[HIGH COURT OF AUSTRALIA.]

THE COMMISSIONER FOR RAILWAYS (NEW SOUTH WALES) . . . } APPELLANT;
DEFENDANT,

AND

CAVANOUGH . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *June* 11, 20.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

Criminal Law—Appeal—Conviction set aside—Railways—Officer—Summary conviction—Felony—Vacation of office—Officer reinstated when conviction set aside—Period of suspension—Unpaid salary—Government Railways Act 1912 (*N.S.W.*) (*No.* 30 *of* 1912), *sec.* 80—*Crimes Act* 1900 (*N.S.W.*) (*No.* 40 *of* 1900), *sec.* 501 (*Crimes* (*Amendment*) *Act* 1924 (*N.S.W.*) (*No.* 10 *of* 1924), *sec.* 24).*

The respondent was an officer in the employ of the Commissioner for Railways of New South Wales and, as such, received a certain salary. He was summarily convicted under sec. 501 of the *Crimes Act* 1900 (enacted by sec. 24 of the *Crimes* (*Amendment*) *Act* 1924) (N.S.W.) of stealing an article valued at six shillings. The conviction was set aside by a Court of Quarter Sessions on

* The *Crimes Act* 1900 (N.S.W.), as amended by the *Crimes* (*Amendment*) *Act* 1924 (N.S.W.), provides :—By sec. 9 : "Whenever by this Act a person is made liable to the punishment of death, or of penal servitude, the offence for which such punishment may be awarded is hereby declared to be and shall be dealt with as a felony, and wherever in this Act the term 'felony' is used, the same shall be taken to mean an offence punishable as aforesaid." By sec. 501 :—"(1) Whosoever commits or attempts to commit—(*a*) simple larceny; or (*b*) the offence of stealing any chattel, money, or valuable security from the person of another . . . and the amount of money or the value of the property in respect of which the offence is charged . . . does not exceed ten pounds, shall on conviction in a summary manner . . . be liable to imprisonment for twelve months or to pay a fine of fifty pounds. (2) The jurisdiction conferred . . . by this section . . . shall be exercisable only by a stipendiary or police magistrate."

appeal. The respondent then sued the Commissioner for salary for the period between the date of his conviction, when he was suspended, and the date of the setting aside of the conviction, when he was reinstated. The Commissioner relied upon sec. 80 of the *Government Railways Act* 1912 (N.S.W.), which provides that an officer convicted of felony shall be deemed to have vacated his office.

Held that upon the setting aside of the conviction it was avoided *ab initio*; therefore the respondent could not be deemed to have vacated his office and he was entitled to the salary claimed.

Per Starke J.: The conviction of the respondent under sec. 501 of the *Crimes Act* was not a conviction for a felony.

Decision of the Supreme Court of New South Wales (Full Court): *Cavanough v. Commissioner for Railways*, (1935) 35 S.R. (N.S.W.) 162; 52 W.N. (N.S.W.) 31, affirmed subject to a variation.

APPEAL from the Supreme Court of New South Wales.

In an action instituted in the Supreme Court of New South Wales, Cecil Herman Cavanough sued the Commissioner for Railways of that State to recover the sum of £88 10s. 6d. which, in the first count, he claimed was payable to him by the defendant for services rendered by him as the officer and servant of the defendant, and for wages and salary in respect of those services. In a second count the plaintiff alleged that he was employed by the defendant as a night officer in the railway service at a certain rate of salary; that it was a term of the employment that he should not be suspended from duty otherwise than for misconduct, or breach of any rule, by-law, or regulation of the railway service; and that he was wrongfully suspended from duty otherwise than for misconduct, or breach of any rule, by-law or regulation of the railway service, whereby he was prevented from carrying out his duties as a night officer and was deprived of salary he could and would otherwise have earned. The defendant, in a second plea, pleaded, as to the whole cause of action, that prior to the conviction thereinafter referred to, the plaintiff was an officer within the meaning of the *Government Railways Act* 1912 (N.S.W.) and whilst so employed and holding office he was convicted of a felony, whereupon his office became vacated and his employment terminated by virtue of sec. 80 of that Act; that an appeal by the plaintiff against the conviction was upheld and the conviction set aside; that after the

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setting aside of the conviction the plaintiff was re-employed by the defendant in the railway service; and that the plaintiff's claim was one for wages alleged to be due to him in respect of the period between the vacation of office and the re-employment. By way of replication the plaintiff stated that the conviction referred to by the defendant was a conviction in a summary manner before a police magistrate of the offence of stealing one primus burner of the value of six shillings, the property of the defendant; that by the conviction it was adjudged that he should pay a fine of one pound, and one pound five shillings costs; and that in default of payment he should be imprisoned for five days with hard labour.

