[HIGH COURT OF AUSTRALIA.]

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

AND

PITMAN . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 5; *Dec.* 7.

Starke, Dixon, Evatt and McTiernan JJ.

Criminal Law—"Felony"—Larceny—Summary conviction—Railways—Officer—Vacation of office—Government Railways Act 1912-1930 (*N.S.W.*) (*No.* 30 *of* 1912—*No.* 39 *of* 1930), *sec.* 80*—*Interpretation Act of* 1897 (*N.S.W.*) (*No.* 4 *of* 1897), *sec.* 29*—*Crimes Act* 1900-1929 (*N.S.W.*) (*No.* 40 *of* 1900—*No.* 2 *of* 1929), *sec.* 501*.

The plaintiff, an officer in the employ of the Commissioner for Railways of New South Wales, was convicted in a summary manner under sec. 501 of the *Crimes Act* 1900-1929 (N.S.W.) of stealing property of the value of £7, and was ordered to pay a fine and costs. Upon the conviction the commissioner

* Sec. 80 of the *Government Railways Act* 1912-1930 (N.S.W.) provides:—"If any officer is convicted of any felony or is sentenced to imprisonment for any term of, or exceeding six months . . . he shall be deemed to have vacated his office."

Sec. 29 of the *Interpretation Act of* 1897 (N.S.W.) provides: "The expression 'felony' used in an Act shall mean a crime in respect of which the punishment of death, or of penal servitude, may be awarded."

The *Crimes Act* 1900-1929 (N.S.W.) provides:—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." 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."

treated the plaintiff as having forfeited and vacated his office. In an action by the plaintiff for wages the commissioner demurred on the ground that the plaintiff had been convicted of a felony within the meaning of sec. 80 of the *Government Railways Act* 1912-1930 (N.S.W.). The Supreme Court of New South Wales gave judgment for the plaintiff on the demurrer. On appeal to the High Court, *Starke* and *Evatt* JJ. were of opinion that the plaintiff had not been convicted of a felony within the meaning of sec. 80: *Dixon* and *McTiernan* JJ. were of the contrary opinion. The court being equally divided, the decision of the Supreme Court was affirmed.

Commissioner for Railways (N.S.W.) v. *Cavanough*, (1935) 53 C.L.R. 220, at pp. 226, 227; 35 S.R. (N.S.W.) 162; 52 W.N. (N.S.W.) 31, considered.

In re Burley, (1932) 47 C.L.R. 53, referred to.

APPEAL from the Supreme Court of New South Wales.

In an action in the Supreme Court of New South Wales against the Commissioner for Railways of that State George Pitman claimed the sum of £300 for wages due to him by the defendant.

The second count of the declaration was as follows:—"And the plaintiff also sues the defendant for that at the time of the breaches hereinafter alleged and at all material times the plaintiff was employed by the defendant in the office of a fettler in a branch of the railway service and it was a condition of such service that the defendant should pay to the plaintiff a certain rate of wages for working as such fettler . . . and it was also a condition of such employment that the plaintiff should not be deemed to have forfeited or vacated his office unless he became convicted of a felony, or sentenced to a term of, or exceeding six months . . . Whereupon the plaintiff was charged before a police magistrate presiding at the Court of Petty Sessions at Walcha . . . as follows:— . . . 'That on or about the 24th May, 1934, at Walcha-road in the State of New South Wales he did steal 85 lbs. of rabbit skins, 4 fox skins and one chaff bag to the value of seven pounds (£7)'; and the said magistrate under and by virtue of the provisions of section 501 of the *Crimes Act* 1900 . . . as amended, proceeded summarily to hear and determine the said charge and convicted the plaintiff and imposed upon the plaintiff a fine which together with certain costs then directed by the said magistrate to be paid by the plaintiff amounted to the sum of . . . £10 3s. 0d., and

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other than the said fine and costs no penalty was imposed, nor was the plaintiff sentenced to any imprisonment in respect of the said or any charge And the plaintiff was always ready and willing and offered to carry out the duties of his . . . office and all things happened and all times elapsed and all conditions were fulfilled and observed necessary to entitle the plaintiff to sue upon the breaches hereinafter alleged Yet the defendant his servants and agents treated the plaintiff as having forfeited and vacated his said office by reason of his having been convicted as aforesaid and not otherwise and thereupon prevented the plaintiff from continuing in his . . . office and carrying out his . . . employment whereby the plaintiff lost the wages he otherwise could and would have earned thereby and was otherwise greatly damnified."

