[HIGH COURT OF AUSTRALIA.]

HALL . . . . . APPELLANT;
DEFENDANT,

AND

BRAYBROOK . . . . . RESPONDENT.
INFORMANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1955-1956.

MELBOURNE, 1955, *Oct.* 19; 1956, *June* 15.

Dixon C.J., McTiernan, Williams, Fullagar and Kitto JJ.

Criminal Law—Mode of trial—Summarily before justices or on indictment—Justices not to adjudicate summarily if of opinion that charge is "from any circumstances" fit to be prosecuted on indictment rather than disposed of summarily—Whether previous criminal record or antecedents of defendant a circumstance to be considered—Refusal of justices to accede to application to adjudicate summarily on ground of defendant's previous convictions—Adjournment to enable defendant to test decision—Whether refusal to proceed summarily reviewable by Supreme Court—Crimes Act 1928 (*No.* 3664) (*Vict.*), *s.* 72—*Crimes Act* 1949 (*No.* 5379) (*Vict.*), *s.* 8—*Justices Act* 1928 (*No.* 3708) (*Vict.*), *ss.* 4, 150.

Section 72 of the *Crimes Act* 1928 (Vict.) after making provision in certain cases for the summary trial before justices of the peace of persons charged with certain offences provides that "if the person charged does not consent or if the justices are of opinion that the charge is from any circumstances fit to be prosecuted by proceedings as for an indictable offence rather than to be disposed of summarily" the justices shall not summarily adjudicate thereon, but shall deal with the charge as a charge of an indictable offence.

Held, by *McTiernan*, *Williams* and *Kitto* JJ., *Dixon* C.J. and *Fullagar* J. dissenting, that the words "any circumstances" in s. 72 enabled the magistrates to have regard to the previous convictions of the person charged in making their determination whether to commit him or not, and that the phrase "any circumstances" should not be limited to refer to the circumstances surrounding the charge.

Section 4 of the *Justices Act* 1928 provides that unless inconsistent with the context or subject matter "'order' includes order adjudication decision grant or refusal of any application and also a determination of whatsoever kind

made by justices or any court of petty sessions and also any refusal by justices or any court of petty sessions to hear or determine any information or complaint or to entertain any application ". Sub-section (1) of s. 150, so far as material, provides that where any person who feels aggrieved . . . by any order of any court of petty sessions or justices . . . shows . . . a prima facie case of error or mistake . . . or that the . . . order ought not to have been made, he may apply for an order to review. Sub-section (4) provides that the expression " ' any person who feels aggrieved ' includes as well as a defendant any informant to an information charging an indictable offence or one punishable upon summary conviction who is dissatisfied in respect of an order adjudication decision grant or refusal of any application or determination of whatsoever kind relating or incidental to such charge (including a refusal to hear or determine such information or to entertain any application) made given or come to by any justice or justices or any court of petty sessions ". By s. 155 of the *Justices Act* 1928 the statutory remedy of " order to review " is substituted for mandamus. Justices were refusing to accede to an application that they deal with a charge against a defendant summarily because and only because they regarded the character and antecedents of the defendant as relevant to the question whether the case should be dealt with summarily or not. In order to enable the defendant to seek to review their decision that they should proceed as for an indictable offence they adjourned the hearing and remanded the defendant on bail.

Held by *Dixon* C.J. and *Fullagar* J., *McTiernan*, *Williams* and *Kitto* JJ. expressing no opinion, that the refusal by the justices was open to proceedings by order to review.

Decision of the Supreme Court of Victoria (*Sholl* J.), for different reasons, affirmed.

APPEAL from the Supreme Court of Victoria.

By information dated 21st March 1955 Ronald Mayne Braybrook charged Patrick Hall with that on 21st March 1955 at Camberwell in the State of Victoria he did steal one Parker fountain pen and pencil set, the property of Leicester Nicholas Ellis and valued at £20 7s. 0d.

The information came on for hearing on 5th May 1955 before the court of petty sessions at Camberwell constituted by a stipendiary magistrate and a justice of the peace. Application was made on the hearing at first by the informant and, at the conclusion of the evidence in support of the information, by the informant and by counsel for the defendant that the charge be dealt with summarily. In the course of determining this application the magistrate adverted to the fact that the defendant had earlier in the day been convicted before the justice of the peace then sitting with him. The application was accordingly refused, the bench taking the view that the

H. C. OF A. 1955-1956.

HALL v. BRAYBROOK.

charge was from the circumstances fit to be prosecuted as for an indictable offence rather than to be disposed of summarily. However, to enable its ruling in this regard to be tested the bench adjourned the further hearing of the charge.

The defendant obtained an order nisi to review the decision of the justices, which on 8th June 1955 was discharged by *Sholl* J.

From this order the defendant, by special leave, appealed to the High Court.

The relevant facts and statutory provisions are fully set out in the judgments of the Court hereunder.

J. P. Bourke Q.C. (with him *D. S. Sonenberg*), for the appellant. The words " from any circumstances " in s. 72 of the *Crimes Act* are not to be taken as including the previous criminal record or character of the accused. [He referred to *Makin* v. *Attorney-General for New South Wales* (1); *Delaney* v. *Bruhn* (2).] Once a magistrate determines to hold a summary trial he is bound to proceed with the hearing. [He referred to *Dodemaide* v. *Tucker* (3).] If the magistrate, having by inquiry ascertained that the accused had a previous record and nevertheless proceeded with a summary trial and convicted the accused, the conviction would be set aside. [He referred to *Faulkner* v. *The King* (4); *Hunter* v. *Joseph* (5).] When it came to the knowledge of the magistrates that the accused had been previously convicted, they should not have proceeded further. [He referred to *Strange* v. *Strange* (6).] Even where the prosecutor and the accused both apply for a case to be summarily tried the magistrates have a discretion to refuse the applications.

H. A. Winneke Q.C., Solicitor-General for the State of Victoria (with him Dr. *S. H. Z. Woinarski*), for the respondent. The words " from any circumstances " in their ordinary grammatical meaning include circumstances as to the prior record of the accused. Evidence of prior convictions or bad character is generally inadmissible because it is irrelevant to the issue of guilt. The words " to be disposed of summarily " show the meaning of the proviso. A charge would not be " disposed of " until the appropriate punishment had been determined. Inasmuch as under s. 73 (*a*) of the Act the magistrates have power to decide to deal with the case summarily before any evidence, except as to value, has been given, it is impossible to confine " circumstances " to those arising out

(1) (1894) A.C. 57, at p. 65.
(2) (1940) V.L.R. 478.
(3) (1927) V.L.R. 539.
(4) (1905) 2 K.B. 76.
(5) (1903) 28 V.L.R. 583.
(6) (1908) V.L.R. 187.

of the evidence given. The task imposed on the magistrates is not concerned with the innocence or guilt of the accused. It is to determine whether the charge is fit to be prosecuted by indictment rather than by being disposed of summarily. The dictum in *R.* v. *Hertfordshire Justices* (1), per *Avory* J., cannot be reconciled with *R.* v. *Sheridan* (2) per *Humphreys* J.; see also *R.* v. *Grant* (3); *R.* v. *Sampson* (4).

J. P. Bourke Q.C., in reply. The words "dispose of" are equivalent to "determine". A determination is complete without sentence. [He referred to *Green* v. *Sergeant* (5).]

Cur. adv. vult.

The following written judgments were delivered :—

1956, June 15.

DIXON C.J. The appellant appeared before a stipendiary magistrate and a justice of the peace in the court of petty sessions at Camberwell in the State of Victoria upon a charge of larceny of a fountain pen and pencil set having a value of £20 7s. 0d. Earlier in the day he had been convicted before the justice of the peace of another larceny and sentenced to six months' imprisonment. On that occasion it appeared that the appellant had previously been convicted and that in New Zealand a sentence of two years' imprisonment had been imposed upon him. When the information for stealing the pen and pencil set was read to the accused in accordance with the practice governing indictable offences an application was made for the informant that the charge be treated summarily, as it might be under s. 72 of the *Crimes Acts* 1928 (Vict.) now embodied in s. 8 of Act No. 5379. On the magistrate inquiring whether the charge was one which could properly be so dealt with an affirmative answer was given. Nevertheless the magistrate directed that depositions be taken. At the end of the evidence in support of the information counsel for the defendant joined in the application for the informant that the charge be dealt with summarily. In the discussion which ensued the magistrate referred to criticisms made in England of the use that was made of the power in inappropriate cases and asked whether the counsel was prepared either to assure him that the defendant had no criminal record or, if he had one, to disclose it. The defendant's counsel declined to adopt either course. The magistrate adverted to the fact that to obtain an

(1) (1911) 1 K.B. 612, at pp. 623, 624.
(2) (1937) 1 K.B. 223, at pp. 230, 231.
(3) (1951) 1 All E.R. 28.
(4) (1947) 32 C.A.R. 94.
(5) (1951) V.L.R. 500.

H. C. OF A. 1955-1956.

HALL v. BRAYBROOK.

Dixon C.J.

account of the history of a defendant might be to disqualify the justices who did so from hearing and determining the information if, in spite of what they learned about him, they decided to deal with the charge summarily. He then referred to the facts ascertained when the defendant was convicted earlier in the day before the justice of the peace now sitting with the magistrate. The justice of the peace of course informed him of these facts. The application or applications that the charge be dealt with summarily was then refused on the ground that, in the language of the proviso to s. 72, the charge was from the circumstances fit to be prosecuted as for an indictable offence rather than to be disposed of summarily. The bench agreed to adjourn the further hearing of the charge as one for an indictable offence so that the defendant might apply to the Supreme Court for an order nisi to review the decision not to hear and determine the charge in a summary way. An order nisi was obtained accordingly.

There is clearly a question whether the refusal to proceed summarily is an order within the definition contained in s. 4 of the *Justices Act* 1928 so as to fall within s. 150. To be so it seems necessary to treat the refusal of the magistrate to dispose of the information summarily as the refusal of an application or a determination within the meaning of the definition of the word " order ". *Sholl* J. was prepared to regard it as a determination or a refusal to entertain an application. If it is an application within the meaning of the word in the definition of " order " no doubt it was refused, but it is not easy to say that it was not " entertained ". On adjourning the hearing the magistrates remanded the defendant, admitting him to bail. Perhaps this was done under s. 57 of the *Justices Act* 1928. The decision to adjourn and remand the defendant may perhaps fall within s. 150 but it is difficult to see how, on an appeal from the mere remand of the defendant, it is possible to go back upon the antecedent decision of the magistrates that in the exercise of their discretion they would not hear the charge summarily but would treat it as an information for an indictable offence. However, although it is a difficulty which the appellant must overcome, if he is to succeed, it is not a point upon which the respondent desired that we should decide the appeal. He, like the appellant, sought a decision on the correctness or incorrectness of the magistrates' refusal to proceed summarily. In the event *Sholl* J. discharged the order nisi on the ground that the decision of the magistrates involved no improper exercise of their discretion. He decided that, for the purpose of forming an opinion whether, in the words of s. 72, the charge is from any circumstances fit to be

prosecuted as for an indictable offence rather than to be disposed of summarily, the magistrates were at liberty to take into account information in their possession as to previous convictions of the defendant and treat it as a ground for refusing to deal with the matter summarily. From this decision the defendant sought special leave to appeal to this Court.

