

## **JUSTICES AND THE INSTIGATION OF CRIMINAL PROCEEDINGS ON COMPLAINT**

### **1. INTRODUCTION**

The role of justice in the instigation of criminal proceedings is ill defined in South Australia. Various powers and functions are conferred upon lay justices by the Justices Act 1921. Couched in general terms, these include the duty to receive a complaint and the power to summons a defendant to answer that complaint. This paper will attempt to rationalise the cases in this area, to identify the nature of the duties imposed upon justices and to examine the issues which have arisen where justices have been said to have misconceived or improperly exercised their powers.

The distinctions between the making of a complaint and the issue of a summons or other process on that complaint have been emphasised in the South Australian cases to an extent that they may not have been in other jurisdictions. The authorities stress that the preconditions for a valid complaint, the document upon which the jurisdiction of the court is founded, are minimal. It will be argued that, although much judicial thought has been given to the procedure which should be observed before a valid summons can issue — in which the rights of the defendant have played an important part, it is clear that in South Australia an improperly issued summons will afford no defence to the individual. As a consequence, it appears that a defendant may rarely, if ever, successfully challenge the jurisdiction of a summary court on grounds other than territoriality. It is submitted that this result is strongly supported by the scheme of Justices Act itself and that, accordingly, not adequate protection exists from maladministration within the criminal justice system in South Australia in this regard. It may be that the predisposition of courts elsewhere to emphasise the judicial nature of the justices' function in relation to the issue of a summons has obscured this problem in the past.

In addition to the foregoing, particular attention will be given to the special procedure available to the police, departments of government and other public authorities pursuant to s57a of the Act. This provision allows a defendant to plead guilty in writing to minor charges, punishable by a fine but not imprisonment, without the necessity of attendance at court. Recent decisions of the Supreme Court appear to be in conflict in relation to the application of general principles where this special procedure is utilised.

### **2. THE JUSTICES ACT 1921 (SA)**

Modern magistrates' courts have a wide and crucially important jurisdiction. It is entirely statutory in origin beginning in 1848 with the passing of the first of a trilogy of statutes commonly known as Jervis's Act<sup>1</sup> The Justices Act therefore, is a code which comprehensively deals with criminal proceedings on complaint.

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<sup>1</sup> 11 & 12 Vict cc 42, 43 and 44.

Criminal proceedings are taken on complaint when 'summary' or 'simple' offences are alleged.<sup>2</sup> The terms 'simple offence' and 'summary offence' appear to be used interchangeably in South Australian legislation. A simple offence is defined in the Justices Act as an offence for which a person is liable to be punished by fine, imprisonment or both, upon summary conviction before a justice or justices.<sup>3</sup> Summary offences are creatures of statute and, ordinarily, a provision in the statute creating the particular offence will state that offences against that Act shall be tried summarily. Where this is not the case, s43 of the Acts Interpretation Act 1915 provides that if the offence is punishable by a fine and not by imprisonment, the offence shall be deemed to be a summary offence.

A court of summary jurisdiction may hear and determine any matter of complaint. The court may be constituted by a special magistrate or two or more justices.<sup>4</sup> A special Justice may constitute a court subject to the right of a defendant who enters a plea of not guilty to elect to have his case heard by a special magistrate or two or more justices.<sup>5</sup> Apart from special magistrates, it is apparent from the Act that no formal legal qualifications are necessarily held by those persons who carry out the duties of a justice in South Australia. When two or more lay justices sit as a court it appears to be the practice to ensure that a least one of them has considerable judicial experience.

Although a special magistrate, two or more justices or a special justice are authorised to do that which a single justice is authorised to do,<sup>6</sup> the powers and functions of a single, lay justice in 'taking' a complaint and issuing a summons thereon are ordinarily exercised by such a justice alone. In relation to these tasks the justice may receive little, if any, assistance. Unlike the position in England where a clerk to justices is a legal practitioner, the clerk of a court of summary jurisdiction is not required to hold legal qualifications<sup>7</sup> and many justices involved in the instigation of criminal proceedings on complaint exercise their powers in isolation from the courts in any event. Justices of the Peace employed by departments of government or municipal councils, for example, may be asked to take a complaint and issue a summons on that complaint on a regular basis notwithstanding that they have not otherwise had occasion to exercise powers of judicial nature. There are various texts in the nature of justices 'handbooks' which may guide the justice in the exercise of his functions<sup>8</sup> but it remains a matter of speculation as to whether these are referred to with sufficient regularity to ensure that justices are informed, and kept informed, of the relevant principles.

Any person may charge another on complaint.<sup>9</sup> In order to initiate proceedings on complaint, a complainant must make his complaint to a justice pursuant to ss49 and 50 of the Act. These provisions read as follows:

'49 A Complaint may be made to a justice in any case where:

- (a) any person has committed, or is suspected to have committed, any simple offence; or

2 Justices Act 1921 (SA) s49(a).

3 Ibid s4(1).

4 Ibid s43.

5 Ibid s5(3).

6 Ibid ss5(1) 13.

7 Ibid s42.

8 Eg Hannan *Summary Procedure of Justices* (4th edn, 1975).

9 Acts Interpretation Act 1915 (SA) s42.

- (b) a justice or justices has, or have or shall have authority by law to make any order for the payment of money or otherwise.
- 50 (1) A complaint may be made by the complainant in person, or by his counsel or solicitor, or by any other person authorised in that behalf.
- (2) No complaint need be in writing unless it is required to be so by some special Act.
- (3) A complaint may be made without any oath being made of the truth thereof, except in any case -
- (a) where some Special Act otherwise requires;<sup>10</sup> or
- (b) where the justice issues his warrant in the first instance.<sup>11</sup>

Where no time is specially limited for making the complaint by the statute relating to the particular case, the complaint must be made within six months from the time of the commission of the offence.<sup>12</sup> However, the Act appears to contain no time limitation in respect of the issue by a justice of his summons on a complaint.<sup>13</sup>

The general power to summons a defendant named in the complaint is contained in s57 which reads in material part:

‘Whenever a complaint is made in manner aforesaid any justice may issue his summons for the appearance of any person charged by the complaint or against whom the order is thereby sought to be made..?’

This power to summons a defendant on complaint may be compared with the power to issue a summons on information in s104. There is no time limitation in respect of the laying of an information. However, unlike s57, it is clear that it is only the justice before whom an information is laid who may issue a summons in respect of it. Section 104 of the Act provides that whenever an information is laid before a justice ‘*he may if the defendant is not then in custody, issue his summons for the appearance of the defendant*’.<sup>14</sup> It appears that the practice adopted by courts of summary jurisdiction, at least in respect of a summons issued on complaint, accords with that in England and that a fresh summons may issue when the original has not been served by the return date irrespective of whether the time in which the complaint may be made has expired. Accordingly, it seems that two or more successive summonses may issue on the one complaint under s57.<sup>15</sup>

Although ‘justice’ is defined as a justice for the peace for the State of South Australia, a single justice is expressly given certain powers in s44. Section 44 provides that:

‘In any case, whether the matter of complaint is or is not directed or required to be heard by two or more justices, a single justice may -

10 Eg Service and Execution of Process Act 1901 (Cth).

11 Supra n 2 s58.

12 Ibid s52.

13 *Sparnon v Lower* [1970] SASR 16, 18.

14 My emphasis.

15 *Brooks v Bagshaw* [1904] 2 KB 798; *Halsbury’s Laws of England* 4th edn, Vol 29 para 322 cf *Hargreaves v Bourdon* [1963] VR 89.

- (a) receive the complaint;
- (b) grant a summons or warrant thereon;
- (c) issue his summons or warrant to compel the attendance of any witness;
- (d) by consent of the parties expedite the date of the hearing;
- (e) either upon the return of the summons, or at any other time before the completion of the hearing, adjourn the hearing as hereinafter provided;
- (f) do all other acts and matters preliminary to the hearing; and
- (g) issue any warrant of distress or commitment upon any conviction or order.

There appears to be no corresponding provision which deals with the powers of a single justice in respect of an information.

The complaint itself is usually in writing. It must contain a statement of the specific offence with which the defendant is charged and this may take the form of words found in the statutory provision creating the offence.<sup>16</sup> Such particulars as are necessary for giving reasonable information as to the nature of the charge must be included,<sup>17</sup> together with a reference to the section of the statute creating the offence,<sup>18</sup> although all the essential elements of the offence need not be stated.<sup>19</sup> Section 181, to be found in Part VII of the Act which is concerned with irregularities and amendments, provides:

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1. It shall be sufficient in any information in any information or complaint, if the same gives the defendant a reasonably clear and intelligible statement of the offence or matter with which he is charged.

A written complaint and any process issued thereon must utilise the forms contained in the Rules Under the Justices Act, 1930.<sup>20</sup> An oral complaint must be reduced to writing for inclusion on any summons or warrant issued on that complaint.<sup>21</sup> A summons to a defendant on complaint must be signed by the justice issuing the summons<sup>22</sup> and, although the Act does not require the justice before whom a complaint is made to sign a written complaint, the complaint (Form 1), the composite complaint and summons (Form 4), and the composite complaint and summons with endorsements and form for pleading guilty in writing (Form 4A), contain in their preamble a statement that the complaint is 'taken' this day 'before the undersigned, a Justice of the Peace'.<sup>23</sup> In relation to the composite forms provision is made for the justice to sign once only and, accordingly, the justice by his signature both acknowledges that he has taken the complaint and issues his summons on that complaint.

