[HIGH COURT OF AUSTRALIA.]

LEE FAN . . . . . APPELLANT;
DEFENDANT,

AND

DEMPSEY . . . . . RESPONDENT.
COMPLAINANT,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

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PERTH, *Oct.* 28, 31.

Griffith C.J., Barton and Isaacs JJ.

Vagrancy—Idle and disorderly person—"No visible lawful means of support"—Police Act 1892 (*W.A.*) (55 *Vict.* No. 27), *sec.* 65 (1).

The *Police Act* 1892 (W.A.), sec. 65 (1), provides that "every person who shall commit any of the next following offences shall be deemed an idle and disorderly person, . . . and shall on conviction be liable to imprisonment . . . (1) Every person having no visible lawful means of support . . . who being thereto required by any Justice, or who having been duly summoned for such purpose or brought before any Justice, shall not give a good account of his means of support to the satisfaction of such Justice."

Held, that the sub-section was intended to create an offence cognizable immediately by a Justice upon the accused person being brought before him and charged with the offence named, and that no preliminary or extra-judicial investigation by a Justice into the existence of lawful means of support is required before the formulation of the charge. Upon *primâ facie* proof of the absence of lawful means of support, the onus falls upon the accused to prove the existence of such means to the satisfaction of the Justice.

Wilson v. *Benson* ((1905) V.L.R., 229; 26 A.L.T., 144), and *Wilson* v. *Travers*, ((1906) V.L.R., 734; 28 A.L.T., 56), overruled.

THE appellant was brought before a magistrate and charged with being a person having no visible lawful means of support. Evidence was given for the prosecution that the appellant

haunted gambling houses in the Chinese quarter of Perth, and lived on his pay as a fighting man hired by a certain Society to prevent evidence being given in gambling prosecutions. The defence also produced evidence of lawful means of support; but the magistrate found appellant guilty of the charge "and thereby deemed to be an idle and disorderly person," and sentenced him to four months' imprisonment with hard labour. He appealed to the General Quarter Sessions on questions of fact; but *Burnside* J. dismissed the appeal. From this decision an appeal was brought by special leave to the High Court.

Penny, for the appellant. The requirements of sec. 65 (1) of *Police Act* 1892 were not complied with in the proceedings before the magistrate; no preliminary account of himself was required of appellant by any justice before his arrest, and no proof of the appellant's having failed to satisfy any such justice was given at the hearing: *Police Offences Act* 1890 (Vict. No. 1126), sec. 40 (1); *Wilson* v. *Benson* (1); *Wilson* v. *Travers* (2). The preliminary inquiry is an administrative proceeding, and he cannot be arrested and charged with an offence until the inquiry is decided against him.

Thomas, for the respondent. *Wilson* v. *Benson* (1), and *Wilson* v. *Travers* (2), were wrongly decided. Sec. 65 (1) of the Western Australian Act constitutes the offence of being an idle and disorderly person, consisting of the two elements of having no visible lawful means of support and of failing to give a good account of oneself to a magistrate. Both the elements of this offence must be the subject of judicial, not administrative, inquiry. The section would be rendered unworkable by the necessity for preliminary extra-judicial inquiry, which a magistrate has no jurisdiction to make, and the result of which there is no practicable way of proving. The ordinary procedure followed by the magistrate is plainly authorized by sec. 65 (1), and no other strained interpretation should be adopted to make it unworkable. [He referred to *Justices Act* 1902 (W.A.) (2

(1) (1905) V.L.R., 229; 26 A.L.T., 144.
(2) (1906) V.L.R., 734; 28 A.L.T., 56.

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Edw. VII. No. 11), secs. 20, 42, 137, 140, 141; *Police Act* 1892 (W.A.) (55 Vict. No. 27), sec. 134).]

Penny in reply. The complaint did not charge the appellant with being an idle and disorderly person, but with having no visible lawful means of support; the whole proceedings are defective: *Reg.* v. *Scotton* (1).

Cur. adv. vult.

The following judgments were read:—

GRIFFITH C.J. The appellant was convicted under sec. 65 of the *Police Act* 1892 (W.A.) of being an idle and disorderly person. Special leave to appeal from the order of *Burnside* J. affirming the conviction was given on the suggestion that, according to the construction of a Victorian enactment in identical words, as declared by the Full Court of Victoria (*Wilson* v. *Travers* (2)), the proceedings against the appellant did not disclose any offence known to the law.

