[HIGH COURT OF AUSTRALIA.]

JOHNSON . . . . . APPELLANT;

DEFENDANT,

AND

MILLER . . . . . RESPONDENT.

COMPLAINANT,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

Justices—Complaint—Disclosure of offence—Sufficiency of particulars—Latent ambiguity—Words applicable to a number of alleged offences—Refusal by prosecutor to specify offence alleged—Power to dismiss complaint—Licensing Act 1932-1935 (*S.A.*) (*No.* 2102—*No.* 2241), *sec.* 209*—*Justices Act* 1921-1936 (*S.A.*) (*No.* 1479—*No.* 2261), *secs.* 22a, 51, 55, 56, 181-183*.

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ADELAIDE, *Oct.* 15, 18.

SYDNEY, *Dec.* 16.

Latham C.J., Dixon, Evatt and McTiernan JJ.

M. laid a complaint against J. in the language of sec. 209 (1) of the *Licensing Act* 1932-1935 (S.A.), alleging that J. was the licensee of specified premises out of which certain persons were seen coming during prohibited hours. In the course of correspondence between the parties and their solicitors in furnishing particulars, it appeared that M. alleged and proposed to prove that about thirty men were seen coming in or out of the premises between the times stated, and that M. was in a position to give the exact time when each

* Sec. 209 (1) of the *Licensing Act* 1932-1935 (S.A.) provides: "Any licensee . . . out of whose licensed premises any person is seen coming during any Sunday . . . except between the hours of one o'clock in the afternoon and half-past two o'clock in the afternoon and between the hours of six o'clock in the evening and eight o'clock in the evening . . . shall be guilty of an offence . . . unless he proves to the satisfaction of the special magistrate or justices hearing the case, that the person—(*a*) was not on the premises for any purpose (whether the sole purpose or not) contrary to the provisions of this Act; or (*b*) was on the premises contrary to the will of the licensee . . . and that the licensee . . . took all reasonable steps to prevent the said person from entering the premises and to remove him therefrom; or (*c*) was on the premises without the knowledge of the licensee . . . and that the licensee . . . exercised all practicable diligence to prevent the said person from entering or being on the premises."

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man was seen, but could prove the identity of only four of the men. Later M. withdrew the letter giving particulars as to the thirty men, and a statement that an unknown person was seen coming out of the premises during the specified hours on the date stated was substituted. At the hearing the complaint was amended to refer to "a certain person" instead of "certain persons." J. then contended that M. should supply further particulars to show which of the thirty men was the man whose emergence from the hotel was the subject of the complaint. M. refused to do so, and the complaint was dismissed on the ground that, within the meaning of sec. 182 (1) of the *Justices Act* 1921-1936 (S.A.), it was defective in substance and J. was prejudiced by the defect.

Held, by *Dixon*, *Evatt* and *McTiernan* JJ. (*Latham* C.J. dissenting), that the complaint was rightly dismissed.

Decision of the Supreme Court of South Australia (Full Court): *Miller* v. *Johnson*, (1937) S.A.S.R. 323, reversed.

APPEAL from the Supreme Court of South Australia.

On a complaint laid by William Charles Miller of Adelaide, police prosecutor, Paul Johnson of Adelaide, licensed person, was charged that on 29th November 1936, at Adelaide, he "was the licensee of certain licensed premises known as the Cumberland Arms Hotel situate at the corner of Waymouth and Elizabeth Streets . . . out of whose said licensed premises certain persons were seen coming during Sunday the said 29th day of November 1936 except between the hours of one o'clock in the afternoon and half past two o'clock in the afternoon and between the hours of six o'clock in the evening and eight o'clock in the evening: Contrary

* The *Justices Act* 1921-1936 (S.A.) provides:—Sec. 22a:—"(1) Every information, complaint, summons, warrant, or other document under this Act in which it is necessary to state the matter charged against any person shall be sufficient if it contains a statement of the specific offence with which the accused person is charged, together with such particulars as are necessary for giving reasonable information as to the nature of the charge. (2) The statement of the offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and, if the offence charged is one created by statute, shall contain a reference to the section of the statute creating the offence. (3) After the statement of the offence, necessary particulars of the offence shall be set out in ordinary language, in which the use of technical terms shall not be required. (4) Any information, complaint, summons, warrant, or other document to which this section applies which is in such form as would have been sufficient in law if this section had not passed shall notwithstanding anything in this section continue to be sufficient in law." Sec. 51: "Every complaint shall be for one matter of complaint only, and not for two or more matters." Sec. 55: "In any complaint and in any proceedings thereon the description of any offence in the words of the special Act or other document creating the offence, or in similar

to the provisions of sec. 209 of the *Licensing Acts* 1932 to 1935." The defendant asked for particulars "identifying the person or persons alleged to have been seen coming off the premises and stating the time or approximate time at which such person or persons is or are alleged to have come off the premises." In response to this request the prosecutor, in a letter dated 9th February 1937, gave particulars stating the names of three persons and the christian name and description of a fourth, and referred to divers persons "whose names are at present unknown, but can be described," and also stating thirty approximate times, the earliest at 8.50 a.m. and the latest at 10.42 a.m., when these persons were alleged to have entered or left the premises. The complaint in this form, and with these particulars, came on for hearing on 10th February 1937. It was objected that the complaint as it then stood disclosed at least thirty offences, and the hearing was adjourned. On 17th February in a letter from the Crown Solicitor the original particulars contained in the prosecutor's letter were "withdrawn" and the following new particulars were furnished: "That some person whose name is unknown to the police was seen coming out of the premises in question at a time between 9 a.m. and 10.45 a.m. on the date charged." On the case coming on for hearing again on 22nd February, the complaint was amended and "a certain person" was substituted for "certain persons." For the defendant it was then contended that the complainant should supply further particulars showing which of the thirty men was the man whose emergence from the hotel was the subject of the complaint.

words, shall be sufficient in law." Sec. 56 (1): "No exception, exemption, proviso, excuse, or qualification . . . need be specified or negatived in the complaint." Sec. 181: "It shall be sufficient in any . . . complaint, if the same gives the defendant a reasonably clear and intelligible statement of the offence or matter with which he is charged." Sec. 182 (1): "No objection shall be taken or allowed to any . . . complaint in respect of—(*a*) any alleged defect therein, in substance or in form; or (*b*) any variance between it and the evidence adduced in its support at the preliminary examination or at the hearing (as the case may be): Provided that the justice or the court shall dismiss the . . . complaint, unless it is amended as provided by section 183, if it appears to him or to it—(*a*) that the defendant has been prejudiced by such defect or variance; or (*b*) that the . . . complaint fails to disclose any offence or matter of complaint." Sec. 183: "If it appears to the justice, or to the court before whom any defendant comes or is brought to answer any . . . complaint that the . . . complaint—(*a*) fails to disclose any offence or matter of complaint, or is otherwise defective; and (*b*) ought to be amended so as to disclose an offence or matter of complaint, or otherwise to cure such defect—the justice or the court may amend the information or complaint upon such terms as may be just."

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This the complainant refused to do. The special magistrate held that the complaint was defective in substance and that the defendant was prejudiced by the defect, and made an order of dismissal accordingly. No evidence was given at the hearing, but the letters already referred to were before the court.

The complainant appealed to the Supreme Court of South Australia, and *Richards* J. held that the failure to give further particulars did not render the complaint defective. This decision was affirmed by the Full Court on an appeal by the defendant: *Miller* v. *Johnson* (1).

From this decision the defendant appealed to the High Court.

Travers, for the appellant. The combined effect of secs. 22a, 55 and 181 of the *Justices Act* 1921-1936 is to provide that a complaint shall state, i.e., classify, the offence by alleging the offence in the terms of the Act which creates the offence, and shall also give reasonable particulars of the offence. This complaint is defective in substance in that it contains more than one matter of complaint (*Hedberg* v. *Woodhall* (2)), and because sufficient particulars are not given. Even the particulars subsequently furnished are not sufficient to cure the defect. *Stokes* v. *Grant* (3) does not apply ; in that case no particulars were sought. *Pierce* v. *Kennedy* (4), *Tucker* v. *Noblet* (5) and *Young* v. *Allchurch* (6) developed the practice of receiving evidence of a number of offences and then allowing the complainant to elect on which he would proceed. But in none of these cases had the issue been narrowed by particulars.

[EVATT J. referred to *Hamilton* v. *Walker* (7).]

