to insert the words 'offering or exposing for sale', 'exposing for sale' being clearly words which would cover the display of goods in a shop window".[19] However, there were no such words in the section in question and even if this was a *casus omissus* it was not for the court to supply the omission.

It is submitted with the greatest respect that His Lordship gives an unfortunately narrow construction to the words "offer for sale", and that it would be more permissible and realistic to speak of Parliament's manifest intention in this case rather than its presumed knowledge. In the case under review Brazel J. reached his conclusion from the words of the Act. He pointed out that the definition of "shop" in the Early Closing Act includes a building in which goods "are offered or exposed for sale by retail or by auction". It has been decided that an auctioneer does not offer goods for sale in law, but each bid at an auction is an offer by an intending purchaser and the fall of the auctioneer's hammer is normally the acceptance of the offer contained in the highest bid.[20] Hence the definition of "shop" in so far as it was intended to cover the places where goods are offered for sale by auction would be rendered nugatory unless the words in question were interpreted in the sense in which these words are ordinarily meant and understood. His Honour also observed that if the legal meaning of the words was adopted the Act would have no application to the "exempted shops" contained in the Third Schedule to the Act or to retail shops as that term is ordinarily understood. This plainly led to an absurdity, and so he gave the words their everyday meaning.

19. Ibid. at 922.
20. *McManus* v. *Fortescue* [1907] 2 K.B.1.

## EVIDENCE

### *The Unsworn Statement*

The right of an accused to make an unsworn statement from the dock, while not submitting himself to the terrors of cross-examination by eloquent and experienced counsel, has recently received the attention of the Supreme Court of South Australia on two occasions. The first occasion was in the *cause célèbre* of *R.* v. *Stuart*,[1] where the matter was discussed by the Full Court (Napier C.J., Mayo and Abbott JJ.) on appeal from a decision of Reed J.[2] The second occasion was in *Lavender* v. *Petherick*,[3] a judgment of Napier C.J. on appeal from a court of summary jurisdiction. The judgments taken together have helped to clarify an otherwise confused section of the law.

In *R.* v. *Stuart* the facts relevant to the present discussion were as follows: at the trial (for murder) of an illiterate aboriginal native whose knowledge of English was extremely limited, counsel for the defence intimated that the accused wished to make an

1. [1959] S.A.S.R. 144.
2. The case went on appeal to the High Court of Australia ((1959) 33 A.L.J.R. 113), but the decision of the Full Court was affirmed without enlargement.
3. [1960] S.A.S.R. 108.

unsworn statement, proposing that he should be allowed to do so by his counsel producing a document previously read over to and signed by the appellant, and that, on the appellant adopting it as the statement that he desired to make, it should be read to the jury as his unsworn statement. Objection being made, His Honour ruled that this could not be allowed, but approved of a suggestion by the Crown Prosecutor that counsel for the accused could prompt him on any topic, ask questions and generally assist him to make his statement. This suggestion was not adopted by counsel, but the accused proceeded to make a statement "while holding a typed statement at his side" which he could not read. The words uttered by the accused were characterized by the High Court as "a few, and relatively inarticulate, words which denied his guilt and alleged ill-treatment on the part of the police officers who had interrogated him".[4]

On appeal, the ruling that the illiterate accused could not have an unsworn statement read out for him, was one of the grounds of complaint. In dismissing this ground, Their Honours looked to the history of the right of an accused to make an unsworn statement.

The right of a person accused of a felony to give evidence on his own behalf was not given until 1839.[5] Prior to this he had been allowed only to make an unsworn statement "to speak for himself and to make his defence as best he could".[6]

In cases of treason, even after the right to be defended by counsel had been granted in 1695,[7] the prisoner as well as his counsel was allowed to address the jury. In misdemeanour, on the other hand, where the defendant had always been allowed counsel, no such statement could be made.[8]

Thus after the right to give evidence on his own behalf was given to a prisoner accused of felony, analogies could be drawn either from the practice of treason trials or those for misdemeanour in determining what was to be the practice in relation to the "statement from the dock" in the case of felony. After an initial leaning towards the practice in misdemeanour,[9] the modern practice was laid down in *R.* v. *Shimmin.*[10] This right is expressly saved by the Evidence Act (S.A.) 1925. In S.A. however this right has been extended by the practice of the judges themselves in allowing the statement to be *read* from a written or typed statement.[11] Nonetheless, Their Honours, while recognising this practice, refused to allow a further departure from the earlier practice as suggested by counsel—"the right of a person to have his statement read out for him". While the conclusion reached is hardly capable of criticism in respect of precedent, the result in the instant case was indeed an anomalous one.

