

1937.

Barber had a life estate, and that they hold both such one-fifth parts on trust for the testator's statutory next of kin.

In re
BARBER;
JAMES
v.
BARBER.
Long Innes
C.J. in Eq.

Solicitors: *Elrington & Elrington* (Yass), by their agents, *Tress, Cocks & Maddox*; *H. M. Wragge & Co* (Gunnedah), by their agents, *Piggott, Stinson, Macgregor & Palmer*.

[NOTE:—On the 9th November, 1937, the Full Court dismissed an appeal against so much of his Honour's decision as held that the defendant Hamilton Hume Barber was entitled only to an estate in tail male, converted into a fee simple by s. 19 of the Conveyancing Act, 1919-1932, in the one-fifth part of the real estate of which his father was a tenant for life.]

1937.

HAILEY *v.* COMMISSIONER FOR RAILWAYS.

Nov. 4, 12.

Jordan C.J.
Halse Rogers
J.
Maxwell J.

Government Railways Act, 1912 No. 30, s. 80—Officer—Conviction—Felony—Vacation of office—Summary Conviction—Crimes Act, 1900 No. 40, ss. 476, 501.

The plaintiff, an officer in the employ of the defendant, the Commissioner for Railways, was convicted in a summary manner before two justices acting under the powers conferred by s. 476 of the Crimes Act, 1900, of an offence of stealing certain goods valued at eight shillings. The defendant, claiming that the plaintiff had been convicted of a felony, did not thereafter pay him his salary and relied on the Government Railways Act, 1912. Section 80 of that Act provides that "If any officer is convicted of any felony . . . he shall be deemed to have vacated his office." The plaintiff sued the defendant for salary alleged to be due to him. Upon a stated case,

Held, that the plaintiff had not been convicted of a felony within the meaning of s. 80 of the Government Railways Act, 1912, and, therefore, that he was entitled to a verdict for the salary claimed.

STATED CASE.

This was an appeal by way of case stated under s. 143 of the District Courts Act, 1912, and was in the following terms:—

"This is an action by the plaintiff to recover from the defendant the sum of seventy-six pounds seventeen shillings

and two pence (£76/17/2) alleged to be salary due to the plaintiff between the seventh day of December, 1936, and the sixteenth day of April, 1937.

At the hearing of the said action in the Metropolitan District Court before me on the twentieth and thirtieth days of August, 1937, the following facts were proved or admitted :—

1937.
HAULEY
v.
COM-
MISSIONER
FOR
RAILWAYS.
—

1. That prior to the seventh day of December, 1936, the plaintiff was an officer within the meaning of the Government Railways Act, 1912, as amended and employed by the defendant as a night officer.

2. That on the seventh day of December, 1936, the plaintiff appeared before two Justices of the Peace sitting at Moss Vale Police Court in the said State on a charge of stealing four gallons of benzine valued at eight shillings, the property of the defendant.

3. That the requirements of ss. 476 and 479 of the Crimes Act, 1900, as amended were duly complied with, and that the plaintiff consented to the case being disposed of summarily.

4. That the plaintiff thereupon pleaded guilty and was convicted of the said offence by the said Justices and was fined two pounds, or in default, four days' imprisonment with hard labour.

5. That the plaintiff has never been dismissed from the service, and that if the plaintiff succeeded in this action, he would be entitled to salary from the seventh day of December, 1936, the date of the abovementioned conviction to the sixteenth day of April, 1937, the date of service of the notice of action herein.

Upon the above facts proved or admitted, I held that the plaintiff on the seventh day of December, 1936, had been convicted of a felony within the meaning of s. 80 of the said Government Railways Act, 1912, as amended, and thereby must be deemed to have vacated his office as from that date. I therefore found a verdict for the defendant and entered judgment accordingly.

On the application of counsel for the plaintiff, I granted a stay of proceedings for twenty-one days.

The questions for the opinion of this Honourable Court are :—

1. Whether my said decision is erroneous in law.

1937.

HAILEY
v.
COM-
MISSIONER
FOR
RAILWAYS.
— —

2. Whether the plaintiff on the seventh day of December, 1936, had been convicted of a felony and therefore must be deemed to have vacated his office within the meaning of s. 80 of the said Government Railways Act, 1912, as amended.
3. Whether the plaintiff is entitled to a verdict for seventy-six pounds seventeen shillings and two pence."

Evatt K.C. and *Dwyer*, for the appellant, the plaintiff. The question always to be considered, in order to determine whether at any given moment an officer shall be deemed to have vacated his office, is whether at that moment the officer "is convicted" of a felony. It is irrelevant to consider whether if charged differently, the officer might have been convicted of a felony. The respondent has always contended that all larcenies are felonies, but the cases are against such contention. The matter is concluded in the appellant's favour by *Cavanough v. Commissioner for Rlys* (1) and *Commissioner for Rlys (N.S.W.) v. Pitman*. (2) Those cases dealt with the position under s. 501 of the Crimes Act, 1900. But the mere fact that the present proceedings purported to be under s. 476 of the Act makes no difference. This was a larceny which fell within the terms of offence created by s. 501, and s. 476 permits two justices, with the accused's consent, to deal summarily with simple larceny : s. 477, and the maximum punishment whether awarded under s. 478 or s. 501, is imprisonment for twelve months, or a fine of fifty pounds. The punishment for a felony is death or penal servitude : Interpretation Act, 1897, s. 29 ; Crimes Act, 1900, s. 9. Hence, the plaintiff was not convicted of a felony and is entitled to his wages.