16 Supra n 2 s55.

17 Ibid ss22a 181.

18 Ibid s22a.

19 Ibid.

20 Rules under Justices Act 1930 rule 6.

21 Supra n 2 s22.

22 Ibid s14.

23 Supra n 20 Forms 1, 4, 4A.

### 3. THE DISTINCTION BETWEEN THE COMPLAINT AND THE SUMMONS

The Courts have taken the view that the power to issue a summons is a power which involves the exercise of a judicial discretion.<sup>24</sup> It has been said that a judicial discretion is important in this context in order to safeguard members of the community from abuse of process.<sup>25</sup> This safeguard is placed in jeopardy if, pursuant to the relevant legislation, the issue of a valid summons initially is not essential for the subsequent exercise of jurisdiction. If the making of the complaint itself is not subject to the exercise of a judicial discretion, and the complaint is isolated and identified as the sole document upon which jurisdiction is based, then this safeguard is effectively removed.

#### (a) *Scott's case* and *Lang v Warner*:

Courts in other Australian jurisdictions, notably New South Wales, have tended to address the receipt of an information or complaint and the issue of a summons as one composite act on the part of a justice. However, South Australian courts treat the different aspects of this process as clearly distinct. This is substantially due to the judgments of the Full Court in *R v Scott; Ex parte Church*<sup>26</sup> which dealt with the duty of a magistrate to receive an information pursuant to s101 of the Justices Act and to consider what, if any, process should be issued on it. Although this decision was concerned with proceedings on information, it has been applied equally to matters arising on complaint<sup>27</sup> and at least one of the judges in *Scott's case* appeared to be of the view that the considerations were the same in both instances.<sup>28</sup>

In *Scott's case*,<sup>29</sup> a magistrate had refused to receive an information because he considered it to be vexatious having regard to the dismissal of a similar charge based on the same facts. The Full Court held that a justice is under duty to receive an information, to consider what is alleged in it and what process, if any, should issue. On the facts of this case the Court determined that the magistrate was not justified in refusing to take the information on a ground relevant only to the question of whether or not to issue a summons. Poole J was of the view that these two distinct duties had been confused.<sup>30</sup> The following propositions may be extracted from the judgments:

1. As the prosecutor has a right to lay his information before a justice pursuant to s101, this must imply a 'correlative' or 'corresponding' duty on the part of the justice before whom the information is laid to take or receive it;<sup>31</sup>
2. The duty to take the information and the duty to consider whether to issue a summons on it are two distinct duties;<sup>32</sup>

24 *R v Wilson; Ex parte Battersea Borough Council* [1948] 1 KB 43, 46, 47; *Electronic Rentals v Anderson* (1971) 124 CLR 27, 39.

25 *Ex parte Qantas Airways Ltd; Re Horsington* (1969) 14 FLR 414.

26 [1924] SASR 221.

27 *Lang v Warner* (1975) 10 SASR 289.

28 *Supra* n 26 at 233.

29 *Ibid.*

30 *Ibid* 231.

31 *Ibid* 224, 232, 235.

32 *Ibid* 233, 235.

3. A justice, in the discharge of his duty to take an information, must 'duly' or 'regularly' consider it and what is alleged in it.<sup>33</sup> He must so apply his mind to the matter as to receive into his mind the information which the oral statement or the written document contains;<sup>34</sup> and
4. A justice has no discretion in respect of his duty to receive or take an information but he has a discretion as to process which he must exercise. A justice has a duty to consider, when asked, whether or not he should issue a summons.<sup>35</sup>

In *Lang v Warner*<sup>36</sup> these principles were re-examined and applied to a complaint made pursuant to s49 of the Act. *Lang v Warner*<sup>37</sup> involved an appeal against conviction in which one of the issues for the Court was whether a justice in receiving or taking a complaint was disqualified by reason of bias from hearing and determining the matter in company with a second justice. When the complaint was made the applicant was under arrest. Accordingly, no question arose as to the issue of any summons. In the circumstances, the Court was of the view that the justice was not disqualified for bias. The most comprehensive treatment of the distinction between taking of a complaint and the issue of a summons appears in the judgment of Walter J. His Honour said:<sup>38</sup>

'If the complaint is tendered in writing, it is necessary for the complainant personally to present to the justice, for his signature, the document in which the required particulars of the complaint are furnished, to ask that it be taken and, as I think, at the same time to state that the matter of the complaint is set forth in the document. At that stage, the justice should consider what is alleged in the complaint, but save in exceptional circumstances where, for example, the complaint is clearly out of time or contains a patently frivolous or nonsensical charge, I do not think the justice is called upon to decide whether there is good cause to take it, or otherwise to exercise a judicial discretion. Certainly, there is not occasion for his considering whether the complainant has a case against the defendant.

Nevertheless, different considerations apply if a justice is asked to issue a summons on the complaint. When he is called upon to perform this function, an exercise of judicial discretion is involved.

In view of ss(1) of s50 of the Act, His Honour's comment about the personal attendance of the complainant before the justice must be taken as a reference to the complainant or a person authorised to act on his or her behalf. As to the issue of a summons pursuant to s57 His Honour applied, *mutatis mutandis*, his earlier dicta in the case of *Holland v Sammon*<sup>39</sup> in relation to a summons to witness pursuant to s23 of the Act. Prior to the issue of a summons to witness, a justice should, in

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33 Ibid 225, 235.

34 Ibid 232.

35 Ibid 232, 235.

36 Supra n 27.

37 Ibid.

38 Ibid 296.

39 (1972) 4 SASR 1, 3.

His Honour's view, take reasonable precautions to satisfy himself, by statements made by the party applying for the summons, that there is material which justifies its issue.<sup>40</sup>

Bray CJ cited the case of *Electronic Rentals v Anderson*<sup>41</sup> for the proposition that in deciding whether or not to issue a summons a justice was exercising a judicial function, or at least a function requiring the exercise of judicial discretion. His Honour acknowledged that the decision in *Ex parte Quantas Airways Ltd; Re Horsington*<sup>42</sup> was authority to the effect that a justice may be disqualified from so acting where he has an interest in the proceedings or is otherwise connected with the case and that the involvement of a justice who was in this sense biased may invalidate the proceedings. Assuming, for the sake of argument, that a justice was exercising a judicial function where he merely takes the complaint, the Chief Justice considered that no bias was created in the justice. Bray CJ explained the nature of a justice's function in taking the complaint as follows:<sup>43</sup>

'He has to listen to the complaint if it is oral, or read it if it is written, and to apply his mind to it; he has to consider whether any process should be issued on it even though the immediate answer is that none need be issued because the defendant is in custody...It may even be that if the complaint is obviously nonsense, or if it alleges what is obviously a non-existent offence at the present time, such as witchcraft, the justice would be justified in refusing to take or receive it.'

The learned Chief Justice was, at this point, purporting to describe the nature of a justice's function where no summons or other process was to issue. That a justice should consider the issue of process when clearly no process need be issued does not appear to be based on any authority, certainly no such assertion appears justified on *Scott*<sup>44</sup> in view of the manner in which the Full Court approached the facts in that case. If it is based on *Electronic Rentals*<sup>45</sup> it seems to read too much into the words of Windeyer J and it may simply be indicative of Dr. Bray's concern that the justice should involve himself in the matter from the outset.

Wells J, who otherwise concurred in the judgment of the Chief Justice, was clearly of the view that no discretion of a judicial nature was exercised by a justice when a complaint is made and no process is to issue.<sup>46</sup> Given the South Australian decisions which have followed *Lang v Warner*<sup>47</sup> it is at the very least doubtful that a justice has any discretion prior to being requested to issue a summons and if the commission of a simple offence is said to be alleged on the face of a written complaint, or a suspicion in that regard is communicated orally to the justice, he is bound to take it.

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40 Supra n 27 at 297.

41 (1971) 124 CLR 27.

42 Supra n 25.

43 Supra n 27 at 291.

44 Supra n 26.

45 Supra n 41.

46 Supra n 27 at 298.

47 Ibid.

**(b) Ex parte Qantas and Electronic Rentals**

Although both the *Qantas Case*<sup>48</sup> and *Electronic Rentals*<sup>49</sup> were cited in *Lang v Warner*<sup>50</sup> neither decision was made the subject of any critical analysis. In *Qantas*<sup>51</sup> the New South Wales Full Court considered the question of whether a complaint and summons, in relation to which both the complainant and the justice taking the complaint and issuing the summons were members of the same industrial organisation, were tainted by bias. The Court concluded that the justice, both in receiving the complaint and in issuing the summons, was executing an administrative duty requiring the exercise of a judicial discretion. The justice was held to be disqualified for bias and both the complaint and the summons were considered to be invalid. Accordingly, the Court determined that the Magistrate had no jurisdiction between the function of a justice in respect of a complaint and that in relation to the issue of a summons in a way which would be difficult to justify in South Australia after *Scott*<sup>52</sup> and, it is submitted, was unwarranted on the authorities referred to by the Court.