How general the importance of the question involved may be in actual practice it is not easy to be sure. No doubt there are times when an informant shares with the defendant a preference for a hearing before magistrates over a trial upon indictment by a jury, although the defendant may, to the knowledge of the informant, be likely to receive a heavier sentence should he be convicted on indictment than it is open to the magistrates to impose. But unless the informant is induced by some such motives to agree in an application that the information be dealt with summarily, in spite of the insufficiency of the maximum punishment, the question whether the magistrates should or may inquire into the defendant's history is not likely to be a very real one. For it may be supposed that magistrates will not often exercise their discretion in favour of a summary hearing in the face of firm opposition from an informant.

How great the importance is to the present appellant is another matter upon which scepticism may be allowed. However that may be, we regarded the question decided by *Sholl* J. as of sufficient importance to warrant this Court in granting special leave to appeal and it is now necessary to determine the appeal. Victorian legislation conferring power upon magistrates to deal with indictable offences in a summary manner does not expressly advert to the question whether for the purpose of deciding whether a given case should be so dealt with, the magistrates may go into the past history and character of the defendant. It is a question which must be answered upon the interpretation of the provision conferring the power which in this case is s. 72 of the *Crimes Acts* of Victoria.

Section 72 begins by enumerating the offences to which the section applies. In none of the cases it enumerated does it apply if it is a completed offence involving more than £25. The section proceeds : " . . . it shall be lawful for the justices to hear and determine every such charge in a summary way and if the person charged confesses the same or if the justices after hearing the whole case for the prosecution and for the defence find the charge proved then the justices may convict the person charged and commit him to gaol for imprisonment ". The maximum terms of imprisonment are then prescribed. If the offence is an attempt or if, though a completed offence, it involves no more than £5, the maximum is

H. C. OF A. 1955-1956.

HALL v. BRAYBROOK.

Dixon C.J.

three months' imprisonment. If the amount involved in a completed offence lies between £5 and £25 the maximum term of imprisonment is six months.

The provision upon which the question before us depends takes the form of a proviso. It is expressed as follows:—"Provided that if the person charged does not consent or if the justices are of opinion that the charge is from any circumstances fit to be prosecuted by proceedings as for an indictable offence rather than to be disposed of summarily, the justices shall instead of summarily adjudicating thereon deal with the case in all respects as if they had no authority finally to hear and determine the same". Section 73 gives some procedural directions which must be followed. It deals with three hypotheses. One is an application of the prosecutor before the hearing of any evidence (other than such evidence, if any, of the amount or value of the matter involved as the justices think fit). Another is an application of the prosecutor or the person charged at any time during or immediately after the hearing of the evidence for the prosecution. The third is that there is a proposal to use the section "on the justices' own motion at any time during or immediately after the hearing of the evidence for the prosecution". If in one of these ways the justices before whom the person is charged propose to dispose of the case summarily under the provisions of s. 72 one of such justices must state to such person the substance of the charge against him and say to him: "Do you consent that the charge against you shall be tried by us or do you desire that it shall be sent for trial by a jury?" If he consents he must be asked how he pleads "and then the justices shall proceed to deal with the case summarily."

In the present case the fact that the defendant had been previously convicted came to the notice of the magistrates in the course of proceedings before one of them, but that in truth is an accidental feature of the case. For, if the fact that the defendant has been previously convicted or bears a bad character forms a good reason for refusing to proceed to deal with a case summarily, it must mean that whenever magistrates are called upon to apply s. 72 they may and perhaps must inquire into the existence of previous convictions or other matters extraneous to the truth of the charge which may bear upon the insufficiency in the case of the particular defendant of the maximum punishment which under s. 72 the magistrates could impose, should they convict him. The question is therefore a more general one: it is whether, for the purpose of forming an opinion that the charge is or is not from any circumstances fit to be prosecuted by proceedings as for an indictable offence

rather than to be disposed of summarily, magistrates may go outside the circumstances disclosed by and in the course of the proceedings before them and inquire into what the *Summary Jurisdiction Act* 1879 (Imp.), s. 13 (1), describes as "the character and antecedents of the person charged". The answer must be found in the interpretation of the proviso and more particularly of the expression "from any circumstances".

The view which at first I took was that the words were so general that they must include any circumstance which might reasonably be considered to affect the question whether proceedings on indictment were more fit than summary proceedings, with all the limitations to which they were subject including the limitations of punishment, and that accordingly they authorised an inquiry as to previous convictions and the character and antecedents of the defendant. But a reconsideration of the matter has led me to think that the better opinion is that the magistrates are not intended to go outside the circumstances which appear from or in the course of the proceedings before them, begun by the laying of the charge, for the purpose of forming an opinion whether by reason of previous convictions or the character and antecedents of the defendant he should be dealt with by a court which was not so restricted as the magistrates would be in the sentence that might be imposed or the course that might be taken with the defendant if convicted. The magistrates form the tribunal which is to judge of the defendant's guilt or innocence of the charge, if it is to be dealt with summarily, or of the sufficiency of the case made against him to put him on his trial, if they decide to proceed as for an indictable offence. In either case to interpret s. 72 as meaning that before embarking upon that duty, or at all events before reaching a conclusion, the magistrates might or should discover whether the defendant had been previously convicted or had a bad character or antecedents, would be to treat the provision as authorising or requiring a violation of the general rule that a tribunal of fact passing upon the guilt or innocence of a defendant should not be informed of the defendant's criminal record or bad character or antecedents before the tribunal pronounces a finding of guilt.

This general rule is subject to specific exceptions or qualifications the grounds of which are as well recognised as the exceptions themselves. The most important is, of course, found in the cross-examination of a prisoner to credit, if he gives evidence on his own behalf and, in Victoria, if such cross-examination is allowable under s. 432 (*e*) of the *Crimes Act*. But these exceptions only serve to give emphasis to the general rule which in truth has gone far beyond a

H. C. OF A. 1955-1956.

HALL v. BRAYBROOK.

Dixon C.J.

precept of the law of evidence and has become a principle which pervades the law governing the conduct of criminal proceedings. It seems to have appeared as a rule of evidence towards the close of the seventeenth century and under the influence of judicial practice and statutory enactment gradually to have hardened into a principle, a principle to any infringement of which all concerned in the criminal law are highly sensitive because of the prejudice to the issue of guilt which is thought inevitably to ensue. Speaking of evidence of the prisoner's bad character *Willes* J., in *Reg.* v. *Rowton* (1), said: "The evidence is relevant to the issue, but is excluded for reasons of policy and humanity; because, although by admitting it you might arrive at justice in one case out of a hundred, you would probably do injustice in the other ninety-nine" (2). Perhaps no more striking modern example of the strength of the principle could be cited than *R.* v. *Dyson* (3), where a court consisting of Viscount *Caldecote* L.C.J., *Asquith* and *Cassels* JJ. quashed a conviction of larceny at the Huddersfield Borough Quarter Sessions, although as *Asquith* J. said in delivering the judgment of the court, "the evidence against the appellant was short and overwhelming" (4), because before the magistrates who committed him for trial some forty previous convictions of the appellant were read out and published in the local newspapers. As the law stood it was right to acquaint the magistrates with the list of convictions, but *Asquith* J. said: "Nevertheless, there are, of course, always risks that the previous record of the accused may, either through being read out in Court, or, as in this case, through being published in a local newspaper, become known to the trial jury, and prejudice his case when it comes before them" (5). The case does not lay down a rule that the publication in local newspapers of a prisoner's prior convictions necessarily imperils his subsequent conviction by a jury from the locality (*R.* v. *Armstrong* (6)) and it may be considered to go too far, but, if so, that only lends point to it as an illustration of the powerful influence of the principle. This perhaps is also true of the decision of the Divisional Court in *Reg.* v. *Barry Justices*; *Ex parte Kashim* (7), where, in stating the reasons for granting a certiorari to quash a conviction by magistrates who had called the clerk into their room, Lord *Goddard* C.J. said: "The applicant has previous convictions in courts in which this very clerk has sat as clerk. I do not impute to

(1) (1865) Le. & Ca. 520 [169 E.R. 1497].
(2) (1865) Le. & Ca. 520, at p. 541 [169 E.R. 1497, at p. 1506].
(3) (1943) 169 L.T. 237; (1943) 59 T.L.R. 314.
(4) (1943) 59 T.L.R., at p. 314.
(5) (1943) 169 L.T. 237; (1943) 59 T.L.R., at p. 315.
(6) (1951) 2 All E.R. 219; W.N. 324.
(7) (1953) 1 W.L.R. 1320; 2 All E.R. 1005.

the clerk any misconduct in the justices' room, but it is important to bear in mind that justice must not only be done but must be manifestly seen to be done. If it appears that there has been an opportunity for information to be given to the justices apart from that proved in open court, doubts may arise whether the trial has been fair " (1) : cf. *Hunter* v. *Joseph* (2).

The influence of the principle is to be seen in the statutory provisions relating to offences punishable more severely if committed after a previous conviction for felony, provisions which no doubt in turn contributed to the strengthening of the principle. By 7 & 8 Geo. IV c. 28, greater punishments, *scil.* transportation, were affixed to offences committed after a previous conviction for felony. It was necessary that the prior conviction should be alleged in the indictment, otherwise the greater punishment could not be inflicted : cf. *Reg.* v. *Willis* (3). Accordingly the prior conviction was proved in support of the indictment at the trial before the jury found a verdict as to the commission of the subsequent offence. In 1836 by 6 & 7 William IV c. III this course of proceeding was forbidden and it was provided that whenever in an indictment the previous conviction should be stated, the reading of such statement to the jury should be deferred until after the jury should have found a verdict of guilty of the subsequent offence and only then should they be charged to inquire into the conviction of the earlier offence. The modern version of this provision is to be found in s. 428 of the *Crimes Acts* (Vict.) : see further *R.* v. *Penfold* (4) and *Faulkner* v. *The King* (5). In 1853 a substitution of penal servitude for transportation on conviction of larceny after a prior conviction of felony was made by 16 & 17 Vict. c. 99, s. 12, a provision which, as will appear, had a relevancy to the history of the enactment representing the earliest form of s. 72 of the *Crimes Acts* (Vict.).

The conclusion I have reached is that to give an interpretation to the proviso to s. 72 which would make it necessary or proper for the magistrates before they have determined the proceeding against the defendant to inquire into his character or antecedents, particularly into the existence of a criminal record, would be out of accord with the principle now traditional which protects a defendant upon a criminal charge from undue prejudice which must be derived from a knowledge of his character and antecedents by the tribunal passing on his guilt or innocence. It is pressing the words " from any circumstances " too far if they are construed as removing this

(1) (1953) 2 All E.R., at p. 1007.
(2) (1903) 28 V.L.R. 583.
(3) (1872) 1 C.C.R. 363.
(4) (1902) 1 K.B. 547.
(5) (1905) 2 K.B. 76.