4. *Stuart* v. *R.*, Judgment of the High Court of June 19, 1959. This portion of the judgment is not reported in 33 A.L.J.R. at 114.
5. Trials for Felony Act 1836: 6 & 7 Wm. IV c. 114.
6. *R.* v. *Stuart* [1959] S.A.S.R. 148.
7. 7 & 8 Wm. III c. 3.
8. *R.* v. *White* (1811) 3 Camp. 98, *R.* v. *Maybury* (1863) 11 L.T. 566, both cited in *R.* v. *Stuart* [1959] S.A.S.R. at 149.
9. *R.* v. *Boucher* (1837) 8 C. & P. 141, and other cases cited in *R.* v. *Stuart* [1959] S.A.S.R. at 149.
10. (1882) 15 Cox C.C. 122.
11. *R.* v. *Stuart* [1959] S.A.S.R. 144 at 150-151.

The practice of the Court was to allow a written statement to be read by the accused.[12] This indulgence would be of little assistance to an illiterate aboriginal or a non-English speaking immigrant. Surely, assuming the policy of the law of Procedure to be the equal treatment of all prisoners, the better procedure would have been to allow the accused here, who was just such an illiterate aboriginal, to have someone read his statement out. Justice would at least have "seemed" to have been done.

The alternative suggested to counsel—that he prompt the witness and help him to make his oral statement—might have been of more benefit to the accused, as suggested by the High Court, but the effect on a jury of a statement adduced from an accused by promptings of counsel may well be thought negligible.

At a preliminary hearing of an indictable offence before a court of summary jurisdiction, the prisoner is entitled to make an unsworn statement, if he so choose.[13]

The position in a court of summary jurisdiction dealing with non-indictable offences was dealt with by Napier C.J. in *Lavender* v. *Petherick*.[14] The relevant facts were that the respondent was charged with failure to stop at a "stop sign", contrary to s.130a of the Road Traffic Act 1934-58. The respondent made an unsworn statement contradicting the evidence of the prosecution, and asserting that he had stopped at the sign. The justices dismissed the complaint, holding that the respondent had given a reasonable account of his actions and was entitled to the benefit of the doubt. On appeal Napier C.J. characterized the result as being indicative of "a little learning" being "a dangerous thing".[15] While dismissing the appeal, on the ground that to send the complaint for another trial would be oppressive, His Honour decided that in a court of summary jurisdiction dealing with a charge of a simple offence the defendant had no right to make any unsworn statement when defended by counsel. The courts of summary jurisdiction were a statutory creation and His Honour could find "nothing in the statutes which gives any support to the suggestion that a defendant who is represented by counsel is entitled to make an unsworn statement".[16] His Honour was referred to a passage in 69 L.Q.R. 24,[17] wherein it was stated:

> "Whatever the practice may be in trials on indictment, in summary jurisdiction unsworn statements are a commonplace. It is explained to the accused or defendant that there are three courses open to him—he may say nothing; he may go into the box and give evidence on oath, being warned that if he does so he will be subject to cross-examination; or he may make a statement 'from where you are' in which case he cannot be asked any questions, except occasionally to clarify what he has said."

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12. A practice which Their Honours admitted would be very difficult to reverse —[1959] S.A.S.R. at 150-151. If this be so, it would probably be more correct to use the word "right" rather than "indulgence".
13. Vide, e.g., *R.* v. *Thimmin* (1852) 15 Cox C.C. 122: Justices Act 1921-56, s.110.
14. [1960] S.A.S.R. 108.
15. Ibid. at 109.
16. Ibid. at 112.
17. C. K. Allen, "Unsworn Statements by Accused Persons", 69 L.Q.R. 22 at 24.

As His Honour pointed out, the Justices Act 1921-56[18] expressly allows the unsworn statement in proceedings to committal. However no such provision is to be found in Part IV of the Act.[19] Indeed it is laid down by s.68(2) that:

> "Subect to the provisions of s.12 Evidence Act 1929[20] every witness shall be examined upon oath."

Under s.29 of the Justices Act, the defendant is at liberty to conduct his case personally or through his solicitor. His Honour concluded that there was no right to make an unsworn statement when the defendant was represented by counsel in proceedings under Part IV—Summary Jurisdiction.