The defendant demurred to the second count on the grounds (*a*) that it disclosed no cause of action, and (*b*) that the offence of which the plaintiff was convicted was a felony within the meaning of sec. 80 of the *Government Railways Act* 1912, as amended.

The Full Court of the Supreme Court held that the point raised in the demurrer was exactly covered by the decision of that Court in *Cavanough* v. *Commissioner for Railways* (1), and that that was a sufficient reason for giving judgment for the plaintiff on the demurrer.

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

Bradley K.C. (with him *Henchman*), for the appellant. The respondent was convicted of a felony within the meaning of sec. 80 of the *Government Railways Act* 1912. Any crime in respect of which the punishment of death or of penal servitude may be awarded is a felony (*Interpretation Act of* 1897 (N.S.W.), sec. 29 ; *Crimes Act* 1900 (N.S.W.), sec. 9). The offence in respect of which the respondent was convicted, that is, simple larceny, was punishable by penal servitude (*Crimes Act* 1900, sec. 117). Even though an accused person consent to such a course a magistrate is not bound under sec. 476 of the *Crimes Act* to deal with a charge summarily, nor is he bound to do so under sec. 501 of the Act (See sec. 548A). Sec.

(1) (1935) 35 S.R. (N.S.W.) 162.; 52 W.N. (N.S.W.) 31.

501 does not create a new and distinct offence. It is the same offence throughout the Act, but in certain cases it, with the consent of the accused, may be dealt with summarily by the magistrate (*In re Burley* (1)). The only difference between sec. 476 and sec. 501 is that under the earlier section the accused must consent, whilst under the later section he can be dealt with by a tribunal whether he consent or not. Under sec. 501 the discretion is that of the magistrate, not of the accused ; the character of the offence remains unaltered (*Ex parte Griffith* ; *Re Lalor* (2)). The jurisdiction of a magistrate under that section was dealt with in *Ex parte Cusack* ; *Re Searson* (3). The test is : Did the respondent at the time he committed the offence render himself liable to punishment of penal servitude ? (*In re Burley* (4) ; *Crimes Act* 1900, sec. 9 ; *Interpretation Act of* 1897, sec. 29). The answer is : Yes. Therefore the offence was a felony (*Cavanough* v. *Commissioner for Railways* (5)). The test cannot depend on whether or not the magistrate chooses to hear and determine the charge in a summary manner ; it must depend upon the punishment the offender was liable to when he committed the offence.

Clive Evatt K.C. (with him *Fitzpatrick*), for the respondent. The conviction is the material factor under sec. 80 of the *Government Railways Act* 1912. On conviction the respondent was convicted of an offence under sec. 501 of the *Crimes Act* ; he was not convicted of a felony (*Commissioner for Railways* (*N.S.W.*) v. *Cavanough* (6)). That section defines a new offence, an offence of simple larceny of goods under £10 in value and enacts that persons guilty of that offence shall be liable to a penalty applicable not to a felony but to a misdemeanour. The offence the respondent was convicted of was a misdemeanour, not a felony. Even if the date of asportation be the determining factor there is no more reason to say that the respondent then committed a felony than that he then committed a misdemeanour. Sec. 80 of the *Government Railways Act* 1912 is

(1) (1932) 47 C.L.R. 53, at pp. 55, 57, 58.
(2) (1931) 48 W.N. (N.S.W.) 133.
(3) (1935) 52 W.N. (N.S.W.) 214, at p. 215.
(4) (1932) 47 C.L.R. 53.
(5) (1935) 35 S.R. (N.S.W.) at pp. 168 et seq. : 52 W.N. (N.S.W.), at p. 33.
(6) (1935) 53 C.L.R. 220, at p. 227.

