jervis' Act.

We can see then that by 1555 a justice was required by law to either commit a person for his trial or bail the person to the next sittings of the court. In either case the justice was expected to have recorded information for the benefit of the trial judge.

An example of how a justice conducted himself is reported in the case of a justice who had got up the case as the principal witness against the prisoner and detailed at length the steps which he had taken to apprehend him is given in the case of Colonel Turner as follows:

> "In 1664 Colonel Turner was tried for a burglary, together with his wife and three of his sons. The principal witness was Sir Thomas Aleyn, an alderman of the city. He said: "Mr Francis Tryon" (the person robbed) "put me on the business to examine it. It went and examined the two servants - the man and the maid. Upon their examination I found they had supped abroad at a dancing-school and had been at cards. . . . The man confessed he had been abroad twenty or thirty times at Colonel

Turner's house at supper about a year since. The maid denied they had been there at all; but it is true the man's saying he supped there (though it was false) was the first occasion of suspicion against Colonel Turner. When I had examined these two, I went to the examination of Turner, where he was all that day, where at night? He told me at several places and taverns, and in bed at nine of the clock, and was called out of his bed; but having myself sum suspicion of him, I wished him to withdraw. I told Tyron that I believed, if he was not the thief, he knew where the things were." Aleyn afterwards charged Turner; "but he denied it, but not as a person of his spirit, which gave me some cause of further suspicion." He afterwards searched Turner's house unsuccessfully; but next day received information from one of the other alderman which enabled him to track Turner into a shop in the Minories, where he found him in possession of money which he believed to be part of the stolen property. He pressed him to account for it, took him to Tyron, managed matters so as to induce him to admit to Tyron, upon Tyron's engaging not to prosecute, that he knew where the property was, and, after all sorts of manoeuvres, got him to cause his wife to give up a number of Tyron's jewels, and finally committed him and her to Newgate. In short, he acted throughout the part of an exceedingly zealous and by no means scrupulous detective armed with the authority of a magistrate. He detailed in court the whole of his proceedings, which were very expeditious. "Thursday", said one of the judges, "was the robbery, Friday he examined, Saturday the money was brought, and that night the jewels were brought and he committed."

In 1836 by the Prisoners' Counsel Act (6 and 7 Will. 4 c.114 s4) provided that all persons under trial should have a right to inspect all depositions taken against them.

Until the mid 19th century the role of justices was inquisitorial. The prisoner was closely examined without being informed of his rights. Witnesses for the prosecution were examined in private and their evidence taken for the information of the court, not the prisoner, who had no right to be present, to hear the evidence nor be legally represented at the hearing. The creation of a professional Police Force in 1829 and in the years following, relieved justices of their duty to pursue and arrest and led to a radical transformation of the preliminary hearing.

With the passage of legislation known as "Jervis' Acts" namely the Indictable Offences Act, 1848, the Summary Jurisdiction Act 1848, and the Justice's Protection Act 1848, (11 and 12 Vic. cc. 42, 43 and 44 respectively), the preliminary inquiry by a justice took on the appearance of the inquiry as we know it today. The accused person was entitled to be present during examination of any witnesses, was entitled to put questions to any witness, depositions were taken of witnesses and (7)

> ". . . if the Justice or Justices of the Peace then present shall be of opinion that it is not sufficient to put such accused Party upon his Trial for any indictable Offence, such Justice or Justices shall forthwith order such accused Party, if in Custody, to be discharged as to the Information then under Inquiry; but if, in the Opinion of such Justice or

Justices, such Evidence given raise a strong or probable Presumption of the Guilt of such accused Party, then such Justice or Justices shall, by his or their Warrant, commit him to the Common Gaol or House of Correction . . ."

The inquiry before a justice or magistrate now become essentially judicial. It had for the previous seven centuries been a ministerial, executive or administrative procedure where a justice of the peace obliged by legislation (8) to pursue and arrest and upon arrest commit or bail. It had been an information gathering exercise which is now performed by police officers.