Sec. 65 enacts that "every person who shall commit any of the next following offences shall be deemed an idle and disorderly person within the meaning of this Act, and shall on conviction be liable to imprisonment for any term not exceeding six calendar months with or without hard labour." Then follows an enumeration of eight separate categories of persons, of which the first is (1) "Every person having no visible lawful means of support or insufficient lawful means of support, who being thereto required by any Justice, or who having been duly summoned for such purpose, or brought before any Justice, shall not give a good account of his means of support to the satisfaction of such Justice."

This category, like the others, is of a class of persons as to whom a state of facts can be predicated, and not of persons who do or omit to do some specific act.

It has been the practice in Western Australia, when it is sought to take advantage of this enactment, to bring the accused person before justices and offer evidence to show that he has no visible lawful means of support or insufficient lawful means of

(1) 5 Q.B., 493.

(2) (1906) V.L.R., 734; 28 A.L.T., 56.

support. It has been supposed that the burden was then cast upon him of giving a good account of his means of support to the satisfaction of the justices, and if he failed to do so a conviction has followed. The same practice had been followed in Victoria until the decision of the case of *Wilson* v. *Benson* (1) by *Hodges* J., and has also been followed in other States under similar enactments. The learned Judges of the Supreme Court of Victoria held that the failure to give a good account of his means of support must occur before any charge can be laid against a man under the Statute, so that the justice before whom he is called upon to give such account of his means of support cannot there and then convict him, but a new charge must be brought against him alleging the failure as an element of the offence. This point is one of great general importance, since similar provisions are in force all over the Commonwealth, and the provisions in question are much relied on by the police in the maintenance of order. Other objections to the conviction have been taken, but if they stood alone the leave to appeal should, I think, be rescinded.

The difficulty arises from the use in a somewhat loose and inaccurate sense of the word "offences" in the enacting sentence of sec. 65. In reality that section creates only one substantive offence, that of being an idle and disorderly person, and the eight categories of persons are not, properly speaking, definitions of offences, but of states of facts which, if proved, will establish that substantive offence. This is clearly shown by the following sec. (66) which is framed on the same lines as sec. 65, and provides that any person who shall commit any one of certain offences shall be deemed a rogue and vagabond. The first case is "Every person committing any of the offences in the next preceding section mentioned, 'having been previously convicted as an idle and disorderly person.'" The seventh case is "Every person apprehended as an idle and disorderly person, and violently resisting any constable or other officer so apprehending him," &c. In like manner sec. 68 speaks of a constable or other person apprehending "any person charged with being an idle and disorderly person." The Act 7 Geo. IV. c. 83, from which the scheme of sec. 65 is taken, gives a form of conviction of an idle and disorderly

(1) (1905) V.L.R., 229; 26 A.L.T., 144.

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person. The form sets out that the defendant is convicted "of being an idle and disorderly person, for that" &c. setting out the terms of the particular category of idle and disorderly persons within which he falls.

In the case of the first category the accused cannot be convicted of the substantive offence until (1) it has been proved that he is without visible lawful means of support or has insufficient lawful means of support, and (2) he has failed to give a good account of his means of support to the satisfaction of the justices. But, in my opinion, this second condition is not an element of the charge to be made against the defendant, but a condition precedent to his conviction on the charge of being an idle and disorderly person, because he has no visible lawful means of support or has insufficient lawful means of support. If, on proof of this fact, and on being lawfully called upon, he fails to give a good account of his means of support, he may be convicted there and then. The section allows him to be so called upon in either of three ways: (1) on being thereto required by any justice; (2) on being duly summoned for such purpose; (3) on being brought before a justice. The first case appears to refer to a summary personal demand made by a justice out of Court in the exercise of his general authority, upon which, under the older Statutes, the justice under a practice now obsolete could have convicted upon view. In this case it might perhaps now be necessary to prefer a charge against the accused after he has failed to satisfy the demand, but I express no opinion on this point. In the second case a summons would be issued upon a complaint that the defendant is an idle and disorderly person being a person without visible lawful means, &c. The summons would be in the ordinary form, calling upon him to appear "to answer the said complaint and be further dealt with according to law." The third case assumes that the defendant is brought before the justice in custody and charged with being an idle and disorderly person for the same reason. The section itself says nothing as to the conditions under which a man may be apprehended on such a charge. Sec. 66 (7) and sec. 68, however, as already shown, contemplate that under some circumstances a man may be so apprehended. In

my opinion the words "brought before any Justice" mean brought on warrant or without warrant as the case may be. Whether a constable has authority to apprehend a man without warrant as an idle and disorderly person on the ground that he is found offending must depend upon whether the category within which the man is alleged to fall is such that the guilt is capable of being ascertained upon view. Some of the cases mentioned in sec. 65 are clearly of such a kind, while others perhaps are not. In the latter case a personal demand by a justice or a summons would perhaps be necessary. The want of visible lawful means of support is certainly capable of being so ascertained.