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directed towards that particularly grave offence which on conviction, and only on conviction, can result in a person being exposed at that stage to penal servitude.

Bradley K.C., in reply.

Cur. adv. vult.

Dec. 7.

The following written judgments were delivered :—

STARKE J. This appeal raises upon demurrer the question whether the respondent has been convicted of a felony within the meaning of the *Government Railways Act* 1912-1930, of New South Wales, sec. 80 : " If any officer is convicted of any felony . . . he shall be deemed to have vacated his office." It appears from the declaration that the respondent was convicted of stealing goods under the value of ten pounds, and sentenced, pursuant to the provisions of sec. 501 of the *Crimes Act* 1900-1929 of New South Wales, to pay a fine which, together with certain costs, amounted to £10 3s.

In my judgment, the respondent was not guilty of any felony. My reasons for this conclusion are stated in *Commissioner for Railways (N.S.W.)* v. *Cavanough* (1), and the further argument in this case has not satisfied me that they are wrong. Simple larceny is one offence, and simple larceny where the amount of money or the value of the property in respect of which the offence is charged does not exceed ten pounds is another offence. It is an idle assertion that the respondent might have been convicted of a felony. The question is whether he was convicted of a felony, and that depends upon the charge upon which he was actually convicted. On the charge laid in the present case, the respondent was not and could not have been sentenced to death or penal servitude, which is the criterion of a felony in New South Wales.

The appeal should be dismissed.

DIXON J. Sec. 80 of the *Government Railways Act* 1912-1930 provides that any person employed by the Commissioner for Railways shall vacate his office if he is convicted of any felony. The respondent was employed by the commissioner. He was summarily

(1) (1935) 53 C.L.R., at pp. 226, 227.

convicted before a Court of Petty Sessions of the larceny of chattels of a value less than £10 and he was fined. Did he lose office ?

In New South Wales felony no longer has its common law meaning. By sec. 29 of the *Interpretation Act* 1897 the word, when used in an Act of Parliament, means a crime in respect of which the punishment of death or of penal servitude may be awarded. Up to the year 1924 no doubt could exist that simple larceny fell within that description. It was an offence to be prosecuted upon indictment and, by sec. 117 of the *Crimes Act* 1900, it was punishable by five years' penal servitude. It is true that then, as now, if a charge of simple larceny involving less than one hundred pounds was brought in the first instance before a magistrate who thought it might properly be dealt with summarily and the accused consented, it might be disposed of as a summary offence. If it was so dealt with, the greatest punishment that the magistrate could impose would be imprisonment for twelve months, not penal servitude (secs. 476-478). But the consequences of such a conviction by the magistrate are the same as those ensuing from a jury's verdict of guilty. For sec. 481 provides that every conviction in such a case shall have the same effect as a conviction upon an indictment for the offence would have had. In 1924, however, the legislature raised the question whether larceny might not have a dual or alternative status. In that year the provision under which the respondent was convicted was introduced into the *Crimes Act*. It embraces many other offences relating to property besides simple larceny. With respect to all of them it provides that, if the amount or value of the property concerned does not exceed ten pounds, the person who commits or attempts to commit the offence shall on conviction before a magistrate be liable to imprisonment for twelve months or to pay a fine of fifty pounds (sec. 501). At the same time it was provided by another section (sec. 548A) that on the hearing of a charge for any of these offences, if the magistrate is of opinion that the charge should not be disposed of summarily he shall abstain from any adjudication thereon and shall commit or hold to bail as in an ordinary case of an indictable offence. If this happened, the prisoner came under the old provisions to which I have referred and might on conviction be sentenced to penal servitude.

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DIXON J.