Bradley K.C. and *Chambers*, for the respondent. It is submitted that an officer automatically forfeits his position when convicted of a felony by reason of s. 80 of the Government Railways Act, 1912, and the present appellant has been so convicted. All larcenies are of the same nature, and may be punishable with penal servitude and hence are felonies : Crimes Act, 1900, ss. 9, 116 and 117.

(1) 53 C.L.R. 220.

(2) 56 C.L.R. 144.

The cases relied upon by the appellant apply to s. 501, and not to s. 476 which is the section applicable to the present case, and the Court is not fettered by authority. The two sections are quite different. The offences embraced by them differ, as does the limitation which determines jurisdiction, and also the persons trying the offences. The election to be dealt with summarily lies with accused under s. 476, but not under s. 501: *Ex parte Griffith*; *Re Lalor* (1); *Ex parte Cusack*; *Re Searson*.(2) Section 476 creates no new offences, it provides a method of procedure in relation to offences listed in s. 477, which include simple larceny, a felony. Section 481 places the matter beyond doubt by providing in respect to cases dealt with under s. 476-480 that "every conviction . . . shall have the same effect as a conviction upon an indictment for the offence would have had . . ." This section should be given its plain meaning, and it shows that the nature of the offence itself is not changed merely because of the new manner in which it may be tried.

1937.

HAILEY
v.
COM-
MISSIONER
FOR
RAILWAYS.

Cur. adv. vult.

Nov. 12.

JORDAN C.J. To determine the questions submitted to us, since the offence of which the plaintiff was convicted consisted in stealing goods of the value of 8/-, it is necessary in the first place to consider s. 501 of the Crimes Act, 1900. Apart from authority, there are two possible views of this section. The first is that it merely provides machinery for the summary trial of certain offences constituted otherwise than by the section itself, subject to certain conditions as to the amount of the property involved and the punishment which may be imposed, and subject to the further condition, contained in s. 548A, that if the magistrate thinks fit they may be dealt with, not summarily, but as in ordinary cases of indictable offences. The other view is that the section creates a number of new minor offences in lieu of the major offences that would formerly have been constituted by the same acts; and provides new smaller penalties for these

(1) 48 W.N. 133; 5 Austn Digest
972; 12 Austn Digest 194.

(2) 52 W.N. 214.

1937. new offences. In this view, it would seem to follow that the discretion possessed by a magistrate under s. 548A, although it could affect the form of the trial, could not alter either the nature of the offence or the quantum of punishment provided by s. 501. No useful purpose would be served, nor, I think, would it be proper, if this Court expressed a preference for either view, having regard to the fact that the latter was adopted both by *Starke J.* and by this Court in *Cavanough v. Commissioner for Railways* (1); and affirmed by the High Court upon an equal division of opinion in *Commissioner for Railways (N.S.W.) v. Pitman*.(2)

HAILEY
v.
COM-
MISSIONER
FOR
RAILWAYS.
Jordan C.J.

In the present case, the plaintiff was not tried by a Magistrate under s. 501, but by two Justices under s. 476. It may be that, by parity of reasoning to that which commended itself in the cases just cited, ss. 476-8 could be regarded as creating still another new group of minor offences, presumably those in which the amount involved did not amount to £100 but did exceed £10; but in the case of the sections in question, read in connection with s. 501, this construction would lead to consequences so curious that I do not think that, unassisted by authority, we should so hold. I think that this group of sections should be regarded as providing merely for a special method of trial when certain conditions exist.

I think, however, that it follows from *Cavanough's Case* and *Pitman's Case* that a person charged with stealing goods, the value of which does not exceed £10, can now be prosecuted only through the medium of s. 501, supplemented or not as the case may be by s. 548A; and that the prosecution now in question must be treated as a prosecution for an offence constituted by s. 501 which by virtue of s. 476 was tried by two justices presumably because the phrase "simple larceny" as used in s. 477 (1) was treated—whether correctly or not I forbear to consider—as including the restricted form of simple larceny created by s. 501. In these circumstances, it follows that the offence was not a felony since it was not punishable by death or penal servitude; and s. 481 does not affect the matter because a conviction upon an indictment

(1) 53 C.L.R. 220 at 227; 35 S.R. 162 at 167-8, 172.

(2) 56 C.L.R. 144 at 148, 152-4.

could have involved no greater penalty for an offence against s. 501 than that section itself provides. 1937.

It follows that upon the facts set out in the case stated, the plaintiff had not been convicted of a felony within the meaning of s. 80 of the Government Railways Act, 1912, as amended. I am of opinion, therefore, that the questions stated should be answered as follows :—

HAILEY
v.
COM-
MISSIONER
FOR
RAILWAYS.
Jordan C.J.

(1) Yes.

(2) No.

(3) Yes.

The appeal should be allowed, with costs, and judgment should be entered for the plaintiff for £76/17/2.

HAILEY ROGERS J. and MAXWELL J. concurred.

Solicitors: *Abram Landa & Co.*; *F. W. Bretnall* (Solicitor for Transport.)

WILLIAMS v. RURAL BANK OF NEW SOUTH WALES. 1937.

Oct. 11.

Vendor and purchaser—Contract for sale of land—Conditional purchase—Instalments of purchase money—Postponement of payment—Instalments to become due—Crown Lands (Amendment) Act, 1932 No. 69, s. 4. Long Innes C.J. in Eq.

Conditions of sale of land held as a conditional purchase under the Crown Lands Acts, so far as material, were as follows :—

“ 5. As to any property which consists of holdings under the Crown Lands Act—(b) Same is sold as such and the purchaser shall pay to the Crown all instalments of purchase money rent and interest to become due thereon.”

“ 10. The vendor shall be entitled to the rents and profits and shall pay or bear all Crown instalments in respect thereof up to the date of completion or entry into possession by the purchaser whichever is the earlier date from which date the purchaser shall be