H. C. OF A. 1955-1956.

HALL v. BRAYBROOK.

DIXON C.J.

protection from the defendant, when he or the prosecutor applies under s. 73 for a summary disposal of the charge in pursuance of s. 72. As some additional support for this conclusion it may be pointed out that after all the proviso to s. 72 speaks of the " charge " being fit to be prosecuted by proceedings as for an indictable offence, and, further, it is more natural to regard " circumstances " as referring to facts surrounding the charge than facts affecting the general deserts of the defendant.

In England the dilemma has been fully recognised in which magistrates are placed when called upon to say whether a man who may or may not have a criminal record should be dealt with not on indictment but summarily by a court with a more limited power of punishment and the dilemma has received the repeated attention of the courts and of the legislature. It is worth while noting what has been done, particularly in as much as the early history of the legislation has a direct bearing upon that of the Victorian provision. It is enough to begin with the *Criminal Justice Act* 1855 (Imp.), 18 & 19 Vict. c. 126, s. 1. That section enabled justices of the peace to deal summarily with a charge of simple larceny of property worth not more than five shillings or an attempt to commit larceny from the person or simple larceny. The maximum punishment they could impose was three months' imprisonment. A proviso enacted that if it appeared to such justices that the offence was one which, owing to a previous conviction of the person charged, is punishable by law with transportation or penal servitude or if such justices be of opinion that the charge is from any other circumstances fit to be made the subject of prosecution by indictment rather than to be disposed of summarily the justices should proceed as for an indictable offence. In this provision the reference to the previous conviction which would lead to transportation or penal servitude is necessitated by 16 & 17 Vict. c. 99, to which reference has already been made. It is important to notice that the charge itself must, or at least ought, to contain the statement of the previous conviction and consequently the proviso does not require the magistrates to look outside the proceedings to discover whether there had been a previous conviction of felony. No case has been found construing the word " circumstances " in the proviso to s. 1 of 18 & 19 Vict. c. 126 as enabling or requiring magistrates to look outside the charge and the proceedings thereon and inquire into the record of the defendant. But it is not clear that the Victorian provision owes its inspiration to that precise section. An Act of 1847, 10 & 11 Vict. c. 82, dealt with juvenile offenders and s. 1 provided with some elaboration for the summary disposal of charges of larceny and the

like against persons not more than fourteen years of age. It contained a proviso which said that if the justices should be of opinion before the person charged made his defence " that the charge is from any circumstance a fit subject for prosecution by indictment " they should deal with it as an indictable offence. This was substantially transcribed in 1850 as 14 Vict. No. 2 of New South Wales and extended in 1853 by 17 Vict. No. 2 of Victoria, which perhaps followed 13 & 14 Vict. c. 37, to adults charged with the like offences if the property involved was not more than two pounds in value. The consolidating *Criminal Law and Practice Statute* 1864, No. 233, s. 64, re-enacted these provisions, though conceivably the draftsman may have used s. 1 of 18 & 19 Vict. c. 126 as his model. The subsequent history of the Victorian provision will be found in s. 67 of the *Crimes Act* 1890, s. 72 of the *Crimes Act* 1915 and s. 72 of the *Crimes Act* 1928 replaced by the version contained in s. 8 of the *Crimes Act* 1949 (No. 5379) which is the provision now in question.

In England the *Summary Jurisdiction Act* 1879 (42 & 43 Vict. c. 49) repealed the previous legislation already referred to and replaced it by more modern provisions contained in ss. 11 to 14 and the first schedule. By s. 12, which deals with the case of an adult who consents to a summary hearing, the power to deal summarily with the offence is clothed with a discretion which specifically requires the magistrates to have regard to the character and antecedents of the person charged, the nature of the offence and all the circumstances of the case. This caused some difficulties. When magistrates decided to proceed summarily and subsequently in the course of the hearing discovered that because of the seriousness of the case or because the defendant's character and antecedents were such that they would judge it better to commit him for trial, could they change their minds and do so ? In *R.* v. *Hertfordshire Justices* (1) it was decided that they could. *Avory* J. put his decision on the very ground that they could not inquire into the defendant's character and antecedents before they embarked on the summary hearing. His Lordship clearly felt that it was impossible to treat the language of the provision as sufficient to authorise the tribunal passing on the guilt or innocence of the defendant to inquire first into his character and antecedents. *Avory* J. said : " It is said " (*scil.* by the defendant) " that by reason of what took place before the justices the offence ceased to be an indictable offence, and s. 12 of the *Summary Jurisdiction Act* 1879, is relied on in support of that contention. Probably the most favourable way of putting the

(1) (1911) 1 K.B. 612.

H. C. OF A. 1955-1956.

HALL v. BRAYBROOK.

DIXON C.J.

argument for the defendant is to say that, as soon as the justices have decided, with the consent of the person charged, to deal summarily with the case, he acquires a right to receive a sentence not exceeding the limit imposed by s. 12, that is, imprisonment with hard labour for a term of three months. I do not think the argument is sound. To give effect to it would produce an impossible and unworkable state of things in Courts of summary jurisdiction. The justices are only to deal summarily with the indictable offences specified in the first schedule to the Act ' if they think it expedient so to do,' and they are to have regard ' to the character and antecedents of the person charged, the nature of the offence, and all the circumstances of the case.' It would obviously be most improper for the justices to inquire into the character and antecedents of the person charged until, after having heard all the evidence, they have determined to convict him ; if they did do so, and then proceeded to convict, the defendant could come to this Court and get the conviction quashed on the ground that the justices had wrongly admitted evidence as to character before conviction. But before deciding to commit a defendant for trial the justices must inquire into his character and antecedents . . . " (1).

In the consolidated *Criminal Justice Act* 1925, s. 24 (1), the discretion of the magistrates was redefined as follows :—" . . . the court, if it thinks it expedient so to do, having regard to any representation made in presence of the accused by or on behalf of the prosecutor, the character and antecedents of the accused, the nature of the offence, the absence of circumstances which would render the offence one of a grave or serious character and all the other circumstances of the case (including the adequacy of the punishment which a court of summary jurisdiction has power to inflict), and if the accused, when informed by the court of his right to be tried by a jury, consents to be dealt with summarily may " etc. Under this provision the magistrates, perhaps guided by the foregoing dictum of *Avory* J., having decided to hear a charge summarily, listened to the evidence, announced their finding that the defendant was guilty of the charge and then upon hearing his record changed their minds and committed him for trial. On his trial he was convicted but the Court of Criminal Appeal upheld a plea on his part of *autrefois convict*. In *R.* v. *Sheridan* (2), *Humphreys* J., delivering the judgment of the court, said :—" In our opinion the present is a case where the justices have proceeded to adjudicate by convicting the defendant, and accordingly the plea of autrefois convict was

(1) (1911) 1 K.B., at pp. 623, 624. (2) (1937) 1 K.B. 223.

established. Some comment was made in the course of the argument upon the dicta of *Avory* J. in the *Hertfordshire Justices Case* (1), as to the right of justices to inquire into the character and antecedents of the person charged before deciding to convict. The language of s. 12 of the *Summary Jurisdiction Act* 1879, the statute then in force, is somewhat different from that used in s. 24 of the *Criminal Justice Act* 1925. A consideration of sub-s. 1 of the latter section makes it plain in our view that justices are now required as a preliminary to any decision as to dealing summarily with an indictable offence to hear and to take into consideration certain matters specified in the section, one of them being the character and antecedents of the accused, to enable them to decide whether they ought to deal with the case summarily. Such a course does not appear to involve any unfairness to the accused. Presumably if the character of the accused as stated to them appears to them to be bad, the justices will refuse to deal with the case summarily, will proceed to take depositions, and, if a prima facie case is proved, will commit the accused for trial; on the other hand, if the character given to the accused is a good one, no harm will be done by the justices having heard that fact stated early in the proceedings " (2). With this view the legislature does not appear to have been content. By the *Criminal Justice Act* 1948, s. 79, and 9th schedule, it was provided that the words, " character and antecedents of the accused ", in s. 24 of the Act of 1925 should cease to have effect. Section 29 of the Act of 1948 provided in effect that if the defendant was not less than seventeen years of age he might on conviction by the court summarily for an indictable offence be committed to Quarter Sessions for sentence, " if, on obtaining information as to his character and antecedents, the court (of summary jurisdiction) is of opinion that they are such that greater punishment should be inflicted in respect of the offence than the court (of summary jurisdiction) has power to inflict ". In *R.* v. *Norfolk Justices*; *Ex parte Director of Public Prosecutions* (3); *R.* v. *Middlesex Quarter Sessions*; *Ex parte Director of Public Prosecutions* (4); *R.* v. *Grant* (5), *R.* v. *Vallett* (6), and *Reg.* v. *Kent Justices*; *Ex parte Machin* (7), some difficulties raised by these sections were dealt with, but the decisions throw no light on the question here involved. The provisions have been recast in ss. 18-29 of the *Magistrates Courts Act* 1952, which by s. 132 and the 6th schedule repeals certain of the material provisions of the 1925 and 1948 Acts. The result is to

(1) (1911) 1 K.B. 612.
(2) (1937) 1 K.B., at pp. 230, 231.
(3) (1950) 2 K.B. 558.
(4) (1950) 2 K.B. 589.
(5) (1951) 1 All E.R. 28.
(6) (1951) 1 All E.R. 231.
(7) (1952) 2 Q.B. 355.

H. C. OF A. 1955-1956.

HALL v. BRAYBROOK.

DIXON C.J.

leave great flexibility in the power of the magistrates who may exercise and reconsider the exercise of their discretion to treat a case summarily. But it is also made clear that only after convicting may they go into the character and antecedents of the defendant (see particularly s. 19 (4) and s. 29).

The provisions of the Act of 1952, the adoption of which here as a solution of the difficulties might well be considered, are the latest in the rather long history of English legislation parallel to our own. It cannot directly control or influence the interpretation of the Victorian provisions. But it does two things. It shows very definitely that express and clear words were regarded as necessary to authorise a consideration of the character and antecedents of an accused person and that judicial opinion of no inconsiderable weight thought that an express authority to do so was insufficient as an authority to proceed to inquire into such matters before a conclusion of guilt was reached. In the second place the English legislative history brings out the perplexity experienced in the dilemma between on the one hand suffering a defendant to escape with insufficient punishment through the exercise of the power to deal summarily with his case and on the other hand allowing him to be prejudiced by an inquiry into his antecedents and character. It shows further that the legislature in England would not leave unremedied the prejudice to which such a man was exposed under the decision in *R.* v. *Sheridan* (1).

It is for the foregoing reasons that, contrary to first impression, I have formed the opinion that the magistrates in the present case ought not to have acted upon the information which, so to speak, was fortuitously acquired, of the defendant's previous convictions and ought not to have refused on that ground the application for a summary disposal of the charge against him.