The respondent's contention is that the question whether the crime of simple larceny when the goods are under £10 in value is a felony or a misdemeanour depends upon the manner in which the charge is disposed of. Thus, if it is dealt with by a magistrate, the delinquent cannot be said to have been convicted of felony. But if it is sent to a jury and the prisoner is found guilty, the conviction is one of felony. This seems wrong to me. The *Government Railways Act*, sec. 80, says " convicted of a felony " and, putting capital offences aside, the word " felony " is defined to mean a crime in respect of which penal servitude may be awarded. When the definition is incorporated in the enactment, it lays down two requirements. There must be a conviction for a crime and that crime (not the conviction) must be one for which penal servitude might be (not is) awarded. It is the crime which is classified and, although the classification depends on the nature of the punishment affixed to it by law, it is the punishment to which under the law that crime is open that determines its character. Where one tribunal may impose a less and another a greater punishment, the crime exposes the offender to the greater. Which in the result he may receive depends on procedure and the actual exercise of jurisdiction.

In *Cavanough's Case* (1) *Starke* J. expressed the opinion that sec. 501 did much more than prescribe a summary punishment for an offence already created; that it stated what is necessary to constitute it an offence punishable in a summary manner. If the provision created a new offence and the punishment for the offence were limited to fine and imprisonment and did not include penal servitude, I should feel no difficulty in the conclusion that a conviction was not a conviction of felony. My difficulty is in regarding sec. 501 as creating an offence or offences and, further, in treating the punishment which a magistrate may inflict as the only punishment belonging to the offences with which sec. 501 deals. It appears to me that when sec. 501 speaks, as it does, of simple larceny, or of offences mentioned in specified and enumerated sections, it is referring to existing offences and not defining new ones. The fact that it adds a limitation in reference to the amount or value of the

(1) (1935) 53 C.L.R., at p. 227.

subject matter of the crime does not, I think, affect its definition. The limitation goes only to the jurisdiction conferred on the magistrate. But, in any case, the offence remains one which may be tried on indictment if the justice thinks it ought and in that case it is punishable by penal servitude. It, therefore, is a crime in respect of which the punishment of penal servitude may be awarded.

The case, in my opinion, is like that of *In re Burley* (1). The provision contained in sec. 501 is jurisdictional and procedural and the nature of the offence is not, I think, affected by its use. For instance, under sec. 188 the receiver of stolen property, the stealing of which amounts to felony, is liable to penal servitude. I should not imagine that the question whether the stealing amounted to felony for that purpose could depend upon the way in which the thief was tried, whether summarily or on indictment. Again, under sec. 501, a magistrate may convict of stealing cattle and of illegally using cattle. On an indictment for the former offence the jury may convict of the latter. Sec. 426 provides that no person tried for felony in any case where under this Act he may be acquitted thereof but be found guilty of some other offence shall be liable to prosecution on the same facts for any such other offence. Is this provision inapplicable to a complete acquittal by a magistrate on a charge of stealing a beast of less value than ten pounds ? If, before a magistrate, cattle stealing cannot be classed as a " felony," it must have no application. Under sec. 466, after the conviction of an offender for any felony he becomes incapable of holding any office or of exercising the franchise until he endures the punishment or receives a pardon. I should think the classification of offences for the purpose of this section is the same whether the conviction takes place under sec. 501 or not.

In short, I think an offence belongs to one category to the exclusion of the other. It is either a felony or a misdemeanour, and not sometimes one and sometimes the other according to the tribunal which in the event may try it.

In my opinion the appeal should be allowed and judgment in demurrer should be entered for the defendant.

(1) (1932) 47 C.L.R. 53.

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EVATT J. Secs. 9 and 10 of the *Crimes Act* and sec. 29 of the *Interpretation Act* 1897 show that, under the law of New South Wales, the *discrimen* as to whether a person has been convicted of a " felony " is whether, upon such conviction, the person became " liable to the punishment of death, or of penal servitude " (*Crimes Act*, sec. 9).

We are now called upon to re-examine the correctness of part of the decision of the Full Court of the Supreme Court of New South Wales in *Cavanough* v. *Commissioner for Railways* (1). There it was held that a person convicted of an offence under sec. 501 of the *Crimes Act* 1900 was not convicted of a felony within the meaning of sec. 80 of the *Government Railways Act* 1912, because the maximum punishment which may be inflicted under sec. 501 is imprisonment for twelve months or a fine of £50, and the test whether a " felony " has been committed is whether the court can sentence the offender to the punishment of death or penal servitude.

