PROSECUTORS' PLEADINGS AND THE RULE AGAINST DUPLICITY

BY JILL HUNTER*

The rule against duplicity requires that one offence only be included in each information. The rule is designed to ensure that a defendant will not have to prepare a defence for more than one offence at each hearing. It is basic to summary jurisdiction and in neither the English nor the Australian jurisdictions has the principle as such been doubted. This article analyses the development of the rule since the late nineteenth century. Despite its simple objectives the rule has caused courts no end of difficulty with the problems associated with determining the parameters of an offence. The author points to the inconsistency of and the lack of logical analysis in the leading authorities and exposes the fallacious principles which have impeded the satisfactory application of the rule in England and Australia.

I INTRODUCTION

The step by step development[1] of the powers and functions of magistrates has had the effect of ensuring that well-defined limits[2] have been placed on their jurisdiction. The limitations apply to the type of offences heard in Courts of Petty Sessions; the geographical and temporal limitations and the discretionary functions of magistrates. All such limitations are defined by statute: in New South Wales by the Justices Act 1902 (N.S.W.).[3] The essence of summary jurisdiction is to provide a simple, flexible and streamlined method of hearing and determining charges for minor offences.

The laying of the information initiates summary proceedings (section 52 of the Justices Act 1902 (N.S.W.)) and, where an indictable offence is involved, committal proceedings (section 21 of the Justices Act 1902 (N.S.W.)), in Courts of Petty Sessions. The significance of the information is by no means purely symbolic.[4] It limits the jurisdiction of the magistrate to the charge contained in it and its contents also inform the accused and the magistrate of the Crown's (or private informant's) case.

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[1] See generally H. Macnamara, *Paley's Law and Practice of Summary Convictions by Justices of the Peace* (4th ed. 1856); A. Stephen, *History of the Criminal Law of England* (1882); J. Smail, J. Miles and K. Shadbolt, *Justices Act and Summary Offences Act (New South Wales)* (1979).

[2] *Paley's Law and Practice, id.*, Ch. 1.

[3] Section 56. Other limitations are listed and discussed by J. Smail *et al.*, note 1 *supra*, 124-125.

[4] See *R.* v. *Hughes* (1879) 4 Q.B.D. 614.

Court procedure at Petty Sessions level is designed to be straightforward and free of technicalities which might cloud the substantive issues. For this reason the initiating process must be clear and undeceptive. It must unambiguously inform the defendant of the charge to be met. The rules against duplicity and uncertainty in informations illustrate the limitations placed on hearings in Petty Sessions.

II THE RULE AGAINST DUPLICITY

Section 57 of the Justices Act 1902 (N.S.W.) states:

> Every information shall be for one offence only, and not for two or more offences. Every such complaint shall be for one matter only and not for two or more matters.

This simple statement of the rule against duplicity belies the difficulties of recognising and avoiding such a defect. The rationale[5] for the rule is the same as for other limitations placed on the jurisdiction of Courts of Petty Sessions. Thus, it is inappropriate for a defendant to have the onerous task of meeting more than one offence per hearing. Ironically, a rule designed to ensure clarity and simplicity in proceedings has itself become the subject of complex rules which seem designed to trap the unwary prosecutor.

According to Macnamara, writing in 1856,[6] at common law (that is prior to the enactment of Jervis' Act[7] in 1848), several offences may have been included in the one information, and it was only due to statutory intervention that the practice became prohibited. This view is supported by the case of *R.* v. *Swallow*[8] where Lord Kenyon C.J. upheld a conviction for three gaming offences contained in the one information, stating that it was the common practice in actions on gaming laws for several charges, convictions and penalties to be based on the one information. However, it seems that it was not that no rule against duplicity existed; rather that it could be defeated by evidence indicating that the information was drawn according to common practice. Thus the information in *Wingfield* v. *Jeffreys*[9] "for selling live cattle or causing them to be sold", which would have been held duplicitous, was held to be good "upon certificate by the Barons that the course was so in the Exchequer . . .".[10] Adherence to common practice was described by Baron Graham as necessary because it could be inferred that if the practice was well established it was conclusive of a more accurate view of the intention of the legislature. Although *R.* v. *Swallow* indicates that

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[5] For a more detailed account of the rationale of the rule, see Glanville Williams, "The Count System and the Duplicity Rule" (1966) *Crim.L.R.* 255.

[6] Note 1 *supra*, 63.

[7] Summary Jurisdiction Act 1848 c. 43, s. 10.

[8] (1799) 8 T.R. 258, 101 E.R. 1392.

[9] (1697) 1 L.D. Raym. 284, 91 E.R. 1087.

[10] *Ibid.*

the rule against duplicity prior to Jervis' Act 1848 (U.K.) (from which the Justices Act 1902 (N.S.W.) is taken) was not inviolable, many other eighteenth and nineteenth century authorities indicate that the principle of rejecting duplicitous informations was well-established,[11] with section 10 of Jervis' Act adding inviolability to the principle in 1848.

An information which is duplicitous will also be uncertain if it charges the defendant with offences in the alternative. Although, uncertainty in this sense will arise only where the information has been found first to be bad for duplicity, the rule against uncertainty is a much wider rule, not limited to disallowing offences charged in the alternative. The rule against uncertainty requires that the time, place and date on which the offence is alleged to have been committed be included in the information. Before steps were taken to relax the technicalities of criminal pleading[12] (which required every ingredient of the offence to be expressed in the information) it was not uncommon for a minor defect in form to defeat the case for the prosecution.[13] The present day application of the rule against uncertainty requires that there must be no ambiguity in the pleadings by charging offences in the alternative. The reasoning behind this rule is usually based on the need to ensure that the pleas of *autrefois acquit* and *autrefois convict* will be available. Additionally, it is said[14] that a charge in the alternative will make it impossible for the defendant to know *which* charge he must defend; or for the court to know which charge it must entertain; and lastly, an uncertain conviction will not give a clear statement of what legal principles were adopted in the case.

III ONE OFFENCE OR MORE?

At first appearance the courts seem to have difficulty in grasping the distinction between an information which is bad for duplicity and one which is bad for uncertainty.[15] The reason for any confusion of the concepts[16] probably stems from the confused methodology used by some courts in determining whether an information contains either defect. However, generally the courts realise that two separate issues are involved and any confusion exists at the semantic level only.

The *first step* in either case is to see if more than one offence is contained in an information. This will require an examination of the relevant statutory provision to ascertain how many offences have been created. Once it is determined that more than one offence exists, it is

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[11] *R.* v. *Hollond* (1794) 5 T.R. 607, 101 E.R. 340; *R.* v. *Morley* (1827) 1 Y. & J. 222, 148 E.R. 653; *R.* v. *Wells; ex parte Clifford* (1904) 68 J.P. 392; *Jones* v. *Sherwood* [1942] 1 K.B. 127.

[12] *E.g.*, s. 65.

[13] See generally, A. Stephen, note 1 *supra*, vol. 1.

[14] *R.* v. *Hollond*, note 11 *supra.*

[15] *E.g.*, *Ianella* v. *French* (1969) 119 C.L.R. 84, 102; *R.* v. *Clow* [1963] 2 All E.R. 216.

[16] Glanville Williams notes this problem of "labelling", note 5 *supra*, 258.

then necessary to look at the way in which the offences are joined. If they are joined in the alternative, then the information is uncertain; if they are joined conjunctively, the information is duplicitous. Of course, if there is only one offence contained in the information it is impossible for the information to be uncertain in the present sense. For example, consider an information which charges a defendant, pursuant to a statutory provision,[17] with "driving a motor vehicle whilst under the influence of drink or drugs". First the court must determine the number of offences created by the statutory provision and repeated in the information. If it is determined that "driving . . . under the influence of drink or drugs" contains only one offence there is no need to proceed any further with the examination. However, if it is determined that each form of intoxication represents a separate offence, and therefore two offences are contained in the information, the second step is to examine how the offences are connected to determine whether the information is duplicitous or uncertain. The use of the joinder "and" linking separate offences will make the information merely duplicitous whilst the use of the joinder "or" will leave the charge uncertain as well. In either case the information falls foul of section 57.

The most common pitfall for courts faced with this issue is for the first step to be by-passed and an examination of the form of joinder substituted to determine the form of the defect. This approach *assumes* that more than one offence is contained in the information, and, as the above example indicates, such an assumption cannot validly be made. The use of "and" or "or" may operate merely to connect two adjectives describing a single offence rather than to connect two offences. In the circumstances of the above example it was held[18] the offence intended by Parliament was driving whilst incapacitated and the reference to drink and drugs merely described the relevant forms of incapacity.

The first step of ascertaining the number of offences created in a statutory provision appears deceptively simple. That is until one is confronted with the mass of confusing cases which do not provide any guidance of the metes and bounds of a statutory offence. Generally the cases say no more than one must determine the intention of Parliament. How the intention of Parliament is to be determined is not explained. The following cases represent the leading authorities on the issue. They are analysed with a view to finding how the courts define an offence.

The United Kingdom as well as two Australian States (New South Wales and South Australia) provide the bulk of cases on duplicitous

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[17] It is common police practice to charge an alleged offender according to the wording of the governing statute pursuant to s. 145A(1) of the Justices Act 1902 (N.S.W.):

> The description of any offence in the words of the Act, or any order, by-law, regulation, or other document creating the offence or in similar words, shall be sufficient in law.