But, for the reasons already given, I do not think that any of these matters are elements of the offence. They relate only to the procedure and not to the subject matter. Another instance of similar procedure is afforded by sec. 69, under which the charge on which a man is brought before a justice is "having on his person . . . . any thing which may be reasonably suspected of being stolen." If he then fails to give an account of the possession to the satisfaction of the justice he may be convicted. In this case it is clear that the giving of the account to the satisfaction of the justice must be after, and not before, the charge is laid. Other instances are afforded by the Statutes relating to offences committed by insolvent debtors, in which it is commonly provided that certain facts shall constitute an offence unless the jury are satisfied that there was no intent to defraud. The practical effect in all these cases is that the alleged offender is to be charged with the facts which *primâ facie* constitute an offence, that the onus to discharge himself is then cast upon him, and that if he fails to discharge that onus he may be convicted.

In my opinion, therefore, the procedure followed in the present case was right, and the view of the Statute taken by the learned Judges in Victoria was erroneous. The cases of *Wilson* v. *Benson* (1) and *Wilson* v. *Travers* (2) must be regarded as overruled so far as they are inconsistent with this judgment.

BARTON J. This Court is not concerned with the sufficiency of

(1) (1905) V.L.R., 229; 26 A.L.T., 144.

(2) (1906) V.L.R., 734; 28 A.L.T., 56.

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the information, the quantum of the evidence, or the form of the conviction. The sole question on which special leave was granted was the meaning of sec. 65 (1) of the Western Australian *Police Act* 1892.

"Every person who shall commit any of the next following offences shall be deemed an idle and disorderly person within the meaning of this Act, and shall on conviction be liable to imprisonment," &c., namely :—

"(1) Every person having no visible lawful means of support or insufficient lawful means of support, who being thereto required by any Justice, or who having been duly summoned for such purpose, or brought before any Justice, shall not give a good account of his means of support to the satisfaction of such Justice."

It is contended for the appellant that justices who act under this provision are performing, not a judicial, but a ministerial or administrative duty, and that if a justice is not satisfied that the person before him has given a good account of his means of support, the justice is not entitled to convict, but that the person, before he can be found guilty, must be brought before another justice and the facts which constitute the offence must be proved over again before he can be called on for a defence. This is tantamount to saying that a second complaint must be laid against him (for it would be a strange thing to inquire whether he is an idle and disorderly person without a complaint in the first instance), and that unless this be done he is entitled to be acquitted or discharged, notwithstanding that he has had an opportunity of rebutting the inference which undeniably arises from the fact of his being without visible or sufficient lawful means of support. I cannot accede to that contention. It is, in effect, to say that in dealing with people, who in a vast number of cases cannot be dealt with at all unless summarily, the formalities are to be gone through which are necessitated upon magisterial inquiries into indictable offences, and that the justice is really called upon to perform a process equivalent to a committal for trial, with the result of a second investigation upon the same evidence for the prosecution which the accused person has already failed to rebut, and with the further grotesquerie that, if due effect be given to the final words of the sub-section,