The principal judgment is that of Sugarman JA, with whom Mason JA agreed. The rule that persons acting in a judicial capacity are disqualified from so acting where a reasonable person would consider there to be a real likelihood of bias was considered in the context of a justice receiving a complaint and issuing a summons. A reasonably thorough analysis of the authorities was embarked upon but it appears that the cases cited as direct authority for the proposition that a justice has a judicial discretion in relation to the receiving of a complaint and the issue of a summons concerned either the issue of the summons alone or, where they did not, used the phrase 'receiving a complaint and issuing a summons' as though it referred to the one act or function in a justice. Sugarman JA seemed to consider that this phrase incorporated the complainant's act in making the complaint or, at least, that the validity of the complainant's act depends upon what is done by the justice. His Honour stated his conclusions as follows:<sup>53</sup>

- (1) That in receiving a complaint and issuing a summons thereon... a justice is not acting merely ministerially in the sense that he is bound to issue his summons upon the mere receipt of the complaint... He has a discretion to be exercised by him (Justices Act, s60) and upon whose exercise a judicial mind is brought to bear... He may, according to the cases earlier cited, refuse to issue his summons if there is no prima facie case or the proceeding is vexatious, and perhaps on other grounds as well — for example, that the complaint is out of time or that the complainant is not authorised by law to lay it, or that some necessary consent has not been obtained.
- (2) That the principle of disqualification for bias is therefore applicable to the performance by a justice of the functions referred to...
- (3) That in the circumstances of this case Mr Butler's exercise of the

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48 Supra n 25.

49 Supra n 41.

50 Supra n 27.

51 Supra n 25.

52 Supra n 26.

53 Supra n 25 at 423-424.



functions of receiving the complaint and issuing a summons was contrary to that principle and invalidated those acts.

- (4) That in consequence there was no valid complaint and no valid summons, with the result that the respondent Chief Industrial Magistrate had no jurisdiction to hear the charge'.

Sugarman JA had determined that the receipt of a complaint or information was not merely a ministerial act and that the cases did not suggest that a justice had no discretion to exercise. His Honour said:<sup>54</sup>

'In Williamson's *Australian Magistrate*, 7th edn p 644, it is said that justices discharge ministerial functions when they receive informations and complaints, and the word 'ministerial' is applied to these functions in *Green v Walker* [(1950) 67 W.N. (NSW) 144]. But in *Shilton v Miller* [(1930) V.L.R. 400, at p 407] Macfarlan J thought that this was at least open to doubt and that any such contention is quite inconsistent with the reasons for judgment given in *Dixon v Wells* [(1890) 25 QBD 249]':

Sugarman JA therefore, characterised the discretion to be exercised by the justice in receiving the complaint as judicial and drew no distinction between this function and the issue of the summons. Of the other members of the Court, Asprey JA discusses the judicial nature of the discretion to issue a summons and, like Sugarman JA, proceeds to the conclusion that both the complaint and the summons were invalid.

The policy underlying the judgments may well be meritorious in that the safeguard of judicial discretion extends to the instigation of criminal process and not merely to the issue of the summons. However, it will be seen that the reasoning was unsound and that the decision is inapplicable in South Australia in any event.

The decision in *Qantas*<sup>55</sup> is substantially based on *Dixon v Wells*<sup>56</sup> which was concerned with the duties of justices in a statutory context in which charges had to be made, the summons had to be served and the hearing had to take place all within certain specified time limits as conditions precedent to a successful prosecution. Consequently, the receipt of the complaint and the issue of the summons were seen as parts of the one act or function necessary for the instigation of proceedings. As the summons was held to be invalid and no fresh summons could issue due to the time limitation, the Court of Queens Bench determined that the proper issue of a summons was mandatory and therefore necessary for jurisdiction. For this reason *Dixon v Wells*<sup>57</sup> did not follow authorities such as *R v Hughes*<sup>58</sup> which had determined that it was the information or complaint alone which founded jurisdiction and not the subsequent issue of a summons or other process. As the legislation in *Qantas*<sup>59</sup> was not the same as that in *Dixon*<sup>60</sup> it appears that it was *Hughes*<sup>61</sup> and not *Dixon*<sup>62</sup> to which the Court should have had regard.

54 Ibid 422.

55 Ibid.

56 (1890) 25 QBD 249.

57 Ibid.

58 (1879) 4 QBD 614.

59 Supra n 25.

60 Supra n 56.

61 Supra n 58.

62 Supra n 56.

In *Dixon v Wells*<sup>63</sup> the court determined that the relevant legislation required the justice by whom the complaint was received to then issue the summons. The Court in *Qantas*<sup>64</sup> reached the same conclusion in respect of a summons issued pursuant to the NSW Act and the question, therefore, arises whether the decision may be distinguished on this ground in South Australia. This question is dealt with below under the heading 'Jurisdiction'.

The *Qantas case*<sup>65</sup> was considered and appears to have been approved, at least in part, by the High Court in *Electronic Rentals Pty Ltd v Anderson*.<sup>66</sup> Five informations were laid by officers of a government department each alleging an offence under the Factories, Shops and Industries Act 1962 (NSW). A summons was issued by the justice who received the information in each case. In respect of three of the informations the justice issuing the summons was employed within the same department as the informant. The applicant argued that in relation to these informations the justices were disqualified for bias and, in relation to the remaining informations, that the justices had failed to exercise a judicial discretion in the process of receiving the informations and issuing a summons on each of them. For these reasons the applicant contended that each information and summons was invalid.

The case was heard as an application for special leave to appeal. Special leave was refused on the basis that the evidence upon which the applicants relied to support their appeal was inadmissible. Accordingly, the comments in relation to the duties of justices are obiter. They have, however, been applied both in Australia and in New Zealand.<sup>67</sup>

The suggestion of bias was unanimously rejected as a general proposition.<sup>68</sup> Windeyer J, who delivered the principal judgment, did comment that it was undersirable for a justice to exercise discretionary functions at the request of a more senior officer of the government department or other organisation which employs him in relation to proceedings in which his employer is in substance a party.<sup>69</sup> However, that which was undesirable was not necessarily seen to be disqualifying and *Qantas*<sup>70</sup> was distinguished on its facts. Of the *Qantas*<sup>71</sup> decision His Honour said:<sup>72</sup>

'The learned judgments delivered in the Supreme Court in that case state, carefully, and I respectfully think correctly, the principles on which a justice of the peace may in a particular case be disqualified from receiving and acting on an information or complaint by reason of his connection with a party interested. I do not doubt that these principles were there rightly applied.'

It seems odd that the High Court should have approved *Qantas*<sup>73</sup> in

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63 Ibid.

64 Supra n 25.

65 Ibid.

66 Supra n 41.

67 *Daemar v Soper* [1981] 1 NZLR 66, 70.

68 Supra n 41 at 31, 45.

69 Ibid 45-46.

70 Supra n 25.

71 Ibid.

72 Supra n 41 at 45.

73 Supra n 25.

this manner in view of the analysis embarked upon by Windeyer J of the relationship between informations and complaints and process issued in respect of them. His Honour, with whom Barwick CJ and Owen J agreed, did give emphasis to the distinction adumbrated in *Scott*.<sup>74</sup> Rather than simply adopt the comments of Sugarman JA in *Qantas*, Windeyer J said:<sup>76</sup>

An information is not laid by handing a document to a justice and misleading him as to its nature. Such misinformation is not an information. A written information is only duly laid before a justice when he receives it as information for his attention. However, it appears that before the Supreme Court, it was not really urged for the applicant that there was no information. The ground taken on the motion for prohibition was expressed to be that 'the justice of the peace before whom the information was laid failed to exercise a judicial discretion in the process of receiving the information and the issuing of a summons thereon...

'A summons', said Lord Goddard CJ, 'is the result of a judicial act. It is the outcome of a complaint which has been made to a magistrate and upon which he must bring his judicial mind to bear and decide whether or not on the material before him he is justified in issuing a summons': *R v Wilson Ex parte Battersea Borough Council* [(1948) 1 KB 43 at pp 46-47.

This does not mean that the issuing of a summons is a judicial act in the same sense as is an adjudication to determine the rights of parties. Probably it would be better described as an administrative or ministerial act or, as this Court said in *Donohue v Chew Ying* [(1913) 16 CLR 364], as a matter of procedure. But, however described, a justice who receives an information must decide whether or not he should issue a summons'

Clearly these comments were intended to be equally applicable to a complaint.<sup>77</sup>

Windeyer J continued to distinguish a summons in this context from originating process in the superior courts.<sup>78</sup> Quoting from *R v Hughes*,<sup>79</sup> His Honour determined that the summons did not confer jurisdiction but was merely process commanding the accused to attend at court and notifying him of the charge, and said:<sup>80</sup>

'...the jurisdiction of a magistrate depends on there being an information. It does not depend on a summons. The invalidity of a summons therefore does not affect the jurisdiction to hear the charge... Moreover, the applicant, a corporation, appeared before the magistrate by counsel: and it well knew what was the offence with which it was charged.'

This passage accords with the position in England. Any attempt at a reconciliation of the decisions highlights the need for care when

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74 Supra n 26.

75 Supra n 25.

76 Supra n 41 at 39.

77 Ibid.

78 Ibid 43.

79 Supra n 58.

80 Supra n 41 at 44.

considering authorities concerned with these issues in a different statutory context. But, as to jurisdiction there can be no doubt that the approach is the same in England as it is here.