The decision of His Honour is by no means without precedent. The Supreme Court of N.S.W. held in *ex. p. Holland*[21] that the defendant had no right to make a statement under a section similar to s.68.[22] Moreover, s.68 appears to contemplate that the Court will hear only the evidence on both sides and the usual addresses.[23]

Perusal of s.68 shows an alternative argument. S.68 reads:

> "(1) If the defendant does not admit the truth of the complaint the court shall proceed to hear . . .
>
> (b) the defendant and his witnesses and any other evidence which he adduces in his defence . . ."
>
> (2) Subject to the provisions of section 12(4) of the Evidence Act 1929, every *witness*[24] shall be examined upon oath.
>
> (3) The practice before a court of summary jurisdiction upon the hearing of any complaint with respect to the examination and cross examination of witnesses and the right of addressing the Court in reply or *otherwise*[25] shall be in accordance as nearly as may be with the practice for the time being of the Supreme Court upon the trial of an action."

This provision was heavily relied on by Napier C.J. in arriving at his conclusion.

However, sub-section 1(b) would seem not to affect the question of unsworn statements, for these do not amount to evidence in the ordinary sense, i.e., evidence as to the facts sworn to, but "evidence" in the entirely different sense of "evidence that this is what he has said or what he says—this is his version of the facts".[26] If this be so, then s.68(2) also does not apply to an unsworn statement—if the prisoner is not giving evidence how can he be a "witness"?

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18. Section 110.
19. Part IV, Summary Jurisdiction—Section 42-100.
20. Evidence Act 1929 s.12 relates to taking evidence from a child under 10 years of age.
21. (1912) 12 S.R. (N.S.W.) 343.
22. Hannan—Summary Procedure of Justices, 3rd edition, at 85 and 86.
23. Ibid. at 86.
24. Italics inserted.
25. Italics inserted.
26. [1960] S.A.S.R. at 114. This view was also adopted in *R.* v. *McKenna* [1951] St. R.Q. 299; Cave J.'s practice appears to have been to direct a jury to accept the statement as true if the prosecution had made no inquiry into its truth or had failed to shake it—*R.* v. *Shimmin* (1882) 15 Cox C.C. 122. Vide quoque: *Peacock* v. *The King* (1911) 13 C.L.R. 119.

"Witness", in legal circles at least, usually refers to a person giving evidence.[27]

Turning then to sub-section (3), cited but not discussed by Napier C.J. in the instant case, one would certainly seem justified in understanding that the practice of the court of summary jurisdiction is to be assimilated to the practice of the Supreme Court in a criminal charge rather than to the practice in a civil case (as seems to have been assumed in His Honour's judgment). The word "action" is a generic term including criminal and civil cases, as was stated emphatically by the House of Lords in *Bradlaugh* v. *Clarke*.[28] Yet Napier C.J.'s reasoning seems, with respect, to have been based in some part on a view of an "action" as a "civil action". If the above definition of an action be applicable here, then the defendant in a court of summary jurisdiction has the right to make an unsworn statement. Certainly the words of the section could be interpreted to apply to such rights—"the right of addressing the court in reply *or otherwise*".[29]

In Napier C.J.'s opinion, the passage from the Law Quarterly Review could possibly be construed as relating only to an accused not defended by counsel and also only to summary trial of indictable offences. If this was not the true construction of the article, His Honour was unwilling to accept it as a statement of the law in South Australia.[30] The law, then, as it stands in South Australia after *R.* v. *Stuart* and *Lavender* v. *Petherick*, can be summarized as follows:

A. In the Supreme Court:—
   (1) The accused has the right to give evidence on oath or make an unsworn statement.
   (2) He is in practice allowed (although he may not be able to insist upon it as a *right*), to read the statement from a written document.
   (3) He has no right to have someone read his statement to the court on his behalf. If this is to be allowed at all it must be with the consent of the prosecutor.

B. In a Court of Summary Jurisdiction dealing with procedure to committal or summary trial of indictable offences:—
   (1) The accused has the right to make an unsworn statement.
   (2) The same principles apply as in the Supreme Court.

C. In a Court of Summary Jurisdiction dealing with non-indictable offences:—
   The defendant has no right to make an unsworn statement.

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27. Wharton's Law Lexicon, 14th edition, at 1073.
28. (1883) 8 A.C. 354.
29. Italics inserted.
30. [1960] S.A.S.R. at 111.