The view I have adopted makes it necessary to consider whether the decision of the magistrates refusing to dispose of the charge against the defendant summarily can be reviewed. The jurisdiction given to the Supreme Court by s. 150 of the *Justices Act* 1928 is a wide one. Its width is in part the result of the definition of the word " order " in s. 4. Section 4 provides that unless inconsistent with the context or subject matter " ' order ' includes order adjudication decision grant or refusal of any application and also a determination of whatsoever kind made by justices or any court of petty sessions and also any refusal by justices or any court of petty sessions to hear or determine any information or complaint or to entertain any application ". Sub-section (1) of s. 150, so far as

(1) (1937) 1 K.B. 223.

material, provides that where any person who feels aggrieved . . . by any order of any court of petty sessions or justice . . . shows . . . a *prima facie* case of error or mistake . . . or that the . . . order ought not . . . to have been made, he may apply for an order to review. Sub-section (4) provides that the expression " ' any person who feels aggrieved ' includes as well as a defendant any informant to an information charging an indictable offence or one punishable upon summary conviction who is dissatisfied in respect of an order adjudication decision grant or refusal of any application or determination of whatsoever kind relating or incidental to such charge (including a refusal to hear or determine such information or to entertain any application) made given or come to by any justice or justices or any court of petty sessions ". I take the expression " as well as a defendant " to be attached like the word " informant " to what follows, that is to say it means a defendant to an information charging etc. who is dissatisfied etc. Both in sub-s. (4) and in the definition of the word " order " the reference most important for present purposes appears to me to be that to the refusal of any application. No doubt the action of the magistrates in adjourning the hearing and remanding the defendant on bail falls within the definition of " order ". But the adjournment and remand were directed only in order to enable the defendant to seek to review the decision or conclusion of the magistrates that they would proceed as for an indictable offence It seems to me impossible to examine the validity of that anterior decision under colour of reviewing the decision to adjourn the hearing and remand the defendant.

Wide as are the words of the definition of " order " and of sub-s. (4), they cannot be pressed to cover every incidental ruling or direction. For example there can be no doubt of the correctness of the decision of *Dean* J. in *State Savings Bank* (*Vic.*) v. *Rogers Bros.* (1), that a magistrate's ruling that evidence is to be admitted or rejected cannot itself constitute an " order " that may be reviewed under s. 150, though of course if erroneous it may be a ground for reviewing a determination affected by it. But an application to dispose summarily of an information for an offence is an application to exercise a jurisdiction to hear and determine the accusation. The refusal, although it implies a decision to go on with the proceedings for committal, which of course are not regarded in our law as involving a judicial determination, means a refusal to exercise a definite jurisdiction. True it is that the question whether the

(1) (1954) V.L.R. 149.

H. C. OF A. 1955-1956.

HALL v. BRAYBROOK.

DIXON C.J.

jurisdiction shall be exercised or not depends on a discretion and not upon an imperative duty. But that affects the examinability of the discretion not the question whether there is the refusal of an application within the meaning of sub-s. (4) or the definition of "order". Section 73 of the *Crimes Acts* in both par. (*a*) and par. (*b*) describes the invoking of the discretion as an application and that in itself provides an important consideration. The question can only arise when the exercise of the discretion is said to be vitiated because it is based on extraneous matters or is otherwise contrary to law. But the discretion is so wide in its ambit that such a thing can seldom occur. Moreover once a committal takes place and a presentment is filed the matter has passed to another jurisdiction. But if you have a refusal which is the result of an inadmissible exercise of the discretion and, as in the present case, an opportunity is afforded of correcting it, I think that it may be reviewed as an erroneous refusal of an application.

Whether the magistrates could have found in this case other and admissible grounds for forming an opinion that the charge is fit to be prosecuted as for an indictable offence rather than to be disposed of summarily does not appear. But the information should be remitted to them to be dealt with according to law and such a remittal covers all their lawful powers.

It follows that in my opinion the order should have been made absolute and the information remitted for the reconsideration of the magistrates at Camberwell.

McTIERNAN J. The facts are stated in the judgment of *Sholl* J. against which the appeal is brought and in the judgment of the Chief Justice. The appellant was charged with an offence which was within s. 72 of the *Crimes Act* 1949 (Vict.) Subject to the provisos to this section, the justices had jurisdiction to hear and determine the charge in a summary way. The charge was for stealing a fountain pen valued at twenty pounds. The maximum sentence which the justices could impose for this offence was imprisonment for six months. The term of imprisonment is so limited by s. 72. The first proviso operates, in effect, to oblige the justices to commit the person charged for trial, if they are of opinion that the charge preferred against him is from "any circumstances" fit to be prosecuted by proceedings as for an indictable offence rather than to be disposed of summarily. Nothing appears in the evidence given before the justices to make inevitable the committal of the appellant for trial. Presumably he is anxious to avoid this mode of trial on the present charge, because, as he has prior convictions, the

court to which he could be committed might, if he should be convicted, upon learning of his bad record, impose a more severe sentence or a sentence less to his liking than imprisonment for six months. For the appellant it was argued that no conviction of the person charged is intended to be included in the words " any circumstances ", for the reason that if the justices could be informed that the person charged had a bad record, and they decided nevertheless to proceed with his trial in a summary way, there would be danger that he would not have a fair trial, because of the prejudice that his bad record would be likely to produce in the justices. This argument leaves out the right of the accused to object to a summary trial. However, as stated above the appellant is anxious to have a summary trial without being troubled by his prior convictions, at least until a conviction takes place, if it should, but then, even if the justices take the convictions into account in measuring the term of imprisonment, it could not be as severe as the punishment to which a court to which he might have been committed for trial, has power to impose.

It is commonplace for a court to take into account whether an offender has or has not been previously convicted when it is considering what sentence to impose upon him, unless the amount of punishment for the crime of which he is convicted before the court is predetermined : see *R.* v. *Geddes* (1). This consideration goes far to destroy the argument of the appellant for narrowing the words " any circumstances " merely to the circumstances of the charge itself. The evidence of these circumstances may not be sufficient to enable the justices to discharge the duty, which the proviso entrusts to them, of deciding the mode of trial. The criterion by which they are directed to act is whether they are of opinion that from " any circumstances " the charge is fit to be prosecuted on indictment rather than to be disposed of summarily. The evidence of the circumstances of the charge by themselves may show that it would not warrant a sentence any more severe than the justices could impose. But, if from other circumstances, it is made to appear that a more severe sentence is warranted—a sentence which a higher court could impose—then the charge answers the description of one fit to be prosecuted on indictment rather than in petty sessions. One of such other circumstances is clearly that the person charged has a bad record. In most cases proof of or reference to the fact that the person charged before the justices had been previously convicted, would be irrelevant to the issue of guilt. Apart from the proviso, the fact could be proved before them only if having tried

(1) (1936) 36 S.R. (N.S.W.) 554, at p. 555; 53 W.N. 157.

H. C. OF A. 1955-1956.

HALL v. BRAYBROOK.

McTiernan J.

him summarily and found him guilty they called for particulars of any prior convictions for the purpose of considering what sentence to impose. But, as the justices have, under the proviso, to decide whether to commit the person charged for trial or dispose of the charge summarily, and to do this according to the directions given by the proviso which have been explained, I think that they may receive proof of his previous convictions, if any, for the purpose of carrying out those directions. They might, however, after receiving such proof not be of opinion that the charge is fit to be prosecuted on indictment rather than to be disposed of summarily. This constitutes the strength of the argument for the appellant because the knowledge of the justices that the accused had been previously convicted may tend to his prejudice, and therefore the legislature presumably, so the argument runs, did not intend that a prior conviction should ever be one of the circumstances of which the justices should obtain any knowledge until after conviction, when it would be material on the question of punishment. It may be conceded that every reasonable presumption should be made that it was not the intention of the legislature to subvert the principle of a fair trial. But I think this is not a satisfactory criterion by which to narrow the meaning of the words " any circumstances " so as to exclude from the consideration of the justices the previous convictions of the persons charged. For, as I have endeavoured to show, the circumstance that he has a bad record could very pointedly raise the question whether he could be adequately punished if he was not committed for trial. *Sholl* J. said : " the protection of the community is involved in the formulation and administration of the criminal law, and one ought not to be astute to exclude by implication from the consideration of the justices circumstances which have an obvious logical relevance from the point of view of the community to the discretionary determination of the question whether a summary trial, with its more limited maximum penalities, is appropriate, or is likely to be appropriate, in a particular case ". I think it is right to oppose this consideration to the argument for narrowing by implication the natural scope of the words " any circumstances " in the context of s. 72. It is at least a doubtful assumption that, if the justices learned that the accused had been previously convicted, they neither could nor would any longer deal with him fairly, as it would be presumed until then. If they proceeded to try him summarily, why should it be presumed that they would fail to act judicially—solely on the evidence which is relevant to the issue of guilt upon the charge before them—and that they would deny him a fair trial ? I agree

substantially with the reasoning which led *Sholl* J. to his conclusion upon the question of the true construction and application of the first proviso of the section. I cannot find anything in the decisions cited as having a bearing on the question, which shows that the conclusion is wrong.

I would dismiss the appeal.

WILLIAMS J. The question with which we are concerned on this appeal, which is brought by special leave, arises under ss. 72 and 73 of the *Crimes Act* 1928 (Vict.) (as re-enacted by s. 8 of the *Crimes Act* 1949 (Vict.)). That section confers on the justices jurisdiction to try summarily certain offences specified in the section which otherwise would have to be prosecuted by proceedings as for an indictable offence. The question is whether the justices, for the purpose of forming an opinion whether the charge should be disposed of summarily, are entitled to take into consideration the past character and antecedents of the accused (including his prior convictions, if any). The crucial words of s. 72 are found in the proviso which is in the following terms: "Provided that if the person charged does not consent or if the justices are of opinion that the charge is from any circumstances fit to be prosecuted by proceedings as for an indictable offence rather than to be disposed of summarily, the justices shall instead of summarily adjudicating thereon deal with the case in all respects as if they had no authority finally to hear and determine the same." Section 73 provides that the application for a summary trial may be made by the prosecutor before the hearing of any evidence (other than evidence of the amount or value of the property involved), or it may be made by the prosecutor or the person charged or originate with the justices of their own motion at any time during or immediately after the hearing of the evidence for the prosecution. One of the justices must then state to the accused the substance of the charge against him and then say to him these words or words to the like effect: "Do you consent that the charge against you shall be tried by us or do you desire that it shall be sent for trial by a jury?" If the person charged consents to the charge being summarily tried and determined he is asked how he pleads to the charge and the justices then proceed to deal with the case summarily.

Section 72 imposes on the justices two duties—first that of deciding whether to dispose of the offence summarily and secondly, if they so decide, that of so disposing of it. The duty of the justices is to form an opinion whether there are any circumstances which make it advisable that the accused should be sent for trial before a jury

H. C. OF A. 1955-1956.

HALL v. BRAYBROOK.