The court had power to dismiss the complaint by reason of sec. 182, and, further, by its inherent power to prevent itself from being made a means of injustice (*Tucker* v. *Noblet* (8) ; *O'Flaherty* v. *McBride* (9) ; *Rodgers* v. *Richards* (10) ; *Davies* v. *Ryan* (11) ; *Johnson* v. *Needham* (12).

(1) (1937) S.A.S.R. 323.
(2) (1913) 15 C.L.R. 531.
(3) (1930) S.A.S.R. 394.
(4) (1923) S.A.S.R. 476.
(5) (1924) S.A.S.R. 326.
(6) (1927) S.A.S.R. 185.
(7) (1892) 2 Q.B. 25.
(8) (1924) S.A.S.R., at p. 330.
(9) (1920) 28 C.L.R. 283.
(10) (1892) 1 Q.B. 555.
(11) (1933) 50 C.L.R. 379.
(12) (1909) 1 K.B. 626.

[LATHAM C.J. referred to *Bartholomew* v. *Wiseman* (1) and *Onley* v. *Gee* (2).]

Joel v. *Barclay* (3) is distinguishable, as it is no authority as to the proper way to deal with a preliminary point taken as in the present case. If the form of the complaint is held to be sufficient, the defendant will not be able to plead *autrefois acquit* or *convict* to a further charge. [Counsel also referred to *Smith* v. *Moody* (4); *Pointon* v. *Cox* (5); *R.* v. *Hush*; *Ex parte Devanny* (6); *Ex parte Duncan* (7); *R.* v. *Lockett* (8); *R.* v. *Partridge* (9).]

Hannan K.C. (with him *Gillespie*) for the respondent. It must not be assumed that what was stated in the prosecutor's letter would be the evidence on the complaint (*Barnes* v. *Norris* (10)).

[DIXON J. referred to *Paley* on *Summary Convictions*, 9th ed. (1926), p. 544.]

The defendant would be in peril of conviction on the complaint in respect of any one of the thirty occasions, but not more than one (*Miller* v. *Daly* (11)). The special magistrate was not justified in asking the prosecutor how many occasions he proposed to prove, nor in taking into consideration that he, and not the defendant, would be embarrassed. *Becker* v. *Miller* (12) indicates that the real offence is being a licensee when a certain state of affairs exists. The prosecution could elect to treat this as an offence continuing over a period (*Joel* v. *Barclay* (3)). The complaint is good, and the special magistrate should have heard the relevant evidence of at least one of the persons coming from the premises, but properly of all the persons, in order to rebut the possible defences, or as part of the *res gestæ*. If the defendant was prejudiced, that could be overcome by an adjournment. The special magistrate's fallacy was in thinking that the particulars formed part of the complaint. [Counsel referred to *Todrick* v. *Dennelar* (13) and *Hunt* v. *Bond* (14), regarding particu-

(1) (1891) 8 T.L.R. 147; 56 J.P. 455.
(2) (1861) 30 L.J. M.C. 222; 25 J.P. 342.
(3) (1937) 1 All E.R. 309.
(4) (1903) 1 K.B. 56.
(5) (1927) 91 J.P. 33.
(6) (1932) 48 C.L.R. 487.
(7) (1924) 41 W.N. (N.S.W.) 128.
(8) (1914) 2 K.B. 720.
(9) (1930) 30 S.R. (N.S.W.) 410; 47 W.N. (N.S W.) 173.
(10) (1876) 41 J.P. 150.
(11) (1936) S.A.S.R. 299.
(12) (1936) S.A.S.R. 125.
(13) (1904) 12 Sc. L.T. 573.
(14) (1930) S.A.S.R. 46.

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lars required before trial. Counsel also referred to *R.* v. *Thompson* (1); *Bell* v. *Sharpe* (2); *Bowen-Rowlands, Criminal Proceedings on Indictment and Information*, 2nd ed. (1910), p. 112).]

Travers, in reply, referred to *Kitchen & Sons* v. *Miller* (3).

Cur. adv. vult.

Dec. 16. The following written judgments were delivered :—

LATHAM C.J. Sec. 209 of the *Licensing Act* of South Australia 1932 as amended by sec. 17 of the *Licensing Act* 1935 provides that any licensee out of whose premises any person is seen coming during any Sunday except between certain specified hours shall be guilty of an offence unless he proves to the satisfaction of the special magistrate or justices hearing the case that the said person (*a*) was not on the premises for any purpose (whether the sole purpose or not) contrary to the provisions of the Act; or (*b*) was on the premises contrary to the will of the licensee or the person in charge at the time and that the licensee or such person took all reasonable steps to prevent him from entering the premises and to remove him therefrom; or (*c*) was on the premises without the knowledge of the licensee or of the person in charge thereof and that the licensee or such person exercised all practicable diligence to prevent him from entering or being on the premises.

The appellant, Paul Johnson, the licensee of the Cumberland Arms Hotel, was charged with an offence under sec. 209. The complaint, as it was amended when the matter came before the special magistrate, was in the following form : " That Paul Johnson . . . on 29th November 1936 . . . was the licensee of certain licensed premises . . . out of whose said licensed premises a certain person were " (*sic*) " seen coming during Sunday the said 29th day of November 1936 . . . contrary to the provisions of sec. 209 of the *Licensing Acts* 1932 to 1935."

The following particulars were given by the complainant: " That some person whose name is unknown to the police was seen

(1) (1914) 2 K.B. 99.
(2) (1912) Q.W.N. 46.
(3) (1896) 22 V.L.R. 265; 18 A.L.T. 59.

coming out of the premises in question at a time between 9 a.m. and 10.45 a.m. on the date charged."

If in fact only one person either came out or was seen coming out of the premises during the period mentioned, no difficulty could arise by reason of the form of the complaint. But the licensee contends that so many persons either came out or were seen to come out during the period mentioned that he is placed in a difficulty as to his defence. It is urged that he is entitled to make the prosecutor frame the complaint in such a manner, or give such particulars under the complaint, as to remove, or at least to diminish, this difficulty. The contention is not one which invites enthusiastic support, but though it is not the function or the duty of a prosecutor to facilitate the preparation of either a true or false defence, it is clear that the defendant is entitled to know what charge is made against him. The defendant contends that in the circumstances of this case he does not know what the charge actually is, because it may relate to any one of a considerable number of persons who, according to a statement made on behalf of the prosecutor in a letter, were seen coming from his premises on the day in question within the prohibited hours. The special magistrate was of opinion that the defendant was prejudiced by the refusal of the prosecutor to give further particulars and, purporting to act under the proviso to sec. 182 of the *Justices Act* 1921-1936, he dismissed the information.

Upon appeal to the Supreme Court *Richards* J. allowed the appeal, quashed the order of dismissal, and ordered that the case should be remitted for hearing before the special magistrate. Upon a further appeal to the Full Court the decision of *Richards* J. was upheld. An appeal is now brought by special leave to this court.

Before examining the particular facts upon which the defendant relies for the purpose of supporting the order of the magistrate, it is desirable to refer specifically to the provisions of the *Justices Act* with respect to the manner in which an offence is to be charged and with respect to the powers of the court where there is an objection to the substance or form of a complaint. I consider these provisions in relation to the complaint with which the magistrate actually dealt, and not in relation to the complaint as originally laid, which alleged, not that "a certain person was seen coming" from the

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premises, but that "certain persons were seen coming" from the premises. The only complaint with which the magistrate dealt was with the complaint as amended, and it is only in relation to that complaint that any question arises upon this appeal. The defendant contends that the original form of the complaint before the amendment was made, together with certain particulars of that complaint which had been given by the prosecutor, are relevant for the purpose of determining whether or not the trial should have proceeded upon the basis of the complaint as amended and of the particulars given under the amended complaint; but the question which the court has to determine depends upon the sufficiency of the amended complaint and not upon the character of the complaint in its original form. Therefore, in the first place, I consider the provisions of the *Justices Act* in relation to the amended complaint, which charges that one person was seen coming from the premises during the prohibited hours.

Sec. 51 of the *Justices Act* provides that every complaint shall be for one matter of complaint only and not for two or more matters. Sec. 55 provides that a description of any offence in the words of the Act creating the offence shall be sufficient in law. The complaint satisfied the requirements of these sections. Sec. 181 provides that it shall be sufficient in any complaint if it gives the defendant a reasonably clear and intelligible statement of the offence or matter with which he is charged. The complaint also satisfies this requirement. The defendant knows that he is charged for that, on a date named, between hours specified, a person was seen coming from his licensed premises contrary to sec. 209 of the *Licensing Act*. It is then for the defendant, if he can, to bring that person within one of the exculpatory conditions which appear in sec. 209. I will examine later the contention that the surrounding circumstances of this complaint deprive the complaint of its apparent clearness and intelligibility. Whether this contention be well founded or not, there is, in my opinion, no doubt that, if the complaint itself with the particulars given under it were looked at without reference to any other circumstances, sec. 181 has been complied with.