The plaintiff demurred to the second plea, and the defendant demurred to the replication. The substantial grounds of the plaintiff's demurrer were (*a*) that the facts alleged in the plea did not establish that he vacated office during and for the period in respect of which the claim for wages was made, and (*b*) that upon the upholding of his appeal and the setting aside of his conviction he should be deemed never to have committed the alleged felony.

The effect of the judgments of the Full Court of the Supreme Court was that there should be judgment on the second plea for the defendant in demurrer, judgment for the plaintiff on his demurrer, and, as a whole, judgment for the plaintiff in demurrer: *Cavanough* v. *Commissioner for Railways* (1).

From that decision the defendant now, by special leave, appealed to the High Court.

Bradley K.C. (with him *Chambers*), for the appellant. The respondent was convicted under sec. 501 of the *Crimes Act* 1900 (N.S.W.), of the offence of larceny. This is an offence punishable by penal servitude (see *Crimes Act* 1900, secs. 117-120), and is therefore a felony within the meaning of sec. 9 of that Act (see also *Interpretation Act* 1897 (N.S.W.), sec. 29, and *Kenny's Outlines of Criminal Law*, 14th ed. (1933), pp. 221 et seq.). The Legislature intended that definition to apply to the word "felony" as used in sec. 80 of the *Government Railways Act* 1912.

[RICH J. referred to *In re Burley* (2).]

(1) (1935) 35 S.R. (N.S.W.) 162; 52 W.N. (N.S.W.) 31.
(2) (1932) 47 C.L.R. 53.

Upon his conviction the respondent automatically and without any action on the part of the appellant, " vacated his office " within the meaning of that expression in sec. 80. Statutory provisions similar to those contained in sec. 80 were before the Court in *Hunkin* v. *Siebert* (1). Sec. 501 of the *Crimes Act* 1900 is a procedure section: it does not create new offences. Although dealt with under sec. 501 as simple larceny, the offence was one of stealing in respect of which offenders are liable to the punishment of penal servitude (sec. 116). The test that should be applied in order to ascertain whether an offence is a felony is: Is the offender liable, as here, to the punishment of penal servitude? (sec. 9). The word " office " in sec. 80 of the *Government Railways Act* 1912, means employment. Upon a conviction for " any felony " the " office " is " vacated " automatically (*In re Bodega Co.* (2)), and remains vacated whilst the conviction subsists. The setting aside of the conviction does not confer upon an offender a right to be reinstated; his return to the employment depends upon a re-appointment by the Commissioner. Alternatively, the right of an offender, in that circumstance, is to be reinstated as from the date of the setting aside of the conviction. In either case he has no legal right to payment for the period between the date of the conviction and the date it was set aside (*In re Bodega Co.* (3)).

O'Mara (with him *Evatt*), for the respondent. The conviction was set aside; therefore the respondent was not " convicted of any felony."

[EVATT J. referred to *R.* v. *Drury* (4).

DIXON J. referred to *In re Hay*; *Langford* v. *City of Richmond* (5).]

The effect of the setting aside of a conviction is that there never was a conviction as a matter of law. The same results flow from the setting aside of a conviction as from the grant of a pardon; that is, the person concerned is entitled to all rights and privileges, including employment and payment, as if there had never been

(1) (1934) 51 C.L.R. 538, at pp. 541, 543.
(2) (1904) 1 Ch. 276, at p. 283.
(3) (1904) 1 Ch., at pp. 286, 287.
(4) (1849) 3 Car. & K. 193, at p. 199; 175 E.R. 517, at p. 520.
(5) (1922) V.L.R. 186; 43 A.L.T. 158.

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a conviction recorded against him (*Hay* v. *Justices of the Tower Division of London* (1)). The basal requirement of sec. 80 of the *Government Railways Act* 1912 that there must be a conviction for a felony is not satisfied; therefore the respondent cannot "be deemed to have vacated his office." The effects of a vacating of office under sec. 80 are far-reaching ; that section should, therefore, be construed strictly.

Bradley K.C., in reply. The Legislature intended that a vacating of office under sec. 80 should operate as a complete severance of relationship between employer and employee. The appellant is not authorized by the *Government Railways Act* 1912 to pay salary or other remuneration to an employee in respect of the period between the date of the latter's conviction and the date on which that conviction was ultimately set aside.