Williams J.

rather than that he should be tried by them summarily. The discretion to choose between the two forms of trial is confided to the justices. It is confided in very wide terms. The justices may take into consideration " any circumstances ". The only apparent limits to the exercise of the discretion are that it must, like every other discretion, be exercised bona fide for the purposes for which it was conferred. The words " any circumstances " read literally would appear quite plainly to authorise the justices to take into consideration any relevant circumstances or, in other words, any circumstances reasonably capable of assisting them to form the requisite opinion. In forming that opinion it would appear equally plainly to be open to the justices to take into consideration the adequacy of the punishment which they could inflict if they convicted the accused compared with the punishment which could be inflicted if the accused was convicted by a jury. They could bona fide believe that, as between two accused persons, one of good and the other of bad character, it would be justifiable to grant the former a summary trial but to refuse it to the latter. For this purpose it would be relevant for them to inquire into the character and antecedents of accused persons, good or bad, including their prior convictions.

But it is submitted that the legislature, in the absence of express words, could not have intended to authorise the justices to make such an inquiry because this would conflict with the settled principle of the criminal law that, save in exceptional cases, evidence of the bad character of an accused person is inadmissible to prove his guilt and can only be taken into consideration by the judge, if he is convicted, in determining the proper punishment. Accordingly " any circumstances " must mean only those circumstances disclosed by the nature of the charge and the evidence that could properly be admitted to prove the offence. If the application was made by the prosecutor before the hearing of any evidence (other than evidence of value), the only circumstance the justices could take into consideration would be the nature of the charge. If the application was made during or immediately after the hearing of the evidence for the prosecution the only circumstances the justices could take into consideration would be the nature of the charge and the evidence that had been given up to that stage.

It is impossible, in my opinion, to give this limited meaning to such wide words as " any circumstances ". The principle that the fair trial of an accused person must not in general be prejudiced by evidence of bad character being admitted is fully established. But it has been established in relation to cases where the accused has no option to choose between a summary trial and a trial by a jury

and must appear before the particular court the law prescribes. In the present case the accused cannot be tried summarily unless he consents. He cannot be deprived of his right to be tried by a jury and if he prefers a jury no evidence of his past character or antecedents could be admitted except where the criminal law provides for its admission. Section 72 is in a different position. It imposes on the justices the two duties already mentioned. If they find themselves placed in a position where the discharge of these duties may cause them embarrassment, that is the fault of the legislature. The initial duty to form an opinion that the accused should be tried summarily is an important duty and one in which the public interest is involved. The justices need not be embarrassed because, if they fear that they may be prejudiced against the accused, they can refuse to dispose of the charge summarily. In many cases evidence that the accused was of good character might assist them in deciding to hear the charge summarily. And it should not be an impossible task for them to disabuse their minds of any prejudice against an accused person because of his antecedents if they decide to try him summarily. A summary trial under s. 72 does not depend upon the consent of the prosecutor as it does upon the consent of the accused, although the prosecutor would no doubt be entitled to be heard for or against the application if it was initiated by the accused or the justices themselves. Presumably, if the prosecutor objected strongly, the justices might guess that he was doing so because the accused was of bad character, and it would surely be better for the justices to know the truth rather than to make a guess.

We were referred to the prior history in Victoria of s. 72 and also to the history of the corresponding legislation in the United Kingdom. I shall not refer to this legislation in any detail. This has already been done in the reasons for judgment of *Sholl* J. in the court below and in the reasons of other members of this Court. I cannot derive any reliable assistance in solving the present problem from carrying out a further investigation. The problem should be solved, in my opinion, by adhering to the cardinal principle that in order to ascertain the intention of the legislature you attribute to the words of a statute their ordinary natural grammatical meaning. The words " any circumstances " cannot, in my opinion, be limited in the manner suggested. In the corresponding legislation in the United Kingdom, the justices were expressly authorised to take into account the past character and antecedents of the accused in deciding whether to grant a summary trial or not. It could not therefore have been thought at Westminster that an accused person,

H. C. OF A. 1955-1956.

HALL v. BRAYBROOK.

Williams J.

who could only be so tried with his consent, would be prejudiced by the justices having this previous knowledge. In *Kenny's Outlines of Criminal Law* (1952), p. 464, where this legislation is summarised, it is said (footnote 4): "Such consent is usually given readily, in order to avoid the risk of imprisonment while awaiting trial, and of receiving a severer sentence than it is possible for the petty sessions to inflict." There is a passage in the judgment of Lord *Goddard* C.J. in *Reg.* v. *Salisbury and Amesbury Justices*; *Ex parte Greatbatch* (1) to the same effect. His Lordship said: "Ever since *Reg.* v. *Cockshott* (2) this court has always insisted on the provisions of s. 17, now s. 25, being strictly complied with, for this reason, among others, that according to the decision of *Wright* J. in that case—and a few other higher authorities on matters relating to statutory law—justices who did not put that question had no jurisdiction to try the case at all. Of course, nearly every accused person who is given the chance of being tried summarily takes it, unless he is charged with being under the influence of drink, when he always goes to quarter sessions if he can and, for some reason, nearly always gets acquitted, but that is the fault of juries and not of the law. In certain cases the justices may not give the accused the chance of being tried summarily, but simply make up their minds that they are going to take depositions and send him for trial" (3). In *R.* v. *Sheridan* (4), *Humphreys* J., delivering the judgment of the Court of Criminal Appeal, said: "Such a course does not appear to involve any unfairness to the accused. Presumably if the character of the accused as stated to them appears to them to be bad, the justices will refuse to deal with the case summarily, will proceed to take depositions, and, if a prima facie case is proved, will commit the accused for trial; on the other hand, if the character given to the accused is a good one, no harm will be done by the justices having heard that fact stated early in the proceedings" (5).

When a legislature entrusts the exercise of a discretion to some particular person or body it does not fall within the province of any court to attempt to prescribe the particular manner in which that discretion is to be exercised. It can only inquire whether it has been exercised according to law. But courts are often tempted to lay down rigid rules governing its exercise and judicial utterances which give reasons for exercising the discretion in a particular case are often sought to be used for prescribing the manner in which the discretion is to be exercised in every case. But this is not permissible.

(1) (1954) 2 Q.B. 142.
(2) (1898) 1 Q.B. 582; 14 T.L.R. 264.
(3) (1954) 2 Q.B., at p. 146.
(4) (1937) 1 K.B. 223.
(5) (1937) 1 K.B., at p. 231.

In *Gardner* v. *Jay* (1) *Bowen* L.J. said : " for my own part I think that when a tribunal is invested by Act of Parliament . . . with a discretion, without any indication in the Act . . . of the grounds upon which the discretion is to be exercised, it is a mistake to lay down any rules with a view of indicating the particular grooves in which the discretion should run, for if the Act . . . did not fetter the discretion of the judge why should the court do so ? " (2). In *Jenkins* v. *Bushby* (3) *Kay* L.J. said : " Of course, in a question of discretion, authorities are not of much value. No two cases are exactly alike, and even if they were, the Court cannot be bound by a previous decision, to exercise its discretion in a particular way, because that would be in effect putting an end to the discretion " (4). The second sentence in this passage was cited with approval by Lord *Wright* in his speech in *Evans* v. *Bartlam* (5). His Lordship added : " A discretion necessarily involves a latitude of individual choice according to the particular circumstances, and differs from a case where the decision follows *ex debito justitiae* once the facts are ascertained " (6). In *Blunt* v. *Blunt* (7) Viscount *Simon* L.C., referring to the discretion of the court under s. 4 of the *Matrimonial Causes Act* 1937 to refuse a divorce where the petitioner has been guilty of adultery, said : " It is impossible to lay down strict rules for its exercise, and to attempt to do so would really be to restrict the liberty conferred by the language of the statute " (8). The principle illustrated by these citations applies, in my opinion, to the discretion under discussion. The justices are not bound, before deciding how they shall exercise their discretion under s. 72, to require or not to require evidence of the accused's character. It is a matter for their discretion whether to do so or not. The meaning of a duty to exercise a discretion in all the circumstances of the case was considered in *R.* v. *Mills* (9) and *Allcroft* v. *Lord Bishop of London* (10). In both cases it was submitted that, although these words in the statute conferred a general discretion, they should be limited by construction so as to confer only a particular discretion. In *R.* v. *Mills* (9) the question was whether the justices of the county into which an apprentice was to be bound had a general discretion to consider the propriety of the binding or whether their discretion was confined to considering the fitness respectively of the master and the apprentice. Lord *Tenterden* said : " here they have a general discretion, after enquiring into all the circumstances of

(1) (1885) 29 Ch. D. 50.
(2) (1885) 29 Ch. D., at p. 58.
(3) (1891) 1 Ch. 484.
(4) (1891) 1 Ch., at p. 495.
(5) (1937) A.C. 473.
(6) (1937) A.C., at p. 489.
(7) (1943) A.C. 517.
(8) (1943) A.C., at pp. 524, 525.
(9) (1831) 2 B. & Ad. 578 [109 E.R. 1257].
(10) (1891) A.C. 666.

H. C. OF A. 1955-1956.

HALL v. BRAYBROOK.

Williams J.

the case " (1). A circumstance that the justices were held to be entitled to take into account so as to afford to the parish of Wivenhoe that protection which they considered themselves bound to give was that the parish ought not to be liable to have paupers from a distance settled on it. In *Allcroft's Case* (2) the bishop had the power, after considering all the circumstances of the case, to decide whether certain legal proceedings should be taken or not. It was submitted that the only circumstance he could properly take into consideration was whether or not there had been a breach of the Act. The submission was rejected by the House of Lords. Lord *Halsbury* L.C. said : " I confess I cannot entertain a doubt that the Legislature, when using the language ' after considering the whole circumstances of the case,' intended to shew that the bishop's jurisdiction was not confined to the mere question whether there had been an infraction of the law. They intended to widen and enlarge the considerations which might weigh on the bishop's mind in determining the question whether the proceedings should go on " (3). He said : " the inquiry into all the circumstances of the case is one which may justly include considerations of the good to be done or the mischief involved in proceedings which, unless they obtain the bishop's sanction, cannot proceed " (4). Lord *Herschell* said : " My Lords, when the statute prescribes that the bishop's opinion is to be formed after considering the whole of the circumstances of the case, I think it must mean that the bishop is to consider all the circumstances which appear to him, honestly exercising his judgment, to bear upon the particular case, and upon the question whether he ought in that case to prevent proceedings being taken. I dissent entirely from the view that it is for the Courts or your Lordships to determine what are the considerations which ought to govern the bishop's opinion. If a dozen persons told to consider all the circumstances of a given case, and to form their opinion thereon, were required to state what considerations they had taken into account, I do not believe that any two of them would precisely agree in their statement " (5).

For these reasons I would dismiss the appeal.

FULLAGAR J. This is an appeal by special leave from an order of the Supreme Court of Victoria (*Sholl* J.) discharging an order nisi to review a decision of a court of petty sessions.