Sec. 182 provides that no objection shall be taken or allowed to any complaint in respect of "(*a*) any alleged defect therein, in

substance or in form ; or (*b*) any variance between it and the evidence adduced in its support at the preliminary examination or at the hearing (as the case may be)." In this case the complaint was dismissed before any evidence was taken, and therefore it is not necessary to consider any question of variance between the complaint and the evidence. There is no defect either in substance or in form in the complaint. It has been argued that further particulars should be given of the complaint, but the complaint itself satisfies the requirements of the statute to which I have hitherto referred. Sec. 182 contains a proviso in the following terms :—" Provided that the justice or the court shall dismiss the information or complaint, unless it is amended as provided by sec. 183, if it appears to him or to it—(*a*) that the defendant has been prejudiced by such defect or variance ; or (*b*) that the information or complaint fails to disclose any offence or matter of complaint." It is not contended that the complaint does not disclose any offence. As already stated, there is no question of variance between the complaint and any evidence, and there is no defect in the substance or in the form of the complaint. Therefore the proviso has no application in this case, and the magistrate was not entitled to dismiss the complaint by reason of the proviso. Further, the proviso operates only in cases where the complaint is not " amended as provided by sec. 183." Sec. 183 is as follows :—" If it appears to the justice, or to the court before whom any defendant comes or is brought to answer any information or complaint that the information or complaint—(*a*) fails to disclose any offence or matter of complaint or is otherwise defective : and (*b*) ought to be amended so as to disclose an offence or matter of complaint, or otherwise to cure such defect—the justice or the court may amend the information or complaint upon such terms as may be just." This section applies only if the complaint does not disclose any offence or matter of complaint or is otherwise defective. But the complaint in this case does disclose an offence under sec. 209 of the *Licensing Act* and is not defective. Accordingly, the provisions of sec. 183 are not applicable. The magistrate was not entitled to insist upon an amendment under sec. 183, and therefore, for this further reason, the proviso of sec. 182 (which applies only where an

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amendment that could have been made under sec. 183 has not been made) has no application.

Sec. 184 repeats the provisions of sec. 182 as to *a* and *b* and applies them to a warrant or summons. Thus, by reason of sec. 184, as well as by reason of sec. 182, no objection could be taken to the summons in this case on account of any alleged defect in substance or in form or on account of any variance between it and the evidence adduced in support of it. The section provides further that the justices may adjourn the hearing when it appears that the defendant has been prejudiced by such defect or variance. In this case there was neither defect nor variance, and therefore this section has no application.

The *Justices Act* 1931 sec. 7, adds sec. 22a to the principal Act. This section provides that every complaint, summons etc. shall be sufficient if it contains a statement of the specific offence of which the accused person is charged together with such particulars as are necessary for giving reasonable information as to the nature of the charge. In the complaint in this case the nature of the charge is fully specified. It will be observed that the particulars required to be given are such as are necessary for giving reasonable information as to the *nature* of the charge. These words are not apt to require particulars to be given of anything further than the nature or character of the charge made. They are not apt to require particulars of the evidentiary facts intended to be proved by the prosecutor. Further, this section relates to the contents of the complaint or summons itself, and not to particulars *ultra* the complaint or summons. But sec. 22a is not important, because sub-sec. 4 of the section provides that any complaint, summons etc. " to which this section applies which is in such form as would have been sufficient in law if this section had not been passed shall notwithstanding anything in this section continue to be sufficient in law." It is therefore impossible so to apply sec. 22a as to bring about the result that any complaint or summons is insufficient in law.

Thus, there appears to be no reason founded upon the provisions of the *Justices Act* for holding that the complaint was insufficient. The section under which the magistrate purported to act in dismissing

the complaint, namely, sec. 182, cannot, for the reasons given, be relied upon to support his decision.

But I have not up to the present referred in any detail to the special facts upon which the defendant relies upon this appeal. The complaint in its original form, as I have already said, referred to " certain persons " who were seen coming out of the hotel. The defendant asked for particulars " identifying the person or persons alleged to have been seen coming off the premises and stating the time or approximate time at which such person or persons is or are alleged to have come off the premises." In response to this request the prosecutor, in a letter dated 9th February 1937, gave particulars stating the names of three persons in full and referring also to another man, named " Tom," who was said to conduct a barber's shop in Waymouth Street, and to divers persons " whose names are at present unknown but can be described." The prosecutor also gave a list of times or approximate times when the persons were alleged to have entered or to have come off the premises. He specified thirty times, beginning at 8.50 a.m. and ending at 10.42 a.m. The complaint in this form, and with these particulars, came before the magistrate on 10th February 1937, and an objection was taken that the complaint as it then stood disclosed at least thirty offences. The court agreed that more than one offence was alleged and ordered that better particulars should be supplied. On 17th February the letter containing the original particulars was " withdrawn," and new particulars were furnished in the form already stated, namely, " that some person whose name is unknown to the police was seen coming out of the premises in question at a time between 9 a.m. and 10.45 a.m. on the date charged." On the case coming on for hearing again upon 22nd February, the complaint was amended and " a certain person " was substituted for " certain persons." Thus, in its final form, and in the only form in which it was dealt with by the magistrate, the complaint was confined to the exit of one person unknown to the police within the period between 9 a.m. and 10.45 a.m. on the date charged.

Upon the basis of these facts it is contended that the defendant is prejudiced in his defence and that the provisions of the *Justices Act* to which reference has been made entitled him to further

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particulars. I have examined in detail the provisions of the *Justices Act* in question and have given reasons for my opinion that none of those provisions can, if careful attention is paid to their precise terms, be applied in this case in such a way as to assist the contention of the defendant. The charge which was ultimately made was a charge which related to one person only, alleged to be unknown to the police. The fact that the police had earlier stated that many persons came out of the hotel during that period does not affect the clearness and intelligibility of the charge which ultimately the police made and which was the only charge which was made before the court.

The court has, however, been referred to the following cases which, it is said, support the defendant's contention that the magistrate acted rightly in refusing to hear the complaint and dismissing it: *Smith* v. *Moody* (1); *Hedberg* v. *Woodhall* (2); *Johnson* v. *Needham* (3); *Davies* v. *Ryan* (4). *Smith* v. *Moody* (1) decides that a conviction should be quashed if it does not specify the facts which are necessary to constitute the relevant offence. A complaint would be insufficient if it were open to the same objection. But a conviction in the terms of the complaint in this case would plainly be good. It could not be held to be bad because it did not name or describe the person seen coming out of the hotel or because it did not specify the actual time within prohibited hours at which he was seen coming out. *Hedberg* v. *Woodhall* (2) does not assist the defendant. It shows that, even where two offences are charged in an information, it is nevertheless the duty of the magistrate to hear the evidence and to form a conclusion as to whether either of the offences charged is proved. The conviction would then be for the offence, if any, which was proved, and it would be proper to amend the information so that the conviction corresponded with it. *Johnson* v. *Needham* (3) shows that, even in a case where a single information charges three offences, the justices should proceed with the hearing, though the conviction should be only for one offence, the prosecutor being required to specify the offence for which he seeks a conviction after the justices have heard his evidence. *Davies* v. *Ryan* (4) illustrates

(1) (1903) 1 K.B. 56.
(2) (1913) 15 C.L.R. 531.
(3) (1909) 1 K.B. 626.
(4) (1933) 50 C.L.R. 379.

the principle that the hearing of a charge should not proceed if the defendant is not fairly informed of the charge against him, and it also illustrates the application of the legislative provision that a charge in the words of a statute creating an offence is sufficient in law. These authorities really go no further, so far as the present case is concerned, than to support the proposition that a defendant is entitled to know what the offence is with which he is charged.