guilt is only to be established finally by proving to the second justice that the accused has failed to satisfy the mind of the first. Obviously such a construction of the Act would lead to absurd and futile results, and it should be avoided, according to ordinary rules of interpretation, if there is another and a more reasonable construction fairly open. Fortunately the position is a safer one, and the practice sanctioned by usage, until recently unbroken, rests upon the plain words of the enactment. The conviction prescribed in sec. 65 is for the comprehensive offence of "being an idle and disorderly person," and the section embraces eight specific sets of facts any of which will prove the commission of that offence, just as the next section (66) embraces twelve separate sets which are each sufficient to prove a person to be a "rogue and vagabond," and the 67th section includes three other classifications, under any one of which a person may be brought for proof that he is an "incorrigible rogue." Apart from procedure, there are in sub-sec. (1) of sec. 65 two things which constitute the *probanda*: (*a*) that the person has no visible lawful means of support or insufficient lawful means of support; (*b*) that he fails to satisfy the justice by a "good," which means a reasonably credible, account, and not what is commonly called a "thin" one, that he has actual, that is, sufficient means of support. Unless he can do that the *primâ facie* case arising by inference from the absence or insufficiency of means, of which some evidence must first be given (see *per Hood* J., *Appleby* v. *Armstrong* (1)) remains unrebutted, and the justice may and should convict and punish, and there an end. Notwithstanding the rather incautious application of the word "offence" to them in the opening words of the section, instead of to the real offence of being an idle and disorderly person, to which the word "conviction" clearly applies, the matters specified in the several sub-sections are just the evidentiary ingredients of the offence in its eight phases. In sub-sec. (1), indeed, the failure to satisfy the justice may be due to entire absence of evidence of actual lawful means as well as from unsatisfactory or insufficient evidence thereof, and there is no compulsion upon the accused to give evidence personally, as seems to be supposed. The person liable to conviction under

(1) 27 V.L.R., 136, at p. 138; 23 A.L.T., 35.

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sec. 65 (1) as an idle and disorderly person, in that he has no lawful means of support, is, therefore, a person whose means of support are non-apparent or insufficient, in the absence of evidence either on his own part, or on that of others, or both, giving an account of his means of support good enough to satisfy the tribunal. If the man cannot satisfy the tribunal he may be convicted, and I cannot imagine why the appellant should conceive it necessary that he should be tried over again before that tribunal or another one. In my view, with the very greatest respect for the opinions of other Judges, it is as unreasonable as to urge that a similar procedure is necessary as to the proof, required by the seven remaining paragraphs of sec. 65, the twelve paragraphs of sec. 66, and the three of sec. 67, for I see no sound reason why this paragraph should be thus distinguished from all the others, and held to require a procedure so complex and elaborate. One would think the evidences of the offence of being an idle and disorderly person, prescribed in that paragraph, were, alone among the means of proving the same offence stated in the eight paragraphs, to be treated as ingredients of an indictable offence until the matter comes before a second justice.

Some argument has been founded on the words "who being thereto required by any Justice, or who having been duly summoned for such purpose, or brought before any Justice." I have not found that their presence in the sub-section alters the otherwise plain meaning of the section as to its evidentiary requirements. The first phrase in all probability refers to cases where the offender has come before the justice on another charge, or as a witness, or as a bystander in Court, and is required to account for his apparent lack of any means or of adequate means of honest livelihood. At any rate the existence of such circumstances would satisfy the meaning of the phrase. The meaning may include cases where the justice could at one time convict "upon his own view," but does so no longer. Such a dealing with the offender was sanctioned by 6 Wm. IV. No. 6, sec. 2. "Duly summoned for such purpose" primarily means served with a summons stating the nature of the complaint, and I see no reason why another meaning should be sought. "Brought before

any Justice" seems to me clearly to mean, brought there in lawful custody under the charge authorized by sec. 65, and on the grounds stated in any of its paragraphs.

For the foregoing reasons I am of opinion that the Police Magistrate of Perth, in treating the offence as proveable and proved before him, acted upon the true view of the meaning of the enactment, that *Burnside* J. was right in dismissing the appeal under sec. 183 of the *Justices Act*, and that this appeal should be dismissed.

ISAACS J. I am of the same opinion. By secs. 65, 66 and 67 of the *Police Act* 1892 (55 Vict. No. 27) the legislature of Western Australia has made provision for the punishment of three classes of offenders, namely, (1) idle and disorderly persons, (2) rogues and vagabonds, and (3) incorrigible rogues.

The first class is liable to six, the second to twelve, and the third to eighteen months' imprisonment, the first two with or without hard labour, and the last with hard labour.

A description is given in each section of the various persons who fall within the class dealt with by that section. Among those who are deemed to be idle and disorderly persons is (1) "Every person having no visible lawful means of support . . . who being thereto required by any Justice, or who having been duly summoned for such purpose, or brought before any Justice, shall not give a good account of his means of support to the satisfaction of such Justice."

Those who are to be deemed rogues and vagabonds include every person who commits any of the offences, which make him an idle and disorderly person if he has "been previously convicted as an idle and disorderly person," and also every person "apprehended as an idle and disorderly person" if he violently resists apprehension and is convicted of the offence for which he was apprehended.