[18] *Thomson* v. *Knights* [1947] 1 K.B. 336.

informations. One could point to any number of unsubstantiated reasons of why this could be so. Regardless of the reason, it can safely be said that the incidence of appeals based on this issue is by no means indicative of the prevalence of the defect. No doubt, one of the side effects of the complexity of the question of duplicity is that more often than not, the defendant and even the magistrate remain blissfully unaware of the defect.[19] One of the greatest problems in analysing the authorities is that although section 57 of the Justices Act 1902 (N.S.W.) is reproduced in similar form in all Australian jurisdictions (having been taken from the United Kingdom provision), most have a number of ancilliary provisions limiting the significance of a duplicity defect.[20] Often, in other jurisdictions, the issue of duplicity will not be crucial in assessing whether a challengeable defect exists.

1. *The English Authorities*

Since Jervis' Act 1848 (U.K.) has served as the drafting model for the Australian States' versions of legislation defining and regulating procedure in magistrates courts, it is instructive to look to English authorities. Often the authorities cite precedents involving indictments rather than informations. The principle in relation to duplicity is the same. Each count in an indictment is for one offence only. There are some statutory modifications affecting the impact of the rule against duplicity of counts in indictments in some jurisdictions. However the analysis of the "one offence or more" question is relevant regardless of whether it is an indictment or an information in dispute.

It was not until the rule was given statutory foundation in 1848 that detailed examination was made by the courts to determine what constituted "one offence". The case of *Cotterill* v. *Lempriere*[21] is one of the earliest cases following Jervis' Act to involve the court in ascertaining the number of offences contained in an information. Pre-Jervis' Act cases were cited in argument and referred to in judgment, indicating that the statute was not seen as altering basic principles. The information stated that Cotterill "did . . . permit smoke to escape from his . . . engine, contrary to the by-laws of the Board of Trade . . .". The relevant by-law stated that "no smoke or steam be emitted from the engines so as to constitute any reasonable ground of complaint to the passengers or the public". Objection was taken on the ground that the information did not indicate whether it was the passengers or the public suffering the inconvenience. The Court held that there were two distinct offences contained in the by-law and because these were repeated in the

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[19] See comments of Sangster J. in *Romeyko* v. *Samuels* (1972) 2 S.A.S.R. 529, 570.

[20] *E.g.*, ss. 22(a), 51(1) and 51(2).

[21] (1890) 24 Q.B.D. 634. See also *Davis* v. *Loach* (1887) J.P. 118 where the phrase "smoke or steam" was analysed.

information and the conviction, both were bad for stating two offences in the alternative. Unfortunately no reasons were given by either Lord Coleridge C.J. or Lord Esher M.R. Cases cited in support of their finding appear to have made the matter conclusive and without need of explanation in the eyes of the learned Judges. For instance, in each of the cases cited by Lord Coleridge it was held that multiple offences were created by the governing statute and repeated in the information. That is, in *R.* v. *Sadler*[22] the information alleged that the defendant "did kill, take, and destroy, or attempt to kill, take, and destroy the fish . . ."; in *R.* v. *North*[23] the defendant was charged with selling "beer or ale" without a licence; and in *R.* v. *Pain*[24] the relevant Act mentioned three different types of casks which, if found on board a vessel, would render the vessel liable for forfeiture.

It seems that the use of the disjunctive "or" acted as an automatic indicator that more than one offence existed. Surprisingly there is no suggestion that "or" in the context of, for example, "beer or ale", should be construed as separating alternative modes of committing the one offence rather than separating distinct offences. Such refinements in analysis did not appear until the twentieth century.

(a) *The "Driving Cases"*

In the case of *R.* v. *Wells; ex parte Clifford*[25] the information and conviction followed the wording of section 1 of the Motor Car Act 1903 (U.K.): driving a motor car "at a speed or in a manner which was dangerous to the public . . .". Lord Alverstone who gave the leading judgment, pointed out that it was possible to differentiate the two prohibited forms of driving because one could do one without the other—it was possible to drive in a dangerous manner *slowly*. Therefore Parliament must have intended to create two offences, one of speeding, and another of driving dangerously.

The cases of *R.* v. *Wilmot*,[26] *Hargreaves* v. *Alderson*,[27] *R.* v. *Jones; ex parte Thomas*[28] and *R.* v. *Clow*[29] each involved informations or indictments framed in accordance with the same or similar statutory provision as in *R.* v. *Wells; ex parte Clifford*. In the first two cases the information restated the statute exactly using the disjunctive joinder, (as in *R.* v. *Wells; ex parte Clifford*) and the respective Courts held that the informations were bad for duplicity (not uncertainty!).

In *R.* v. *Jones; ex parte Thomas* and *R.* v. *Clow* the information joined the forms of driving conjunctively: "driving recklessly and at a

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[22] (1787) 2 Chit. 519.
[23] (1825) 6 D. & R. 143, 28 R.R. 538.
[24] (1826) 7 D. & R. 678, 29 R.R. 231.
[25] Note 11 *supra*.
[26] (1934) 24 Cr. App. R. 63.
[27] [1962] 3 All E.R. 1019.
[28] [1921] 1 K.B. 632.

speed dangerous to the public". In both cases the information was held to be good because the offences related to the one indivisible act. Clearly there is an inconsistency. If in the former cases it was concluded that the relevant statutory provision contained multiple offences then it is inconsistent for another court to conclude that only one offence is intended by Parliament in the same provision merely because a different joinder is used in the *information*. The fault arises in the approach taken. The Courts looked to the information initially rather than to the statute to determine how many offences were intended to be created by Parliament.[30] Instead, the Courts should have examined the statute to determine the number of offences created and then if more than one of those offences are repeated in the information, *then* the type of joinder used would determine whether the defect is one of duplicity or one of uncertainty.

The judgment of Avory J. in *R.* v. *Surrey Justices; ex parte Witherick*[31] is often cited as indicating the correct approach to be taken.[32] In *Witherick* the information repeated the wording of the statute exactly: "driving without due care and attention or without reasonable consideration for others". Avory J. did not consider it material that different forms of driving were being scrutinised. He stated that if a person could do one form of driving without the other then "it follows as a matter of law that an information which charges him in the alternative is bad".[33] Implicit in that statement is a finding that each form of driving represents a separate offence. His reasoning is clearly in conformity with that of Lord Alverstone in *R.* v. *Wells*. The analysis of Avory J. foundered when he attempted to find support in *R.* v. *Jones; ex parte Thomas*, a case he accepted as adopting the converse of his principle: if the act is one indivisible act, then the information is good. The *non sequitur* is obvious.

(b) *The "Cruelty Cases"*

At least in the "driving cases" the errors made result from a *consistent* misapplication of principles. This is not so when one looks at two "cruelty to animals" cases decided by the same judge just three years apart. Both cases involved informations drafted pursuant to section 2 of the Cruelty to Animals Act 1849 (U.K.): "if any person shall . . . cruelly ill-treat, abuse or torture . . . any animal . . .". In both informations the term "and" was changed to the term "or". In *R.* v. *Cable*[34] the information was held to be good. The thrust of the defendant's case

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[29] Note 15 *supra*.

[30] *E.g.*, the judgment of Lord Parker C.J. in *R.* v. *Clow*, *id.*

[31] [1932] 1 K.B. 450.

[32] *E.g.*, in *R.* v. *Clow* note 15 *supra*; *Jones* v. *Sherwood* note 11 *supra*; *R.* v. *Wilmot* note 26 *supra*; *Hargreaves* v. *Alderson* note 27 *supra*.

[33] Note 31 *supra*, 452.

[34] [1906] 1 K.B. 719.

was that the information was duplicitous because five animals were involved. Although Lord Alverstone cited a decision[35] which had examined the same statute to ascertain whether "ill-treat", "beat", "abuse" and "torture" constituted four offences, or one offence with four characteristics, he did not allude to that problem himself. He merely discussed the issue of more than one animal being involved and concluded that the presence of multiple animal victims did not make the information duplicitous. He accepted by implication that the statute created one offence which could be committed in a number of ways.

However, in *Johnson* v. *Needham*[36] decided three years later, Lord Alverstone was presented with a case identical to that of *R.* v. *Cable*, except that only one animal was involved. He held that the information was defective because it included three offences, namely "ill-treating", "abusing" and "torturing". He based his conclusion on the "intention of the Legislature", but unfortunately did not indicate how this intention was divined.

These two cases are the most blatant examples of the confused state of the approach of the judiciary to the "one offence or more" question. Generally the inconsistencies are less obvious. This is exemplified by the "driving cases" where the Courts have cited the same precedents with approval, and expressly adopted the same approach. It is only when each case is examined that the disorder comes to light. Individual examination exposes the different methodologies expressly or implicitly adopted and the random citing of "precedents" to support analytically inconsistent conclusions.