The complaint must show upon its face that what is charged is an offence according to law, and it is sufficient if it sets forth the acts which are relied upon as constituting the offence with such a reference to time and place as identifies those acts. The only point upon which, in my opinion, it may be suggested that the circumstances surrounding the complaint (as distinct from the substance or form of the complaint itself) show that this complaint, though apparently sufficient, is really insufficient, is to be found in the fact that the prosecutor has specified a period of nearly two hours (between 9 a.m. and 10.45 a.m.) on a specified date. The letter of 9th February giving the original particulars undoubtedly suggests very strongly that it would be possible for the prosecutor to select one of the thirty names mentioned in those particulars so as to confine the charge to the case of a person who left the hotel at a particular time. Such selection, made before the hearing, might prevent a possible adjournment of the hearing, but it would not really assist the defendant in his defence. If he has no evidence of the identity of the persons who left at precise times, the specification of precise times by the prosecutor would not help him in his defence. If he has such evidence, he can adduce it as soon as he hears the police evidence —either at once, or, if he desires an adjournment, after an adjournment. But the test of the sufficiency of a complaint is not to be found in the convenience of the defendant. It is to be found in the terms of the relevant sections of the *Justices Act*. There is no provision in that Act which compels the degree of particularity for which the defendant contends. The offence is clearly charged, and the defendant must be prepared to meet it.

If the case had proceeded to trial, as I think it ought to have proceeded, no practical difficulty would, I think, have arisen. Either the prosecutor would have given no evidence at all, in which case

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the complaint would have been dismissed, or on the other hand, the prosecutor would have tendered evidence to show that a person was seen leaving the hotel. As soon as such evidence was tendered the question would arise as to whether it was admissible. If the prosecutor was not prepared to state that the person as to whom evidence was tendered was the person referred to in the complaint, the evidence must, at that stage of the hearing, have been rejected as irrelevant. Then, in the absence of any admitted evidence, the prosecutor would be in the position of having given no evidence, and the complaint would be dismissed. If the prosecutor stated that that person was the person upon whose exit from the licensed premises he relied to prove the offence, then he would be confined, so far as proof of the offence was concerned, to evidence with respect to that person. If the defendant was not prepared with evidence with respect to that person, for example, with evidence as to the exculpatory conditions *a*, *b* and *c* as set forth in sec. 209, he would be entitled to obtain an adjournment on the grounds that he had not had a proper opportunity of preparing his defence (*Ord* v. *Ord* (1)). Upon the adjourned hearing he would be entitled to cross-examine the police witnesses and to adduce his own evidence.

It has been suggested in argument that, even under the amended complaint, evidence might be admissible in respect of a number of persons seen leaving the hotel during the period mentioned.

As at present advised I do not see how such evidence would be admissible in the prosecutor's case, whatever might be the position if he were allowed to make a case in rebuttal of some unexpected defence. But this question of the admissibility of evidence does not arise upon the present appeal. It could be dealt with if and when it did arise.

I am of opinion, for the reasons given, that no injustice would have been done to the defendant by proceeding with the trial and that he would not have been prejudiced. The refusal of the prosecutor to give further particulars might well be taken into account in dealing with the costs of the adjournment, but, for the reasons which I have stated, I do not see how it can be held to have entitled the magistrate to dismiss the complaint.

(1) (1923) 2 K.B. 432, at p. 439.

It has been urged that it is unreasonable to expect a licensee to be prepared to deal with an allegation that a person unknown to the police left his premises within prohibited hours. But, as pointed out by *Richards* J. and by *Cleland* J., sec. 209 of the *Licensing Act* requires a licensee, in order to observe the law, to place himself in such a position as to be able to prove to the satisfaction of a court, as to each and every one of persons who leave his premises during the prohibited hours, some one or other of the matters of defence specified in the section. If a licensee chooses to allow, or is so unfortunate as to have, large numbers of persons upon his premises in prohibited hours, he cannot, in my opinion, be allowed to escape all liability on the ground that there were so many people in the hotel during those hours that he really does not know who the person is to whom the police refer when they bring a charge against him.

It was argued on behalf of the appellant that it was apparent from the correspondence between the parties that the police intended to prove that a considerable number of persons emerged from the hotel within the period mentioned in the final particulars, and to rely upon getting a conviction in respect to some one or other of them without being bound to specify at the outset of the hearing any particular one or other of them. Possibly the prosecutor was not guiltless of such an intention, but the proceedings at a trial are under the control of the court, and I have already described the proper procedure, the observance of which would compel, in the ordinary course of the trial, a specification of the person which would give the defendant all the information that he needed. The observance of such a procedure is, I think, greatly to be preferred to the introduction of any rule that particulars should be given of complaints before justices as if they were proceedings in a superior court. Proceedings before justices are intended to be as simple as possible. No provision is made for interlocutory proceedings. There is no procedure which enables a defendant to summon a complainant to appear, either before some justice of the peace selected by the defendant or before a court of petty sessions, for the purpose of obtaining an order for particulars. No justice or court has any power to make such an order so as to impose any duty upon a defendant. The next step after the service of a summons based upon a complaint

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is the hearing of the complaint. When the parties appear before the court which is to hear the complaint, the question of the sufficiency of the complaint can be dealt with in accordance with the provisions of the *Justices Act* to which reference has been made. The provisions of the *Justices Act* prevent the justices from dismissing a complaint without hearing it if it is sufficient in law and the complainant wishes to proceed with the hearing. From a practical point of view an intimation that particulars should be given will often be a sensible non-technical course to pursue. But, if a complaint is sufficient in law, the justices cannot, in the face of objection by the complainant, give themselves authority to dismiss the complaint without hearing it by purporting to make a curial order for particulars with which the complainant is not willing to comply. In such a case other means are available for procuring a fair trial. I have already stated how, in my opinion, all the provisions of the law can be observed and a fair trial procured in the present case. The control which the justices have over proceedings in their court is ample to prevent any injustice being done to a defendant who is genuinely embarrassed because the information given with respect to an offence with which he is charged is not as detailed and particular as it might have been.

In my opinion the decisions of *Richards* J. and of the Full Court are right and, therefore, the appeal should be dismissed and the case remitted to the special magistrate for rehearing.

DIXON J. A question of procedure is raised by this appeal, and the procedure is that of a court of summary jurisdiction. But the question has proved to be of considerable difficulty. In part the difficulty arises from the peculiar characteristics of the substantive offence forming the subject of the proceedings. It does not consist in specific acts or omissions on the part of the offender, defined without reference to the manner in which they may be proved. It is created by a provision of the *Licensing Act* 1932-1935 (S.A.) for the purpose of imposing on a licensee penal liability for the presence on the licensed premises during certain prohibited hours of any person, unless the licensee can establish one or other of the excuses or justifications which the statute allows to him. As amended,

sec. 209 (1) provides that a licensee shall be guilty of the offence if, within the hours in question, any person is found on his licensed premises or is seen coming out of them, unless the licensee proves to the satisfaction of the court hearing the case that at least one of three conditions was fulfilled. The first condition is that the person was not on the premises for any purpose contrary to the provisions of the *Licensing Act*. The second condition is that he was on the premises against the will of the licensee, or his representative for the time being, who took all reasonable precautions to prevent his entering the premises and to remove him. The third alternative condition is that the person was there without the knowledge of the licensee, or his representative, who exercised all practicable diligence to prevent his entering or being on the premises. The provision appears to me to impose upon the licensee for each person found upon or seen leaving the premises a distinct liability as for a separate offence. Perhaps the generality of this statement needs qualifying by one exception. For, possibly, if a number of persons is found upon or coming out of the premises at one time and they are acting in combination, their presence does not constitute more than one offence. As they are jointly there, they may be regarded as together satisfying the condition which constitutes that particular element in the offence and not as providing separate instances of that element. But I am unable to agree in the view that the presence on the premises, or the departure from the premises, on distinct occasions however close in point of time of several persons acting independently may be treated as constituting or evidencing but one offence. They are repetitions, not continuations, of the state of facts which exposes the licensee to penal liability if he fails to prove one or other of the three matters of exculpation. Each of these matters of excuse depends upon something which is or may be peculiar to the person found in or seen leaving the premises. His purpose must have been one consistent with the provisions of the Act, or his entrance must have been against the will of the licensee and in defiance of his precautions, or the person's presence must have been without the licensee's privity and in spite of his care to prevent it. No licensee could succeed in bringing the case within any of these grounds of excuse unless the presence or departure of

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some identifiable person or collection of persons on some distinct occasion constituted the offence from which he must so exculpate himself. This view is, I think, confirmed by a curious qualification of sub-sec. 1 of sec. 209 contained in sub-sec. 2. If a licensee charged with the commission between certain hours of an offence under the first sub-section proves that he kept his front door unlocked and afforded reasonable facilities for the entrance of the police, then the second sub-section directs that the charge shall be treated as one under the next succeeding section, a section which places upon the prosecution the burden of proving that the person found upon or seen coming out of the premises was there for a purpose contrary to the Act and with the knowledge of the licensee, and allows the licensee to exculpate himself by proving that the person was there against his will. Here it is not only the nature of the excuse or justification but also of the facts to be proved by the prosecution that makes the identification of a specific person and a specifie occasion the foundation of a charge under the provision. But the purpose of sec. 209 is to place upon the licensee the obligation of preventing any supply of liquor after hours or any other unlawful use of his premises. If a licensee is systematically or frequently disregarding this obligation, it is not unlikely that a numerous succession of persons will be seen to come to and go from his premises during the forbidden hours. Among the visitors or intruders there may be some few whose purpose is not contrary to the provisions of the Act, and, even if there is none such, yet it is not inconceivable that a licensee may be ready with a story of some verisimilitude to account for the presence of one or two persons, a story which could not but fail to justify that of a greater number. It is, therefore, not unnatural for a prosecutor who believes that he can show that, one after another, men went into or out of licensed premises within the proscribed hours to object to specify one of them to the exclusion of the others as the particular subject of the charge contained in any given complaint.