An incorrigible rogue includes every person committing an offence subjecting him to be dealt with as a rogue and a vagabond, if he has been "previously convicted as a rogue and a vagabond."

Sec. 68 speaks of a person being "charged with being an idle and disorderly person, or a rogue and vagabond, or an incorrigible

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rogue." It refers to his being apprehended on that charge, and it gives power to take and convey him before a justice or justices, and it further enacts that the justice or justices by whom "any person shall be adjudged to be an idle and disorderly person, or a rogue and a vagabond, or an incorrigible rogue," may make certain orders.

The provisions referred to make it clear that the charge is that of being an idle and disorderly person, &c., and the conviction follows the charge.

The contention of learned counsel for the appellant rested entirely upon the Victorian case of *Wilson* v. *Travers* (1), the reasoning of which he simply presented to the Court as correct.

Wilson v. *Travers* (1) is largely based upon the reasoning which governed the case of *Wilson* v. *Benson* (2), a decision of *Hodges* J.

Without minutely dissecting the reasons given by the Full Court in *Wilson* v. *Travers* (1), it practically amounts to this: that if a person has no visible lawful means of support he may be questioned by a justice acting administratively and not judicially as to his means of support. This may be done either on the justice's own view, or when the person is summoned, in some unofficial way not provided for by law, to appear before the justice, or upon his being brought before the justice in some equally informal and undefined manner. If his account be then considered satisfactory by the justice there is an end to the matter; but if the account be not satisfactory, or if he do not come, the person has committed an offence. Then, and then only, upon the reasoning of the Victorian Court, can a charge be formulated and the accused put upon his trial.

Passing by for the present the expression "who being thereto required by any Justice," which has an early origin, and at one time stood alone, and taking into consideration the two other branches of the latter portion of the sub-section, namely, "who having been duly summoned for such purpose, or brought before any Justice," they are, so far as the words themselves import, ordinary provisions commonly found in connection with the

(1) (1906) V.L.R., 734; 28 A.L.T., 56.

(2) (1905) V.L.R., 229; 26 A.L.T., 144.

exercise of judicial functions by justices. A summons, or a warrant, or a summary arrest are well known methods of securing the attendance of an accused person. No instance has been brought before the Court where these expressions have been used to indicate the exercise of any administrative duties of a justice. It is a somewhat startling proposition that, although the officer, the procedure, and the determination are all *primâ facie* judicial, these are all, without any express statutory provision and by some exceptional implication, invested with an administrative character, and not for the purpose of simply ascertaining whether a person is already a criminal, but for the possible purpose of constituting that person by administrative process a criminal though otherwise he is not a criminal.

What is there in the Statute to justify, much less to require, this unique interpretation of what appears to me to be a very plain enactment? A person appears, suppose to a constable, to be going about at large without any visible lawful means of support, and therefore to be a menace to society. It is of importance to protect the public by means of preventive as well as punitive measures, and so the legislature has declared that such a person shall be deemed an idle and disorderly person, unless he can satisfy a justice, notwithstanding appearances, or what may be called the *primâ facie* conclusion which a fair-minded and careful observer would come to regarding his means, that he really has sufficient lawful means of support. The word "deemed" is significant; the person apparently without lawful means of support is in law considered dangerous, unless he shows the contrary. He may be charged with being an idle and disorderly person as having no lawful means of support; he may be summoned upon that charge for the "purpose" of giving a good account of his means if he can, it being essential, however, that the prosecution should first establish that he is without visible lawful means of support; or he may be brought before the justice by warrant or summary arrest as *primâ facie* an offender; and, assuming the onus of proof in the first instance is satisfied by the prosecution, he is then required to displace it, otherwise he may be convicted.

There is nothing new in this method of procedure, nothing

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unjust or out of harmony with the ordinary course of summary criminal procedure. The case is one requiring more prompt treatment than usual—rather than dilatory process; and, so far as I can ascertain, there is not, nor has there ever been in any State or Colony including New Zealand (see *Curran* v. *O'Connor* (1)), any difficulty in administering the law so interpreted with justice and efficacy.