Sec. 80 of the *Government Railways Act* provides, *inter alia*, that if any officer " is convicted of any felony or is sentenced to imprisonment for any term of, or exceeding, six months," he is deemed to have vacated his office.

Sec. 501 of the *Crimes Act* 1900 is contained in Chapter 3 of Part XIV. of the Act, which is headed " Offences Punishable by Justices and Procedure before Justices Generally." Chapter 1 refers to indictable offences punishable summarily with the consent of the accused, Chapter 2 to offences punishable summarily by whipping, and Chapter 3 to " Other Offences Punishable Summarily." Chapter 3 contains eight sub-divisions of offences, and sub-division B deals with " Larceny and Similar Offences."

Sec. 501 enables a number of offences to be made punishable summarily without the consent of the accused. It uses language the form of which is appropriate to the creation of a new offence, as well as to the exercise of a new jurisdiction. It runs as follows: —" Whosoever commits or attempts to commit—(*a*) simple larceny . . . *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 before two

(1) (1935) 35 S.R. (N.S.W.) 162; 52 W.N. (N.S.W.) 31.

justices be liable to imprisonment for twelve months or to pay a fine of fifty pounds." (Italics are mine.)

The question is whether a person convicted under sec. 501 was convicted of a felony within the meaning of sec. 80 of the *Government Railways Act*. By sec. 548A of the *Crimes Act*, the justices are empowered to abstain from any adjudication under sec. 501, and to deal with the case "as in an ordinary case of an indictable offence." In the present case, no use was made of sec. 548A, and, as appears from the declaration, the charge made and dealt with summarily contained a specific averment as to the value of the property stolen, viz., £7. The established practice of the New South Wales Courts of Petty Sessions is to treat similar averments as an essential part of the charge preferred against the accused, and a reference to sec. 501 is always contained in the summons or information. The procedure adopted is that applicable to the trial of summary offences, and the offence of larceny is frequently referred to as "petty larceny."

I think that the decision of the Supreme Court in *Cavanough's Case* (1) should be followed. *Stephen* J., who dissented, stated that he was impressed by the fact that a decision of a magistrate not to apply sec. 548A of the Act to charges under sec. 501 operates so that "that charge which up to that moment was a felony becomes by that action of the magistrate converted into a misdemeanour" (2).

With all respect, this reasoning assumes that, under sec. 80 of the *Government Railways Act*, the determination as to whether a person has been convicted of a "felony" depends upon the abstract nature of the crime, and not upon the maximum punishment which may be visited, after conviction, upon the delinquent. There is force in what *Street* J. says: "Liability to punishment does not arise until the accused has been convicted of some offence. and until that moment, it cannot properly be said that he is liable to any form of punishment" (3). And the general principle suggested seems to provide an explanation of the apparent anomaly that, after a committal for trial, a chairman of Quarter Sessions may decide upon a sentence of three months' imprisonment only for larceny tried on indictment, although the accused has admittedly been convicted of felony, whereas a magistrate, acting summarily under sec. 501, may inflict a punishment of six months' imprisonment (*Cavanough's Case*

(1) (1935) 35 S.R. (N.S.W.) 162; 52 W.N. (N.S.W.) 31.

(2) (1935) 35 S.R. (N.S.W.), at p. 170.

(3) 1935 35 S.R. (N.S.W.) at p. 172.

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(1)). This kind of illustration seems to be rather unconvincing, for a similar apparent anomaly results whenever a judge presiding at Quarter Sessions imposes (as he may) greater punishment in respect of a conviction for a misdemeanour than he does in respect of a conviction for a felony.

The question is merely one of construction of New South Wales statute law. One point is whether the existence of a conviction for felony is to be determined by the actual *quantum* of punishment which may be imposed on a person after his conviction of the particular crime, or by the *quantum* of punishment if some other person had been convicted of the same crime upon some other occasion and by an entirely different form of legal procedure. Of these competing interpretations the former is the more reasonable. It has to be recalled that there is not, in cases of conviction under sec. 501, a specific provision similar to that found in sec. 481 of the *Crimes Act*, which relates to certain indictable offences being dealt with by the consent of the person accused.