The respondent, who laid the complaint in the present case, regarded himself as in such a position. The complaint alleged that the appellant was the licensee of licensed premises, naming them, out of which certain persons were seen coming on a specified Sunday,

contrary to sec. 209. As a result of letters passing between the solicitors for the two parties, the respondent furnished the following particulars of the complaint: That some person whose name is unknown to the police was seen coming out of the premises in question at a time between 9 a.m. and 10.45 a.m. on the date charged. But in the course of the same letters it appeared that the respondent alleged and proposed to prove that about thirty men were seen coming in or out of the premises between the times stated. The respondent was in a position to give the exact times when each was seen, times the intervals between which varied between half a minute and twenty minutes. But he could not prove the identity of more than four of the men. At the hearing of the complaint these letters were placed before the learned special magistrate constituting the court of summary jurisdiction. At the instance of the respondent, an amendment was made in the complaint so that it should allege, not that certain persons were seen coming out of the appellant's licensed premises, but that one such person was so seen. For the appellant it was contended that the respondent should supply further particulars showing which of the thirty men was the man whose emergence from the hotel was the subject of the complaint. This the respondent refused to do. The learned special magistrate agreed in the appellant's contention, and, upon the respondent's persisting in his refusal, dismissed the complaint on the ground that it was defective in substance and that the defendant (the now appellant) was prejudiced by the defect. Dismissal of a complaint for such a reason is authorized by a proviso to sec. 182 of the *Justices Act* 1921-1936 (S.A.). Sec. 181 of that Act provides that it shall be sufficient in any complaint if it gives the defendant a reasonably clear and intelligible statement of the offence or matter with which he is charged. Sec. 182 then provides that no objection shall be taken or allowed to any complaint in respect of any alleged defect therein in substance or in form or any variance between it and the evidence. So far, the legislation follows the provision in *Jervis' Act* 1848 (11 & 12 Vict. c. 43, sec. 1). That provision, however, goes on to enact that the justices may adjourn the case to some future day if there be a variance such that the defendant has been deceived or misled. The South-Australian sec. 182 ends with a proviso which gives, not a

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power of adjournment, but a power of dismissal, and it extends the power from the case of a variance to that of a defect in the complaint or a failure of the complaint to disclose any offence or matter of complaint.

If it appears to the court of summary jurisdiction that the defendant has been prejudiced by such a defect or variance or that the complaint fails to disclose any offence or matter of complaint, then, unless the complaint is amended, the court must dismiss it. Thus, the view taken by the learned special magistrate supposes a defect in the complaint. In stating the offence, the complaint described it in the words of sec. 209 (1) of the *Licensing Act* without specifying or negativing the excuses, and the *Justices Act* 1921-1936 (secs. 55 and 56) provides expressly that such a description shall be sufficient in law. But this relates only to the nature of the offence and does not dispense with the necessity of specifying the time, place and manner of the defendant's acts or omissions (*Smith* v. *Moody* (1)). The complaint did in fact state the day, the place and the circumstances of the offence, and, until it appeared that according to the complainant during the time particularized many persons were seen coming from the licensed premises, the sufficiency of the complaint would be taken for granted. But, if the complainant were to prove that many persons unknown issued from the hotel during the period given in the particulars on the day, at the place and in the circumstances mentioned in the complaint, it is evident that it would become quite uncertain which of them was the person unknown to whom the complaint referred. In other words, the facts or the alleged facts disclosed a latent ambiguity in the complaint. The latent ambiguity might have been removed by making an amendment or by giving particulars selecting one instance or person to the exclusion of the others. Doubtless it would not be easy to avoid all ambiguity, but, either by reference to the exact time when the person selected was seen to emerge or to the numerical place he occupied in the succession of people said to have been seen between the times given, it would have been possible to tie the complaint down to one instance and make it incapable of equal application to each of the thirty instances. The existence in the complaint of such a latent ambiguity

(1) (1903) 1 K.B., at pp. 61, 63; 87 L.T. 682, at p. 685.

is the foundation for the contention, which the magistrate upheld, that there was a defect in the complaint by which the defendant, the now appellant, had been prejudiced. The respondent, however, took the ground that on its face the complaint gave sufficient particulars and that he was entitled to support the charge by any instance he was able to prove falling within the times specified. In a sense this may be correct, but not in the sense intended. If the respondent had been content to confine his evidence in support of his complaint to one person who was seen coming out of the licensed premises between the times stated, the complaint might be regarded as having given the appellant sufficient information to meet the case made. But the real claim of the respondent is to prove that all thirty men entered or issued from the hotel one after another without tying himself down to any one of them as the man to whom the complaint refers. Prima facie, but one offence can be proved under one charge. For, except to prove intent or system and to exclude accident or mistake, evidence that accused persons committed other like offences is seldom relevant to the issue of guilt. But, if the present case fell within the prima-facie rule, plainly to admit evidence of thirty distinct offences would be contrary to law, and the fact that each satisfied the description contained in the complaint could afford no justification for such a breach of so important a rule. It happens that, unless the appellant abandoned all reliance upon the matters of excuse available to him, issues might arise to which the proof of system or intent and the rebuttal of accident or mistake would possibly be relevant. But the respondent's claim that in proof of the charge he may rely indifferently on each of the thirty persons alleged to have entered or left the hotel cannot depend on this accidental feature of the case. If it be true that, although it appears that a number of offences is said to have been committed at the place and on the date stated in the complaint, the prosecutor cannot be compelled to specify which of them is the subject of the charge, it must follow that he can prove all or any of them in support of his complaint, which *ex hypothesi* is capable of applying to each of them indifferently, and he must be at liberty to do so whether the case otherwise is or is not one for the admission of evidence of similar acts.

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That a prosecutor cannot pursue such a course appears to me to have been decided in *Parker* v. *Sutherland* (1). It is true that the proceeding quashed in that case was a conviction and not an information or complaint, but the rule is that a conviction should have as much certainty as an information, not more certainty. The charge was laid under regulations which during the War were aimed at the suppression of treating. It was that on 21st April 1916 the defendant supplied certain intoxicating liquor to persons on licensed premises for consumption on such premises without the liquor having been ordered and paid for by the persons so supplied. Evidence was given that at 7.55 p.m. on that date the defendant supplied beer to a group of men in circumstances sustaining the charge and that at 8.30 p.m., that is thirty-five minutes later, he supplied another group of men in like circumstances. Three objections were taken to the conviction. In the first place, it was contended that it was bad for duplicity because it covered two offences. The Divisional Court, which consisted of Lord *Reading* C.J. and *Ridley* and *Avory* JJ., did not give effect to this contention. They regarded the information and conviction as relating to one of the two offences only. But the other two objections they upheld. The objections were that evidence of two offences had been led and that the conviction was uncertain because it was capable of equal application to either of them.