(c) *The "Victim" Test*

A number of leading cases contain judgments which suggest that the number of victims affected by the commission of an act may provide an indication of the number of offences Parliament intended to create in a statutory provision. The first case in which this method of interpretation was clearly adopted was *Cotterill* v. *Lempriere*[37] where Lord Coleridge C.J. and Lord Esher M.R. concluded that the provision prohibiting the emission of smoke by an engine which interfered with either passengers or the public, contained two offences: one for each class of persons (victims) affected. Ironically this test is adopted by Lord Alverstone C.J. (who refused to count the number of victims in the "cruelty cases"!) in *Smith* v. *Perry*.[38] In that case the information was framed under section 72 of the Highway Act 1835 (U.K.), which forbade the laying of "any timber stone . . . or other matter or thing whatsoever upon such highway to the injury of such highway or to the

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[35] *R.* v. *Totnes Justices*, The *Times* 9 May 1879, p. 4.
[36] [1909] 1 K.B. 626.
[37] Note 21 *supra.*
[38] [1906] 1 K.B. 262.

injury, interruption, or personal danger of any person travelling thereon". Lord Alverstone held that this provision created two offences: one of injury to the highway and a second of injury to the public.

Similarly, Avory J. in *R.* v. *Surrey Justices; ex parte Witherick*[39] held that an information, drafted in the same form as the statute and charging the defendant with driving "without due care and attention or without reasonable consideration for other persons using the road" constituted two offences. His reasoning was that it could be said that the legislature was attempting to protect two classes of potential victims: first, other persons using the road; and secondly, the driver/offender. As Lord Alverstone found in *R.* v. *Cable*[40] the "victim test" cannot have universal application. Its failings are illustrated in the fact situation which existed in *Lafitte* v. *Samuels*[41] where the defendant was charged with "behaving in a disorderly or offensive manner". The prosecution produced two policemen as witnesses to testify regarding the nature of Mr Lafitte's conduct. Applying the "victim test", this would have meant that two offences were committed. Of course, employing "class" victims rather than individual victims might reduce the absurdity but not the arbitrariness of the test.

(d) *The "Duty versus Prohibition" Test*

This test is articulated by Viscount Caldecote C.J. in *Field* v. *Hopkinson*.[42] The defendant was charged and convicted of failing "to keep or cause to be kept an accurate record . . .":

> I can express my view in two sentences. If an enactment forbids the doing of act A or act B, it creates two offences and a conviction on one information charging both in the alternative is bad for uncertainty, but if the enactment creates a duty to do either A or B, there must, to constitute an offence, be a failure to do both acts. In my view, quarter sessions were wrong in holding that the conviction of the respondent was bad for uncertainty. . . .[43]

Does the statute create a duty to act or does it proscribe certain acts? In *Field* v. *Hopkinson* it is not difficult to see why Viscount Caldecote C.J. categorised the statutory provision as a duty to act. However, in *Ex parte Polley; re McLennan*[44] where the statute stated that a licensee must "keep his licensed premises free from offensive or unwholesome matters", the categorisation is less clear. Is there a *duty* to keep the premises in a certain manner? Or, is there a *prohibition* from keeping the premises in a certain manner? If there is a duty, is it satisfied by keeping the premises free of offensive matters only as the reasoning of

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[39] Note 31 *supra.*
[40] Note 34 *supra.*
[41] (1972) 3 S.A.S.R. 1.
[42] [1944] K.B. 42.
[43] *Ibid.*
[44] (1947) 47 S.R. (N.S.W.) 391.

Viscount Caldecote suggests? Obviously Parliament intended unwholesome matters to be excluded from the premises also. These proscribed qualities are by no means synonymous—the keeping of a pet in a kitchen may not be considered offensive but could be considered unwholesome. If it is categorised as a prohibition Viscount Caldecote's test would provide a rational analysis, namely, both acts are prohibited. However, the statute is constructed in the form of a duty rather than a prohibition and it is of little assistance to apply an aid to interpretation with such a distortion merely to assist conformity to a dubious test.

Although Viscount Caldecote's decision was cited by Jordan C.J. in *Ex parte Polley; re McLennan* he preferred to apply it loosely. Jordan C.J. found that it was the intention of the legislature to create the one duty of keeping premises free from "insanitary" matter and thus only one offence was created. This conclusion highlights the flaws in the approach of Viscount Caldecote. Even if one can deal with the problem of determining whether a statute creates a duty or a prohibition, the next problem is to determine the relevant act. If one can define the act in terms other than those stated in the statute, the predictive value of the test is negligible. The approach of Jordan C.J. conforms to what is later described as the "gist test".

(d) *The "One Act Equals One Offence" Test*

The adoption by Viscount Caldecote of the term "act" as synonymous with "offence" is an interesting assumption which has been adopted by others. The reference to an "act" is first noted in *R.* v. *Jones; ex parte Thomas* where Lord Coleridge stated that "where the offences charged consist of one single act, they may be the subject of a single count".[45] This was then taken up in the often cited case of *R.* v. *Surrey Justices; ex parte Witherick*[46] and more recently *R.* v. *Clow*.[47] In fact the reference to an "act" was not a totally original concept. It appears to be a surreptitious adoption of the phraseology of section 4 of the Indictments Act 1915 (U.K.).[48] As the rationale for this approach has been considered in greater depth by the Australian authorities it is more appropriate to defer analysis of this approach until the Australian authorities are considered.

(e) *The "Single Activity/Gist of the Offence" Test*

In *Thomson* v. *Knights*[49] the relevant information charged the

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[45] Note 28 *supra*, 635.
[46] Note 31 *supra*.
[47] Note 15 *supra*.
[48] S. 4 of the Indictments Act 1915 (U.K.) allows joinder of offences where the issue relates to a single incident. This is the most plausible explanation for the reasoning of Lord Parker C.J. in *R.* v. *Clow* note 15 *supra*, despite the fact that he made no mention of the statute and based his analysis on decisions which examined rules relating to information governed by the Summary Jurisdiction Act 1848. In *R.* v. *Clow* the initiating process was an indictment.
[49] [1947] 1 K.B. 336.

defendant with "being in charge of a motor vehicle whilst under the influence of drink or drugs to such an extent as to be incapable of having proper control of the vehicle". Lord Goddard C.J. held that the gist of the offence intended by Parliament was being in charge of a motor vehicle whilst in a state of self-induced incapacity, due to either drink or drugs, so that only one offence was created. Although *Thomson* v. *Knights* has been cited approvingly on many occasions, in fact the same approach has not been *used* as readily as approaches which rely on interpreting the acts or potential acts of the defendant. This in part is due to the failure of the Court in *Thomson* v. *Knights* to articulate the reasons for its decision. It is only with the help of later authorities that the decision of *Thomson* v. *Knights* can be categorised at all.

The approach of Lord Goddard C.J. was adopted by Lord Parker C.J. in *G. Newton Ltd* v. *Smith*[50] where the issue of duplicity arose in relation to a charge of "wilfully or negligently" failing to comply with a condition on a road service licence. After referring to *Thomson* v. *Knights*, Lord Parker C.J. applied the same reasoning and concluded that the offence was failing to meet the conditions of a licence, the form of the failure being irrelevant.

A recent English decision in which the court based their finding on the gist of the offence is *Vernon* v. *Paddon*[51] where the charge was using "threatening and insulting words and behaviour whereby a breach of the peace was likely to be occasioned". The Court agreed with the finding of the justices that the statutory provision was "aimed at . . . the punishment of any form of human conduct which is intended to provoke a breach of the peace . . ."[52] and therefore created only one offence. The English decisions adopting this kind of approach to questions of duplicity are neither numerous nor of strong authority. In no English decision does the Court actually analyse its approach with any kind of precision.

A similar method which has had a greater impact on judicial thinking in this area is the "single activity" test. This is the approach which Lord Parker C.J. described and adopted in *Ware* v. *Fox*.[53] In that case the charge made under the Dangerous Drugs Act 1965 (U.K.) stated that premises were being used "for the purpose of smoking cannabis or for the purpose of dealing in cannabis". Lord Parker C.J. concluded that the two prohibited behaviours were completely different, not "one activity achieved in one or two different respects",[54] and therefore two distinct offences.

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[50] [1962] 2 Q.B. 278.
[51] [1973] 3 All E.R. 302, [1973] W.L.R. 663.
[52] *Id.*, 666.
[53] [1967] 1 All E.R. 100, [1967] 1 W.L.R. 379.
[54] *Id.*, 381.

Lord Parker C.J. has been consistent in *G. Newton Ltd* v. *Smith*[55] in that both the "gist" approach and the "single activity" approach are likely to produce the same result by adopting an overview of the statutory provision and the defendant's behaviour respectively. The difference lies in the perspective adopted by the Court. In a case such as *G. Newton Ltd* v. *Smith*, Lord Parker C.J. has determined the kind of offence Parliament intended to define by looking at the essence of the statutory provision. However, in *Ware* v. *Fox* Lord Parker C.J. examined the type of behaviour which the statute was designed to prohibit and determined Parliamentary intent on the basis of the "number of activities"[56] that were involved, with each "activity" representing an offence.

Analytically, there is a difference in the approaches. However, this difference can be reconciled. It could be said that the purpose of defining a "single activity" is to assist in determining the "gist of the offence" intended by Parliament. In some cases it will not be necessary to look at the behaviour (either actual or anticipated) resulting in the commission of the offence, because the gist of the offence can be discovered by analysing the wording of the statutory provision. For all practical purposes the methodologies are the same. Although the English courts have been slow to adopt the "gist/single activity" approach in relation to statutory interpretation it is only a matter of time before the courts realise that it has much to commend it. It is a sufficiently nebulous term to accommodate the variety of statutory provisions to which it will be applied. Its universal adoption will represent an appreciation of the deficiencies of using the concept of an act as a measure of a single offence.