### (c) The present position in England

As has been said, the *Qantas*<sup>81</sup> decision was based, to no small degree, on *Dixon v Wells*.<sup>82</sup> The effect of *Dixon v Wells*<sup>83</sup> was recently explained by the House of Lords in *R v Manchester Stipendiary Magistrate; Ex parte Hill*.<sup>84</sup> *Ex parte Hill*<sup>85</sup> itself involved a reconsideration of the decision in *R v Gateshead Justices; Ex parte Tesco Stores Ltd*<sup>86</sup> in which, again on the authority of *Dixon v Wells*,<sup>87</sup> the Court of Queens Bench held that the act of receiving an information and the decision as to whether or not a summons should issue were judicial and, therefore, could not be delegated. The House of Lords overruled this aspect of *Gateshead*<sup>88</sup> and decided that the receipt of the information was a ministerial act which could be delegated. The case served to clarify the position in England and represents a return to the more legalistic approach evident in the South Australia decisions.

The judgment of the House appears in the speech of Lord Roskill with whom the other members agreed. Lord Roskill concluded, as Windeyer J had done in *Electronic Rentals*,<sup>89</sup> that it is the information or complaint upon which the jurisdiction of the court is based and not the summons. The following passage appears in the judgment of Hawkins J in *R v Hughes*<sup>90</sup> and was extracted by both Lord Roskill in *Ex parte Hill*<sup>91</sup> and Windeyer J in *Electronic Rentals*:<sup>92</sup>

'The information, which is in the nature of an indictment, of necessity precedes the process; and it is only after the information is laid, that the question as to the particular form and nature of the process can properly arise. Process is not essential to the jurisdiction of the justices to hear and adjudicate. It is but the proceeding adopted to compel the accused to answer the information already duly laid, without which no hearing in the nature of a trial could take place (unless under special statutory enactment).'

In *Hughes*<sup>93</sup> Huddleston B went on to say:

'Principle and the authorities seem to show that objections and defects in the form of procuring the appearance of a party charged will be cured by appearance.'

The case of *R v Hughes*<sup>94</sup> had been applied by Walters J in South

81 Supra n 25.

82 Supra n 56.

83 Ibid.

84 [1983] 1 AC 328.

85 Ibid.

86 [1981] QB 470.

87 Supra n 56.

88 Supra n 86.

89 Supra n 41.

90 Supra n 58 at 625.

91 Supra n 84 at 344-345.

92 Supra n 41 at 41.

93 Supra n 58 at 633.

94 Ibid.

Australia, prior to His Honour's judgment in *Lang v Warner*,<sup>95</sup> in the case of *Hinton v Young*.<sup>96</sup> In *Hinton v Young*<sup>97</sup> Walters J concluded that the mode of bringing a person before a court of summary jurisdiction was 'a mere matter of procedure' and that any defect in the summons was immaterial where the defendant appeared, whether personally or by counsel, and thus made himself amenable to the 'coercive jurisdiction of the court'.

In *Ex parte Hill*,<sup>98</sup> Lord Roskill considered it of critical importance to appreciate that the laying of an information and the making of a complaint were matters for the informant and complainant respectively. The acts of delivery and receipt were characterised as ministerial and the House confirmed that the function of the justice in determining whether a summons should be issued had to be performed judicially.<sup>99</sup> The case of *R v Brentford Justices; Ex parte Catlin*<sup>100</sup> was accepted as representing the correct statement of the law in respect of the duties of a justice in issuing a summons and these principles were considered to be equally applicable to the issue of a warrant.<sup>101</sup> Being ministerial in nature, the House of Lords held that the receipt of the information by a justice was a function which could be delegated and further, that the information was laid at the time it was delivered to a person authorised to receive it, rather than upon transmission to the justices who issue the summons.

The Australian courts have continued to characterise the function of a justice in issuing a warrant or summons as ministerial but at the same time affirming that the justice must act judicially, that is, fairly and impartially. The difference between the position in Australia and that in England is one of terminology only. Due to the constitutional implications of characterising a power as judicial in Australia, a narrow definition of the term is preferred.

#### 4. THE MAKING OF A COMPLAINT

It now becomes necessary to ascertain what is required in order to make a valid complaint. Pursuant to s49, it must be made to a justice. It can be made where a person has committed or is suspected to have committed a simple offence. Pursuant to s50 it must be made by the complainant or a person authorised by the complainant. It appears that a failure to observe any other requirement in the Act, such as a failure to state clearly the offence charged as directed by ss22a and 181, will not necessarily invalidate the complaint.

In *Scott's case*<sup>102</sup> Poole J said of the Magistrate's duty to take an information:

'If he declines to do that in any case where there is a suspicion on the part of the informant of the commission within the State of an indictable offence by any person, he does not perform that duty which the informant is entitled

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95 Supra n 27.

96 (1973) 6 SASR 129.

97 Ibid.

98 Supra n 84 at 342.

99 Ibid 343.

100 [1975] QB 455.

101 Supra n 84 at 343.

102 Supra n 26 at 232-233.

to have done. It is not a matter of discretion on the part of the justice: he must, in this sense, 'receive' or 'take' the information...This duty [is] absolute.'

That the making of the complaint is primarily a matter for the complainant was again clearly asserted in South Australia, prior to *Ex parte Hill*,<sup>43</sup> in the case of *R v Manos*; *Ex parte Samuels*.<sup>104</sup> There the making of the complaint was considered in isolation. However, the South Australian Full Court has recently affirmed *Manos*<sup>105</sup> and applied it in circumstances where both the complaint and the summons were challenged as invalid.<sup>106</sup>

In *Manos*<sup>107</sup> the accused was arrested and charged on complaint with offences under the Road Traffic Act, 1961. He was subsequently remanded on thirteen separate occasions and, when the matter eventually became on for hearing, the time in which a fresh complaint could have been made had expired. At the hearing, and for the first time, the accused contended that he was not properly before the Court because the complaint had been incorrectly made and taken. The Magistrate before whom he appeared upheld the objection on the basis that the justice taking the complaint had not sufficiently applied his mind to the matter of the complaint. The Magistrate had concluded, on the authority of *Scott*,<sup>108</sup> *Electronic Rentals*<sup>109</sup> and *Lang v Warner*,<sup>110</sup> that a complaint was made at the time the justice received it into his mind and not merely when the complainant completes his voicing of the simple offence to the justice or presents him with a written complaint. As, on the evidence, the justice did not himself advert to the sufficiency of the complaint, the Magistrates determined that the court had no jurisdiction to hear it. The material facts were identified as follows:<sup>111</sup>

1. The complaint was signed by the complainant and the justice;
2. The justice saw that the complaint was dated and in the proper form;
3. The complainant said to the justice at the time of signing 'I have sufficient grounds for this complaint';
4. The justice did not himself consider the sufficiency of the complaint; and
5. The justice knew the accused had been arrested and that no process was to issue.

The Full Court unanimously determined that the complaint was valid and allowed the appeal.

Mitchell ACJ considered that it would be naive to suggest that the timing of the challenge to the complaint was simply fortuitous and clearly the Court was unimpressed both by the technical nature of the objection and the fact that it had been first raised at a time when the accused could not be re-charged with the relevant offences. Her Honour,

103 Supra n 84.

104 (1981) 28 SASR 262.

105 Ibid.

106 *R v Fiala*; *Ex parte GJ Coles & Co Ltd* (1986) 134 LSJ 41.

107 Supra n 104.

108 Supra n 26.

109 Supra n 41.

110 Supra n 27.

111 Supra n 104 at 267.

who quoted at length from *Scott's case*,<sup>112</sup> formed the view that the corresponding duty of a justice to receive and apply his mind to the information to which Murray CJ had referred was not relevant to the determination of whether a complaint had been made in accordance with ss49 and 50 of the Justices Act.<sup>113</sup> Mitchell ACJ held that, unless some process is to issue as a result of a complaint, it is only the complainant's mental application to the matter of the complaint which is material. Her Honour considered that the state of mind of the justice when he took the complaint was not. The complaint was made when the complainant signed it and placed it before the justice!<sup>114</sup> Wells J addressed the matter as follows:<sup>115</sup>

'...A justice to whom a complaint is made — that, and no more — represents an identified and accessible authority to whom a complainant may repair and lay his complaint against a defendant...The Justice of the Peace does not, be it noted, concern himself with the merits, in truth or in law, of the complaint. He is a formal and exclusive clearing house - not a person exercising a judicial function or judicial powers.'

In the circumstances, Wells J concluded that the complaint had been duly made.

White J agreed with the remarks of the Acting Chief Justice. His Honour relied on the passage from the judgment of Windeyer J in *Electronic Rentals*<sup>116</sup> quoted above and determined that a complaint was duly taken by a justice when the justice appreciates that the complainant is before him to make a complaint and is neither misinformed nor misled as to the nature or effect of the document!<sup>117</sup> In His Honour's view, the only discretion vested in the justice would have arisen at the next stage, that is, where the justice has to decide whether or not a summons or warrant should issue!<sup>118</sup>

Although it may be conceded that the provisions in Part V of the Justices Act with which the Court in *Scott's case*<sup>119</sup> was concerned are materially different to those in relation to the procedure on complaint, it is difficult to reconcile the judgment of Mitchell ACJ in *Manos*<sup>120</sup> with *Scott*.<sup>121</sup> A complaint cannot be made to a justice pursuant to s49 if he does not either 'take' the complaint in discharge of a duty to do so under that section or 'receive the complaint' under s44. It is suggested that the judgment of White J contains the reasoning left unexpressed by Her Honour and acknowledges that the High Court had limited the 'corresponding duty' of a justice, at this stage at least, to the physical receipt of the document as a complaint. Any other attempt at a rationalisation of these cases appears to produce unsatisfactory results.

