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The car was placed in such a situation that it could not be extricated, and the tram car struck it and did the injury complained of. There is, therefore, ample evidential connection in the causation, and of a direct and proximate kind, so that the jury were quite justified in finding that the damage was attributable to the negligence.

I therefore think the appeal should be dismissed.

GAVAN DUFFY J. I desire to abstain from expressing a final opinion as to whether any Act of Parliament makes the appellants liable for non-feasance as well as for misfeasance. It is enough to say that in this case the jury were justified in finding, as they did, that the injury complained of was caused by negligence of the appellants in respect of work actually done by them.

Appeal dismissed with costs.

Solicitors, for the appellants, *Dowling & Tayler.*
Solicitor, for the respondent, *E. J. Peterson.*

B. L.

Appl *Love & Peters v A-G (NSW)* 64 ALJR 175

Cons *Love v A-G (NSW)* 169 CLR 307

[HIGH COURT OF AUSTRALIA.]

DONOHOE . . . . . APPELLANT;
INFORMANT,

AND

CHEW YING . . . . . RESPONDENT.
DEFENDANT,

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ON APPEAL FROM A POLICE MAGISTRATE OF NEW SOUTH WALES.

SYDNEY, *March* 26.

Griffith C.J., Barton, Isaacs and Gavan Duffy JJ.

Practice—Summons upon information for offence against Commonwealth Statute—Issue of summons by justice of the peace for a State—Form of summons—Persons before whom defendant called on to appear—Judicial exercise of jurisdiction—Appeal—Case stated—Notice of appeal not given within prescribed time—Special leave to appeal—Judiciary Act 1903 (*No.* 6 *of* 1903), *sec.* 39—

Justices Act 1902 (*N.S. W.*) (*No.* 27 *of* 1902), *secs.* 13, 99, 105, *Second Schedule, Form* M1—*Justices* (*Amendment*) *Act* 1909 (*N.S. W.*) (*No.* 24 *of* 1909), *sec.* 19.

The issue of a summons upon an information for an offence punishable on summary conviction is a matter of procedure for the summary conviction of a person charged with an offence, and a justice of the peace in issuing such a summons is not judicially exercising any jurisdiction.

Held, therefore, that a summons for an offence against a Statute of the Commonwealth, punishable on summary conviction, alleged to have been committed in New South Wales may be issued by a justice of the peace notwithstanding the provisions of sec. 39 of the *Judiciary Act*.

The form of a summons upon an information for an offence prescribed by the *Justices Act* 1902 (N.S.W.) Second Schedule, Form M1, requires the defendant to appear at a certain place and time "before such justices of the peace for the said State as may then be there." A summons issued upon an information for an offence alleged to have been committed in New South Wales against the *Immigration Restriction Act* 1901-1910 required the defendant to appear "before such justice or justices of the peace for the said State as may then be there."

Held, that the summons was good, notwithstanding that under sec. 39 of the *Judiciary Act* the information could only be heard by a Stipendiary or Police Magistrate.

Although the appellant has not served notice of appeal within ten days after receiving a case stated pursuant to the *Justices Act* 1902 (N.S.W.) and the *Justices* (*Amendment*) *Act* 1909 (N.S.W.), as required by sec. 105 of the Act of 1902 as amended by sec. 19 of the Act of 1909, special leave to appeal may be granted by the High Court on terms.

APPEAL from a Court of Petty Sessions of New South Wales exercising federal jurisdiction.