The decisions in the "driving cases" all illustrate the attempts by the judiciary to use artificial definitions based on a determination of "an act" to delineate the offences which Parliament intended to proscribe in the statute. Namely, whether one can do one act without the other;[57] whether the actual behaviour of the defendant in the instant case was a single indivisible act even though it contained a number of characteristics (driving recklessly and at speed);[58] whether the acts were directed at different categories of people (for example, smoke interfering with passengers or with the public);[59] whether the act being scrutinised can be categorised as a duty or a prohibition. The deficiencies in these analyses are patent and whether Lord Parker C.J. is employing the "single activity" formula as a conscious effort to avoid the inadequacies of the earlier courts is unclear. As the discussion below indicates it is

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[55] Note 49 *supra.*
[56] Note 54 *supra.*
[57] *R.* v. *Surrey Justices; ex parte Witherick* note 31 *supra,* 452.
[58] *R.* v. *Jones; ex parte Thomas* note 28 *supra.*
[59] *Cotterill* v. *Lempriere* note 21 *supra.*

only through this overview approach that the courts will satisfactorily cope with this issue which, it should be emphasised, is the interpretation of a provision designed to *simplify* criminal procedure in relation to minor offences.

2. *The Australian Authorities*

There have been a number of High Court cases in which the issue of duplicity has arisen. In *Hedberg* v. *Woodhall*[60] the issue was whether "possession and control" of flounders created one or two offences. Griffith C.J. examined the meanings of the two terms and concluded that possession was a larger term necessarily encompassing control. Thus, only one offence was intended. It is unfortunate that the same approach was not taken in *Ianella* v. *French*.[61] In that case the Court held that an information charging the accused with "wilfully demanding or recovering" rent referred to two offences. Taylor J. was the only member of the Court who examined the issue of duplicity; the other members merely referred approvingly to his analysis but decided the case on the question of intent. Taylor J. cited and adopted the approach of two English "authorities".[62] These held that the use of "or" in an information *automatically* made the information bad for duplicity,[63] regardless of the context in which the disjunctive was used. The High Court decisions in *Johnson* v. *Miller*,[64] *O'Sullivan* v. *Truth & Sportsman Ltd*[65] and *Montgomery* v. *Stewart*[66] are discussed below.

Although High Court pronouncements must be given due consideration, the most considered and lucid analyses of the duplicity problem in Australia have been made by Chief Justice Bray of the South Australian Supreme Court in the cases of *Romeyko* v. *Samuels*[67] and *Lafitte* v. *Samuels*.[68]

(a) *The "One Act Equals One Offence" Test*

The equating of an act with an offence was adopted by Bray C.J. in *Romeyko* v. *Samuels* as the all-purpose formula for solving duplicity problems:

> The true distinction . . . is between a statute which penalises one [sic] or more acts, in which case two or more offences are created,

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[60] (1913) 15 C.L.R. 531.
[61] (1969) 119 C.L.R. 84.
[62] *Id.*, 102. The authorities were *R.* v. *Molloy* [1921] 2 K.B. 364 and *R.* v. *Disney* [1933] 2 K.B. 138.
[63] Although uncertainty (in the present sense) necessarily assumes that an information is also duplicitous, strictly speaking Taylor J. should have described the information as uncertain not duplicitous.
[64] (1937) 59 C.L.R. 467.
[65] (1957) 96 C.L.R. 220.
[66] (1967) 116 C.L.R. 220.
[67] (1972) 2 S.A.S.R. 529.
[68] (1972) 3 S.A.S.R. 1.

> and a statute which penalises one act if it possesses one or more forbidden characteristics. In the latter case there is only one offence, whether the act under consideration in fact possesses one or several of such characteristics. Of course, there will always be borderline cases and if it is clear that Parliament intended several offences to be committed if the act in question possesses more than one of the forbidden characteristics, that result will follow.[69]

It must be assumed that Bray C.J. intended to state that one act equals one offence; multiple acts equal multiple offences and one act, with multiple characteristics equals one offence. The application of his "test" indicates this and it would be nonsensical to not recognise that it was a judicial slip of the pen that lead him to infer that one act would equal two offences.

In *Romeyko* v. *Samuels* the defendant was charged with an offence under section 107(c) of the Post and Telegraph Act 1901 (Cth) (as amended): "knowingly sending a postal article having therein words marks or designs of an indecent obscene blasphemous libellous or grossly offensive character". Bray C.J. found that the proscribed act was *sending* material in the post which possessed one or more of the forbidden characteristics. This is a superficial solution but it is only with some probing that the flaws appear.

For example, Bray C.J. considered[70] the possibility of several articles being enclosed in one postal package, each article contravening one of the categories mentioned in section 107(a) of the same Act: "send[ing] . . . any postal article which encloses an explosive or a dangerous filthy noxious or deleterious substance or a sharp instrument not properly protected or a living noxious creature or any other thing likely to injure other postal articles in course of conveyance or to injure an officer of the department or other person". He suggested the possibility that this section could contain more than one offence if more than one of the items referred to was enclosed in a postal article. Unfortunately Bray C.J. does not explain further. It seems that under section 107(c) the proscribed act is "sending" and under section 107(a) the proscribed act is "enclosing". Thus, under the former provision it is necessary to send more than one postal article for more than one offence to be committed; and in the latter case multiple enclosures will create multiple offences. So, in determining what an *offence* is, Bray C.J. has shifted the issue to determining what an *act* is.

Bray C.J. was first confronted with the duplicity problem in *Timms* v. *Van Diemen*.[71] Clearly he did not appreciate the complexities. He adopted the all too common approach of citing a handful of authorities and then deciding the case by analogy with an English decision, in this

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[69] Note 67 *supra*, 552.
[70] *Ibid.*
[71] [1968] S.A.S.R. 379.

instance, *R.* v. *Clow*.[72] *R.* v. *Clow* represents an unsophisticated attempt to find an easy rule of thumb solution for duplicity problems and is analytically unsound. In *Lafitte* v. *Samuels* Bray C.J. found himself having to explain away the "wrong" decision reached in *Timm's* case, by reading down his own remarks as obiter and made "without the advantage of the full argument which was adduced to us in the case of *Romeyko* v. *Samuels*".[73]

Lafitte v. *Samuels* was decided only four months after *Romeyko* v. *Samuels*. In *Lafitte's* case the information followed the wording of the statutory provision prohibiting behaviour "in a disorderly or an offensive manner". Bray C.J. was faced with Samuels' counsel citing *Timm's* case, and Lafitte's counsel citing *Romeyko's* case. Rather than maintain unaltered his reasoning in *Romeyko* v. *Samuels*, he varied it in *Lafitte* v. *Samuels*, adopting principles applicable to the pleas of *autrefois acquit* and *autrefois convict*:

> In the course of one episode a man may behave in several different ways. If each of several different pieces of behaviour on the same occasion is attacked, then, in my view, that would amount to an allegation of as many offences, irrespective of whether all such pieces of behaviour were alleged to be offensive, or all disorderly, or all both offensive and disorderly, or some offensive and some disorderly. If on the other hand only one act is attacked, then, I think that one act is only capable of constituting one offence, irrespective of whether it is alleged that it was offensive or that it was disorderly or that it was both offensive and disorderly. I think that the gist of the offence against s. 7(1)(a) is behaviour in a manner which may possess one or other or both of two forbidden characteristics. I do not think Parliament intended a man to be convicted twice in respect of the same act if it was both offensive and disorderly. I realise that even if the section does create two different offences in respect of the same act, the court could, and probably should, prevent two different convictions in respect of that act by applying the principles laid down by this court in *R.* v. *O'Loughlin; ex parte Ralphs* [where the pleas in bar were analysed].[74]

This is a more flexible approach, bearing a strong resemblance to the "single activity" approach of the English courts. Instead of attempting an all-purpose test, Bray C.J. has sought to define the parameters within which "an offence" must fall. First, the "lower limit" is that one "act" is only capable of constituting one offence. This applies even if Parliament has created two different offences with respect to the one act, although, in such a case the rule against double jeopardy would prevent a second conviction. Secondly, the upper limit is dependent on the number of "different pieces of behaviour", each of which can represent a separate

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[72] Note 15 *supra*.
[73] Note 68 *supra*, 5.
[74] *Id.*, 4.

offence. Finally, one ascertains the "gist of the offence" created by a statute to determine the intention of Parliament. Clearly Bray C.J. has realised the need to broaden the *Romeyko* v. *Samuels* distinctions. Bray C.J. has built on the *Romeyko* v. *Samuels* formula maintaining the predictive value of his reasoning whilst expanding the scope of his "test".

In *Romeyko* v. *Samuels* Bray C.J. sought to include the High Court judgment in *Hedberg* v. *Woodhall*[75] as supporting his reasoning. In fact this is incorrect. In that case, Griffith C.J. studied the substance of the terms in the statutory provision, concluding that the characteristics of "possession" would necessarily contain the characteristics of "control". Bray C.J. however expressly disclaimed the need to look at the meanings of the terms used in the statutory provision, namely, "blasphemous", "libellous", "indecent", "obscene" and "grossly offensive", terms which are clearly not synonymous. Using the Bray test, Griffith C.J. would have arrived at the same conclusion; however, if Bray C.J. had used the same approach as Griffith C.J. the conclusion in *Romeyko* v. *Samuels* would not have been the same.