The most recent of the South Australian decisions is *R v Fialoa; Ex parte Coles*<sup>122</sup> which involved an attack on the validity of both the

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112 Supra n 26.

113 Supra n 104 at 267-268.

114 Ibid.

115 Supra n 104 at 269.

116 Supra n 41 at 39.

117 Supra n 104 at 270-271.

118 Ibid.

119 Supra n 26.

120 Supra n 104.

121 Supra n 26.

122 Supra n 106.

summons and the complaint. The applicant had argued on the evidence that the justice had merely witnessed the complainant's signature and no more. A majority of the court did not accept the view of the evidence put forward by the applicant. The following attempt at a rationalisation of the cases is to be found in the judgment of Jacobs J where His Honour states:<sup>123</sup>

'For the present it is sufficient to say that the cases show clearly that there is no dichotomy between s44 and s50; the justice to whom the complaint is 'made' under the latter section 'receives' it, as he is authorised to do by the former section; 'making' a complaint (by the complainant) and 'receiving' it (by the justice) are complementary, but not the same acts..'

This analysis appears to ignore the fact that both acts need logically be present for a valid complaint to be made under s49. Even on *Ex parte Hill*,<sup>124</sup> a written complaint must be received by somebody, albeit the person to whom a justice has delegated this function, before it can be said to be 'made to a justice'. On *Scott*<sup>125</sup> a justice in taking a complaint and issuing a summons on that complaint has two duties. First, he must take the complaint. Secondly, he must consider, when asked, whether or not he should issue a summons.

It could be argued that the use in s44 of the word 'may' indicates that the powers in that section are discretionary in nature and, therefore, that it is the powers to receive the complaint and to grant a summons thereon vested in a justice by s44 which are complementary. It may be argued that s44 is not concerned with the taking of a complaint by a justice under s49 at all. The justice may 'receive the complaint', already duly made before him, for the purpose of exercising his judicial discretion in relation to process pursuant to ss44 and 57 but must 'take' a complaint made to him pursuant to s49. Although such a construction may appear to be contrary to *Scott*<sup>126</sup> in that a justice has a *duty* to receive the complaint, *Electronic Rentals*<sup>127</sup> seems to suggest that there is also a discretion to receive a complaint duly made under s57 in order that a summons may issue. The difficulty with terminology in this area is considered below.

Perhaps the better view is that 'may' in s44 is not indicative of discretion. It may be that s44 merely facilitates the exercise by a single justice of the duties and powers contained in other sections of the Act, the power to summons a witness in s23 for example, and has nothing to say about the character of those functions or whether a discretion is conferred. If this is correct then even though a single justice 'may...receive the complaint' the nature or character of this act is determined by s49 and, on *Scott's case*,<sup>128</sup> there is no discretion. The correlative duty which was found in *Scott*<sup>129</sup> to be inherent in s101 to take the information is also inherent in s49. The judicial discretion in respect of the issue of a summons may be said to come solely from s57.

123 Ibid 45.

124 Supra n 84.

125 Supra n 26.

126 Ibid.

127 Supra n 41 at 39.

128 Supra n 26.

129 Ibid.



In *Lang v Warner*,<sup>129</sup> Bray CJ and Walters J were both of the view that a justice might refuse a nonsensical complaint or one which alleged a non-existent offence thus suggesting some limited discretion is involved. This may be answered on the basis that the putative complainant will simply not have brought himself with s49 of the Act and that it is for the justice, not the complainant, to determine this issue. Jacobs J in *Coles*<sup>131</sup> said of the passage extracted above from the judgment by Bray CJ in *Lang v Warner*<sup>132</sup> concerning the duty of a justice in taking a complaint:

‘It is quite unrealistic to suggest in the context that the word ‘read’ means read every word. It means no more than that the justice must look at or look through the document to satisfy himself that he is indeed being asked to take or receive a complaint against some person for a recognisable offence, just as he must listen and ‘receive into his mind’ if the complaint is oral.’

However, His Honour seems not to consider the comments of Walters J in *Lang*<sup>133</sup> to the effect that a justice may be entitled to refuse to break a complaint where the alleged offence is patently frivolous or is clearly out of time. Similarly, that the justice is himself required to ascertain whether a simple offence is alleged seems to be contrary to *Manos*<sup>134</sup> and the apparent conflict between *Lang*<sup>135</sup> and *Manos*<sup>136</sup> remains unsolved. It is to be hoped that Jacobs J, in adopting a view of the authorities which preserved the validity of the complaint, has not read down the duties of a justice to adequately consider the allegations contained in the complaint prior to the issue of a summons.

Windeyer J in *Electronic Rentals*<sup>137</sup> speaks of the justice receiving and considering an information duly laid for the purpose of issuing his summons and, as the cases treat time limitations and the failure of a complaint to disclose an offence as proper grounds for refusing to issue a summons, it would appear that the mere physical receipt of a complaint by a justice is sufficient to found jurisdiction. It may be that the complainant’s suspicion under s49 need not be reasonable, that it is wholly subjective and, once declared, compelling. It can be argued that there ought to be some discretion in the justice in relation to the making and taking of a complaint but *Lang v Warner*<sup>138</sup> lacks legitimacy insofar as the judgments purport to rely on earlier authority for such a proposition and fail to address the policy considerations relevant to this issue.

It may be said that the requirement in *Scott’s case*<sup>139</sup> that a justice receive ‘into his mind’ the information contained in the written document in order to take a complaint has been read down in subsequent decisions. *Lang*<sup>140</sup> maintained that a justice must give consideration to the complaint

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130 Supra n 27 at 291, 296.

131 Supra n 106 at 49.

132 Supra n 27 at 291.

133 Ibid 296.

134 Supra n 104.

135 Supra n 27.

136 Supra n 104.

137 Supra n 41 at 39.

138 Supra n 27.

139 Supra n 26 at 232.

140 Supra n 27 at 291, 296.

at the outset. Subsequent cases have taken the two stage process identified in *Scott*<sup>141</sup> and determined that the justice is obliged to consider the complaint only at the second stage, in the context of s57. The weight of authority supports the proposition that, as a matter of construction, s49 is directed solely to the complainant. The making and taking of a complaint pursuant to s49 of the Justices Act does not involve a discretion on the part of the justice and, accordingly, there is no occasion which warrants any mental application by the justice to the substance of the complaint in the manner proposed in *Scott*.<sup>142</sup>

In *Coles*<sup>143</sup> nine offences were alleged on a form 4A complaint and summons. A standard, single page form was used. Only one count appeared on the face of the document, inserted between the preamble and the summons. The endorsements for a plea of guilty in writing appeared on the reverse side. Counts 2 to 9 were contained on two separate pages annexed to the document. There was evidence that the justice had merely 'scanned' the first page but it was clear that he had not looked at the annexed pages at all. Olsson J, in the minority, considered the duty of a justice to take a complaint to be 'almost' absolute.<sup>144</sup> In His Honour's view, there was a 'golden thread running through all of the relevant dicta' to the effect that there is a limited discretion to decline a complaint and an 'unequivocal requirement' that a justice apply his mind to a complaint when it is put before him.<sup>145</sup> In support of this contention he relied upon the judgment of Walters J in *Lang*.<sup>146</sup>

Olsson J attempts to distinguish *Manos*<sup>1467</sup> on the ground that the defendant in that case had been arrested and that the complaint had been made at the time of the arrest. According to His Honour it therefore became irrelevant that the complaint had not been received by a justice.<sup>148</sup> This argument appears to have the tail wagging the dog. *Electronic Rentals*<sup>149</sup> makes it clear that the validity of the complaint does not depend upon what it is, or is not, done in relation to a summons.

It may be that the majority in *Coles*<sup>150</sup> erred on the facts before the Court and that the summons should have been quashed for want of adequate consideration by the justice. However, there is no 'golden thread' running through the cases in this area. As has been noted, the 'unequivocal requirement' to consider a complaint comes from *Scott*.<sup>151</sup> *Electronic Rentals*<sup>152</sup> and *Ex parte Hill*<sup>153</sup> suggest that the physical receipt of a document said to be, or to contain, a complaint is sufficient. *Manos*<sup>154</sup> rejects the requirement of consideration by the justice at the making of a complaint. Accordingly, the requirement is at least equivocal

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141 Supra n 26 at 233, 235.

142 Ibid.

143 Supra n 106.

144 Ibid 69.

145 Ibid.

146 Supra n 27.

147 Supra n 104.

148 Supra n 106 at 70.

149 Supra n 41.

150 Supra n 106.

151 Supra n 26.

152 Supra n 41.

153 Supra n 84.

154 Supra n 104.

and, if there is no discretion to exercise, it is illogical — there is no reason for the justice to receive any information into his mind prior to taking the complaint. Alternatively, if there is a limited discretion and there are aspects of s49 which are not wholly subjective, for example, it may be for the justice to establish that the complaint is in the proper form or that it refers to the statute creating the offence, then the justice, logically, need only give the matter such consideration as is necessary for this purpose when he takes the complaint.

Provided the justice is satisfied that the complainant is alleging that some person has committed a simple offence it appears that is enough and he must 'take' the complaint. He must simply comprehend, in substance, that which is taking place. If he is being asked to issue a summons on the complaint he must then receive it 'into his mind' and exercise his judicial discretion in relation to it prior to granting a summons, or refusing to do so, pursuant to s57. A written complaint is made when it is handed to the justice as such. He signs only once on the composite forms and, by his signature, issues his summons but his signature, in relation to the complaint, is merely evidence that he has already taken it.