TWENTIETH CENTURY

The provisions of the Jervis Acts have now been adopted with amendment in all states of Australia, the Australian Capital Territory, the Northern Territory and New Zealand. At the end of a preliminary examination, a magistrate must decide whether or not to commit the defendant for trial. (9)

In each jurisdiction the legislation creates a two staged process and calls for a decision being made at the end of the prosecution evidence and again at the conclusion of the defence case. In most jurisdictions the criteria which at the end of the prosecution case, governs the decision to discharge the defendant or proceed with the hearing is whether the evidence is "sufficient to put the accused person upon his trial for an indictable offence". The same criteria is employed at the end of the hearing. The only exceptions to this general rule are in New South Wales, where after the prosecution evidence the criterion is "the evidence is capable of satisfying a

jury beyond reasonable doubt that the defendant has committed an indictable offence". And after all the evidence "a jury would not be likely to convict the defendant of an indictable offence - discharge the defendant".

In the Australian Capital Territory the first stage test is "of the opinion the evidence has established a prima facie case against the accused person." The second stage decision is the sufficiency test.

A magistrate's ultimate task then, is only to decide whether the defendant should be committed for trial.

> "The magistrate's function in committal proceedings is to receive, examine and permit the testing of evidence in order to determine whether there is sufficient evidence to warrant the defendant before him being put on trial (Moss v Brown [1979] 1 NSWLR 14 at 125) including the further matters now entrusted to the magistrate by ss41(6) since its amendment in 1985. It is not within the magistrates function to concern himself with issues which normally would fall within the discretionary powers of a trial judge. It is not for a magistrate to preempt any exercise of the trial judge's discretion." (10)

We see clearly in this extract from Grassby's case, a decision of the New South Wales Court of Criminal Appeal handed down on the 9/12/88, that the earlier administrative function of a justice, namely, "receiving and examining of evidence" is complemented by the judicial function to "permit testing of evidence".

The evidence that a magistrate must consider is only "evidence directly relevant to the alleged criminal act and the accused connection with it." (11)

It is helpful at this stage to distinguish between the various levels of evidence from the time of a persons arrest until their conviction or acquittal. First there is the evidence which justifies arrest. Second there are two levels of evidence which must be considered at a committal hearing and third is the quantum of evidence which permits a jury to convict; what a jury requires is of course proof beyond reasonable doubt. The criminal process then can be seen in terms of gradually increasing standards and there should be a clearly identifiable difference between the standards required at each stage.

The "sufficiency test" is not a high standard. Mr Justice Hunt in case of Haas (1986) 22 A. Crim. R. 299 at page 304 observed:

> "The evidence in support of the Crown case, and the inferences available from that evidence, must be taken as having been accepted by the jury without contradiction, qualification or explanation for the purposes of deciding the no case to answer application: Jayasena [1970] AC 618 at 624. Similarly, the evidence in support of the case of the accused - using the "case" in a loose sense - must be taken as having been rejected by the jury: Rothery (1925) 25 SR (NSW) 451 at 461 and Towers at 5-6. As the Crown case depends upon inference, the facts from which those inferences may be drawn must be capable of being accepted by the jury beyond reasonable doubt:

Chamberlain's case at 536, 570, 599. The evidence will be held to be capable of establishing the guilt of the accused only if it is capable of establishing each element of the Crown case beyond reasonable doubt: **May v O'Sullivan** (1955) 92 CLR 654 at 658 and **Plomp's** case at 247. The same test is applied on a no case to answer application: **Haw Tua Tau v Public Prosecutor** [1982]."

The above case concerned an application for a "no case" ruling but in my view would apply to committal proceedings.

The notions of "reasonable doubt" and "a reasonable jury" seem to me to require a consideration of the credibility and reliability of the evidence. Only a perverse or unreasonable jury could act on manifestly unreliable or inherently incredible evidence. The consideration of the evidence by a magistrate in the same way as a reasonable jury implies the judicial function involved in a magistrate's decision making.

To summarize then, after completion of the prosecution evidence - stage 1 - a magistrate must:

1. Hear evidence relevant to an alleged criminal act and the accused connection with it.

2. Disregard evidence favourable to the defendant.

3. Assume evidence is accepted by a reasonable jury without qualification.

4. Find evidence of each element of an indictable charge.

5. Find the quality of evidence adduced by the prosecution has not been so discredited as a result of cross examination as to be inherently incredible or manifestly unreliable.

6. Find the evidence is "sufficient" if a reasonable jury (properly instructed) could be satisfied beyond a doubt.

Elements one to three outlined above, in my opinion, closely approximate the traditional role of an investigating justice of the peace with the obvious exceptions that the evidence has not been obtained by the justice and that it has been given in a court of law with the defendant and his counsel present.