Bray C.J. also cited the High Court decision in *O'Sullivan* v. *Truth & Sportsman Ltd*[76] where the charge was based on a statutory provision prohibiting the *sale* of "any newspaper in which any one report . . . touching or relating to sexual immorality, unnatural vice or indecent conduct which occupies . . ." more than a given space or carries type exceeding a given size. The issue was whether four offences were committed when one issue of a paper containing four prohibited reports was sold:

> The offences consist in the various acts [that is, printing, sale, distribution etc.] which the section forbids with reference to . . . an issue of a newspaper the contents of which are of the proscribed description. The fact that the contents include more than enough to satisfy the proscribed description, or indeed enough to satisfy it many times over, may make the offence worse, but it does not make it more than one offence. It may be that a separate sale of a copy is an offence distinct from every other sale of a copy, but that is not a question which now arises.[77]

It is clear that Bray C.J. relied heavily on this statement in formulating his "test" in *Romeyko* v. *Samuels*. It is unfortunate that Bray C.J. is compelled to cite a string of English decisions[78] to substantiate his reasoning. Apart from *O'Sullivan's* case, none of the cited cases conform to the reasoning of the Chief Justice for the simple reason that none of the cases attempted to analyse the issues in depth. It is for this reason that it is not intended to make an exhaustive examination of all the

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[75] Note 60 *supra*.
[76] Note 65 *supra*.
[77] *Id.*, 224.
[78] *Viz.*, *Smith* v. *Perry* note 38 *supra; Moore* v. *Allchurch* [1924] S.A.S.R. 111; *Thomson* v. *Knights* note 49 *supra; R.* v. *Naismith* [1961] 2 All E.R. 735.

cases in which the issue of duplicity has arisen. However, there are two other Australian cases worthy of mention: the first, because it is a High Court decision which contains two sophisticated examinations of the problem of defining an offence; the second, because it purports to apply the approach of Bray C.J. in *Romeyko* v. *Samuels.*

In the case of *Montgomery* v. *Stewart*[79] the defendant was charged under section 43 of the Companies Act 1958 (Vic.) which provided: "Where in a prospectus there is any untrue statement or wilful non-disclosure any person who authorized the issue of the prospectus shall be guilty of an offence... unless . . . he had reasonable ground to believe . . . *the* statement was true or *the* non-disclosure immaterial . . .".[80] The defendant pleaded that the effect of the exculpatory words was to indicate that the legislature intended each untrue statement and each wilful non-disclosure to constitute a single offence. Kitto J. was the only member of the bench to accede to this argument. Whereas Menzies J. was willing to state that the "true meaning of the latter part of the operative provisions of section 43 is brought out if [it is read as] . . . *each* false statement or wilful non-disclosure",[81] Kitto J. stated that amendment was not the province of the High Court. The judgments of Taylor J. and Menzies J. are interesting because they both attempt forms of analysis consistent with the well-reasoned approaches of Bray C.J. Both Justices dealt with the grammatical difficulty by ascertaining the gist of the offence. Menzies J. reinforced his decision by adding that the *act* of giving of authority to issue a prospectus is a single offence. Although Menzies J. does not show the refinement in reasoning of Bray C.J. he does support his decision with similar common-sense reasoning[82] which is absent from all other judicial attempts to resolve this issue.

The second case is *Bowling* v. *General Motors Holden*[83] where the information charged the defendant under section 5 of the Conciliation and Arbitration Act 1904 (Cth). The charge stated that the defendant "dismissed and injured an employee, namely the informant or altered his position to his prejudice by reason of the circumstances that the employee" was an officer, delegate and member of the Vehicle Builders Employees' Federation and acting lawfully within that role. Woodward J. stated that applying the test formulated by Bray C.J. in *Romeyko* v. *Samuels*, three offences were created by the statute and repeated in the information: *dismissing, injuring* and *altering the position* of the informant. Although Woodward J. purported to follow Bray C.J., in reality he adopted the same approach as Avory J. in *R.* v. *Surrey Justices; ex*

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[79] Note 66 *supra.*
[80] Emphasis added.
[81] Note 66 *supra*, 232 (emphasis added).
[82] *Id.*, 231.
[83] (1975) 8 A.L.R. 197.

parte Witherick by asking the question whether one can do one act without the other. A true application of the *Romeyko* v. *Samuels* test would be if the one act of dismissing an employee (analogous to posting an offensive letter) has the characteristics of injuring or altering the position of the employee to his detriment (or the offensive letter has the characteristics of being blasphemous or libellous etc.) then there is only one offence, though it may contain characteristics which would particularise the form of the offence.

The misapplication of the one act equals one offence formula illustrates the problem inherent in it, namely, the problem of determining what constitutes an act. In *Romeyko* v. *Samuels* the relevant act was "sending" though Bray C.J. was unsure whether the relevant act in another section of the Post & Telegraph Act 1901 (Cth) was "sending" or "enclosing". Similarly, in *Bowling* v. *General Motors Holden* it is difficult to determine whether the act is "dismissing" or "injuring the position" of an employee or "altering the position" of an employee. In *Lafitte* v. *Samuels* Bray C.J. appreciated the difficulty and made the appropriate amendments to his "test".

First, he introduced the term "pieces of behaviour" which, like the term "single activity" used by the English courts, retains the nebulous qualities of "an act" whilst allowing for greater flexibility in adaptation to other statutory provisions. Secondly, he referred to the gist of the offence which is a mechanism for focussing on the act/activity/piece of behaviour which Parliament intended to prohibit. Once this focussing has taken place it is a simple matter to classify the remainder of the statutory provision as describing the "forbidden characteristics" of the prohibited act/activity/piece of behaviour.

In fact, it is immaterial which of these terms a court uses because each term is sufficiently imprecise to accommodate a variety of applications. The transition from the term "act" to "activity" (or "piece of behaviour") has occurred in both England and Australia.[84] In England, although there were many applications of the "one act equals one offence" test, the applications were not founded on sound reasoning but on unthinking assumptions. For this reason the adoption of the single activity approach in England is apparently more by accident than by evolution. The Australian decisions in *O'Sullivan* v. *Truth & Sportsman Ltd, Montgomery* v. *Stewart, Romeyko* v. *Samuels* and *Lafitte* v. *Samuels* represent a natural development of analysis. These decisions articulate how the gist of the offence/act/activity is to be ascertained. Some common principles have emerged.

First, there is an evaluation of the sense of justice by balancing the penalty against the form of behaviour. For example, in *Montgomery* v.

[84] Particularly noticeable in the judgments of Bray C.J. in *Romeyko* v. *Samuels* note 67 *supra* and *Lafitte* v. *Samuels* note 68 *supra*.

Stewart,[85] Menzies J. stated that it would be ludicrous to penalise a person ten times because there were ten false statements in a prospectus. Secondly, it would be unjust to adopt a form of statutory interpretation which would expose a person to further punishment if it was shown after one conviction had been entered, that the prospectus contained another punishable statement.[86] However, as Bray C.J. stated in *Lafitte* v. *Samuels*, if the interpretation of the statute has this potential a court should refrain from allowing a second conviction. Thirdly, it would be wrong to encourage multiple proceedings arising out of the same set of facts. The fact that the behaviour under scrutiny contravenes the statutory provision many times over can be reflected in the choice of penalty. Fourthly, if the provision allocates different penalties for different forms of behaviour, this must be taken as conclusive of the intention of the legislature to provide for different offences. For example, one penalty for driving under the influence of drugs, and another for driving under the influence of alcohol would be conclusive of the intention of Parliament to create two offences. These criteria are the most common bases for determining the gist of an offence or the parameters of an act and it is a sensible application of these criteria which prevents irrational conclusions such as those reached in the early English cases.

3. *Alternative Bases for Interpreting a Statutory Provision*

Having seen the great divergence in the application of principles of interpretation of the rule against duplicity and the lack of conformity of these principles, it may well be of greater predictive value to interpret according to rules of grammatical construction rather than the intangible "parliamentary intent". One technique is to distinguish those statutory provisions which use the conjunctive "and" from those which use the disjunctive "or". For example, "stop vehicle and remain",[87] ". . . dismissed and injured an employee"[88] represent two statutory provisions in which the common sense interpretation of the presence of the conjunctive joinder would indicate the intention of the legislature that both factors need be present before one offence can be committed. However, the Courts in each case held that each statutory provision provided for two offences. The reason for this seemingly illogical interpretation is explained by the apparently accepted practice of interpreting statutes and deeds according to the author's intention, even at the expense of ordinary grammatical interpretation:

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[85] *Note* 82 *supra.*

[86] Although, as Bray C.J. states in *Lafitte* v. *Samuels* note 68 *supra*, if the interpretation of the statute has this potential, the Court should refrain from allowing a second conviction. See also *Temperley* v. *Playground Supplies Pty Ltd* (1980) A.T.P.R. 40-164, 42,295.

[87] *McCann* v. *Pease* (1973) 1 Q.L. 259.

