COMMENT

ANOTHER LOOK AT DAVISON'S CASE

BY LESLIE KATZ*

R. v. *Davison*[1] was an important case in the development of the meaning of the term "judicial power of the Commonwealth" in section 71 of the Australian Constitution. However, no commentator on the case[2] has referred to one peculiar aspect of it, an aspect which leads me to believe that the case ought not to have been an authority on the meaning of the term at all. The purpose of this comment is to illuminate that aspect of the case, now almost a quarter of a century old.

Davison had petitioned for the making of a sequestration order in respect of his estate. The petition had been granted by a Deputy Registrar in Bankruptcy. Five months later Davison made a compulsory application for the discharge of his order. On the hearing of this application the Federal Bankruptcy Judge ordered that Davison be charged with three bankruptcy offences, an essential element of each of which was that he had been a bankrupt at the relevant time. When the hearing of these charges began before the Judge some time later, Davison asked the Judge to state a case for the High Court on two questions of law. The first of these was whether the Deputy Registrar in Bankruptcy had had the power to make Davison's sequestration order and the second was whether Davison was a bankrupt within the meaning of the sections of the Bankruptcy Act[3] which created the offences with which Davison had been charged. The Judge stated the case as Davison had asked. Argument before the High Court dealt solely with the first question, it being assumed apparently that the answer to the second question flowed inevitably from the answer to the first. The High Court answered both questions in the negative,[4] making no reference to the second question other than answering it. The answer given to the second question obviously rendered the criminal proceedings against Davison abortive.

The basis of the Court's answer to the first question was that the legislation which purported to confer on Deputy Registrars in Bankruptcy the power to make voluntary sequestration orders was unconstitutional, because the making of such orders was an exercise of the judicial power of the Commonwealth, a power which Deputy Registrars in Bankruptcy were incapable of exercising.

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1 (1954) 90 C.L.R. 353.

2 See, *e.g.*, Lane, *Australian Federal System* (1972) 325; Howard, *Australian Federal Constitutional Law* (2nd ed., 1972) 184-187; Sawer, "Judicial Power of the Commonwealth—Decisions by Registrars in Bankruptcy" (1954) 28 *A.L.J.* 341; Bernfield, "The Bankruptcy Registrar: *Davison's Case*" (1953-1955) 1 *Syd. L. Rev.* 416.

3 Bankruptcy Act 1924 (Cth) ss 209(g) and 214(1).

4 Dixon C.J., McTiernan, Fullagar, Kitto and Taylor JJ.; Webb J. dissenting.

The peculiar aspect of the case, not referred to either by counsel for the Crown or by the Court, which causes me to say that the case ought not to have been an authority on the meaning of the term "judicial power of the Commonwealth", is that Davison was seeking to escape criminal liability by attacking the constitutionality of legislation on whose validity he had relied when petitioning for his sequestration order and under which he had obtained benefits. I do not believe that he should have been allowed to do this.

How could the Crown have argued the case so that the constitutional question would not have been reached and Davison's attempt to deny his status as a bankrupt to avoid criminal liability would have been frustrated?

One way might have been to argue that the Court need not hear argument on the constitutional question, because the term "bankrupt", as used in the legislation creating the offences, included people who acted as bankrupts after sequestration orders had been made in respect of their estates, even if such orders were void. In other words, the legislation applied to *de facto* bankrupts.[5] Such an argument would have had respectable antecedents in the law relating to the criminal liability of *de facto* officers. For instance, in *Hawkins' Pleas of the Crown*[6] we find a chapter entitled "Of Escapes Suffered by Officers".[7] In the course of this chapter there appears a discussion of the liability of people who act as gaolers although they are not authorised to do so.

About such people's criminal liability for deliberately allowing prisoners to escape Hawkins says:

> Also such an escape, suffered by one who wrongfully takes upon him the keeping of a gaol, seems to be punishable in the same manner as if he were never so rightfully intitled to such custody, for that the crime is in both cases of the very same ill consequence to the public; and there seems to be no reason that a wrongful officer should have greater favour than a rightful, and that for no other reason but because he is a wrongful one.[8]

A later editor of the work adds:

> It has been determined, that gaolers, as well *de facto* as *de jure*, are liable to attachment for contempt of court, and to fine . . . [and] . . . imprisonment . . . for gross and palpable abuses; as in treating criminals with barbarity, extorting money, not making lawful deliverance, or suffering them to escape; and that if death be the consequence of their harsh treatment it is felonious homicide.[9]

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[5] The Bankruptcy Act 1924 (Cth) s. 4 defined "bankrupt" as meaning "any person in respect of whose estate a sequestration order has been made".

[6] (1st ed., 1721).

[7] *Id.*, II, Ch. 19.

[8] *Id.*, s. 23. Footnote omitted.