If the magistrate is satisfied of the sufficiency of evidence then reads the charge and addresses the defendant.

There arises now a difficulty. Except for Tasmania, so far as I am aware, the magistrate having found a prima facie case to exist or that there is sufficient evidence to put a defendant upon his trial for any indictable offence, the magistrate must then read the charge and the warning and ask the defendant if he or she wishes to make a statement, give evidence or call witnesses. If the defendant chooses to do none of these things the procedure under all the Justices Act or their equivalent requires the magistrate to then commit the defendant to stand trial. There is, in my view, and intermediate step which a magistrate must then take. This was alluded to in Wentworth v Rogers per Samuels JA at page 438:

"However, the question which remains is the extent to which the magistrate may consider the defendant's evidence when he comes to consider the first of the two tests. As I have said, the standards required by s 41(2)(b) and 41(6)(b) are the same. But they may be applied to different materials, thus producing different results. If, even at the conclusion of the second stage, the magistrate is to consider only the evidence for the prosecution, the tender of evidence for the defence, which s 41 plainly contemplates, would be an entirely useless exercise. Since the legislature cannot be taken to have intended an absurdity of these dimensions, it follows that the magistrate must have some regard to the defendant's case. There are general statements in support of this proposition eg R v **Horseferry Road Stipendiary Magistrate; Ex parte Adams** [1977] 1 WLR 1197 at 1199; [1978] 1 All ER 373 at 375, but the difficulty is to define its limits."

To paraphrase the words Samuel JA, if at the conclusion of these procedures the magistrate is to consider only the same evidence for the prosecution in the same way then the exercise required of the magistrate is entirely useless. It follows that the magistrate must have some regard to the defendant in so far as it is his decision to commit or not to commit to trial.

It is at this stage I suggest that a magistrate has regard to the evidence and inferences favouring <u>both</u> the prosecution and the defendant and if he is still of the opinion on all the evidence that is sufficient to satisfy a reasonable jury properly instructed beyond reasonable doubt then the defendant should be committed.

If the defendant makes a statement, gives evidence or calls witnesses then that evidence must be given consideration. This was alluded to in Chid's case at page 346:

> "It is obvious that the magistrate must give attention to the weight and acceptability of the evidence in relation to the character of the evidence itself and the credibility of the witnesses who gave it. But he is to do so from the point of view of a reasonable jury which is presented with the evidence, and neither more nor less than the evidence, he has heard. He is required to make an assessment of the effect all that evidence would have upon the hypothetical reasonable jury properly instructed and to make a forecast of the possibility of conviction upon that evidence."

The magistrate must have some regard to the defendant's case. Samuels JA indicates what this should be at page 440:

> "In dealing with the first the magistrate must determine whether there is evidence which, if believed, could satisfy a reasonable jury that the charge was proved beyond reasonable doubt. In order to make that determination he may consider evidence tendered by or on behalf of the defendant which:
>
> ""in the circumstances reasonable men could not reject, which does not in any relevant aspect involve evidence that is capable of being treated as genuinely in dispute, and which shows that a prima facie case has not been made out.""

If the defendant furnishes an explanation by evidence which cannot be treated as generally in dispute and which reasonable men could not reject, the defendant should be discharged.

Recent amendments to the Justices Act in New South Wales may provide a higher standard for a magistrate in deciding to commit a person for their trial. Section 41(6) provides as follows:

> "(6) When all the evidence for the prosecution and any evidence for the defence have been taken, the Justice or Justices shall, after considering all the evidence before the Justice or Justices-
>
> (a) if of the opinion that, having regard to all the evidence before the Justice or Justices, a jury would not be likely to convict the defendant of an indictable offence - forthwith order the defendant to be discharged as to the information then under inquiry; or
>
> (b) if not of that opinion - commit the defendant for trial."

In Carlin v Chidkhunthod 20 ACR 332 at page 352 O'Brien CJ Cr D observed:

> "In these circumstances it is for the magistrate to consider the quality and acceptability of the evidence for the prosecution both with regard to the evidence and inferences favouring the prosecution and also to any of that evidence and any inferences therefrom which favour the defendant and to form his opinion according to the principles of law then applicable.