[88] *Bowling* v. *General Motors Holden* note 83 *supra.*

> "And" may, however, be construed "or" where one member of the sentence includes the other [that is, the *Hedberg* v. *Woodhall* sense] so that by construing the words literally one member of the sentence would be rendered unnecessary, and the change is made in order to give effect to each member of the sentence.[89]

Ironically this type of grammatical reconstruction could explain a finding of two offences in the case of *Hedberg* v. *Woodhall*[90] ("possession and control"), but does not render the above examples any more logical because the reconstruction only applies in the examples where there is a greater term encompassing a lesser.

4. *Conclusion*

The only consistent trend that can be deduced from a review of the authorities is that the judiciary employ precedent to substantiate a predetermined view. They cite authorities indiscriminately and similarly conclude the matter arbitrarily. Many of the English Court of Appeal decisions show that there is a willingness to evolve rules which will ensure that no conviction is quashed for duplicity. Similarly it can be seen that a judge who disapproves of lax pleadings can with great ingenuity reduce the efficacy of the statutory provisions designed to eliminate the technicalities inherent in the common law rules.[91] The inconsistencies have arisen because each court has seen fit to tailor its reasoning to fit its conclusion. This review illustrates the impossibility of reducing the issue to a glib formula. It has also shown that it is not legitimate for a court to cite a handful of authorities, purport to adopt the reasoning in all of them, and proceed to an unsubstantiated result. The categories and decisions which have been presented here are by no means exhaustive. Many decisions do not state with any kind of precision how a conclusion was reached. In some decisions it has been possible to deduce the reasoning; but most often one is left to speculate as to how a result could logically be justified. Both Australian and English authorities are moving towards what must be considered the only possible approach to the issue of duplicity, namely avoiding an over technical analysis.

IV DEFINING THE BEHAVIOUR OF THE DEFENDANT

In the preceding pages we have examined the approach of the Courts in analysing the number of offences created by Parliament and restated in the information. Generally the approach has involved equating the number of offences with either portions of the defendant's behaviour or with the results of such behaviour. It may be that only one offence is

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[89] J. Saunders (ed.) *Words and Phrases Legally Defined* (2nd ed. 1969) 82.
[90] Note 60 *supra.*
[91] Such as Bray C.J. in *Romeyko* v. *Samuels* note 67 *supra.*

contained in an information, but either the particulars or the evidence indicate that that offence has been committed more than once. This may create what the English courts refer to as a latent duplicity in the information.

Definitional problems of similar complexity as those arising in relation to determining the offences created in a statute arise in determining the number of offences contained in a defendant's actions. A classic illustration of these difficulties is found in *R.* v. *Firth*[92] where the offence was using gas by tapping into a main pipe without authority. The theft took place over a number of years and the question arose whether one theft or multiple thefts had occurred. It was held that one continuous act had been committed and therefore the information was not duplicitous.

1. *The English Authorities*

The first of the modern English decisions to consider the problem of defining the parameters of an offence in this sense is *R.* v. *Ballysingh*[93] where the indictment contained a single count of larceny. Lord Goddard C.J. held that each act of the accused in taking articles from different parts of a large department store constituted separate offences because each theft was an individual *transaction*. Lord Goddard C.J. accepted that if the same articles had been taken from one department only there would have been a single offence because in such a case only one transaction would have been made.

This "transaction" test is referred to by Lord Widgery C.J. in *Jemmison* v. *Priddle*[94] as "that . . . phrase hallowed by time, but not in my judgment, of particular assistance in dealing with a particular problem". Lord Widgery C.J. suggested that a more useful guide was provided by Lord Parker C.J. in *Ware* v. *Fox*[95] where the concept, "activity" was used to determine the limits of an offence defined by statute. Lord Widgery C.J. used the "activity" test in *Jemmison* v. *Priddle* and concluded that shooting two deer without a gaming licence, although involving two separate *acts*, constituted only one offence because "occurring as they must have done within a very few seconds of time and all in the same geographical location, are fairly to be described as components of a *single activity* . . .".[96] The comments made by Lord Widgery in *Jemmison* v. *Priddle* on the "transaction test" used in *Ballysingh* suggest that there is a significant difference between it and the "single activity test" which he adopted in *Jemmison* v. *Priddle*. In fact, on closer inspection it is apparent that the term "transaction" is merely a form of "activity".

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[92] (1869) 11 C.C.C. 234.
[93] (1953) 37 Cr. App. R. 28.
[94] [1972] 1 Q.B. 489, 495.
[95] Note 53 *supra*.
[96] Note 94 *supra* (emphasis added).

Despite his obvious disagreement with the conclusion reached in *Ballysingh*, Browne L.J. in *Wilson* v. *R.*[97] was clearly of that opinion and cited *Ballysingh* and *Jemmison* as applying consistent principles. Both *Ballysingh* and *Wilson* have essentially the same set of facts. Browne L.J. examined *Jemmison* v. *Priddle* and the decisions in *D.P.P.* v. *Merriman*[98] and *Jones* v. *R.*,[99] two recent applications of the "single activity" test, as well as *Ballysingh*, and was obviously in a dilemma, wishing to conform to the pattern of reasoning without reaching the same conclusion as was reached in *Ballysingh*. He unconvincingly distinguished *Ballysingh*, pointing out that the Crown was not called to present its case and that the facts were not clearly reported because it was not made clear whether "department store" was used in the modern day sense, or whether it had a 1953 meaning. Because the question is one of "fact and degree",[100] Browne L.J. considered that the lack of clarity with which *Ballysingh* was reported meant that it was better to "read it in the light of the later authorities",[101] namely *Jemmison* v. *Priddle* and *D.P.P.* v. *Merriman*. Therefore, he concluded that thefts of a number of separate items from different departments of the same store constituted only one offence.

Although in *D.P.P.* v. *Merriman* both Morris L.J. and Diplock L.J. accepted the approach of Lord Widgery C.J., they did so with one important proviso which Morris L.J. stated:

> The question arises—what is an offence? If A attacks B and, in doing so, stabs B five times with a knife, has A committed one offence or five? If A in the dwelling-house of B steals ten different chattels, some perhaps from one room and some from others, has he committed one offence or several? In many different situations comparable questions could be asked. In my view, such questions when they arise are best answered by *applying common sense and deciding what is fair in the circumstances.* No precise formula can usefully be laid down. . . . [I]t will often be legitimate to bring a single charge in respect of what . . . [Lord Widgery] called one activity even though that activity may involve more than one act. It must of course depend on the circumstances.[102]

If Lord Goddard C.J. had put less emphasis on formula and allowed for some flexibility in his evaluation of the facts in *R.* v. *Ballysingh* he would have reached a preferable conclusion.

The fact that the basis of the "single activity" test is a decision involving statutory interpretation is of no consequence. Rather than doubting the legitimacy of such an adaptation it should be seen as a

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[97] (1979) 69 Cr. App. R. 83.
[98] (1972) 56 Cr. App. R. 766.
[99] (1974) 59 Cr. App. R. 120.
[100] Note 97 *supra*, 88.
[101] *Ibid.*
[102] Note 98 *supra*, 775-776 (emphasis added).

rare example of judicial consistency. There is every reason for preferring a single judicial approach to two areas of interpretation, one statutory, one common law, where the purposes of the analyses are common: to define "an offence".

2. *The Australian Authorities*

The earliest High Court decision which analysed continuous activities was *Johnson* v. *Miller*[103] where the evidence was that approximately 30 people had been seen to enter and leave licensed premises during prohibited hours. The Court held that each person represented the commission of an offence. Dixon J. was mindful of the problems of reaching such a conclusion. He accepted that a distinction could possibly be made between a situation where people acted together and a situation where people entered and left the premises individually:

> 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. . . .[104]

Johnson v. *Miller* is often considered the leading case on continuous offences even though it does not fit into the classic English mould of continuing offences. In this respect the New South Wales case of *Ex parte Graham; re Dowling*[105] is more significant. The information alleged that Graham, ". . . being the driver of a motor car No. DRY 373, upon . . . [the] Hume Highway, N.S.W. . . . did drive the same negligently",[106] contrary to the relevant statutory provision. In the course of his judgment, Asprey J.A. considered the issue of whether certain behaviour involved one continuous act or a number of separate and distinct acts:

> The test could sometimes be whether the acts in question are so separate and complete in themselves that each constitutes an offence (*Parker* v. *Sutherland*, per Viscount Reading C.J. at p. 1054 and per Avory J. at pp. 1054-5), but that is not a universal touchstone, as in each case the conduct of the defendant must be considered in relation to the nature of the offence with which he is charged. . . . [O]ne offence of driving negligently may be constituted by conduct which continues for a period and involves

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[103] (1937) 59 C.L.R. 467.
[104] *Id.*, 483.
[105] (1968) 88 W.N. (N.S.W.) (Pt 1) 270.
[106] *Id.*, 277.

> more than one act which may differ in nature (cf. *R.* v. *Clow*). The dividing line must of necessity be at times very thin, and there is scope for divergent views.[107]

In that case, one negligent act of driving was separated from another act of negligent driving of a different character by a period of acceptable driving (for half to three-quarters of a mile). This was sufficient to separate the negligent acts, each of which had different characteristics, into two separate offences.