This is sufficient to dispose of the case, and, if it were not that our decision is practically a reversal of the decisions in *Wilson* v. *Benson* (2), and *Wilson* v. *Travers* (3), I should not feel called upon to say anything further. But it is due to the learned Judges who determined these cases, to examine on its own basis the reasoning by which their judgments are supported. And before indicating what appears to me to be serious practical difficulties in the way of accepting their interpretation of the law, some of which were anticipated by their Honors, I would advert to the fact rightly pointed out by *à Beckett* A.C.J., that according to the practice previously followed, when a person having no visible means of support was brought before a Court of Petty Sessions, and evidence was given that he had no visible means, a *primâ facie* case was made against him, which he could displace by proving that he had means, or by giving a good account to the satisfaction of the bench before whom he appeared. This interpretation of the law is very distinctly recognized by *Madden* C.J. in *Whitney* v. *Wilson* (4), and by *Hood* J. in *Appleby* v. *Armstrong* (5). The observations in the two last-mentioned cases on this point are of course not agreed with by the Full Court who decided *Wilson* v. *Travers* (3), and are at variance with the reasoning of *Hodges* J. in *Wilson* v. *Benson* (2); but the consistency of the practice referred to by *à Beckett* A.C.J. over a long period of considerably more than thirty years is undoubted. No inconvenience or injustice in following that practice has ever, so far as I am aware, been suggested, and the new construction introduced for the first time by *Wilson* v. *Travers* (3) and *Wilson* v. *Benson* (2), does, as *à Beckett* A.C.J. correctly points out, present

(1) 12 N.Z.L.R., 442.
(2) (1905) V.L.R., 229; 26 A.L.T., 144.
(3) (1906) V.L.R., 734; 28 A.L.T., 56.
(4) 24 V.L.R., 574; 20 A.L.T., 157.
(5) 27 V.L.R., 136; 23 A.L.T., 35.

an unsatisfactory view of the sub-section under which the decision was given, and would leave the law ineffective as a working enactment. These are considerations which are very strong to lead a Court to inquire anxiously whether the former view of the enactment so long continued, so reasonable and effective and not unjust, is not after all the proper interpretation; in other words, whether the language of the legislature contained in that sub-section, when read in conjunction with other sections in the same part of the Act, is not reasonably capable of bearing that interpretation. If the history of the legislation be looked at the matter is beyond doubt. In 1835 an Act was passed in New South Wales, (6 Will. IV. No. 6), which is the Australian foundation of such legislation. By sec. 2 it was provided that "every person who having no visible lawful means of support or insufficient lawful means shall not being thereto required by a Justice of the Peace give a good account thereof to the satisfaction of such Justice" (then follows the enumeration of other descriptions of offenders) "shall be deemed an idle and disorderly person within the true intent and meaning of this Act, and it shall be lawful for any Justice of the Peace to commit such offender (being thereof convicted before him by his own view or by the confession of such offender or by the evidence on oath of one or more credible witness or witnesses) to His Majesty's nearest Gaol," &c. The form of conviction given by sec. 13 of the Act corresponded with the form under the English Act read by the learned Chief Justice.

It is manifest that, as under that enactment at least the justice might convict on his own view, the justice who had to be satisfied was the same justice who if not satisfied could on the same occasion convict. Further he might convict on the confession of the offender, and that confession could scarcely include a confession that some other justice, or the same justice on some other occasion, acting in another capacity, namely, in an administrative capacity, had not been satisfied with the account of his means.

In 1851 that Act was repealed in New South Wales and the enactment as to this description of persons was substantially repeated, except that the three alternatives as they have been

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called were inserted, namely, "required," "summoned," and "brought." Sec. 15 shows that the form of conviction should still be as before. The penal section in this later Act (15 Vict. No. 4) referring to disorderly persons, retained the same references to conviction on view, and confessions, as existed in the former Act. Those references are not now found in the Victorian Act of 1890, being matters of procedure, and procedure is otherwise provided for. But the meaning of the alternatives is the same as it was originally. If the view adopted by the Supreme Court of Victoria is correct, the working of the enactment would be not merely ineffective, but practically impossible, as well as out of harmony with the rest of the procedure relating to justices. That view supposes a person who to all appearance has no lawful means of support, and assumes that a justice may voluntarily visit him and require him to give an account of his means. No provision is made for recording or certifying the dissatisfaction of the justice, if he be not satisfied; and before he can lawfully put the inquiry at all, he must first, at least mentally, have satisfied himself that *primâ facie* the individual before him has no lawful means of support. If, however, the justice does not voluntarily go to the individual in question he is, according to the reasoning of the Supreme Court, to address some sort of notification to him to attend and be questioned. The further assumption of the Court is that so far no offence is possible, and no charge can be formulated, and consequently the notification cannot be more than a bare request to attend and give some explanation of his means without saying why. If there be nothing in the individual's outward appearance to justify the belief that he is without means, and if he do not admit it, I do not know by what process a justice can in the circumstances assumed obtain the right to require him to give any account of his means of support. It is by the express words of the sub-section a condition precedent to the right of the justice to make any inquiry that the person should have no visible lawful means or insufficient means of support, and if the justice is acting administratively merely and not judicially, I do not understand how, in the case I have supposed, he can get any evidence of the necessary fact. Nor do I understand how the individual