> If the credibility of the witnesses who gave evidence for the prosecution has not been disturbed and there are no contradictory features in their evidence so that a jury may fairly accept the whole of the evidence there is obvious difficulty in holding that while that evidence is capable of satisfying the hypothetical reasonably jury beyond reasonable doubt that the offence has been committed, the same jury is not likely to convict in the sense I have given that there is no real chance or prospect that such a jury would convict."

The observations of O'Brien CJ have now been approved in several reported and unreported decisions. (13)

The test, as I understand it in New South Wales, after hearing evidence from the defendant is as follows: (per O'Brien CJ of Cr. D. Chid's case 349-350)

> "In determining then whether a defendant should be committed for trial the function intended by s 41(6) as best serving the interests or competing interests of all concerned is, in my opinion, that the defendant should be discharged when an opinion can affirmatively be reached that there is no real chance or prospect of conviction but that in the absence of such an opinion, the defendant should be committed. No useful purpose is, in my opinion, served by talking in this connection of percentage chances or of the gambler's odds which is not in any event how the mind works in matters of this kind. Rather is it necessary to talk of real and not mere possibilities as the standard of forecasting which is required in applying

s 41(6)."

To summarize the requirements of a magistrate exercising a discretion to commit for trial

First Stage

1. Hear evidence relevant to an alleged criminal act and the accused connection with it.

2. Disregard evidence favourable to the defendant.

3. Assume evidence is accepted by a reasonable jury without qualification.

4. Find evidence of each element of an indictable charge.

5. Find the quality of evidence adduced by the prosecution has not been so discredited as a result of cross examination as to be inherently incredible or manifestly unreliable.

6. Find the evidence is "sufficient" if a reasonable jury, properly instructed, could be satisfied beyond a reasonable doubt.

Then proceed to

Intermediate Stage

7. Same as elements 1, 4 & 5 and assess all prosecution evidence and inferences favouring to both prosecution and defendant.

8. Find the evidence "sufficient" if a reasonable jury, properly instructed, could be satisfied beyond a reasonable doubt, commit the defendant.

Second Stage

9. Same as elements 1, 4, & 5 and assess all evidence of both prosecution and defendant, his witnesses and any statements, favouring both the prosecution and defendant.

10. Discharge if the defendant provides and explanation which cannot be treated as generally in dispute and which reasonable men could not reject.

11. Find the evidence "sufficient" if reasonable jury, properly instructed, could be satisfied beyond a reasonable doubt, commit the defendant to trial.

In New South Wales

12. Discharge defendant if there is no real chance or prospect of conviction.

I believe many of the difficulties that confront a magistrate have been caused by an inadequate consideration of what a magistrate does between the first and second stages in committal proceedings and this question appears to have been overlooked in many of the authorities. It has been assumed that the elements of a prima facie case, as it has been explained in numerous authorities, is applied without qualification to committal proceedings. I wonder if this is appropriate, bearing in mind the requirements imposed on a magistrate after hearing all the prosecution evidence.

To return to the question I posed. When one considers the concept of "preliminary examination" in an historical perspective, it is clearly a concept that has evolved: from the deliberations of a jury comprised of members in a community who supplied information; to a Grand Jury of presentment; to the justice of the peace who was obliged by statute to investigate, record evidence, then either commit or bail (there was no discretion to be exercised), we have in the 20th century a procedure we describe as committal proceedings.

Until the 19th century, the preliminary examination and the committal proceedings required the performance of different functions. It is my view that the difference between these functions - the taking of evidence and the decision to commit or not to commit - which are now performed by the one person - a magistrate - explains in no small way the problems which I have outlined at the beginning of this paper.

Furthermore the legislature does not clearly indicate what is required of a magistrate who commits a defendant. I also believe that the decisions of superior courts have not only not suggested a higher test but have on many occasions have only confusion by the use of imprecise and vague expressions of the requirements of a prima facie case or a committal proceedings.

The importance of committal proceedings has in recent years been reiterated on many occasions. But the courts have also emphasised on many occasions the administrative nature of committal proceedings.