Unlike the English Courts, the Australian courts have not taken the opportunity to refine their definition of a continuous offence. The approach of Asprey J.A. in *Ex parte Graham; re Dowling* is consistent with the approach in other Australian decisions. No attempt is made to give a precise guide to determining when a continuous offence exists. Much like the early English cases on duplicitous informations, the courts are willing to use as their starting point the existence or otherwise of multiple offences committed by the defendant without indicating how that assumption was made.

3. *Latent Duplicity*

If the defendant's behaviour is found to constitute multiple offences rather than a continuous offence, is the information alleging the offence necessarily duplicitous? On its face it is not duplicitous.[108] There have been two approaches taken by the courts. First, it is suggested that such an occurrence represents a "latent duplicity". This view is summarised by Napier J. in *Tucker* v. *Noblet*:

> It may be possible that a case could occur in which the complaint is good, [that is, on its face] 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 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 as far as to justify a dismissal of the complaint: *O'Flaherty* v. *McBride* (1920) 28 C.L.R. 283, at p. 288.[109]

This is the view adopted by the English courts.[110]

The second approach is that the issue is not one involving the information at all, but is related to the admission of irrelevant evidence. For

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[107] *Id.*, 283-284.

[108] See the example given by W. Paul, "Duplicity in Indictments and Informations" (1935) 8 *A.L.J.* 430, 433.

[109] [1924] S.A.S.R. 326, 340; quoted approvingly by Dixon J. in *Johnson* v. *Miller* note 103 *supra*, 488-489.

[110] *Jones* v. *R.* (1974) 59 Cr. App. R. 120; *Wilson* v. *R.* (1979) 69 Cr. App. R. 83; *Jemmison* v. *Priddle* [1972] 1 Q.B. 489; *D.P.P.* v. *Merriman* [1973] A.C. 584. *Cf.*, *Parker* v. *Sutherland* (1917) 86 L.J.K.B. 1052.

example, in *Johnson* v. *Miller*[111] where the prosecutor was basing his information on 30 people entering licensed premises during proscribed hours, the Court found the error was not in the information but that it was a question of limiting the prosecution case to only one offence. This second approach is generally adopted by the Australian courts[112] and it has much appeal. It is difficult to anticipate a case which would not fit its reasoning. The recent approach of equating an offence with the defendant's acts/activities/transactions increases the probability that only one offence will be contained in a single factual situation.[113] Therefore rarely will it be a complex matter to require a prosecutor to refrain from leading evidence of a second offence. The difference in reasoning in the two jurisdictions represents the most significant divergence in the approaches of the English and Australian courts to the issues canvassed in this article. Because the English authorities have followed the adaptation of the statutory interpretation formula in *Ware* v. *Fox*[114] a case of "true duplicity",[115] it has been without hesitation that they have assumed that cases in which the evidence indicates more than one offence are cases involving a form of duplicity which can be conveniently called "latent" duplicity.

Although in the Australian decisions there is invariably a mention of latent duplicity or ambiguity, this is as close as the Australian courts come to following the English authorities. The focus of their inquiry is on the evidentiary aspects of the proceedings with the assumption that the information is good as long as no evidence is admitted of any additional offences. Limiting the prosecutor to selecting on which act/activity/transaction he wishes to rely bears a strong resemblance to the procedure in cases of "true" duplicity. If, as in *Ex parte Graham; re Dowling*, the cases have already been heard, the conviction will most likely be quashed:

> Whether what took place amounted to duplicity strictly so called or whether the alleged facts disclosed a latent ambiguity or uncertainty in the information matters not. Upon this charge only one

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[111] Note 103 *supra.*

[112] *Johnson* v. *Miller id.; Ex parte Graham; re Dowling* note 105 *supra; Phillips* v. *Corporate Affairs Commission* [1974] 2 N.S.W.L.R. 489. *Cf. McDonald* v. *Mather* (1976) 13 S.A.S.R. 438.

[113] Note the decision in *R.* v. *Thompson Holidays Ltd* [1974] 1 Q.B. 592 where the defendants were charged with recklessly making a false statement contrary to s. 14(1)(b) of the Trade Descriptions Act 1968 (U.K.). The Court held that there were as many offences as there were readers and the plea of *autrefois convict* could not be valid. This would mean that the act of printing brochures could amount to the commission of an infinite number of offences. Possibly the comments in *O'Sullivan* v. *Truth & Sportsman Ltd* note 77 *supra,* would be followed to avoid such a conclusion: see *Thompson* v. *Riley McKay Pty Ltd* (1980) A.T.P.R. 40-152.

[114] Note 53 *supra.*

[115] This phrase is used by Browne L.J. in *Wilson* v. *R.* (1979) 69 Cr. App. R. 83, 85.

offence could be proved and the admission of evidence of more than one offence was contrary to law (*Johnson* v. *Miller*, per Dixon J.).[116]

As a consequence of the approach taken, the role of particulars[117] and especially the failure of a magistrate to order particulars is of paramount importance in cases where an assumed continuous offence may in fact be multiple offences.

V SECTION 65 JUSTICES ACT 1902 (N.S.W.)

S. 65(1) No objection shall be taken or allowed to any information, complaint, summons, or warrant in respect of—

(a) any alleged defect therein in substance or in form; or

(b) any variance between any information, complaint, summons, or warrant and the evidence adduced in support of the information or complaint at the hearing.

(2) No variance between any information and the evidence adduced in support thereof at the hearing in respect of the time or place at which the offence or act is alleged to have been committed shall be deemed material if it is proved that the information was in fact laid within the time limited by law in that behalf or that the offence or act was committed in New South Wales, as the case may be.

(3) Where any such defect or variance appears to the Justice or Justices present and acting at the hearing to be such that the defendant has been thereby deceived or misled such Justice or Justices may upon such terms as he or they may think fit adjourn the hearing of the case to some future day.

Section 57 requires that only one offence be included in an information, and as the cases which have involved a study of this rule have made clear, no common law inroads have been made into the rule. This is despite the fact that at times the rule has been shown to be no more than a pedantic technicality inhibiting the function of the court. Section 65(1)(a) appears to destroy the potency of the rule against duplicity by disallowing objections based on defects in an information. In fact, the effect of section 65(1) is quite limited and will not permit a duplicitous information to remain unchallenged. The first apparent suggestion that section 65(1) is not as inflexible as it appears is found in the very presence of subsections (2) and (3). Subsection 2 states that some kinds of variances will not be considered material. If subsection (1)(b) is meant to be a full statement of the effect of an objection based on a variance, subsection (2) would be superfluous. Similarly, if the prohibition

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[116] Note 105 *supra*, 284.

[117] See *Romeyko* v. *Samuels* note 67 *supra*; *Lafitte* v. *Samuels* note 68 *supra*; *Ex parte Graham; re Dowling* note 105 *supra*; *Johnson* v. *Miller* note 103 *supra*; *Tucker* v. *Noblet* note 109 *supra*. *Cf. Hodge* v. *Commonwealth* (1943) 61 W.N. (N.S.W.) 36.

on entertaining objections to defective informations was unassailable, it would be inappropriate to consider whether or not the defendant was deceived or misled. What is the effect of an objection to an information which is defective due to either duplicity or uncertainty?

1. *Section 65(1)(a): No Objections Allowed*

The English case of *Edwards* v. *Jones*[118] provides a comprehensive and representative analysis of the United Kingdom equivalents of section 57 and section 65. The opinion of the Court (and a statement of the present New South Wales position) is put most succinctly by Oliver J.:

> To my mind it is fundamental in summary jurisdiction procedure that an information should contain only one offence. Our attention has been drawn to the provisions of s. 1 of the Act which say that no objection is to be taken or allowed with regard to substance or form. All I take that to mean is that no information is to be summarily dismissed because it is defective in form or substance, but it must be put in order. It must be put in a condition in which it is not in complete violation of s. 10 before it is heard.[119]

2. *Section 65(1)(b): Variance Between Information and Evidence*

Of course, it is impossible to make a general statement regarding a variation in evidence and in an information without looking to the degree of variance. At one extreme are variations so great that the offence charged in the information is different to the offence described in the evidence which as a consequence is inadmissible.[120] At the other extreme are minor variances, where "the pith and substance remain constant, namely that the appellant on a named day and at a named place made false pretences. . . . The details of the pretence and the mechanics of its operation . . . [being] mere particulars".[121] It is not possible to categorise the kinds of variances that will be minor enough to attract section 65(1)(b) because the nature of the offence and the nature of the particulars can quite often alter the importance of otherwise minor matters.[122]

Apparently in an attempt to delineate the kinds of variance that can be objected to, section 65(2) was included in the Justices Act 1902 (N.S.W.). The origins of this provision, taken from the Summary Jurisdiction Act 1848 (U.K.),[123] stem from the English system of local government which divided the country into autonomous areas for

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[118] [1947] K.B. 659.

[119] *Id.*, 666. See also *Mildren* v. *Nicholson* [1920] S.A.S.R. 369.

[120] *Felix* v. *Smerdon* (1944) 18 A.L.J.R. 30.

[121] *Elliott* v. *Harris (No. 2)* (1976) 13 S.A.S.R. 516, 522 *per* Bray C.J.; see also *Martin* v. *Pridgeon* (1859) 1 E. & E. 778, 120 E.R. 1102 and *Lawrence* v. *Same* [1968] 2 Q.B. 93.