[DIXON J. referred to *Dr. Drury's Case* (2).]

Cur. adv. vult.

June 20.

The following written judgments were delivered :—

RICH, DIXON, EVATT AND MCTIERNAN JJ. By sec. 80 of the *Government Railways Act* 1912 (N.S.W.) it is provided that an officer convicted of felony shall be deemed to have vacated his office.

The respondent was an officer of the Commissioner and, as such, received a certain salary. He was summarily convicted of larceny under sec. 501 of the *Crimes Act* 1900 (N.S.W.). From that conviction he appealed to Quarter Sessions, which upheld his appeal and set aside the conviction (sec. 125 (1) of the *Justices Act* 1902 (N.S.W.)). During the period which elapsed from his conviction until its reversal he received no salary and the performance of his duties was suspended.

Upon these facts, which are not proved but appear from pleadings demurred to, the question for our decision is whether the respondent is entitled to recover the unpaid salary.

In our opinion he is so entitled because, his conviction having been quashed, he cannot be considered ever to have been convicted and he cannot be deemed to have vacated his office.

(1) (1890) 24 Q.B.D. 561, at p. 565. (2) (1610) 8 Co. Rep. 141 b ; 77 E.R. 688.

An appeal is not a common law proceeding. It is a remedy given by statute (*Attorney-General* v. *Sillem* (1); *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (2)).

The scope and effect of an appeal must in the end be governed by the terms of the enactment creating it. But the power given to the Quarter Sessions includes authority to quash and set aside convictions. These are familiar expressions and describe a jurisdiction exercisable at common law by Courts of error. The effect of the reversal of a conviction by proceedings in error has long been settled, and the same effect is produced by quashing it, or setting it aside upon a statutory appeal. The conviction is avoided *ab initio*. "The judgment reversed is the same as no judgment" (per *Coleridge* J., *R.* v. *Drury* (3)).

If the conviction were alleged in a pleading, it would be a good answer that there was no such record (*Dr. Drury's Case* (4)). It is "utterly defeated and annulled" (*Lord Sanchar's Case* (5)). Acts done according to the exigency of a judicial order afterwards reversed are protected: they are "acts done in the execution of justice, which are compulsive" (*Dr. Drury's Case* (6)). And proceedings which, although based upon a judgment, are brought to completion before its reversal are not avoided. For "collateral acts executory are barred, but not collateral acts executed" (*Dr. Drury's Case* (7)). But "upon the reversal of a judgment against any person convicted of any offence, the judgment, execution and all former proceedings become thereby absolutely null and void. If living, he (or if dead, his heir or personal representative, as the case may be) will be entitled to be restored to all things which he may have lost by such erroneous judgment and proceedings, and shall stand in every respect as if he had never been charged with the offence in respect of which judgment was pronounced against him" (*Archbold's Criminal Pleading, Evidence and Practice*, 21st ed. (1893), pp. 226, 227).

As the respondent in contemplation of law was never out of office, he is entitled to the salary attached to it. There is no allegation

(1) (1863) 2 H. & C. 581, at pp. 608, 609; 159 E.R. 242, at p. 253; (1864) 10 H.L. Cas. 704; 11 E.R. 1200.
(2) (1931) 46 C.L.R. 73, at p. 108.
(3) (1849) 3 Car. & K., at p. 199; 175 E.R., at p. 520.
(4) (1610) 8 Co. Rep., at p. 142 b; 77 E.R., at p. 691.
(5) (1613) 9 Co. Rep. 117 a, at p. 119 b; 77 E.R. 902, at p. 906.
(6) (1610) 8 Co. Rep., at p. 143 a; 77 E.R., at p. 691.
(7) (1610) 8 Co. Rep. 141 b; 77 E.R. 688.

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that under the terms of his employment an actual performance of duty is a condition precedent to his right to salary.

The Supreme Court (*Davidson* and *Street* JJ., *Stephen* J. dissenting) reached a conclusion in favour of the respondent but based it upon another ground. Their Honors all rejected the view which commends itself to us, but the majority were of opinion that a summary conviction for larceny is not a conviction of felony. The correctness of this interpretation of the *Crimes Act* was not fully argued upon the hearing of this appeal, but we desire to say that we must not be taken as assenting to it.

The judgment of the Supreme Court should be varied by entering judgment for the plaintiff on the demurrer to the second plea. Subject to the variation, the appeal should be dismissed with costs.