The decision upon the ground of uncertainty is in conformity with that of *Napier* J. in *Young* v. *Allchurch* (2) and of the Full Court of the Supreme Court in *Pierce* v. *Kennedy* (3). Indeed, the facts both of the present case and of *Parker* v. *Sutherland* (1) fall almost exactly within the following statement of *Napier* J. in *Tucker* v. *Noblet* (4), viz.: "It may be possible that a case could occur in which the complaint is good," that is, I take it, apparently good if read apart from the circumstances of the case, " but evidence is admitted which gives rise to duplicity or uncertainty, and where there is some grave embarrassment or prejudice of such a character that it cannot be fairly met by any adjournment. If that should

(1) (1917) 116 L.T. 820; 86 L.J. K.B. 1052.
(2) (1927) S.A.S.R. 185.
(3) (1923) S.A.S.R. 476.
(4) (1924) S.A.S.R., at p. 340.

happen and the prosecutor should refuse to elect, I think that the court must have some inherent power to secure a fair trial and to prevent an abuse of its process. If all other means fail, the inherent power may extend so far as to justify a dismissal of the complaint: *O'Flaherty* v. *McBride* (1). But that could be only as a last resort, and in a very unusual case."

But, although the matter does not arise in the present case, the application of the first ground upon which *Parker* v. *Sutherland* (2) was decided ought not to be overlooked. For, in many cases, evidence of more than one offence cannot be admitted, and under one charge to take evidence of a number of separate instances of the commission of the same offence because each will indifferently fit the complaint is to pursue a course contrary to law. It cannot be enough to require the complainant to elect among the instances he has proved after his evidence has been given in full. Where an information or complaint is so drawn as to disclose more than one offence and one set of facts amounts to each of the various offences covered by the charge, as was the case in *Johnson* v. *Needham* (3), the proper course is to put the complainant to his election. In such a case, to wait to the end of his evidence before doing so may be convenient and may cause no injustice. But it is the converse of the present case, where the question is whether the prosecutor should not be required to identify one of a number of sets of facts, each amounting to the commission of the same offence as that on which the charge is based. In my opinion he clearly should be required to identify the transaction on which he relies and he should be so required as soon as it appears that his complaint, in spite of its apparent particularity, is equally capable of referring to a number of occurrences each of which constitutes the offence the legal nature of which is described in the complaint. For a defendant is entitled to be apprised not only of the legal nature of the offence with which he is charged but also of the particular act, matter or thing alleged as the foundation of the charge. The court hearing a complaint or information for an offence must have before it a means of identifying with the matter or transaction alleged in the document the

(1) (1920) 28 C.L.R., at p. 288.
(2) (1917) 116 L.T. 820; 86 L.J. K.B. 1052.
(3) (1909) 1 K.B. 626; 100 L.T. 493.

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matter or transaction appearing in evidence. For example, if the court in the present case had proceeded with the hearing of the complaint and, after ascertaining what the defence was, had decided that evidence of similar acts ought not to be admitted, how could it have discovered which was the offence charged and which the similar acts ? Moreover, there is an added reason why, in a charge under sec. 209 of the *Licensing Act*, the instance or person should be unmistakably identified. For the defences open to the licensee depend upon the purpose of the individual concerned or the manner and circumstances of his obtaining entrance to the premises.

There are more than one means by which the occurrence or transaction, the subject of the charge, may be identified and distinguished from other occurrences or transactions alleged to have occurred, equally capable of supporting the complaint. A direction may be given that particulars should be furnished : the complainant may be required to elect among the instances or transactions he proposes to prove and to state definitely to the court which of them is to be treated as the subject of the complaint : or the complaint may be amended so as to indicate one to the exclusion of the others. Although no statutory provision exists enabling courts of summary jurisdiction to require the furnishing of particulars, it is well recognized that they may do so if, as sometimes but probably not often happens, the interests of justice make it necessary (See *Olding* v. *Olding* (1), *Boston* v. *Boston* (2); per *Evatt* J. in *R.* v. *Hush* ; *Ex parte Devanny* (3) and in *Davies* v. *Ryan* (4), *Frazer* v. *Barclay* (5) and, per *Napier* J., *Stokes* v. *Grant* (6)). In the same way the common-law practice of putting a prosecutor to his election has been considered applicable in summary proceedings. Amendment is authorized by sec. 183 of the *Justices Act*, but the complaint must be " defective."

All three methods of dealing with the difficulty have one feature in common ; they place upon the complainant the burden of indicating to or before the court which set of facts or transaction is the subject of the charge. Ordinarily a prosecutor will not decline this burden when the court has ruled, after hearing and considering

(1) (1936) 3 All E.R. 189.
(2) (1928) 138 L.T. 647.
(3) (1932) 48 C.L.R., at p. 515.
(4) (1933) 50 C.L.R., at p. 386.
(5) (1920) S.A.L.R. 157.
(6) (1930) S.A.S.R., at pp. 396, 398.

his reasons to the contrary, that it is incumbent upon him to specify exactly which of the matters he relies upon as the commission of the offence. In this case, however, the complainant, being desirous of reviewing the learned magistrate's ruling before the Supreme Court, took the course of refusing to comply with the direction. By doing so he necessarily raised the question, What is the consequence of a complainant's declining to indicate which of a plurality of transactions covered by the complaint is that upon which the charge is based or upon which he relies to make out the charge? If in the absence of such an indication, whether it is expressed in an amendment, in particulars, or by election, the actual application of the complaint to the known or the alleged circumstances is so equivocal as to make it impossible to identify the occasion, transaction or occurrence to which it refers and distinguish it from other like occasions, transactions or occurrences indifferently answering the description contained in the complaint, then I think there is a defect in the complaint within the meaning of sec. 182. Although on its face the complaint may have appeared sufficient, yet when applied to the facts it is found to contain a latent ambiguity, and this, in my opinion, is a defect in particularity. This view, as I understand his Honour's reasons, was that of *Murray* C.J. For he says that it is obvious that the time when the person referred to in the complaint came out of the premises could be better defined than by a period of an hour and three quarters and as there was a number of such persons the defendant might easily be misled as to the particular one for whom he had to answer, and his Honour said that he agreed that the complaint was defective. But he considered that under sec. 182 the magistrate struck too soon, because that section authorizes the court to dismiss the information if it appears that the defendant "has been prejudiced" by the defect, words which show, his Honour thought, that the hearing must go on and that the power of dismissal could only be exercised if, after all the evidence on both sides had been taken, it then appeared that the defendant had been prejudiced. I think this view places too great a burden on the words "has been." They come from sec. 1 of 11 & 12 Vict. c. 43 (*Jervis' Act*), where they state the condition upon which the power to adjourn arises, a power exercisable from the

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beginning of the hearing. I think they are satisfied if it appears that the existence of the defect unless removed has the effect of producing a prejudice under which the defendant then lies.

I am, therefore, of opinion that the learned magistrate was justified under sec. 182 in the course he took. But there is another reason for the conclusion that a complaint may be dismissed if it covers equally two offences which cannot be distinguished but cannot be heard together. It is that relied upon in *Johnson* v. *Needham* (1), namely, that, where a complainant does not pursue one charge as he is entitled to do, but asks for a conviction upon a plurality and will not by election do otherwise, a conviction upon his complaint may be refused. This reasoning applies *a fortiori* where he persists in a refusal to identify the transaction upon which a conviction is sought.

The present case presents a peculiarity in the manner in which the question arose. The parties in an informal way acquainted the magistrate with the position relied upon by the complainant and the nature of the facts he proposed to prove. If a strict course had been followed, the difficulty would have been disclosed in the course of the evidence and it would then have been incumbent upon the magistrate to call for an identification of the person whose departure from the hotel was the subject of the charge. But he was right in doing it as soon as the ambiguity and the embarrassment were fairly disclosed. It may be unfortunate that the allegations made by the complainant of flagrant breaches of the licensing law should not be investigated, but, in my opinion, the result of the attitude adopted by the complainant was that his complaint was rightly dismissed.

Accordingly, I think the appeal should be allowed and the dismissal restored.

EVATT J. Although the decision of this case is not in itself of importance, some questions of great importance are involved.

The complaint against the appellant was based upon the provisions of sec. 209 (1) of the *Licensing Act* 1932, as amended by sec. 17 of the *Licensing Act* 1935; that section provides, *inter alia*, that a

(1) (1909) 1 K.B. 626; 100 L.T. 493.

licensee out of whose licensed premises "any person" is "seen coming" during any Sunday except between 1 p.m. and 2.30 p.m., and 6 p.m. and 8 p.m., shall be guilty of an offence unless he proves that "the said person" is included within one of the three classes mentioned in sec. 209 (1) (*a*), (*b*) and (*c*). Sec. 209 (1) (*a*) enables the licensee to escape the penalty if he proves that "the said person" was not on the premises for any purpose contrary to the Act; sec. 209 (1) (*b*) operates if "the said person" was on the premises contrary to the will of the licensee or the person in charge, &c.; and sec. 209 (1) (*c*) operates similarly if "the said person" was on the premises without the knowledge of the licensee or the person in charge.