On 28th August 1912 an information was exhibited at Sydney, whereby John Thomas Tamplin Donohoe alleged that George Chew Ying had been guilty of a contravention of the *Immigration Restriction Act* 1901-1910. Upon this information a summons was issued by Arthur Blix, a justice of the peace, commanding Chew Ying to appear on a specified day at a specified hour at the Police Office, Moruya, "before such justice or justices of the peace for the said State as may then be there," to answer the information. The information came on for hearing before the Court of Petty Sessions at Moruya before M. J. McMahon, Esq., P.M., when objection was taken on behalf of Chew Ying to the jurisdiction of the Court on the grounds—

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(1) that the summons purported to be issued by a justice of the peace; (2) that the defendant was not summoned to appear before a Stipendiary Magistrate, a Police Magistrate or other magistrate as specified by sec. 39 of the *Judiciary Act*, but was summoned to appear before a justice or justices of the peace for the State of New South Wales. The Police Magistrate overruled the first objection, but he upheld the second objection, and, therefore, did not hear and determine the information.

From that decision the informant now appealed to the High Court. The appeal was brought by way of a case stated by the Police Magistrate pursuant to the *Justices Act* 1902 (N.S.W.) and the *Justices (Amendment) Act* 1909 (N.S.W.).

Flannery, for the appellant.

E. M. Mitchell, for the respondent, took a preliminary objection. The notice of appeal was not served within ten days after the receipt of the case stated, as required by sec. 105 of the *Justices Act* 1902 as amended by sec. 19 of the *Justices (Amendment) Act* 1909. Compliance with the provisions of that section is a condition precedent to the right of appeal, and in the event of non-compliance the appeal should be struck out: *McPherson* v. *Burke* (1); *Hart* v. *Todd* (2); *Fortescue* v. *Pearce* (3); *Braham* v. *Sisson* (4); *Wills & Sons* v. *McSherry* (5).

[ISAACS J. referred to *Enders* v. *Rouse* (6); *Lockhart* v. *Mayor &c. of St. Albans* (7).

GRIFFITH C.J. referred to *Great Northern and London and North Western Joint Committee* v. *Inett* (8).]

Flannery applied for special leave to appeal, if necessary.

Per curiam. Special leave will be granted, the appellant undertaking to abide by any order as to costs that the Court may think fit to make. The practice appears, from the cases which have been cited, to be well settled. According to the practice both in England and New South Wales, the appeal should be struck out.

(1) 26 W.N. (N.S.W.), 150.
(2) 11 W.N. (N.S.W.), 123.
(3) 12 W.N. (N.S.W.), 112.
(4) 14 W.N. (N.S.W.), 149.
(5) 29 T.L.R., 48.
(6) 11 V.L.R., 827.
(7) 21 Q.B.D., 188.
(8) 46 L.J.M.C., 237.

Flannery. The summons is a mere variation of the form prescribed by Form M1 in the Second Schedule to the *Justices Act* 1902, and such a variation may be made under sec. 99. [He also referred to secs. 60, 62, 115.] A summons need not be so particular in form as to show on its face the absolute jurisdiction of the Court. The onus is on the respondent to show that the summons indicates a Court which has no jurisdiction. The respondent has not been prejudiced by the form of the summons. [He also referred to *Waters* v. *Handley* (1); *R.* v. *Garrett-Pegge*; *Ex parte Brown* (2); *Stone's Justices Manual*, 40th ed., p. 418; *Neal* v. *Devenish* (3); *Pearks, Gunston & Tee Ltd.* v. *Richardson* (4).]

E. M. Mitchell. The words "justices of the peace" mean one or more justices of the peace: See 11 & 12 Vict. c. 43. The form was not adapted so as to tell the respondent that the justice who would preside at the Court would be one of the magistrates specified by sec. 39 of the *Judiciary Act.* In the case of summary jurisdiction the issue of a summons is an exercise of judicial power. The test is that if the summons showed on its face that there was no offence certiorari or prohibition would lie.

Flannery, in reply, referred to *R.* v. *Thom Sing* (5).