STARKE J. Cavanough sued the Commissioner for Railways of New South Wales for wages. The Commissioner, by a plea, alleged that the wages sued for were in respect of a period between Cavanough's vacation of office and his re-employment, and that Cavanough, an officer within the meaning of the *Government Railways Act* 1912, was convicted of a felony, and thereby vacated office, and thereafter he appealed and his conviction was set aside, whereupon he was re-employed. Cavanough, in his replication to the plea, alleged that the conviction in the plea mentioned was a summary conviction of the offence of stealing one primus burner of the value of six shillings, and that the conviction adjudged him to pay a fine of £1 and certain costs and, in default, imprisonment. Cavanough demurred to the Commissioner's plea, and the Commissioner to Cavanough's replication. The *Government Railways Act* 1912, sec. 80, provides: "If any officer is convicted of any felony . . . he shall be deemed to have vacated his office." Two questions arise, one whether the summary conviction of Cavanough constituted a conviction for felony: the other whether the setting aside of that conviction abrogated and obliterated it.

The offence of simple larceny created by sec. 117 of the *Crimes Act* 1900 is undoubtedly a felony (see secs. 9, 116, 117, and the *Interpretation Act* 1897 (N.S.W.), sec. 29.) It may be that the provisions of the *Crimes Act* 1900, Part XIV., chapter I., providing for

the hearing and determination of certain indictable offences in a summary manner, do not alter the character or quality of the offence (*In re Burley* (1)). But chapters II. and III. deal with offences punishable summarily as distinguished from indictable offences punishable summarily. Chapter III. comprises, amongst other offences, "A. Assaults; B. Larceny and similar offences." The language used in the various sections is appropriate for the creation of offences, and no offence would exist, in many cases, but for the particular section. (See secs. 495, 496, 505, 506, 510, 512.) Sec. 501, under which Cavanough was charged and convicted, falls within chapter IIIB. and provides:—"(1) Whosoever commits . . . (*a*) simple larceny; or (*b*) the offence of stealing any chattel, money, or valuable security from the person of another . . . and the amount of money or the value of the property in respect of which the offence is charged . . . does not exceed ten pounds, shall on conviction in a summary manner . . . be liable to imprisonment for twelve months or to pay a fine of fifty pounds. (2) The jurisdiction . . . shall be exercisable only by a stipendiary or police magistrate." But this provision does much more than prescribe a summary punishment for an offence already created: it states the offence and what is necessary to constitute it an offence punishable in a summary manner. The provisions of secs. 497 and 548A were referred to as inconsistent with this view. But the effect of those sections is that the offence punishable in a summary manner may be remitted for trial upon indictment, as an indictable offence may be remitted for summary hearing and determination under Part XIV., chapter I. In the result I agree with *Davidson* and *Street* JJ. that Cavanough was not convicted of any felony.

Even if Cavanough were convicted of a felony, however, the allowance of his appeal and the setting aside of his conviction abrogated and obliterated it. It is true that anyone who acts in execution of a judgment may justify under it, notwithstanding its removal, reversal or annulment, for it was good when given (*Alleyne* v. *The Queen* (2); *Smallcombe* v. *Olivier* (3)). But the consequence of the reversal of a judgment or conviction is that it is

(1) (1932) 47 C.L.R. 53.
(2) (1855) 5 E. & B. 399; 119 E.R. 529.
(3) (1844) 13 M. & W. 77; 153 E.R. 32.

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annulled and held for nothing, and the party is restored to all things which by reason of the judgment he has lost (see *Archbold's Criminal Pleading, Evidence and Practice*, 22nd ed. (1900), p. 261; *R.* v. *Drury* (1); *R.* v. *O'Keefe* (2); *R.* v. *Lee* (3)). The allegation in the plea that Cavanough's appeal was upheld and his conviction set aside is in substance an allegation, when the relevant statute (*Justices Act* 1902) is examined, that the conviction was reversed and quashed. The consequence was that his conviction was obliterated, and, to use the language of the old forms, "altogether held for nothing."

Judgment should be entered for the plaintiff in demurrer.

Judgment of the Supreme Court varied by entering judgment for the plaintiff on the demurrer to the second plea. Subject to the variation appeal dismissed with costs.

Solicitor for the appellant, *F. W. Bretnall*, Solicitor for Transport.
Solicitors for the respondent, *Landa & Lamaro.*

J. B.

(1) (1849) 3 Car. & K. 193; 175 E.R. 517.
(2) (1894) 15 L.R. (N.S.W.) 1; 10 W.N. (N.S.W.) 194.
(3) (1895) 16 L.R. (N.S.W.) 6; 11 W.N. (N.S.W.) 121.