In my opinion, it is reasonably clear (1) that, under the terms of sec. 209 (1), a licensee commits and may be charged with a separate offence in relation to each and every person who is seen coming from the licensed premises during the prohibited hours, and (2) that in relation to each and every such person separate considerations of an incriminatory or exculpatory nature may arise. Thus, in relation to one person "seen coming," the licensee may be able to prove defence *a*, in relation to another, defence *b*, and, in relation to a third, defence *c*; and, even if he does not finally succeed in proving *a*, *b* or *c*, the statute gives him the right of attempting to exculpate himself upon one ground or another.

It is in the light of this interpretation of the section that I turn to the terms of the complaint. In its first form it alleged that the appellant was the licensee, &c., and that out of his premises on a named Sunday "certain persons were seen coming." The appellant's solicitors at once wrote to the prosecutor asking for particulars of the complaint. In reply they received a letter which gave the names of four separate persons and a statement that there were "divers other persons whose names are at present unknown but can be described." No less than thirty different occasions were specified, the first being at 8.50 a.m. on the particular Sunday, and the last at 10.42 a.m.

The matter duly came before Mr. E. J. R. Morgan, S.M. Before pleading, counsel for the appellant asked for better particulars, as at least thirty separate offences had been disclosed by the complaint.

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The court held that the particulars were embarrassing, and adjourned the case in order that better particulars should be furnished. Next, the learned Crown Solicitor intervened in the matter. By letter dated February 17th, 1937, he claimed to withdraw the letter of the police prosecutor, but only "so far as the same purports to furnish particulars of the complaint." The letter of the Crown Solicitor stated that the particular now furnished was "that some person whose name is unknown to the police was seen coming out of the premises in question at a time between 9 a.m. and 10.45 a.m. on the date charged."

On February 22nd, when the case was again called pursuant to adjournment, the prosecutor appeared by counsel, and the magistrate very properly pointed out that, on its face, the complaint alleged more than one offence, stating as it did that "certain persons were seen coming." This view was at once acceded to by Mr. *Gillespie* for the prosecutor, who applied to amend the complaint so that it would read "a certain person." The amendment was duly made. Mr. *Gillespie* next announced that the prosecutor refused to supply any further or better particulars. Counsel for the appellant asked for the dismissal of the complaint, and, in a carefully reasoned judgment, the magistrate dismissed the complaint.

While the question which is directly raised by this appeal is whether such a dismissal was warranted by law, it is plain that an even more important contention is involved. For Mr. *Hannan*, who argued the case for the Crown with extreme ability and equal frankness, boldly contended that, although the complaint has been amended so as to charge one offence against the licensee and one offence only, the prosecution proposed to call evidence which will or may establish each and every one of the thirty instances where a person was "seen coming" from the premises of the defendant, and that only at the end of all the evidence and after the defendant had attempted to answer each and every separate instance by reference to the matters of exculpation defined in sec. 209 (1) (*a*), sec. 209 (1) (*b*) or sec. 209 (1) (*c*), will the prosecutor be pleased to specify, in order to obtain a conviction, the particular instance where "the said person" was "seen coming" (I am quoting from the complaint).

It may be that the prosecutor has been placed in some difficulty because he could only prove the fact that thirty persons emerged from the licensed premises during the course of the two hours here in question, so that, if, in advance of the evidence, the prosecutor selected one person only, his case might break down so soon as convincing matter of exculpation was proved by the defendant in relation to the particular person selected. It is for this reason that the apparent recalcitrance of the prosecutor in declining to provide better particulars is readily explained. Probably he was *not* in a position to be reasonably sure that the single instance he might select would not be satisfactorily accounted for by the defendant. The prosecutor wished (the Crown Solicitor's letter makes this clear) to place the defendant in the position of having to exculpate himself in reference to thirty separate charges, so that, at the end of all, the prosecutor could " elect " or " select " the charge where the defendant's answer had turned out to be the weakest.

In my opinion, the course of action proposed by the prosecutor is contrary to recognized principles of law, and, so long as a defendant insists from the outset on being informed of the specific offence with which he is charged, so transparent a device will be defeated. In substance, the prosecutor was trying to convert the court exercising a strictly judicial function—that of determining guilt or innocence of a single offence—into an administrative commission of inquiry into the question whether, in respect of the Sunday morning mentioned, when there were thirty possible occasions when an offence *might* have been committed, the defendant could exculpate himself in respect of *all* thirty occasions. The prosecutor planned that, after the court had acted as such commission of general inquiry, it would resume its normal function, the prosecutor would graciously " elect," i.e., " select," his strongest case, and obtain a conviction.

In my opinion, the learned magistrate perceived the object of the manœuvre, and was justified in frustrating it. His action was justified in law upon two independent grounds.

In the first place, I consider that, in the circumstances, the complaint, as amended, although it related to one offence, did not give the defendant " a reasonably clear and intelligible statement of the offence or matter with which he is charged." This extract from

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sec. 181 of the *Justices Act* occurs in a provision which in form defines what is a sufficient, not an insufficient, complaint. None the less, the positive statement in sec. 181 carries with it the negative proposition that a complaint which does *not* give the defendant information of the defined character may be treated as defective; in which case it becomes the duty of the court, pursuant to sec. 183, to cause the complaint to be amended. Further, I think that, when an amendment is rendered impossible because a prosecutor, after full consideration, refuses to give sufficient particulars, by which the complaint, when amended, will "give the defendant a reasonably clear and intelligible statement of the offence or matter with which he is charged," prejudice to the defendant has arisen from the defective complaint and the court is authorized to dismiss the complaint pursuant to the proviso to sec. 182.

Why did the complaint as amended fail to give the defendant the information defined by sec. 181? Certainly the complaint was no longer bad for duplicity. It charged a single offence. But it charged a single offence in circumstances where it was impossible for the defendant to know what was the particular offence he was called upon to answer. Under sec. 181 what is a "reasonably clear and intelligible" statement of the offence depends upon the circumstances. In some cases what is a "reasonably clear" statement may depend upon what action the prosecutor has already taken in relation to the prosecution. In the present case it is plain that the complaint was designedly left obscure, lest the defendant should obtain the very information which sec. 181 postulates as necessary.

If the magistrate had decided to go ahead with the case, not a single step forward could have been taken. How was the magistrate to deal with the evidence of the first witness whom the prosecution would call? Presumably the witness would be examined as to his having seen some person come from the hotel. If the prosecutor was willing to assure the magistrate that the person "seen coming" was the person referred to in the complaint, then the complaint could at once have been amended (although even that might not be necessary) and the evidence could proceed. But this was only because, upon such an assurance, the evidence of the first witness would be

relevant to the complaint and therefore admissible. But the prosecutor was resolute upon not giving any such assurance, for it would have amounted to the very particular he was refusing to furnish. In the absence of either an assurance or of particulars, the magistrate could not possibly allow any evidence whatever to be given. Therefore, I am unable to agree that in dismissing the complaint the magistrate "struck too soon." In my opinion, he struck at precisely the right moment, and his action was authorized by the statute.

I also think that, even apart from the statute, he was warranted by law in acting as he did. The court possesses an inherent authority to require that the particulars of a charge shall be furnished. In this court the matter of particulars has been recently adverted to in cases like *R.* v. *Weaver* (1), *R.* v. *Hush*; *Ex parte Devanny* (2) and *Davies* v. *Ryan* (3). It is of the very essence of the administration of criminal justice that a defendant should, at the very outset of the trial, know what is the specific offence which is being alleged against him. This fundamental principle has been deemed applicable to bodies which are not strictly judicial in character. But the rigorous application of the principle by courts of justice proper is to be regarded as deriving from the court's inherent power and jurisdiction. It is inherent because it is an essential and integral part of any system of administering justice according to law. For various reasons, including the miscarriages caused by technical objections to matters of form, the formal indictment, information or complaint is allowed to become more sparing in the information it imparts. Side by side, the jurisdiction to order particulars may call for more frequent exercise. It is an essential part of the concept of justice in criminal cases that not a single piece of evidence should be admitted against a defendant unless he has a right to resist its reception upon the ground of irrelevance, whereupon the court has both the right and the duty to rule upon such an objection. These fundamental rights cannot be exercised if, through a failure or refusal to specify or particularize the offence charged, neither the court nor the defendant (nor perhaps the prose-

(1) (1931) 45 C.L.R. 321. (2) (1932) 48 C.L.R., at p. 515.
(3) (1933) 50 C.L.R., at p. 386.