On 5th May 1955 the appellant was charged before the court of petty sessions with larceny. The court was constituted by a stipendiary magistrate (Mr. *Downey*) and a justice of the peace

(1) (1831) 2 B. & Ad., at p. 581 [109 E.R., at p. 1258].
(2) (1891) A.C. 666.
(3) (1891) A.C., at p. 675.
(4) (1891) A.C., at p. 676.
(5) (1891) A.C., at pp. 680, 681.

(Mr. *Harvey*). The appellant was represented by counsel. Larceny is an indictable offence, and in the ordinary course of things evidence would have been heard, depositions taken, and the appellant either committed for trial before a jury or discharged. Section 72, however, of the *Crimes Act* 1928 (Vict.), as re-enacted by s. 8 of the *Crimes Act* 1949, provides, so far as material, that, where any person is charged in petty sessions with larceny, and the value of the property stolen does not exceed £25, it shall be lawful for the justices to hear and determine the charge in a summary way, and, if the person charged confesses the same, or if the justices after hearing the whole case for the prosecution and for the defence find the charge proved, then they may convict him and commit him to gaol, if the value of the property does not exceed five pounds, for a term of not more than three months, or if that value exceeds five pounds, for a term of not more than six months. If they find the offence not proved, they are to dismiss the charge. There is a proviso that, " if the person charged does not consent, or if the justices are of opinion that the charge *is from any circumstances fit* to be prosecuted by proceedings as for an indictable offence rather than to be disposed of summarily ", the justices shall not summarily adjudicate thereon, but shall deal with the charge as a charge of an indictable offence. Section 73 (which also is re-enacted by s. 8 of the *Crimes Act* 1949) provides that, where the justices propose, either (a) on the application of the prosecutor before the hearing of any evidence on the charge, or (b) on the application of the prosecutor or the person charged or on the justices' own motion at any time during or immediately after the hearing of the evidence for the prosecution, to dispose of the case summarily, the person charged is to be asked whether he consents to the charge being tried summarily or desires that it should be sent for trial by a jury. If he consents to the charge being tried summarily, he is to be asked how he pleads, and the justices are then to proceed to deal with the case summarily. Section 74 (which has been amended by s. 8 of the *Crimes Act* 1949) has no application to the present case, but it was referred to in argument, and it will be convenient to state its effect here. It provides that, when any person is charged in petty sessions with (*inter alia*) simple larceny of property which may exceed £25 in value, and the evidence when the case on the part of the prosecution has been completed is in the opinion of the justices sufficient to put him on his trial for the offence charged, if it appears to them a case which may properly be disposed of in a summary way *and* may be adequately punished by virtue of the powers given by the section, they shall reduce the charge into writing and read it to the person

H. C. OF A. 1955-1956.

HALL v. BRAYBROOK.

Fullagar J.

charged and ask him whether he is guilty or not. If he says that he is guilty, they shall convict him and may commit him to gaol for a term of not more than twelve months. They are to inform the person charged, before they ask him to plead, that he is not bound to plead or answer, and that, if he does not plead or answer, or if he pleads not guilty, they will direct him to be tried.

What happened in the present case after the appellant had been charged in the court of petty sessions may be summarised from the reasons given by the magistrate for adopting the course which is challenged. As soon as the charge had been read, the police prosecutor asked that it be dealt with summarily. The magistrate asked him whether he was able to assure the court that the charge was one which could properly be dealt with summarily. He replied that it was a simple case of shoplifting, and that the amount was under twenty-five pounds. The magistrate said that, unless he could be given an assurance that the case could " in other respects " be dealt with properly in a summary way, the court would not deal with it summarily. What he meant by " in other respects " will appear in a moment. The evidence for the prosecution was then heard, depositions being taken. It appeared to the magistrate that a prima-facie case had been made out against the appellant, and he then read the information to the appellant and addressed him in the words required by s. 45 of the *Justices Act* 1928 in cases where the charge is of an indictable offence. Before the appellant pleaded, his counsel asked the court to consider further the application that the case should be dealt with summarily, and he joined the police prosecutor in applying that the case should be so dealt with. Discussion followed, in the course of which the magistrate observed that one of the matters which might well have to be considered on such an application was the character and antecedents of the person charged, and he asked counsel whether he was prepared to assure him that his client had no criminal record, or, if he had one, to disclose it to the court. Counsel declined to adopt the course suggested. After further discussion the magistrate announced that the court would " postpone further hearing of this matter, to give defendant an opportunity of testing our view, but, if no step is taken, the matter will be proceeded with as a preliminary examination "—that is to say, the charge would not be dealt with summarily, but would be treated in the ordinary way as a charge of an indictable offence.

It is clear that the view to which the magistrate felt bound to give effect was that the court could not decide whether any particular

charge of an indictable offence could properly be dealt with summarily unless and until it had information as to the character and prior convictions (if any) of the defendant, because without that information it could not determine whether the maximum penalty which could be imposed on summary conviction would be adequate. His Worship, however, was not unconscious of the possibility of embarrassment arising from this. He said that it seemed to him that, "if the justices are to require information as to the prior history of the defendant, the result may well be to disqualify them from adjudicating upon his guilt or innocence, even though they felt that, even in the light of any criminal record of the defendant, the offence, in the event of conviction, could have been adequately punished summarily." He then mentioned that earlier on that very day his colleague on the Bench, Mr. *Harvey*, had dealt summarily with a charge against the appellant, and had informed him (the magistrate) that the appellant had prior convictions, on one of which he had been sentenced to two years' imprisonment in New Zealand.

One point which was discussed in the course of the case appears to me to be clear. It was indeed, I think, abandoned in the end by counsel for the appellant. It is clear that neither a prosecutor nor a defendant, even if all the conditions prescribed by s. 72 are fulfilled, has a right to have a charge of an indictable offence dealt with summarily. It is always a matter for the discretion of the justices. I would say that it is a very wide discretion, the exercise of which could be reviewable, if at all, only in exceptional circumstances.

One other point, which is more arguable, may be dealt with at this stage. That is the question whether there was any "order" of the court of petty sessions which could be challenged by "order to review" under Div. 3 of Pt. V of the *Justices Act* 1928. On this question I agree with *Sholl* J. According to the register of the court of petty sessions, the appellant was "Remanded for seven days—Bail allowed in £50 with one surety in £50". This order was very properly made, and to the remand as such there could be no objection. But it was made because, and only because, the court was refusing to deal with the case summarily, and was so refusing because, and only because, it regarded the "character and antecedents" of the defendant as relevant to the question whether the case should be dealt with summarily or not. If it was wrong in regarding "character and antecedents" as a relevant consideration, mandamus would lie at common law to compel it to determine, without regard to that consideration, whether it would deal with

H. C. OF A. 1955-1956.

HALL v. BRAYBROOK.

Fullagar J.

the case summarily or not. In such a case the statutory remedy of "order to review" is substituted for mandamus by s. 155 of the *Justices Act* 1928.

These matters being out of the way, the question for decision may be stated as being whether what are rather vaguely called the "character and antecedents" of a person charged with an indictable offence, to which s. 72 of the *Crimes Act* 1928 applies, are or are not matters relevant for consideration by justices in deciding whether they will deal with the charge summarily. If the answer to this question should be in the affirmative, it would seem clear that some inquiry into these matters ought to be undertaken in every case in which an exercise of the power given by s. 72 is asked for by the prosecution or by the defence, or is suggested by the justices of their own motion. It would also seem clear that such an inquiry should not be limited to the matter of prior convictions but should extend to all those many and various matters which may carry weight with a court when it is called upon to pronounce sentence after conviction.

That a statute may require the making of such an inquiry cannot, of course, be disputed. It is purely a matter of construction of the relevant statutory provisions. But statutes are neither framed nor construed in a vacuum, and no lawyer, to my way of thinking, could possibly approach the question of construction unconscious of a principle always regarded as fundamental in the administration of criminal justice. This is that the prior convictions or bad character of a person charged with an offence cannot be proved by cross-examination or otherwise before a tribunal which is concerned with the question of his guilt or innocence of the offence charged. (There are, of course, exceptions to this rule, but they are limited and defined.) If, on the trial of an offence punishable summarily, the person charged is permitted to be cross-examined as to character or prior convictions, his conviction cannot stand, even though the justices say that they have been in no way influenced in their decision by the evidence as to character: see, e.g., *Hunter* v. *Joseph* (1); *Teese* v. *Revill* (2). The same principle underlies s. 428 of the *Crimes Act* 1928, which provides for cases where prior convictions are included as counts in a presentment or indictment. A very strict observance of the provisions of this section is required: see *Faulkner* v. *The King* (3). It must be considered indeed a strange anomaly that evidence of character should be required or permitted to be given before a tribunal which, whether the charge

(1) (1903) 28 V.L.R. 583.
(2) (1917) 42 V.L.R. 569.
(3) (1905) 2 K.B. 76.

be dealt with summarily or treated as indictable, will be called upon to deal with the case on its merits. A statute could, of course, so provide, as I have said, and at one time, as will be seen, there were statutes which did so provide in England. But I would think it a very grave mistake to construe a statute as so providing, unless it so provided in express terms or a very clear affirmative implication to that effect was apparent.

It is plain that s. 72 of the *Crimes Act* 1928 does not expressly provide that an investigation of the character and antecedents of the person charged shall or may be undertaken before the discretion given by that section is exercised. And, so far as implications are concerned, any implication to be found is, in my opinion, to the contrary. The material words of the proviso are : " if the justices are of opinion that the charge is from any circumstances fit to be prosecuted by proceedings as for an indictable offence rather than to be disposed of summarily." I would agree that the words " from any circumstances " are very wide. But the question to be determined in the light of " any circumstances " is whether the *charge* is " *fit* to be prosecuted " in the one way rather than in the other. I would not, of course, say that the language used is incapable of including a reference to the possibility of adequate punishment, but I would certainly say that the reference is prima facie to the charge itself, to the alleged acts constituting the commission of the offence charged, and to nothing else. It is not really correct to say, as the learned Solicitor-General said, that to read the section as not including " character and antecedents " involves a " reading down " of the word " circumstances ". I would say, on the contrary, that prima facie the word does *not* include a reference to character and antecedents.

The history of the relevant legislation in England and in Victoria is interesting, and, I think, illuminating. The first English Act which needs to be mentioned is that of 1847 (10 & 11 Vict. c. 82) which dealt only with " juvenile offences ". The words used in that Act were : " if such justices shall be of opinion before the person charged shall have made his or her defence that *the charge is from any circumstance a fit subject* for prosecution by indictment ". More general provision was made by an Act of 1855 (18 & 19 Vict. c. 126), s. I of which corresponds to Victorian s. 72, and s. III to Victorian s. 74. In s. I the relevant words are " if it appear to such justices that the *offence is one which, owing to a previous conviction of the person charged is punishable by law with transportation or penal servitude,* or . . . that *the charge is from any other circumstances fit to be made the subject* of prosecution by indictment

H. C. OF A. 1955-1956.

HALL v. BRAYBROOK.