> "However, it is rare in this State that the defendant elects to call any evidence and committal proceedings have in many cases, at least in this State, gone beyond their intended legitimate purpose in the interests of the community and the defendant and have degenerated into a prolonged contest, intended almost exclusively to design and set up a basis for the conduct of a trial regarded as inevitably justified. They have come to involve for this purpose persistent, repetitive and much irrelevant cross-examination as well as long debates upon the admissibility of evidence, the conduct of voir dire examinations, the exercise of discretions and the like, much of it appropriate only to an actual trial. The process has therefore come under substantial criticism as subjecting the community to unjustified inconvenience, delay and expense and amounting in itself almost to an actual trial in which the fundamental role of the jury as the only constitutional tribunal for the determination of issues of fact and the role

of the presiding judge in the determination of questions of law and of the issues to be left to the jury tends to be forgotten." (15)

My observations are not to be taken as an apology for those magistrates who do not properly discharge their duty in considering the evidence in the committal. But the suggestion that "all magistrates will play safe: they will dismiss a charge only in the weakest of cases" is a little unfair.

The remarks were prompted by responses to a questionnaire by the author which were obtained prior to the amendments to the Justices Act in New South Wales in 1985. I note that of recent times the magistrates appear to have been very active in their control of committal proceedings and maybe along with the change in legislation there has been a change in attitude. Perhaps the recent NSW's amendments to the Justices Act show the way for the future.

THE ABOLITION OF COMMITTAL PROCEEDINGS

One of the consequences of the perception that committal proceedings have not been adequately performing the function of screening out weak cases, is the proposal to abolish the present form of committal proceedings or abolish committal proceedings altogether.

The move for such change has gathered momentum because of lengthy committal proceedings in conspiracy fraud and various corporate charges brought in the Magistrates' Court particularly in Victoria and New South Wales.

The important advantages provided by committal proceeding were identified in Barton's case as including 1. the right to hear what the prosecution witnesses can say on oath, 2. the opportunity of cross examining those witnesses, 3. the opportunity of calling evidence in rebuttal and 4. the possibility of a magistrate ordering the accused should be discharged.

While the primary function of a magistrate is to consider whether there is sufficient evidence to commit the accused person for trial, there are collateral benefits which are as follows:

1. Disclosure of prosecution case;
2. Testing reliability, credibility and demeanour of witnesses;
3. Perpetuation of testimony;
4. Identification of issues between parties.
5. Enables prosecution to properly formulate charges;
6. Early disposition of charges.

The benefits listed above are not all effectively realised in every case for a number of reasons which include the lack of representation of the accused person, the prosecution not required to call all witnesses the cost and delay in conducting committal proceedings. Speaking for myself, the loss of these so called collateral benefits is a considerable loss to both prosecution and defendant as well as the overall administration of the criminal law and should not be ignored in any decision to change the present system.

At the Australian Criminal Lawyers Conference at Broadbridge in July 1988, Mr Justice Lee of the Supreme Court of NSW delivered a paper called "In Defence of the Committal for Trial". He said:

> "Those who have been brought in contact with it in a professional capacity can recognise the tremendous part it can play in the proper defence of an accused person's interests, and it is a regrettable fact that those who have not had that experience may see its function and purpose in an entirely different light. Used responsibly by both prosecutor and accused it can be of significant benefit both to the public interest in ensuring that prosecutions are not brought except on proper material and secondly in safeguarding the rights of an accused person and ensuring his fair trial. Where witnesses are required to give oral evidence and are cross-examined it can be a valuable aid to a prosecutor in deciding on the proper charge to be laid at the trial and in many cases the oral evidence given at committal can induce an accused to plead guilty."

From the point of view of a former practitioner both prosecution and defendant and now as Stipendiary Magistrate, I endorse His Honour's remarks. If there is to be a change let us try and simplify the presentation of cases to the committal system and the trial system so as to create a more effective system. If the "screen" is not working effectively, lets try to improve it before we decide to discard it.

As for the present arrangements in the Northern Territory there is <u>no good reason</u> to change the present committal system. I say this

because our criminal law legislation is presently under review and it may be thought that because changes are being made in other jurisdictions they should be made in the Northern Territory to improve the efficiency of the system. I do not deny however that changes can be made to improve the efficiency of a committal system while still protecting the interest of the defendant. To this end I offer the following suggestions:

1. A clarification of the test for a magistrate's discretion to commit for trial.

2. An obligation on the prosecution to disclose all evidence in the committal in accordance with the observations of King CJ. in R v Harry; ex parte Eastway (1985) 39 SASR 203 (see pages 211 to 214).

3. Provision for the prosecution to make an application to the magistrate that prosecution witness not be called to give oral evidence. e.g. interstate witnesses; formal witnesses.