Another way of putting the matter is this : Sec. 80 of the *Government Railways Act* itself addresses itself to two situations, and proceeds to draw a contrast between them. The two situations are, conviction of felony and the imposition of an actual sentence of imprisonment for six months or more. The latter event produces vacation of office by reason of what the sentencing authority *in fact does*, after conviction, and the former event produces vacation of office by reason of what the sentencing authority is *empowered by law to do*, also after conviction.

A third way of approaching the matter is to regard the legislature as having, in sec. 501, recreated a special type of petty larceny. This is in accordance with the practice of the New South Wales Courts of Petty Sessions to which I have referred, and with the opinions of *Starke* J., and of the majority of the Supreme Court in *Cavanough's Case* (2).

I do not think that the decision in *In re Burley* (3) is of assistance here. There the statute in question required that prosecutions should be commenced within a certain period commencing from the time of commission of an offence ; so that, of necessity, the definition of the offence by reference to the punishment assignable to it had to be applied to its general or abstract nature, rather than to the particular or concrete situation arising after conviction.

(1) (1935) 35 S.R. (N.S.W.), at p. 170.
(2) (1935) 35 S.R. (N.S.W.) 162 ; 52 W.N. (N.S.W.) 31.
(3) (1932) 47 C.L.R. 53.

As it was a matter of admeasuring time from the moment of the commission of the offence, it was impossible to have any regard to the maximum quantum of punishment which could be visited on the particular offender.

It was said that the result of the above view might lead to unsatisfactory railway administration. I am unable to agree. The Act gives ample authority to the commissioners to deal suitably with officers convicted of offences or guilty of misconduct, although the particular case is not within the precise description of sec. 80 of the *Government Railways Act*; indeed, sec. 78 of the Act gives the commissioners power to dismiss an officer at pleasure.

The appeal should be dismissed.

McTiernan J. The question for decision is whether the appellant rightly treated the respondent as having incurred the forfeiture of his office in the appellant's service on the ground that he was convicted of a felony.

Sec. 80 of the *Government Railways Act* 1912 provides that if any officer in the railway service is convicted of any felony or is sentenced to imprisonment for any term of or exceeding six months or becomes subject to other disqualifications also mentioned in the section, he should be deemed to have vacated his office. The section visits any officer convicted of a felony with deprivation of his office regardless of the punishment imposed for the offence, but in other cases it is not the conviction but the imposition of a sentence of not less than six months' imprisonment which causes the officer to lose his office.

The respondent was convicted in a summary manner under sec. 501 of the *Crimes Act* 1900 of stealing property of the value of £7 and was ordered to pay a fine and certain costs. Sec. 501 provides that whosoever commits or attempts to commit simple larceny or the offence of stealing from the person of another or any offence mentioned in various sections of the *Crimes Act* and referred to in the section and the amount of money or the value of the property in respect of which the offence is charged or of the reward does not exceed £10 shall on conviction in a summary manner be liable to imprisonment or to pay a fine of £50. The jurisdiction conferred by sec. 501 is declared to be exercisable only by a stipendiary or police magistrate. But none of these offences ceases to be an indictable offence, for, by sec. 548A of the *Crimes Act*, it is provided that on the hearing of a charge for any offence referred to in sec.

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501, if the magistrate is of opinion that the charge should not be disposed of summarily, he should abstain from any adjudication thereon and deal with the case by committal or holding to bail as in an ordinary case of an indictable offence.