Fullagar J.

rather than to be disposed of summarily ". The Acts of 1847 and 1855 (so far as material) were repealed by the *Summary Jurisdiction Act* 1879 (42 & 43 Vict. c. 49), which enacted new and somewhat different provisions extending considerably the scope of the summary jurisdiction in respect of indictable offences. Sections 11, 12 and 13 provided respectively for the exercise of the summary jurisdiction in three different classes of case. In ss. 11 and 12 the power to exercise that jurisdiction was given to the justices " if they think it *expedient* so to do *having regard to the character and antecedents of the person charged, the nature of the offence, and all the circumstances of the case* ". In s. 13 the jurisdiction was given if the justices are satisfied " that the *case is one which, having regard to the character and antecedents of the person charged, the nature of the offence, and all the circumstances of the case*, may properly be dealt with summarily, *and may be adequately punished* by virtue of the powers of this Act. It should be added that s. 14 provided generally, with regard to adults, that the case should not be dealt with summarily if the offence was " one which, owing to a previous conviction on indictment of the person so charged, is punishable by law with penal servitude."

Sections 12 and 13 of the *Summary Jurisdiction Act* 1879 were repealed by the *Criminal Justice Act* 1925 (15 & 16 Geo. V. c. 86), and replaced by s. 24 of that Act, which, however, still included " the character and antecedents of the person charged " among the matters which were to be considered by justices in deciding whether it was expedient to deal with a charge summarily. In 1948, however, a radical departure was made by the *Criminal Justice Act* of that year (11 & 12 Geo. VI. c. 58). Section 79 of that Act repealed the references to " character and antecedents of the person charged " in s. 11 of the *Summary Jurisdiction Act* 1879 and in s. 24 of the *Criminal Justice Act* 1925. At the same time it was enacted by s. 29 that, where under s. 24 of the Act of 1925 a person who is less than seventeen years of age is tried summarily for an indictable offence, and is convicted, then, if the justices think that his " character and antecedents " are such that his punishment should be greater than that which they have power to inflict, they may commit him in custody to quarter sessions for sentence. It is to be noted that this provision does not apply to all cases covered by s. 25 of the *Criminal Justice Act* 1925, and, so far as I can ascertain, does not apply to cases under s. 11 of the *Summary Jurisdiction Act* 1879. The cases not covered by s. 29 of the Act of 1948 seem to be cases of juvenile offences. In those cases the references to " character and antecedents " have been abolished, and there is no power to commit to

quarter sessions for sentence. The whole subject is now covered by the *Magistrates Courts Act* 1952 (15 & 16 Geo. VI. and 1 Eliz. II. c. 55) : see especially s. 19. The main point to be noted is that before 1879 the immediately relevant English provision did *not*, whereas from 1879 to 1948 it *did*, refer expressly to " character and antecedents ".

Before proceeding to consider the Victorian legislation, I point out that under the relevant English legislation the justices were not bound finally to decide whether they would deal summarily with the charge or not until the moment arrived for a decision as to the guilt of the person charged. That is to say, they might proceed to deal with the case summarily, and hear all the evidence, and then, before actually pronouncing a conviction, decide that they will commit for trial. If, of course, they actually pronounced a conviction, that was the end of the matter, and it only remained to pass sentence : if, instead of passing sentence, they then committed for trial, a plea of *autrefois convict* would be open to the accused in quarter sessions. But at any time up to actual pronouncement of conviction, they might change their minds and commit for trial. This fact suggests that, under the *Summary Jurisdiction Act* 1879, it might have been held proper for the justices to abstain from inquiry into " character and antecedents " until they had decided to convict, and then to undertake that inquiry before actually convicting. I have tried to find out, but have not been able to ascertain, whether there was any settled or approved practice in the matter. We find, however, Dr. *Pendleton Howard* in his book *Criminal Justice in England* (1931), writing :—" Some courts attempt to get around the difficulty by asking the police officer at the outset whether there is any reason why the case should not be dealt with summarily. The officer, having in mind the ' character and antecedents ' of the accused, replies simply ' Yes ' or ' No ', and the magistrate is usually governed accordingly." This may have been a sensible enough escape from an embarrassment which was obviously felt, but it left a great deal to the police officer. Some twenty years earlier *Avory* J. in *R.* v. *Hertfordshire Justices* (1), had said :— " It would obviously be most improper for the justices to inquire into the character and antecedents of the person charged until after having heard all the evidence, they have determined to convict him ; if they did do so, and then proceeded to convict, the defendant could come to this Court and get the conviction quashed on the ground that the justices had wrongly admitted evidence as to character before conviction " (2). This *dictum* was referred to by

(1) (1911) 1 K.B. 612.

(2) (1911) 1 K.B., at p. 624.

H. C. OF A. 1955-1956.

HALL v. BRAYBROOK.

Fullagar J.

Humphreys J., speaking for the Court of Criminal Appeal, in *R.* v. *Sheridan* (1). At that time the relevant legislation was contained in the *Criminal Justice Act* 1925. *Humphreys* J. said :—" Some comment was made in the course of the argument upon the dicta of *Avory* J. in the *Hertfordshire Justices Case* (2), as to the right of justices to inquire into the character and antecedents of the person charged before deciding to convict. The language of s. 12 of the *Summary Jurisdiction Act* 1879, the statute then in force, is somewhat different from that used in s. 24 of the *Criminal Justice Act* 1925. A consideration of sub-s. (1) of the latter section makes it plain in our view that justices are now required as a preliminary to any decision as to dealing summarily with an indictable offence to hear and to take into consideration certain matters specified in the section, one of them being the character and antecedents of the accused, to enable them to decide whether they ought to deal with the case summarily " (3). This comment is itself open to two comments. Firstly, it does not suggest that the *dictum* of *Avory* J. was wrong, though I find some difficulty in distinguishing between the two statutory provisions which are contrasted. Secondly, it omits to take into account (although it was the whole point in *R.* v. *Hertfordshire Justices* (4), which was held to have been correctly decided) the fact that the " decision ", to which the inquiry into character was " a preliminary ", need not be finally made until after a decision that there ought to be a conviction has been reached. In any case the observation of *Avory* J. seems to me very significant in relation to the suggestion that the question of character should be a " preliminary " question in a criminal proceeding. It seems clear that the magistrate in this case felt pressed by the same view. And I do not think that he would be likely to find much comfort in the concluding words of the judgment of *Humphreys* J. in *R.* v. *Sheridan* (5), which were repeated by Lord *Goddard* L.C.J. in *R.* v. *Sampson* (6). He might perhaps be more impressed by what was said by *Hodges* J. in *Teese* v. *Revill* (7). In that case, in which the justices had said that their minds had not been affected by evidence of bad character and prior convictions, which had been wrongly admitted, his Honour said : " It is a difficult thing for any man—I can say it from personal knowledge—to say how much he is affected by facts that come to his knowledge in that way, although he may feel it is not legitimate evidence " (8).

(1) (1937) 1 K.B. 223.
(2) (1911) 1 K.B. 612, at pp. 623, 624.
(3) (1937) 1 K.B., at pp. 230-231.
(4) (1911) 1 K.B. 612.
(5) (1937) 1 K.B., at p. 231.
(6) (1947) 32 C.A.R. 94, at pp. 96-97.
(7) (1917) 42 V.L.R. 569.
(8) (1917) 42 V.L.R., at p. 572.

Turning now to Victoria, the first material Act seems to be the Act of the Legislative Council of New South Wales, 14 Vict. No. 2, which was simply adopted after Separation (with some extension of scope) by the Act of the Legislative Council of Victoria, 17 Vict. No. 2. This enactment followed the terms of the English Act of 1847. The material words in the proviso are simply " from any circumstance ", but it is to be noted that, as in the English Act of 1847, the proviso commences : " If such justices shall be of opinion *before the person charged shall have made his or her defence.*" The next legislation is contained in s. 66 of the *Criminal Law and Practice Statute* 1864 (No. 233). Like the English Act of 1855, it omits the words italicised in the above extract from the Act of 1847, and it otherwise follows the terms of the English Act of 1855 except that it omits the words " that the offence is one which, owing to a previous conviction of the person charged is punishable by law with transportation or penal servitude ". The material words left are thus " from any circumstances ". Neither transportation nor penal servitude has ever been a lawful punishment in Victoria. Sections 67 and 68 of the Victorian Act of 1864 follow the terms of ss. II and III of the English Act of 1855.

Since 1864 various changes have been made affecting the scope of the legislation relating to indictable offences triable summarily, and slight alterations of language have been made. The latest changes were made, as has been seen, by the *Crimes Act* 1949. But no change relevant to the present case has ever been made. In particular the important change made in England by the *Summary Jurisdiction Act* 1879, when reference to " character and antecedents of the person charged " was first introduced, has never been adopted in Victoria, although Victoria did adopt, by s. 56 of the *Justices of the Peace Act* 1887, s. 24 of the English Act of 1879, which deals with the same subject matter. This section now appears as s. 57 of the *Justices Act* 1928.

This recital has been tedious, but what it reveals has, in my opinion, a twofold significance which can be stated very shortly.

In the first place, it shows that the legislature in England, when it intended—if it ever did really so intend—that an inquiry into character and antecedents should precede the substantive inquiry, indicated that intention by express reference to character and antecedents. When it ceased in 1948 to have that intention, it simply omitted that express reference to character and antecedents. At the same time it provided, in some cases, for an inquiry into character and antecedents after summary conviction, and authorised

H. C. OF A. 1955-1956.

HALL v. BRAYBROOK.

Fullagar J.

the justices, if they thought fit, to commit the case to quarter sessions for sentence. But it did not do this in all cases. In some cases it simply deleted the reference to character and antecedents, and gave no new power to the justices.

In the second place, the survey shows the legislature in Victoria adhering throughout to the English Act of 1855, which contained no general reference to character and antecedents. That English Act did contain a special reference to a particular class of prior convictions, and this was omitted from the Victorian legislation. To have simply transcribed it would have been inappropriate, because, as I have said, neither transportation nor penal servitude has ever been a lawful punishment in Victoria. But there were, of course, corresponding offences in Victoria, and no reference to any of these was included.

These considerations appear to me to lend strong support to the view which I should certainly have taken without reference to any historical matter. That view is simply that a statute ought not to be construed as abrogating a fundamental principle of criminal law unless it appears very clear that such an abrogation is intended. And, in the present case, so far from this appearing very clear, the word " circumstances " in its context refers, in my opinion, prima facie to circumstances surrounding the commission of the crime itself, and not to such extrinsic facts as that the person charged is a very virtuous person or a very vicious person.

There is one other point which supports, I think, the view which I have expressed. That is that s. 72 of the Victorian Act (which is the immediately relevant section) is to be contrasted with s. 74. For, whereas s. 72 contains no reference to character or antecedents or to the possibilty of adequate punishment, s. 74 contains the words " and may be adequately punished by virtue of the powers given by this section." These words come from the corresponding section (s. III) of the English Act of 1855. Their inclusion in s. 74 and their omission from s. 72 seem natural and appropriate, and the contrast between the two sections seems to be conspicuous and important. For s. 74, unlike s. 72, gives the power to exercise summary jurisdiction to the justices only at the close of the case for the prosecution, only if they then think that a prima facie case has been made against the person charged, and only if the person charged, after being properly warned, then pleads guilty.