[122] *Wright* v. *Nicholson* [1970] 1 All E.R. 12, [1970] 1 W.L.R. 142.

[123] Jervis' Act, c. 43, s. 1.

administrative purposes. Lay magistrates presided over these courts and the purpose of section 65(2) was to ensure that these magistrates stayed within narrow jurisdictional boundaries.[124] Cases in which it might have seemed relevant to analyse the effect of section 65(2) on a variance have ignored it, reinforcing the view that the effect of section 65(3) makes section 65(2) otiose.[125]

3. *Section 65(3): Deceives or Misleads the Defendant*

Although the equivalent South Australian provision[126] refers to "prejudice to the defendant" rather than "deceives or misleads", it seems that the test is substantially the same.[127] The question is essentially one of determining whether there will be any injustice to the defendant in leaving the information unamended. Obviously this will vary depending on the defect involved,[128] however it can be said that without exception a duplicitous or uncertain information will attract an adjournment under section 65(3) even if an amendment is forthcoming.

VI POWER OF AMENDMENT

Although there is no express power to amend a defective information[129] in the Justices Act 1902 (N.S.W.), section 65(3), which allows for adjournment, has been interpreted as requiring the magistrate to take steps to ensure that the prosecutor amends a seriously defective information. The correct procedure[130] to be adopted by the magistrate is to request the prosecutor to amend. Where the information is for more than one offence the prosecutor must elect on which offence to proceed. If there is no election, then the magistrate must dismiss the information.[131] Sheppard J. in *Phillips* v. *Corporate Affairs Commission*[132] cited approv-

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[124] For a discussion of the law relating to summary procedure prior to the 1848 Act and the effect of that Act on the law; see H. Macnamara, *Paley's Law and Practice of Summary Convictions by Justices of the Peace* note 1 *supra*, in particular, as to jurisdiction of the justices, see especially Part 1 Chapter 1.

[125] *Felix* v. *Smerdon* note 120 *supra; Parmeter* v. *Proctor* (1949) 66 W.N. (N.S.W.) 48.

[126] S. 182 Justices Act 1921-1979 (S.A.).

[127] *Parmeter* v. *Proctor* note 125 *supra; Garfield* v. *Maddocks* [1974] Q.B. 7; *Wright* v. *Nicholson* [1970] 1 All E.R. 12, [1970] 1 W.L.R. 142; *Ex parte Ashby; re Carless and Egg & I (Farm) Pty Ltd* [1973] 2 P.S.R. (N.S.W.) 969.

[128] See Bray C.J. in *Elliott* v. *Harris (No. 2)* (1976) 13 S.A.S.R. 516, 523.

[129] Section 365(1) of the Crimes Act 1900 (N.S.W.) empowers a court to amend a defective indictment "as the court thinks necessary to meet the circumstances of the cases, unless, having regard to the merits of the case, the required amendments cannot be made without injustice". Amendment can be made at any stage of the proceedings. No use of this power has been made in relation to defective informations in Courts of Petty Sessions. *Quaere*, the effect of this section given that if the amendments "cannot be made without injustice", they should not be made.

[130] See *Phillips* v. *Corporate Affairs Commission* [1974] 2 N.S.W.L.R. 489; *cf. Ex parte Cunliffe* (1871) 10 S.C.R. (N.S.W.) 250; but see *Sheil* v. *Crothers* (1933) 33 S.R. (N.S.W.) 229, 233 (no mention was made of the issue in the High Court appeal).

[131] *Edwards* v. *Jones* [1947] K.B. 659, 661-662 *per* Lord Goddard C.J.

[132] Note 130 *supra*.

ingly the English and New South Wales decisions which support this implied power to amend or dismiss a bad information. It is clear that the implied power is as extensive as the express powers in the other States of Australia. Where the prosecutor amends an information by electing to rely on one offence only, this election does not amount to a fresh charge being laid and thus place the prosecution in danger of infringing section 52, or any other statutory time limit. There is no power for a *magistrate* to amend an information, conviction or order:

> If the defect is curable it is the duty of the magistrate to aid in curing it. But it is neither his duty nor his right to take the conduct of the prosecution out of the hands of the prosecutor and compel him to proceed against one person alone [or on one offence] when he insists on proceeding against several.[133]

1. *No Offence Disclosed*

Where no offence is disclosed in the information the position is now quite clear:[134] "if the information does not state an offence it is something more than a defect—it is not an information at all".[135] It will not always be clear whether the omission of some ingredient amounts to a failure to disclose an offence, or merely an example of a poorly drafted information. Dixon J. (at he then was) suggested in *Broome* v. *Chenoweth*[136] that rather than dealing with the problem along firm logical principles, it is better to treat the issue as a question of degree. Any other approach would be doomed to suffer insurmountable problems of universality.

2. *Amendment of the Conviction*

(a) *"Latent" Duplicity*

Unless the "latent duplicity" arises from a failure to state which of a number of possible statutory provisions was contravened,[137] amendment will be inapplicable to a conviction found to be defective due to a "latent" duplicity in the information for the simple reason that there is nothing on the record to amend. In the case of so-called latent duplicity, the only satisfactory way of avoiding problems is if the prosecutor is limited to presenting evidence in connection with a single offence only.

(b) *"True" Duplicity*

Aside from any problem associated with the defect not being on the face of the record, it is unlikely that section 115 would be considered

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[133] *Per* Jordan C.J. in *Ex parte McAuley; re Cam* (1944) 61 W.N. (N.S.W.) 138, 139.

[134] Some confusion and uncertainty was created by the opinions expressed in *Ex parte Parkinson* (1909) 9 S.R. (N.S.W.) 174.

[135] *Ex parte Palmer* (1907) 7 S.R. (N.S.W.) 544, 549, *per* Darley C.J.; see also *Ex parte Thomas; re Otzen* (1947) 64 W.N. (N.S.W.) 21; *Connor* v. *Sankey* [1976] 2 N.S.W.L.R. 570.

[136] (1945) 73 C.L.R. 583.

[137] Note 108 *supra.*

appropriate for amending a conviction which is bad for either duplicity or uncertainty. These defects are too fundamental to be corrected in such a way. Similarly, section 132 would not undermine an appellant's right to have the conviction quashed.

VII RIGHT OF APPEAL

Under Part V of the Justices Act 1902 (N.S.W.) there are three forms of appeal. Section 101 provides for a stated case to be made to the Supreme Court on a point of law. Should a magistrate refuse to state a case, an application can be made directly to the Supreme Court under section 104. The remedy of statutory prohibition is retained in sections 112 and 115 of the Act. Where, "after inquiry and consideration of the evidence adduced before the . . . Justices" it is found that "the conviction or order cannot be supported"[138] the order of prohibition will be made. Because of the magnitude of a defect of duplicity or uncertainty in a conviction (which must necessarily follow the wording of the information) it would be unlikely for a Supreme Court to refuse to grant an order. Under section 115, the Supreme Court has power to amend a conviction. This power would not authorise the amendment of a conviction which is bad for duplicity or uncertainty. It merely allows minor defects to be corrected.

The right of appeal contained in section 122 is a summary rehearing. It is the only method of appeal to the District Court. If a person chooses to appeal by way of stated case to the Supreme Court, any right to appeal to the District Court pursuant to section 122 is abandoned. Because it is in the nature of a rehearing, the judge hearing the appeal has the same powers as the magistrate who heard the charge at first instance. This allows the person to be re-charged if the six month limitation period in section 52 can be complied with. However, it does not allow the judge to amend the information before proceeding. This function is solely the prerogative of the prosecutor. For instance, in some cases where no offence is disclosed it will not be possible to amend even if the prosecutor wishes to do so. Generally, the appellate court will consider that justice would be best served by quashing the conviction and not putting the defendant to the expense and inconvenience of a second hearing.[139] This unsatisfactory conclusion has caused one commentator to make an exasperated attack on the duplicity rule[140] and at least one Supreme Court judge to show similar signs of exasperation at what he saw as an unmeritorious device for avoiding a just hearing of a criminal charge.[141]

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[138] S. 112(5), Justices Act 1902 (N.S.W.).

[139] *E.g. Ex parte Graham; re Dowling* note 105 *supra; Lafitte* v. *Samuels* note 68 *supra; Romeyko* v. *Samuels* note 67 *supra.*

[140] Glanville Williams, note 5 *supra.*

[141] *R.* v. *Elliott; ex parte Elliott* (1974) 8 S.A.S.R. 329, 368 *per* Sangster J.

VIII CONCLUSION

However, whilst section 57 remains without guidelines for determining or limiting its applicability, it will continue to generate problems. Some jurisdictions[142] have limited the effect of the duplicity rule by stating that it will not apply when the offences "arise out of the same set of circumstances". As the recent authorities show, the courts are moving quickly towards adopting a definition of "an offence" which in effect incorporates this statutory addition. As well they are shying away from applying a legalistic approach to the problem. This adoption of a common-sense approach is in accord with the philosophy of summary jurisdiction and will no doubt become entrenched because, not only is it easy to apply, but it avoids most of the pitfalls of the "over-technical" approaches attempted in the past.

[142] *E.g.* Justices Act 1921-1979 (S.A.) s. 51(1).