*Manos*<sup>155</sup> stands as authority for the proposition that the functions of a justice under ss49 and 57 are discrete. If there was any doubt as to the correctness of the decision in view of *Scott's case*<sup>156</sup> that must now have been dispelled by *Ex parte Hill*<sup>157</sup> which determined that the ministerial duty to receive a complaint could be delegated provided that at some later time the justice issuing a summons on that complaint duly considered the allegations contained in it.

## 5. THE ISSUE OF THE SUMMONS

To what further test is the complainant's accusation exposed prior to the defendant being called upon to answer it? It appears that more robust scrutiny should take place at the next stage, when the justice is asked to consider the complaint with a view to the issue of his summons.

As to the nature of the justices' function in issuing a summons pursuant to the English legislation, the House of Lords in *Hill*<sup>158</sup> recently approved the *Brentford Justices case*<sup>159</sup> in preference to *Gateshead*.<sup>160</sup> The House of Lords appears to have thought it sufficient to say simply that the justice must act fairly and impartially in determining whether or not to summon the defendant to court and did not attempt to state precisely the criteria to which the justice must have regard. In *Gateshead*,<sup>161</sup> the Court of Queens Bench had clearly specified certain aspects of the duty:

'We have no doubt that this function is judicial. We agree with that part of the advice of the Council of the Society of Justices' Clerks which affirms that every information must at the very least be examined to ascertain: (i) that an offence known to the law is alleged; (ii) that it is not out of time;

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155 Ibid.

156 Supra n 26.

157 Supra n 84.

158 Ibid.

159 Supra n 100.

160 Supra n 86.

161 Ibid.

(iii) that the court has jurisdiction; and (iv) that the informant has any necessary authority to prosecute.’

This passage imposes positive duties upon justices to ascertain, and be satisfied of, the matters enumerated.

The most onerous statement of the duty in Australia comes from *Qantas*:<sup>162</sup> Sugarman JA considered that a justice *may refuse* to issue a summons if not satisfied in relation to any of the above factors and, in addition, may refuse to issue his summons if he were not satisfied that a prima facie case exists or if he considered that the matter was vexatious. The relevance of the question of whether a prima facie case exists comes from the English case of *Dixon v Wells*:<sup>163</sup> and it should again be noted at this stage that justices’ clerks in the UK are legally qualified practitioners of not less than five years standing.

In South Australia Part VII of the Act, particularly s181, suggests that a justice should be more concerned with the issue of whether the complaint is drafted so as to give a defendant sufficient notice of the charge which he is called upon to answer than with the quality of the evidence which will be relied upon to support it. The fact that every element of the offence need not be specifically addressed on the face of the complaint does, perhaps, reinforce this view. It would, it is submitted, be inappropriate to impose any positive duty upon lay justices in South Australia to ascertain whether or not the complainant has a prima facie case against a defendant at any stage. A justice of the peace is simply not qualified nor sufficiently trained to assess the merit of the complainant’s case and even to suggest that he may refuse to issue a summons on this basis is misleading.

When *Electronic Rentals*:<sup>164</sup> came before the New South Wales Court of Appeal, Asprey JA adverted to the duty of a justice when a written information was placed before him in the following manner:

‘[T]he duty of the Justice of the Peace before whom it is laid is to read it in order that he may be able to exercise his discretion whether or not to receive it and issue a summons thereon. In the exercise of such a discretion it has been held that he should satisfy himself that a prima facie case is made out...It seems to me however that the expression...is not a wholly satisfactory one to use in this context.’

After affirming that a justice may, in appropriate cases, receive evidence in order to satisfy himself that a summons is justified, His Honour concludes that past references to a prima facie case mean no more than ‘[i]f the justice, after reading the information, is satisfied that no legal offence is alleged in it, he may decline to issue the summons’.<sup>165</sup>

The foregoing passage illustrates the differences between the use of the word ‘receive’ in *Scott*:<sup>166</sup> and the use of that word in the NSW cases. When Poole J speaks of the duty of a justice to receive an information in *Scott*:<sup>167</sup> he is concerned with what the justice must do in order that

162 Supra n 26.

163 Supra n 56.

164 *Ex parte Electronic Rentals Pty Ltd; Re Anderson* [1970] 3 NSW 355, 362.

165 Ibid 363.

166 Supra n 26.

167 Ibid.

an information can be laid pursuant to s101. In *Electronic Rentals*,<sup>168</sup> when Windeyer J and Asprey JA speak of the power to receive an information already laid before the justice, they seem to treat the receipt of the information as integral to the issue of a summons. In the present context, *Scott*<sup>169</sup> suggests a justice must take a complaint pursuant to s49 and *Electronic Rentals*<sup>170</sup> suggests that he has a discretion to receive it under s57 and issue his summons. In the latter case Windeyer J acknowledges that *Scott*<sup>171</sup> is authority for the proposition that mandamus will go to compel a proper consideration of whether a summons should issue.<sup>172</sup> Accordingly, there is no difference in substance between the two cases and, apart from the confusing terminology, it is submitted that the approach of Asprey JA to the question of a prima facie case is correct. In the Federal Court, Burchett J has said of the duty of a justice in issuing a search warrant pursuant to s10 of the Crimes Act 1914 (Cth):<sup>173</sup>

'Parliament decreed that laymen should be empowered to issue warrants, and s10 should not be interpreted inconsistently with the fundamental feature of its intended working.'

The comments in the *Brentford Justices case*<sup>174</sup> which the House of Lords approved were more general in their import than those in *Gateshead*<sup>175</sup> stating simply that the issue of a summons involved the exercise of a judicial discretion in the justice which require him to properly apply his mind to the information before him. In New Zealand<sup>176</sup> the Court of Appeal has indicated a preference for the more general statement of the nature of the duty in *Electronic Rentals*<sup>177</sup> to that in the English decision of *Ex parte Klahn*<sup>178</sup> which, although it was decided prior to *Gateshead*,<sup>179</sup> stipulated that the same enumerated factors were to be considered. Accordingly, in Australia, New Zealand and the United Kingdom a general statement of the function of a justice in issuing a summons has been preferred, leaving it to the courts to determine what is fair and just in individual cases. This is to be applauded to some extent. The fixing of specific criteria may have a tendency to reduce the exercise of duty to no more than a superficial consideration of certain formalities rather than instil in justices an appreciation of the importance of their task. However, one cannot help but think that a clear expression of some broad guidelines in lay terms would be beneficial in this context. Jurisdiction, time and authority to prosecute are relevant considerations but it is submitted that at present a justice is entitled to rely on the information contained in the complaint or supplied by the complainant. If the document appears regular on its face the justice is not required to go behind that which is placed before him.

The method whereby a justice approaches the issue of a summons to witness under s23 was considered to be equally applicable to a summons

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168 Supra n 41, n 165.

169 Supra n 26.

170 Supra n 41.

171 Supra n 26.

172 Supra n 41 at 40.

173 *Parker v Churchill* (1985) 9 FCR 316, 323.

174 Supra n 100.

175 Supra n 86.

176 *Daemar v Soper* [1981] 1 NZLR 66, 70.

177 Supra n 41.

178 [1979] 1 WLR 933, 935-936.

179 Supra n 86.

issued on complaint by Walters J in *Lang v Warner*.<sup>180</sup> However, although an inquisitorial process is necessary under s23, where the material which justifies the issue of a witness summons will not otherwise be apparent, it is submitted that it is not required of a justice issuing a summons pursuant to s57. In respect of a summons on complaint the document should always be sufficient of itself to justify the summons. The fact that an offence pursuant to a particular provision of a statute is alleged will probably be held to be sufficient to reasonably infer that there is evidence to support the commission of that offence by the defendant named in the complaint. The justice should, however, where the date of the offence is more than six months from the date upon which the complaint is made or where the place of the offence or the address of the defendant is outside the State, be put on inquiry and further question the complainant as to the possibility that there may be problems with process. Although it appears that where a complaint is made out of time this merely gives rise to a defence and does not go to jurisdiction,<sup>181</sup> the justice should conclude that the issue of a summons based upon such a complaint is vexatious.

The Court of Appeal in New Zealand has stated that power to refuse a summons on the ground that the complaint is vexatious should be exercised with care having regard to the important public interest of preserving free access to the courts and mandamus will lie, not to compel a justice to issue a summons, but to compel a proper consideration of whether or not process should be issued.<sup>182</sup> Clearly a balance must be found between the public interest in providing full and free access to the courts and the possibility of injustice to individuals required to attend at criminal proceedings without just cause. However, the powers in Part VII of the Justices Act indicate a strong legislative bias in favour of free access to the criminal courts in South Australia.

## 6. JURISDICTION

On the authorities it appears that the making (and taking) of a complaint and the process whereby a justice grants his summons on that complaint are distinct and that an irregular or invalid summons will not affect the jurisdiction of a court to hear and determine the charge, either where the defendant in fact appears or, more strictly, where the statutory preconditions for an ex parte hearing are present. The distinction in *R v Hughes*<sup>183</sup> between the complaint, as the document upon which the jurisdiction of the court is based, and a summons issued on complaint is to be found within the Justices Act itself no more obviously than in a comparison between ss182 and 184 of that Act. Section 182 provides that where a defect appears in a complaint occasioning prejudice to a defendant the complaint shall be dismissed whereas, pursuant to s184, a defect in a summons or warrant to the defendant's prejudice will merely enable the court to adjourn the proceedings. The power given to the court in s182 to dismiss a complaint which fails to disclose an offence, presumably with costs pursuant to s71, suggests that a document which simply purports to be a complaint is to be treated as sufficient to found jurisdiction.