Sec. 9 of the *Crimes Act* establishes a criterion for deciding whether an offence is a felony. This section says: "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." A similar criterion is established by sec. 29 of the *Interpretation Act* 1897, which is applicable to the statutes of New South Wales generally. Sec. 117 of the *Crimes Act* says: "Whosoever commits simple larceny, or any felony by this Act made punishable like simple larceny, shall, except in the cases hereinafter otherwise provided for, be liable to penal servitude for five years." A different form of punishment was introduced by sec. 501 for an offender summarily convicted under that section, but the punishment mentioned in sec. 117 would be applicable if the magistrate abstained from summarily disposing of the charge and the offender were convicted on indictment. There can be no doubt that a person convicted on indictment of simple larceny is convicted of a felony regardless of the value of the property stolen. Is it also true to say that if the property stolen were less than £10 in value and the offender were convicted in a summary manner under sec. 501 he was convicted of a felony? In my opinion it is. For it appears that, whether he was convicted summarily of that offence or convicted of it on indictment, he was convicted of committing the offence referred to in sec. 117 of the *Crimes Act*, and any person who commits that offence is thereby made liable to penal servitude.

It should be observed that among the offences included in sec. 501 are the offences mentioned in the following sections of the *Crimes Act*, secs. 126, 148 and 152. Sec. 126 provides that whosoever steals any cattle or kills any cattle with intent to steal the carcase or skin or other part of the cattle so killed shall be liable to penal servitude for ten years. Sec. 148 provides that whosoever steals in a dwelling house any property to the value in the whole of £5 or more shall be liable to penal servitude for seven years. Sec. 152 provides that whosoever steals from a ship in port or from a wharf

shall be liable to penal servitude for seven years. It could hardly be contended that sec. 80 of the *Government Railways Act* 1912 has a harsh application if it excludes from the railway service an employee who is summarily convicted of any of these offences, and it is not possible to give it a different application when the offence is simple larceny. I would not agree that if a person were tried summarily and thus convicted under sec. 501 of simple larceny or of any of these offences he was convicted of a new offence created by sec. 501.

The provision which is now sec. 80 of the *Government Railways Act* 1912 was first introduced by 51 Vict. No. 35 at a time when the *Criminal Law Amendment Act*, 46 Vict. No. 17, was in force whereby felony was defined to have the meaning assigned to it by sec. 9 of the *Crimes Act* 1900.

If the question whether an officer was convicted of a felony had to abide the manner of his trial, depending on whether he was tried summarily or on indictment, sec. 80 would operate capriciously. One instance may be given. An officer convicted summarily of stealing goods from a dwelling house of the value of £5 and sentenced to less than six months' imprisonment would not be deemed to have vacated his office; but an officer convicted on indictment of simple larceny of goods of the value of £5 and sentenced to a term of penal servitude whether shorter or longer would suffer that loss.

It is useful in considering whether the effect of sec. 501 is to make simple larceny of goods less than £10 in value a crime less than felony if the offender is convicted in a summary manner, to read it with other sections of the *Crimes Act*, e.g., sec. 109. Sec. 109 provides that whosoever enters the dwelling house of another with intent to commit a felony therein shall be liable to penal servitude for fourteen years. Under this section the intent to commit felony would be made out if the intent proved were to steal property whether above or below the value of £10, because whosoever commits that offence commits the offence of simple larceny, which according to the statutory criterion is a felony. Compare secs. 58, 188 and 189.

The effect of sec. 501 is not to make simple larceny of goods less than £10 in value a crime of indeterminate character at the time of its commission, neither felony nor misdemeanour, and only capable of classification when it becomes known whether the person charged

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with that offence was convicted summarily or on indictment. It is true that the jurisdiction of a magistrate, acting under sec. 501, does not extend to the imposition of a sentence of penal servitude. But the statutory criterion for determining what is a felony is not based on the powers of the adjudicating tribunal, nor, indeed, on the punishment in fact awarded (compare sec. 442), but on the nature of the punishment to which the person charged exposed himself by committing the offence. The appellant's argument is strongly supported by the reasoning in the judgments in the case of *In re Burley* (1).

In my opinion the appeal should be allowed.

Appeal dismissed with costs.

Solicitor for the appellant, *Fred. W. Bretnall*, Solicitor for Transport.

Solicitor for the respondent, *J. J. Lyons*, Tamworth, by *Cleary & Callachor*.

J. B.

(1) (1932) 47 C.L.R., particularly at pp. 55, 58.