GRIFFITH C.J. The objection taken by the respondent on which the magistrate decided was that the summons was bad because, the offence charged being an offence against a Commonwealth law, the summons did not require the respondent to appear before a Stipendiary Magistrate or a Police Magistrate, or a Special Magistrate, as specified by sec. 39 of the *Judiciary Act.* The summons was drawn in the ordinary form prescribed by the *Justices Act* 1902 (N.S.W.). The form given in the Schedule to that Act requires the defendant to appear "before such justices of the peace for the said State as may then be there." The summons in this case required the respondent to appear "before such justice or justices of the peace for the said State as may then be

(1) 6 Dowl. & L., 88.
(2) (1911) 1 K.B., 880.
(3) (1894) 1 Q.B., 544.
(4) (1902) 1 K.B., 91.
(5) 13 C.L.R., 32.

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there." Of course, as there are many cases which cannot be adjudicated upon by less than two justices, the summons may very properly be varied so as to meet one of those cases. Indeed, sec. 99 expressly so provides. But, in my opinion, a summons drawn in the form given in the Schedule is sufficient in all cases.

It is suggested that it does not appear on the face of the summons that the justices before whom the respondent is called upon to appear will have jurisdiction to hear the information. But that is a difficulty which may arise in any case. In many of the Australian States justices have jurisdiction all over the State. In some of them, just as in England, justices have only a limited territorial jurisdiction. But the summons in all is in the same form. In my opinion, it means that the defendant is called upon to appear before such justices qualified to exercise jurisdiction as may then be there.

If that were not a sufficient answer to the objection, we find that by sec. 13 of the same *Justices Act* 1902 it is provided that, within the metropolitan and certain other police districts the jurisdiction which justices ordinarily have shall only be exercised by a Stipendiary Magistrate, and yet the same Act prescribes a form of summons to be used in all cases. It appears to me, therefore, that there is nothing in the objection, and that the magistrate was wrong.

The respondent, however, is entitled, special leave to appeal having been granted, to fasten on any ground in order to support the decision of the magistrate, and so he takes a further ground of objection, which he took before the magistrate, and which the magistrate decided against him, namely, that the summons does not purport to be signed by a magistrate entitled to exercise jurisdiction judicially under the *Judiciary Act*. Sec. 68 of that Act prescribes that the laws of each State respecting the procedure for, amongst other things, the summary conviction of persons charged with offences shall apply and be applied, so far as they are applicable, to persons charged with offences against the laws of the Commonwealth committed within that State, and that the several Courts of a State exercising jurisdiction with respect to the summary conviction of offenders charged with offences against the laws of the State shall have the like jurisdiction with respect to persons charged with offences against the

laws of the Commonwealth committed within the State, with a proviso that such jurisdiction is not to be "judicially exercised with respect to summary conviction or examination and commitment for trial," except by certain named magistrates.

In my opinion, the issue of a summons is a matter of procedure for the summary conviction of a person charged with an offence. In *R.* v. *Thom Sing* (1), I held that the taking of a recognizance before a justice who was not specially authorized to act judicially with respect to an offence against a law of the Commonwealth was a matter of procedure, and that the justice in taking the recognizance was not judicially exercising any jurisdiction. In my opinion the issue of a summons is in like manner a matter of procedure and is not a judicial exercise of jurisdiction. It is clear that some meaning must be given to the word "judicially" whether it refers to summary conviction or to commitment for trial. It seems to me that the jurisdiction which is not to be judicially exercised is the jurisdiction to decide whether to convict or to discharge the accused, or, in the case of commitment for trial, to commit or not to commit. Otherwise, no effect at all would be given to the word "judicially," and the proviso should be read "provided that such jurisdiction shall not be exercised," &c. A distinction is clearly drawn between exercising jurisdiction judicially and exercising it ministerially. The same word "judicially" is used in sec. 39 (2) (*d*), and obviously in the same sense.

The objections therefore fail, and the appeal should be allowed.

BARTON J. I concur.

ISAACS J. I concur.

GAVAN DUFFY J. I concur.

Appeal allowed.

Solicitor, for the appellant, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

Solicitor, for the respondent, *D. A. B. Pollock*, Moruya, by *W. M. Smyth King*.

B. L.

(1) 13 C.L.R., 32.