questioned can bring other persons to support his account and corroborate his story. He is, nevertheless, according to the argument, concluded by the dissatisfaction of the justice. But let us carry the matter a stage further, and suppose that the justice obtained an unsatisfactory account, or, after summons, none at all; the next step is to charge the offender and bring him before a justice in the ordinary criminal jurisdiction. The fact of his having no visible lawful means must be again proved, this time before a justice acting judicially, and, on the assumption of the Supreme Court, there must also be proved the necessary dissatisfaction of the justice who acted administratively. If it be the same justice, I do not know how that essential fact will be proved—it is impossible to imagine the same justice being both Judge and witness or taking judicial notice of the fact—and even if it were another justice who acted administratively, is he to be called and to testify as to his dissatisfaction? I can hardly think the case is met by the suggestion of *Cussen* J., that some person present who hears the justice openly express his dissatisfaction could be called to prove it. Apart from this being a most unusual mode of proving, in fact at secondhand so to speak, what is assumed to be an essential element of an offence, one can easily conceive of a conflict of evidence as to what the justice actually said, and some difference of opinion as to what he meant.

Moreover the Court's reasoning involves the strange result, adverted to by *à Beckett* A.C.J., that no matter what evidence the accused may on his trial adduce to show that, notwithstanding appearances, his means are in fact undeniable, it is unavailing, because the administrative justice was previously dissatisfied, and therefore on proof that the accused had no visible means the judicial justice is bound to convict. It seems to me that this reasoning is by no means so well founded as that which has for so many years supported the practice previously in force. In my opinion that practice was justified by the true construction of the enactment.

Sec. 46 of the Victorian Act of 1890 and sec. 122 of the Western Australian Act of 1892 strongly support the view I have indicated: but independently of these sections the decision upon which the appellant in this case relies cannot in my opinion

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be supported, and if that decision be wrong the appellant's case must fall.*

Appeal dismissed.

Solicitors, for the appellant, *Penny & Hill.*

Solicitor, for the respondent, *Barker* (Crown Solicitor).

N. G. P.

[HIGH COURT OF AUSTRALIA.]

MOORE AND SCROOPE . . . . APPELLANTS; SUPPLIANTS,

AND

THE STATE OF WESTERN AUSTRALIA RESPONDENT. DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

Pastoral lease—Reservation of power to "sell"—Homestead and grazing leases—Conditional "sale"—Dispossession—Quiet enjoyment — Breach of covenant—Lease under regulations — Alteration of regulations and new legislation — Australian Waste Lands Act (18 & 19 *Vict. c.* 56)*—Crown Lands Regulations 2nd March* 1887 (*W.A.*)*—Constitution Act* 1890 (*W.A.*), (53 & 54 *Vict. c.* 26), *sec.* 4 (2)*—Homesteads Act* 1893 (*W.A.*), (57 *Vict. No.* 18)*—Land Act* 1898 (*W.A.*), (62 *Vict. No.* 17).

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PERTH, *Oct.* 28, 29, 30; *Nov.* 4.

Griffith C.J., Barton and Isaacs JJ.

In pursuance of a power vested in the Crown to dispose of Crown lands in Western Australia under conditions prescribed by the Regulations then in force "or by any Regulations amending or substituted for the same," a pastoral lease was granted in 1887, containing a reservation to the Crown of a right to sell the land comprised in the lease; and the Regulations also contained a similar reservation of a power to sell subject to the provisions of the

*NOTE:—Sec. 40 (1) of the *Police Offences Act* 1890 (Vict.), under which *Wilson* v. *Benson* and *Wilson* v. *Travers* were decided, has been repealed by the *Police Offences Act* 1907 (Vict.) and a new provision substituted. See secs. 3 and 4 of the amending Act. [ED.]