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cutor) is as yet aware of the offence intended to be charged. Indeed the matter arises at an even earlier stage. The defendant cannot plead unless he knows what is the precise charge being preferred against him. If he so chooses, a defendant has a right to plead guilty, and therefore to know what it is he is being called upon to answer. I think that the observations of *Napier* J. in *Tucker* v. *Noblet* (1) support the view that, at the outset of the hearing, the prosecutor may be called upon to select his charge and particularize his complaint, and that in the absence of the necessary information, and, as a last resort, the court has inherent power to dismiss the complaint. Of course, if the relevant statute takes away such power from the courts of summary jurisdiction, it will have to be obeyed. But, in the absence of such a statute, the ultimate sanction is, and must be, dismissal of the complaint. No plea can be taken, no evidence can be admitted, nothing can be done, an adjournment will be useless, if a prosecutor is set upon a refusal to particularize.

I am therefore of opinion that, independently of the statutory authority for dismissing, the magistrate had also inherent power to dismiss the present complaint, and that he took the correct course in so acting.

I appreciate fully that the present appellant may have no merits except the legal merits with which alone we are concerned. But, as the matter was mentioned in argument, I will add that I can see no great difficulty in the proper enforcement of sec. 209 (1) of the *Licensing Act* in cases of the character suggested, viz., wholesale breaches. The licensee may be charged with a separate offence in respect of each person " seen coming " from the premises. If certain matters of exculpation are relied upon, evidence that, at or about the same time, divers other persons were also " seen coming " from the hotel may well be admissible in evidence in accordance with the principles recently stated in *Martin* v. *Osborne* (2). It may even be that, in some circumstances, such evidence will be admissible in the prosecutor's case in chief. In all such cases, however, the fundamental principle is that a specific charge has been stated and is known to the court, to the defence and to the prosecutor.

(1) (1924) S.A.S.R., at p. 340.

(2) (1936) 55 C.L.R. 367.

Although the course I now suggest may lead to a multiplicity of charges, it would in the circumstances suggested by Mr. *Hannan* be entirely proper, it would be in no sense an abuse of the court's process, and a defendant could have no reasonable objection. But I think it *is* an abuse of the court's process to refuse to particularize or specify an offence until in effect the defendant has been compelled to answer thirty charges, after being charged in the complaint with one only. The court functions for the purpose of determining guilt or innocence in relation to a specific charge, not for the purpose of assisting the prosecutor by ascertaining which of a large number of possible charges holds out to such prosecutor the best chance of a conviction.

The appeal should be allowed, and the magistrate's order restored.

McTIERNAN J. The appellant was charged with an offence against sec. 209 of the *Licensing Act* 1932-1935 of South Australia. The complaint in its original form alleged that " certain persons " were seen coming out of the appellant's licensed premises during prohibited hours on the day charged, which was a Sunday, in contravention of that section. The special magistrate gave the following summary, which I adopt, of the particulars of the complaint which were furnished by the police to the appellant by letter dated 9th February 1937 :—" It will be seen that the first set of particulars relates to :—(1) The egress from the hotel of three named persons, one described person, and an indefinite number of unspecified persons. (2) The ingress and egress from the hotel of such person or persons at thirty specified times, the first being 8.50 and the last 10.42." The complaint, as amended, on which the respondent proceeded, alleged that a " certain person " was seen coming out of the premises on the day charged during prohibited hours in contravention of the section. In a letter furnishing particulars of the amended complaint, the Crown Solicitor, writing on behalf of the prosecutor to the appellant's solicitor, said :—" I withdraw the letter of the police prosecutor dated 9th inst., in so far as the same purports to furnish particulars of the complainant " (*sic*). " The following are the particulars of the complaint : That some person whose name is

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unknown to the police was seen coming out of the premises in question at a time between 9 a.m. and 10.45 a.m. on the date charged." If the letter had stopped there, it would have been quite clear that the matter of complaint was that one person, and only one, whose name was unknown to the police, was seen coming out of the premises during the interval of time mentioned in the particulars, and it would have been equally clear that the appellant had been given a reasonably clear and intelligible statement of the offence or matter with which he was charged. The requirements of sec. 181 of the *Justices Act* 1921-1936 would have been perfectly satisfied, and there would have been no ground for saying that the complaint was defective in substance or in form. The difficulty in the case arises from what is said in the remaining part of the Crown Solicitor's letter. It continues : " With the above particulars and the information contained in the police prosecutor's letter of 9th inst. your client is perfectly well aware of the occasion on which the offence is alleged to have occurred, and with the details of the evidence which will be led to prove that offence. It is no answer that such evidence will disclose a number of acts any one of which may be sufficient to establish the charges (*Stokes* v. *Grant* (1)). There is no prejudice or embarrassment to the defendant in this case any more than in *Stokes* v. *Grant* and the following passage at p. 398 seems particularly appropriate." After making the quotation, the letter concludes : " The above particulars furnish all that *Stokes* v. *Grant* requires to be furnished, viz., a ' reasonable period within which ' the offence is alleged to have been committed, so that the defendant can identify such occasion." The letter has very clearly said that the particulars formerly supplied, stating that the complaint on which the respondent was then intending to proceed comprehended a number of occasions, were withdrawn, and the new particulars furnished indicated that the egress of one person only was all that was comprehended in the amended complaint. But the Crown Solicitor's letter also makes it apparent that, in seeking to prove that matter of complaint, evidence would be led to show that a number of persons, whose names were presumably all unknown to the police, were seen coming out of

(1) (1930) S.A.S.R., at p. 397.

the premises, each on a distinct occasion, during the interval mentioned in the new particulars, and the onus would therefore rest on the appellant to prove the matter of excuse mentioned in the section in the case of each person in order to escape conviction. Although the complaint itself disclosed one offence only, the result is that the letter could not but put the appellant in doubt as to the person whose egress from the premises was being charged as the incriminating matter which the appellant would be bound to explain in order to exculpate himself. The letter read as a whole informed the appellant that such person is any one of a number of people to whom the description, "a person whose name is unknown to the police," would apply and who were seen leaving the premises during the period mentioned in the new particulars. When read with the letter the complaint cannot be understood as referring to one particular person, but to any one of a number of persons. For this reason it fails to comply with the standard imposed by the well-established rule of practice in criminal proceedings now embodied in sec. 181 of the *Justices Act*, which requires that fair information and reasonable particularity as to the nature of the offence charged must be given to the defendant (See *Smith* v. *Moody* (1)). In the present case, when the complaint came on to be heard the magistrate directed the respondent to give what have been described as better particulars, which would remove the ambiguity in the complaint and give the appellant a clear and intelligible account of the offence with which he was charged. It was within the discretion of the magistrate at that time to give such a direction as a convenient means of making it sufficiently clear what was the matter of the offence (*R.* v. *Hush*; *Ex parte Devanny* (2); *Davies* v. *Ryan* (3); *Stokes* v. *Grant* (4); and cf. *R.* v. *Weaver* (5); *Frazer* v. *Barclay* (6); *R.* v. *Partridge* (7)). If the respondent had complied with the direction, the objection to the complaint might have disappeared, because, as explained by fuller particulars, it might have become sufficiently certain to what person it applied. But, as the respondent refused to give any further particulars, the complaint remains as one which

(1) (1903) 1 K.B., at p. 60.
(2) (1932) 48 C.L.R., at p. 515.
(3) (1933) 50 C.L.R., at p. 386.
(4) (1930) S.A.S.R., at pp. 396, 398.
(5) (1931) 45 C.L.R. 321.
(6) (1920) S.A.L.R. 157.
(7) (1930) 30 S.R. (N.S.W.) 410; 47 W.N. (N.S.W.) 173.

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fails to comply with the rule embodied in sec. 181 of the *Justices Act*. The ambiguity of the complaint was a defect of substance which clearly prejudiced the appellant at the very threshold of the hearing. The magistrate, therefore, had jurisdiction to dismiss the complaint under sec. 182, and his order was, in my opinion, rightly made.

Appeal allowed with costs. Order of Supreme Court set aside. Order of magistrate restored. Respondent to pay costs of proceedings before Richards J. and Full Court of South Australia.

Solicitors for the appellant, *Villeneuve Smith, Kelly, Hague & Travers*.

Solicitor for the respondent, *A. J. Hannan*, K.C., Crown Solicitor for South Australia.

C. C. B.