In my opinion, this appeal should be allowed, the order nisi to review made absolute, and the case remitted to petty sessions.

KITTO J. Section 72 of the *Crimes Act* 1928 (Vict.), inserted by the *Crimes Act* 1949, applies where a person is charged before justices assembled in petty sessions with any of certain specified offences. The function of the justices in such a case, apart from the section, is only the executive function of investigating the two questions whether the evidence available in support of the charge justifies putting the person charged upon his trial, and, if so, whether he should be held or admitted to bail in the meantime. The section, however, gives the justices jurisdiction to hear and determine the charge in a summary way themselves, provided first that the person charged consents to their doing so after having been asked whether he does so consent or desires the charge sent for trial by a jury, and secondly that the justices are not of opinion that the charge is " from any circumstances " fit to be prosecuted by proceedings as for an indictable offence rather than to be disposed of summarily. If they hear the charge summarily and convict the person charged, they may commit him to gaol for imprisonment, but the maximum term they may impose is less than may be imposed if the charge is prosecuted on indictment.

In the case now before us, a charge came for investigation before two justices, a stipendiary magistrate and an honorary justice. Although both the prosecution and the defence requested the justices to determine the charge summarily they refused to do so, their reason being that in view of previous convictions of the person charged it was more expedient that the charge should be tried before a court which would have power to impose a more severe sentence of imprisonment than the limits of their own jurisdiction would permit. The matter was then adjourned to permit of a proposed application to the Supreme Court of Victoria for an order to review. An order nisi was obtained, but upon its return it was discharged by *Sholl* J. From the order discharging it this appeal is brought by special leave.

In the argument before us the appellant took his stand upon the familar rule of English law which in general precludes a tribunal responsible for adjudicating upon a criminal charge from learning, before giving its decision, of the character or antecedents of the person charged unless that person himself brings character into the case. The use he made of the rule was to submit that it has won such full recognition as essential for the fair administration of criminal justice that Parliament ought not to be understood as including any prior convictions of the person charged among the circumstances to which in s. 72 it authorises justices to have regard.

H. C. OF A. 1955-1956.

HALL v. BRAYBROOK.

KITTO J.

I have not found it possible to accept this submission. If Parliament, or the draftsman, had adverted to the point and had decided that prior convictions, if known to the justices, should be excluded from the circumstances to be regarded, I should think that almost inevitably the intention to exclude them would have been expressed in appropriate words. The all-embracing expression " any circumstances " would have clamoured for qualification. The history of comparable legislation in England and in Victoria seems to me to make it practically certain that the qualification would not have been left to inference or speculation. No doubt the reasons for the rule might be expected to commend themselves to Parliament ; but to read unambiguous words as subject, for that reason, to an unexpressed exception is a course which I do not feel to be justifiable in principle.

It was indeed submitted for the appellant that the words " any circumstances " are not unambiguous, but may mean, on the one hand, all circumstances which are relevant to the fitness of the charge to be prosecuted by one method rather than by the other, or, on the other hand, only the circumstances of the conduct which is charged as an offence ; and the general rule which has been mentioned was said to provide a reason for preferring the latter interpretation. But the expression used is not " any circumstances of the conduct charged ". It is " any circumstances ". Relevance to the choice of the appropriate mode of prosecution of the charge necessarily distinguishes the circumstances which may influence the opinion of the justices from those which may not ; but the expression " any circumstances " itself seems to me unambiguous. Even as to relevance, it may be observed that the question to be decided is whether there is a superior fitness in the prosecution of the charge by " proceedings as for an indictable offence ", and that such proceedings do not end with the return of a verdict, but extend to and include the passing of the sentence or the making of the order which the court thinks proper in consequence of the verdict. In any case, it would be difficult to maintain that although the circumstances of the conduct charged are relevant, the circumstances of the person against whom the charge is made are irrelevant, to the determination of the better method of dealing with even the limited question of innocence or guilt.

But let it be assumed that the rule excluding prior convictions from proof in the course of the case for the prosecution would provide, if it were an absolute rule, a ground for treating the expression " any circumstances " as not including prior convictions of the person

charged. Should the same result be considered to follow when it is recognised that the rule is not absolute? Whatever its *rationale* (as to which some remarks in *R.* v. *Sims* (1) may be noted), the rule is subject at least to the qualification that if the person charged endeavours to establish a good character for himself, even if only by cross-examining the witnesses for the prosecution, the prosecution is at liberty, in most cases, to give proof of his previous convictions: *R.* v. *Redd* (2). See also *MacDonald* v. *The King* (3) and an article by Professor *Julius Stone* (4). If prior convictions, proved during the prosecution's case in accordance with this or any other qualification to the general rule, are to be understood as excluded from the circumstances described in s. 72 as "any", it must be because, unless convictions are always excluded, even when rightly before the justices, the section would necessitate an inquiry into the existence of prior convictions in every case, and so contradict the rule completely. In my opinion the answer is that s. 72 takes the circumstances known to the justices exactly as it finds them at the time when the decision as to the appropriate mode of prosecution comes to be made, neither prescribing a separate investigation of facts nor interfering in the least with the principles which up to that time have applied to the conduct of the proceedings. Its meaning seems to me to be that the justices are to take account of all those circumstances in the material before them which are in any way relevant to the choice of procedure, having regard to every aspect of the prosecution of the charge, including the imposition of appropriate punishment in the event of a conviction.

The judgment of *Avory* J. in *R.* v. *Hertfordshire Justices* (5), whether it should now be regarded as right or wrong in result, illustrates the method of approach to such a matter which seems to me to be correct. There were two sections in the English legislation there considered. One provided that justices might deal summarily with certain offences if they thought it expedient so to do and that they should have regard on the question of expediency to the character and antecedents of the person charged. The other provided that for the purpose of ascertaining whether it was expedient to deal with the case summarily they might, "either before or during" the hearing, adjourn the case and remand the person charged. *Avory* J. did not give to either section a meaning narrower than that which it appeared to have upon its face; but

(1) (1946) K.B. 531, at pp. 537 et seq.
(2) (1923) 1 K.B. 104, at p. 107.
(3) (1935) 52 C.L.R. 739.
(4) (1942) 58 L.Q.R. 369.
(5) (1911) 1 K.B. 612, at p. 624.

H. C. OF A. 1955-1956.

HALL v. BRAYBROOK.

KITTO J.

he declared that if the justices inquired into the character and antecedents of the person charged before having reached the point of deciding to convict him they would be guilty of an impropriety which would invalidate a conviction. The general rule which forbade them to inform themselves as to character and antecedents before making up their minds upon the issue of guilt or innocence applied, as I read his Lordship's judgment, not to require or justify an artificial or limited construction of the legislation, but to govern the admissibility of evidence throughout the proceeding into which the legislation merely injected a new question.

I am willing to assume that, under the Victorian Act we are considering, justices would be acting contrary to law if they were to institute an inquiry into the matter of prior convictions at any stage of the hearing of a charge, unless and until, having determined to proceed summarily, they had reached the point of deciding that he should be convicted. True, if they made such an inquiry before determining to proceed summarily they would be inquiring as to a matter relevant to the choice to be made between the possible modes of prosecution, but they would be thereby precluding themselves from proceeding legitimately to a summary adjudication, and that means that they would be precluding themselves from making the choice which the statute requires shall be made.

In the present case the stipendiary magistrate asked a question on the topic. He was fully alive to the general rule and was anxious to give the benefit of it to the person charged. On the other hand he obviously felt that if the charge should be found proved and the person charged had prior convictions, the interests of justice might not be fully served by the comparatively short term of imprisonment which was all that could be imposed at a summary trial. He used a form of words which he evidently hoped would observe the rule and at the same time would enable a proper choice of procedure to be made. He asked counsel for the person charged whether he was prepared either to give an assurance that his client had no criminal record, or, if he had a record, to disclose it. Though this question did not inquire directly whether the client had a record or not, it placed counsel in the position of either disclosing the client's record or giving a clear indication by silence that he had a record the disclosure of which would or might be to his disadvantage. For that reason the question, though put with a desire to observe the rule, was in substance an infringement of it. Counsel declined to make either of the statements which the question invited, and the incident as a whole, if it had occurred in the course of a trial which

resulted in a conviction, would clearly have provided a sufficient ground for setting the conviction aside. That was enough to raise at once the question whether the justices ought to refrain from proceeding further with the case. But there was another circumstance also which made that question one of immediate importance, namely that the honorary justice had learned in other proceedings of prior convictions of the person charged, and had communicated his information to his colleague. In some circumstances the proper view would doubtless have been that they were in such a position of embarrassment that they ought to proceed no further, and should leave the whole case, including the selection of the appropriate form of proceeding, to be dealt with by other justices. But if this had been so, the reason would have been that since they could not properly undertake to try the charge summarily themselves, and had no power to direct a summary trial before other justices, they were not in a position to make the choice between the two possible kinds of proceedings which s. 72 contemplates.

What happened next, however, completely altered the situation, removing altogether the reason for their ceasing to deal with the matter. The stipendiary magistrate stated from the bench what the honorary justice had told him about prior convictions, and the incident of the magistrate's question and counsel's response to it was fresh in everyone's mind. Notwithstanding the clear knowledge which the appellant and his counsel thus had that the justices knew of his record, he not only consented to their disposing of the charge summarily, but insisted through his counsel that he was entitled as of legal right to have them do so. There was no such legal right, for the justices were authorised by the Act to deny a summary trial if from any circumstances they should be of opinion that the prosecution of the charge by proceedings as for an indictable offence was the more fitting procedure. But the point is that the appellant declared, in the most emphatic way possible, his willingness to be tried summarily by justices who he knew were aware of his record, and did so with counsel to advise him and in such circumstances that, if a summary trial had been proceeded with and had resulted in a conviction, the justices' knowledge of his record could not have been available as a ground of challenge to the conviction. That meant that the justices' freedom to make the choice required by s. 72 was effectually restored.

It was in this situation that the justices applied their minds to making the choice, and in my opinion there was no reason in law why, in doing so, they should not treat as a relevant matter, and

H. C. OF A. 1955-1956.

HALL v. BRAYBROOK.

KITTO J.

as the decisive matter, the existence of the appellant's record of convictions. I see no reason why they might not properly have done so if they had learned of the convictions through evidence which had become admissible because the appellant had allowed it to be given by opening up the question of character, and I see no difference in principle between such a case and the present. Because of the prior convictions, the opinion of the justices was that the charge before them was fit to be tried on indictment rather than summarily. Holding that opinion, they were disentitled by s. 72 to proceed to a summary adjudication, and it was their duty to commit for trial.

For these reasons I am of opinion that *Sholl* J. was right in discharging the order nisi, and I would dismiss the appeal.

Appeal dismissed with costs.

Solicitor for the appellant, *J. M. Lazarus.*

Solicitor for the respondent, *Thomas F. Mornane*, Crown Solicitor for the State of Victoria.

R. D. B.