4. Waiver of committal proceedings by the accused person.

CONVERSION OF COMMITTAL PROCEEDINGS TO SUMMARY HEARING

So far as I am aware all jurisdiction in Australia provide that a large range of indictable offences may be dealt with some summarily if two conditions are met. Firstly, the magistrate must be of the view that the case is suitable for summary jurisdiction. Secondly,

the accused person must consent to having the matter dealt with summarily.

The most serious problem certainly in the Northern Territory is determining the stage of the proceedings at which the magistrate should decide whether the case is suitable for summary jurisdiction. The law as I understand it is that a decision by a magistrate that the case may be disposed of in the Court of Summary Jurisdiction cannot be made until the prosecution case has been completed. This can create major difficulties for both prosecution and defence. I recently heard a case, which after five and half days of prosecution evidence, became a summary hearing. You will remember the admonitions of O'Brien CJ. in the case of Carlin v Chidkhuntod concerning the behaviour of defence counsel at committal proceedings.

I believe the problem has been overcome so far as is possible in South Australia under the provisions of s.122 of the Justice Act. This section provides:

> "122. (1) Subject to this Act, the procedure and powers of a court of summary jurisdiction in relation to the hearing and determination of a charge of a minor indictable offence shall be the same as if the charge were a complaint of a simple offence.
>
> (2) At any time in the course of proceedings in respect of a minor indictable offence up to and including the completion of the case for the prosecution, the defendant may

elect to be tried upon indictment and upon the making of that election the court shall not proceed to convict the defendant but may commit him for trial upon indictment.

(3) If it appears to the court that the offence, by reason of its seriousness, the intricacy of the facts in issue, the difficulty of any questions of law likely to arise at the trial, or for any other reason, ought to be tried upon indictment, it shall not proceed to convict the defendant but may commit him for trial upon indictment.

(4) Where a defendant appears before a court of summary jurisdiction charged with a minor indictable offence, the court shall, if the defendant does not elect to be tried upon indictment, inform him, at the completion of the case for the prosecution, whether or not it proposes to deal with the case in a summary way.

(5) If the defendant elects to be tried on indictment, or the court determines not to deal with the case in a summary way, the proceedings shall continue as a preliminary examination.

(6) In proceedings before a court of summary jurisdiction relating to a minor indictable offence, the deposition of any witness for the prosecution -

(a) shall be recorded in writing;

(b) shall be read over by, or read over to, the witness; and

(c) shall be signed by the witness and the special magistrate.

I am not aware of similar legislation existing in other parts of Australia. Legislative amendment in terms similar to that of s.122 of the South Australian Justices Act would in my view contribute to the greater efficiency of the Magistrates' Court as well as enable the parties involved to more effectively litigate any charge.

B. McCORMACK SM

28th April 1989

FOOTNOTES

1. Bishop J.B. - Prosecution without Trial: p.104

2. Holdsworth W. - A History of English Law: Vol 1 p. 312

3. Ibid - p.321

4. Ibid - pgs. 82-87

5. Cox v Coleridge 107 E.R. 15 at p.17

6. Stephen - A History of the Criminal Law of England

7. 11 & 12 Vic. C.42 S.XXV

8. 34 Edward III C.I 1360

9. First Stage - Vic. s.56(1)(a) and (b); Qld s.1042(2); SA s.109(1), (2) and (3); NT s.109(1), (2) and (3); WA s.106; Tas s.61; NZ s.167

   Second Stage - NSW s.41(6)(b); Vic s.59(7); Qld. s.108(1); SA s.112(1), (2) and (3); WA s.107; Tas. s.62; ACT s.94; NT s.112(1), (2) and (3); NZ s.168

10. R v Grassby - Unreported decision of Court of Criminal Appeal N.S.W. 9th December 1989

11. R v Van Beelen [1974] 9 SASR 163 at p.244

12. Wentworth v Rogers 1984 2 NSW LR 442 at ; Roberts 1967 1 WLR 47

13. Besey v Mackenzie 31 A. Crim. R. 347; Prerato v Governor of Metropolitan Remand Centre 64 ALR 37 at p.60

14 Barron v Attoney-General NSW 1987 10 NSW LR 215

15. Carlin v Chidkhuntod 20 A. Crim. R. 322 at p.339