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180 Supra n 27.

181 *Adams v Chas Watson Pty Ltd* (1938) 60 CLR 545.

182 Supra n 176.

183 Supra n 58.

The scheme of the legislation appears to suggest that defective complaints are merely voidable, not void. Dixon J said in *Posner v Collector for Inter-State Destitute Persons*:<sup>184</sup>

'When there has been a failure of the due process of law at the making of an order, to describe it as void is not unnatural. But what has been said will show that, except when upon its face an order is bad or unlawful, it is only as a result of the construction placed upon a statute that the order can be considered so entirely and absolutely devoid of legal effect for every purpose as to be described accurately as a nullity. Modern legislation does not favour the invalidation of orders of magistrates or other inferior judicial tribunals and the tendency is rather to sustain the authority of orders until they are set aside and not to construe statutory provisions as meaning that orders can be attacked collaterally or ignored as ineffectual, if the directions of the statute have not been pursued with exactness.'

At least one member of the South Australian Supreme Court has considered that the foregoing passage is equally applicable to documents prepared for the purpose of initiating proceedings under the Justices Act.<sup>185</sup>

Similarly, it appears that bias in the justice who issues a summons on complaint pursuant to the Justices Act will not go to jurisdiction, it will not invalidate a complaint. Whilst it may be said that a fair and unprejudiced mind must be seen to be brought to bear on the allegations contained in a complaint in order for a justice to properly exercise a judicial discretion in issuing his summons, on the authority of *Ex parte Hill*<sup>186</sup> and *Manos*<sup>187</sup> a justice who takes a complaint is performing no function which requires the degree of overt impartiality appropriate when a person must act in a judicial manner.

It is of course possible that, where a complaint and summons are issued together, the courts as a matter of policy rather than principle may continue to refuse to distinguish between the different functions involved even though the illegality or impropriety relates to process only. In *Coles*, Jacobs J considered that:<sup>188</sup>

'It may be doubted in the first place whether a purely ministerial, as distinct from a judicial act, can be tainted by bias, but for the purposes of considering an allegation of bias it may be unrealistic to separate the two acts.'

Accordingly, as justice must be seen to be done, legalistic distinctions may be thought to be inappropriate. However, should these issues again arise, the courts will be forced to address the matter directly. *Qantas*<sup>189</sup> can no longer be relied upon for the legal sufficiency of its propositions in view of *Ex parte Hill*.<sup>190</sup>

No alternative argument appears to be available in favour of striking down a complaint as a matter of law. The provision with which the

184 (1946) 74 CLR 461, 483; cf *Mundae v Lowcock* (1982) 101 LSJS 110, 114.

185 *Howie v Scheer* (1984) 114 LSJS 286 per Cox J.

186 *Supra* n 84.

187 *Supra* n 104.

188 *Supra* n 106 at 51.

189 *Supra* n 25.

190 *Supra* n 84.

*Electronic Rentals*<sup>191</sup> and *Qantas*<sup>192</sup> decisions were concerned, s60 of the Justices Act (NSW), was in similar terms s104 of the South Australian Act. Section 60 provides:

‘Whenever an information or complaint is laid or made before a Justice, against any person as hereinafter provided, such Justice may issue his summons for the appearance of such person...?’

An argument, based on *Dixon v Wells*,<sup>193</sup> that a valid summons is necessary for jurisdiction where only the justice who receives the information may issue a summons, may be open in respect of s104. At least in the event that the defendant does not appear or does so under protest. Should the argument succeed, the defendant would not necessarily escape prosecution as an information could simply be re-laid pursuant to s101 but if, as was the case in *Qantas*,<sup>194</sup> the time in which an information could be laid was limited, a defendant could avoid the charge entirely.

This argument cannot, however, avail a defendant charged on complaint in South Australia. Section 57 of the South Australian Act is not in the same terms as s60 in the NSW legislation. As Bray CJ noted in *Sparnon v Lower*,<sup>195</sup> contrary to the practice prevailing elsewhere and formerly prevailing in South Australia, the Justice who issues the summons need not be the justice who took the complaint. Unlike the position in NSW, when a justice who takes a complaint is disqualified for bias from issuing a summons or warrant on that complaint a summons may still validly issue. There is no time limit upon the issue of a summons and no limit upon the number of summonses which may issue.<sup>196</sup> Accordingly, a second justice may, where the original summons is invalid, issue another summons to compel the appearance of the defendant at court.

That a less drastic result is occasioned by a invalid summons having been issued pursuant to s 57 is surely the result of legislative recognition of the limitations inherent in the form of words contained in s104 where the document which founds jurisdiction may only be made within certain time limits. In adopting the same form of words in respect of the power to issue a summons for a summary offence and for an indictable offence, the NSW Act prevents a second justice from acting where the justice who takes the complaint is disqualified and the time in which a fresh complaint may be made has expired. The court cannot issue a warrant in these circumstances. Proof that a valid summons has been duly served is necessary before a court can issue a warrant.<sup>197</sup> The distinction is that whilst the South Australian Act preserves a method whereby a defendant can be made amenable to the jurisdiction of the court where a summons on complaint is invalid, the NSW Act does not.

The decision in *Qantas*<sup>198</sup> was wrong in that the information was not invalid for bias as no judicial discretion was involved in its making but,

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191 Supra n 41.

192 Supra n 25.

193 Supra n 56.

194 Supra n 25.

195 Supra n 13.

196 Supra n 15.

197 Justices Act 1921 (SA) s58(3) cf s105; Justices Act 1902 (NSW) ss66, 75.

198 Supra n 25.



given that the applicant seems to have appeared under protest, the practical result may, perhaps, have been the same even if the reasoning had been satisfactory because no justice other than the justice disqualified for bias could then issue a summons or warrant and a fresh information was out of time.

In view of the foregoing, it seems that *Qantas*<sup>199</sup> correctly decided or not, is inapplicable to South Australia, notwithstanding that the case is cited for the proposition that a complaint is invalid where the justice who takes it is biased. The Queensland Supreme Court adopted the approach in *Qantas*<sup>200</sup> in the case of *R v Joice Ex parte Tsay Wann Fure*<sup>201</sup> but this decision was prior to *Ex parte Hill*<sup>202</sup> and the summons power in the Queensland Act is the same as that in NSW.<sup>203</sup>

The present position appears to be that it is for the complainant to properly invoke the jurisdiction of the court when he makes his complaint and process, defective by reason of some impropriety on the part of the justice, will not of itself operate as a shield for the defendant.

## 7. SECTION 57a: JURISDICTION TO ENTERTAIN A PLEA OF GUILTY IN WRITING

It remains to consider whether the distinction in *Hughes*<sup>204</sup> may be relied upon by a prosecuting authority where the procedure in s57a of the Act is utilised. For the purposes of the present discussion the material parts of s57a are as follows:

(1) Where a public authority or public officer makes a complaint for a simple offence not punishable by imprisonment either for a first or subsequent offence, he may, by using a form of complaint and summons bearing the endorsements prescribed by rules made by the Governor under s 203 of this Act, and causing two copies thereof to be served on the defendant, initiate a procedure whereby the defendant may plead guilty without appearing in court in obedience to the summons.

...

(6) Any defendant who serves a form pleading guilty which complies with this section need not attend the court as directed by the summons.

(7) Where a defendant who has been served with forms of complaint and summons pursuant to this section fails to serve a form pleading guilty which complies with this section and fails to appear in obedience to the summons, the court may, subject to subsection (7) of section 62b, proceed to exercise its powers under paragraph (a) or (b) of section 62.

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199 Ibid.

200 Ibid.

201 [1981] Qd R 550.

202 Supra n 84.

203 Justices Act 1886 (Qld) s53.

204 Supra n 58.

A defendant who pleads guilty in writing in accordance with s57a may be convicted *ex parte* pursuant to s62b and a penalty may then be imposed under s62c of the act. The form prescribed by the rules is Form 4A.

The authorities are in conflict as to whether s57a is a code, the effect of which is that where a summons contained on a Form 4a is invalid the complaint is also invalid and the court has no jurisdiction, or whether the complaint and summons are merely different, and severable, parts of the same document. Clearly, if the jurisdiction which the court purports to exercise is the jurisdiction to convict *ex parte* a defendant who enters a written plea of guilty, then the statutory requirements must be strictly followed.

In *Mundae v Lowcock*<sup>205</sup> the proceedings were irregular in that a form of complaint and summons pursuant to s57a was used in respect of an offence punishable by imprisonment for a subsequent offence. In addition, the Form 4A was served by post pursuant to s27a of the Act which, like s57a, may only be utilised where imprisonment is not a sentencing option. The defendant, who was a resident of Victoria, completed the form 4a stating that he did not wish to attend the Court and pleaded guilty.

Walters J considered that the unauthorised use of the procedure in s57a denied to the court the power to assume jurisdiction in the absence of the defendant and that the irregularities disclosed went beyond mere matters of procedure.<sup>206</sup> The conviction was quashed and the penalty set aside. As the matter was 'hopelessly stale' it was left to the respondent 'to take such further action as he may be advised'.<sup>207</sup> The decision cannot be criticised as a conviction under s62b requires, as a statutory precondition, compliance with s57a. However, *Mundae v Lowcock*<sup>208</sup> is not authority for the proposition that the ordinary jurisdiction of the court, even the ordinary jurisdiction to proceed *ex parte*, cannot be invoked by simply treating the form 4A as the sum of its constituent parts and no more.

The issue seems first to have arisen in the case of *Howie v Scheer*<sup>209</sup> in which the complainant had used a form 4A complaint and summons which had been superseded by a new form prescribed under s203 of the Act. The defendant did not plead guilty in writing and failed to attend at the hearing at which he was convicted and fined. The defendant argued that the variations to the endorsements contained in the new Form 4A, which concerned the fixation of a hearing date should a defendant opt to plead not guilty, were important and that their absence invalidated the summons and the conviction.

Cox J considered the purpose and history of the Form 4A procedure and determined that the form served upon the defendant did not conform to the requirements of s57a.<sup>210</sup> His Honour was of the view that the form used was not saved by s25 of the Acts Interpretation Act 1915, which permitted the use of forms to the same effect as prescribed forms,

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205 (1982) 101 LSJS 110.

206 *Ibid* 114.

207 *Ibid* 115.

208 *Ibid*.

209 *Supra* n 185.

210 *Ibid* 291.

because the new endorsements were materially different from the old.<sup>211</sup> Cox J held that the use of the prescribed form was mandatory and, accordingly, that any proceedings which required a s57a complaint and summons were ineffectual where the defendant had not been served with the proper form. However, His Honour continued:<sup>212-</sup>

'An analysis of a Form 4A complaint and summons shows that it is in three distinct parts - a complaint (s49) and a summons (s22) and the endorsements referred to in s57a itself. If there is something wrong with the endorsements but they do not negate or otherwise compromise the complaint and summons that precede them on the printed form, can it not be said that the defendant has nevertheless been served with a summons, albeit for a Form 4A summons, that is valid and effectual? In other words, that the matter can proceed on a summons which is itself in the standard form (Form 3) prescribed by the rules? The addition of the obsolete endorsements could not have prejudiced a recipient in any significant way. Nor could the endorsements be said to have qualified the effect of the other sections of the document, except in the case of a defendant who wanted to plead guilty by completing the form on the back. I do not think this produces such a fundamental change in the nature of the ordinary summons as to deprive it of its true character. As I said, an ordinary summons issued by a justice under s57 is a proper vehicle for ex parte proceedings taken under s62ba. It matters not, in my opinion, that the justice who issued the process was, in a sense, intending to issue a summons under s57a and not a summons under s57. So to hold would be to exaggerate the differences between the documents. After all, a Form 4a is, at bottom, simply the standard Form 4 complaint and summons with some added information to the defendant and a convenient means whereby he may plead guilty by post.'

The appeal against conviction in *Howie v Scheer*<sup>213</sup> was dismissed.

The above analysis was challenged by White J in *Howie v Gordon*<sup>214</sup> as involving an incorrect interpretation of the Justices Act. White J, who considered that s57a was a separate code for the rapid disposal of minor offences to which a complainant must strictly adhere, seriously doubted whether the constituent parts of a Form 4A could be severed so as to give the court jurisdiction and appeared to be strongly of the view that the whole process was invalid where the endorsements were fundamentally defective. In a lengthy 'judgment', His Honour referred the matter to the Full Court saying that it was 'undesirable that differing opinions on such a question be expressed at a single judge level'. Unfortunately, the Full Court found that the complaint was itself incurably defective and determined not to address the matters raised in the case stated by White J.<sup>215</sup>

As a result, although *Howie v Scheer*<sup>216</sup> remains as authority for the

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211 Ibid 292.

212 Ibid 295.

213 Ibid.

214 (1985) 122 LSJS 1.

215 SA Supreme Court, Full Court, unreported, 2 May 1986.

216 Supra n 185.

proposition that the various parts of a Form 4A may be severed so as to preserve jurisdiction, the question is still far from settled. However, it is submitted that *Howie v Scheer*<sup>217</sup> does represent the correct approach. Section 57a does not purport to be a complete code in itself. The section relies on the general powers contained in other provisions of the Act and it may even be argued that the power to issue a summons comes solely from ss44 and 57 notwithstanding the special form prescribed. The position of the section in the Act and the policy behind its introduction as expressed by Cox J in *Howie v Scheer*<sup>218</sup> support this view. White J appears, from his repeated references to a summons being out of time<sup>219</sup> and his characterisation of the summons on a Form 4a as the complainant's summons,<sup>220</sup> to misconceive the scheme of the legislation. His Honour certainly seems to have departed from his own judgment in *Manos*.<sup>221</sup> *Howie v Scheer*<sup>222</sup> has been cited as authority for the proposition that a fresh summons may issue on a complaint notwithstanding that the complaint is contained on a Form 4a<sup>223</sup> but the matter has yet to be determined authoritatively.

## 8. CONCLUSION

The burden of showing that a complaint has not been duly made or a summons properly issued is on the defendant if the document is or the documents are regular on their face. Walters J in *Hinton v Young*<sup>224</sup> saw no validity in the contention that the magistrates should have required evidence that the complaint was properly made and the summons properly issued. His Honour states:<sup>225</sup>

'Everything is presumed to be rightly and duly performed until the contrary is shown...if a complaint and summons, from its nature or the contents of it, appears to be in an official character, and there is nothing to destroy the effect of that appearance, then a court of summary jurisdiction is at liberty to act upon it...'

It may be said that this principle, combined with the policy manifest in Part VII of the Justices Act, will generally be successful in preventing the administration of the criminal justice system from being frustrated by technical challenges divorced from the merits of the individual case. Notwithstanding this, however, it is important that a justice possess a proper understanding of his functions and his responsibilities in relation to those functions. The cases show that some justices have, in the past, misconceived their tasks. In respect of the composite forms prescribed by the Rules where a justice simultaneously acknowledges that he has taken the complaint and issues his summons, a justice must clearly perceive the dual nature of his role.

The following points may be extracted from the judgments. They are consistent with the scheme of the Justices Act and may be said to

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217 Ibid.

218 Ibid.

219 Supra n 214 at 20, 25.

220 Ibid 26.

221 Supra n 104.

222 Supra n 185.

223 *Howie v Scheer* SA Supreme Court, Bollen J, unreported, 10 February 1986.

224 (1973) 6 SASR 129.

225 Ibid 133-134.

represent the present position in South Australia in relation to the making of a complaint and the issue of a summons:

1. The making of a complaint is primarily a matter for the complainant; provided the justice is not misled and is aware of what is transpiring, that is, that the complainant is alleging that a simple offence has been committed, there will be a valid complaint;
2. A justice is bound to take a complaint made to him pursuant to s49; he has a duty to receive it; his function is purely administrative in nature;
3. It is the complaint upon which the jurisdiction of the court is based;
4. A justice, when asked to issue a summons pursuant to s57 has a duty to consider what is alleged in the complaint;
5. A justice has a discretion as to whether or not a summons should issue and he must exercise his discretion in a judicial manner, that is, fairly and impartially;
6. The duty to take a complaint and the duty to consider whether or not a summons should issue are separate and distinct;
7. Unlike the situation which obtains in NSW, the justice who issues the summons need not be the justice who takes the complaint and, therefore, a defendant may still be made amendable to the jurisdiction of the court notwithstanding that the latter is disqualified for bias; and
8. A defect or irregularity in the summons or impropriety in the process whereby a summons is issued does not go to jurisdiction and a fresh summons may at any time be issued pursuant to s57, subject to point 5, above.

It is unclear whether a defendant may appear under protest to contest the validity of a summons without exposing himself to the jurisdiction of the court. *Coles*<sup>226</sup> leaves this point open, as does *Electronic Rentals*,<sup>227</sup> and the English cases seem to be inconclusive. However, it is submitted that a defendant must be allowed to appear under protest if the process whereby a summons is issued is to provide any protection for individuals charged on complaint. There is a marked difference between the public interest in bringing to trial a person charged with assaulting a police officer, for example, and that in relation to prosecuting a person charged with a minor matter under a regulatory provision of strict liability. Both are summary offences and are subject to time limitations. However, in respect of minor offences at least, the courts could reasonably take the view that the issue of a second summons when the first is invalid would not serve the interests of society. Such an attitude would appear to be justified if only on the basis that it would tend to compel a proper exercise of power by justices. White J may have had this aim in mind in *Howie v Gordon*.<sup>228</sup>

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226 Supra n 106 at 50-51.

227 Supra n 41.

228 Supra n 214.

Given the presumption of regularity and that there is no simple appeal procedure available from a preliminary determination which upholds jurisdiction until a finding of guilt or innocence has been made,<sup>229</sup> it may safely be assumed that most instances of maladministration under the Justices Act presently go undetected by the Supreme Court and government. The courts, in emphasising the judicial nature of the discretion in a justice as to whether a summons will issue when the importance of this function is limited by the principle that it is the complaint and not the summons which is essential to jurisdiction, may be said to have created the illusion of a genuine safeguard for the individual where none exists in South Australia.

If the Justices Act will reasonably admit of no interpretation other than that the making of a complaint is a formalised process over which the courts can have little practical control, the onus must be upon government to ensure, as far as is possible by administrative action or legislation, that individuals are not exposed to the rigors of the criminal process without just cause.

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229 *Supra* n 2 s163.