[9] (8th ed., 1824) I, Ch. 27, s. 3. Footnote omitted. This section was added by Leach, the editor of the 7th edition (1795). Of Leach's additions, Curwood, the editor of the 8th edition, said: ". . . it appears to the Editor of the present edition, that the book was swelled to an unnecessary bulk, by the insertion of much

Hawkins had not been the first commentator to point out the criminal liability of *de facto* gaolers. Coke, in his *Third Institute*, the first book ever written in the English language on the criminal law,[10] had referred to a statute of 1341 creating a felony for prison keepers and under keepers. He had said: "If he be keeper, or under keeper, *de jure*, or *de facto*, by right or by wrong, he is within the purvien [*sic*] of this statute".[11]

We find such an attitude toward *de facto* officers manifested again in the nineteenth century. Section 27 of the English Companies Act 1862 provided that a company director or manager who knowingly and wilfully authorized or permitted his company to default in forwarding once a year to the registrar of joint stock companies a list of all its members was liable to a penalty. In *Gibson* v. *Barton*[12] the defendant was charged under the section as a manager and defended himself on the ground that he was not a manager. The statute did not require companies to appoint managers, nor did it provide a method for their appointment. Blackburn J. pointed out that

> . . . if the articles of agreement contained a clause, that the . . . directors should have power to appoint a . . . manager . . . then that person being expressly authorized to act would be a manager . . . within the meaning of s. 27.[13]

However, the articles of the company with which Gibson was associated contained no such provision. Blackburn J. continued:

> The evidence comes to no more than this, that he [Gibson] was permitted by the board of directors to manage the company generally, just as if he had been legally appointed by them to act as manager. I think there is evidence that the appellant took upon himself to act, and did act just as if he was such manager. The question, therefore, is, whether . . . he can protect himself from the liability cast upon a manager under s. 27, by saying, "I am not manager de jure". I think he cannot. There are many instances in which a person who de facto exercises an office cannot defend himself by saying, when he is called upon to bear liability in consequence of his wrong, "I am not rightfully in the office, there is another man who may turn me out." . . . So, if a director were to set up in answer to a penalty under s. 27, that he was not a director, that he was illegally elected, the answer would be, "You have acted as a director . . ."[14]

Lush J., concurring, asked himself whether Gibson was a manager for the purpose of the section and answered:

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matter wholly irrelevant, or but slightly connected with a work which professed to treat only of 'Pleas of the Crown' . . ." *Id.*, vi. The section quoted in the text was one of Leach's "excrescences", as Curwood described them, which was allowed to remain.

[10] It was completed in 1628. See Holdsworth, *A History of English Law* (3rd ed., 1945) V, 466; see also Bowen, *The Lion and the Throne* (1957) 510 and 565.

[11] (1797) Ch. 24, "Dures [*sic*] of Imprisonment".

[12] (1875) L.R. 10 Q.B. 329.

[13] *Id.*, 337.

[14] *Id.*, 337-338.

> I think he is, and that "manager" in that section must mean manager de facto. I do not think that it is competent for him to say, "True, I acted as manager of the company; but yet, not being manager de jure, I can evade the liability imposed. . ."[15]

Gibson's case was referred to in a number of subsequent cases, the most important of which for this discussion was *R.* v. *Lawson*,[16] decided in 1905.

Section 84 of the English Larceny Act 1861 made it an offence for a company director, manager or officer to publish false statements with intent to deceive or defraud. The articles of association of the company with which the defendant Lawson was associated provided for the appointment of a manager. However, the Crown was unable to prove Lawson's appointment; it merely proved his having acted as manager.

Lord Alverstone C.J., with whom Ridley J. concurred, said:

> Finding the offence aimed at and contemplated by the section to be an offence the consequences of which might be just as serious if a de facto manager was guilty of the offence, and that the principle [of liability of *de facto* managers and directors] has been applied in *Gibson* v. *Barton* and approved of, or at least not dissented from, by this large number of judges [*viz* ten], I have myself no doubt . . . that the conviction must stand.[17]

Channell J., with whom Phillimore J. concurred, said:

> . . . this is one of a group of sections dealing with offences which can only be committed by persons who occupy certain positions, but I think they can be convicted if they occupy those positions quite apart from whether they happen to have been either duly appointed or appointed at all to those positions.[18]

Thus there were, at the time of *Davison's* case, a number of instances in English law in which *de facto* officers were held to be criminally liable just as though they were *de jure* officers.[19] Were there any such instances in Australian law?

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[15] *Id.*, 341. Quain J. dissented from the view of Blackburn and Lush JJ. discussed in the text.

[16] [1905] 1 K.B. 541.

[17] *Id.*, 549. The ten judges referred to were: Lord Coleridge, Archibald J. and Amphlett B. in *Edmonds* v. *Foster* (1875) 45 L.J. (M.C.) 41; Sir George Jessel, James, Baggallay and Bramwell L.JJ. in *Coventry and Dixon's Case* (1880) 14 Ch.D. 660; Lindley, A. L. Smith and Rigby L.JJ. in *In re Western Counties Steam Bakeries and Milling Co.* [1897] 1 Ch. 617.

[18] [1905] 1 K.B. 541, 550. Darling J., the fifth judge on the Court, said that "to hold that he [Gibson] was not the manager of the company would be to take an extraordinarily technical view in his favour . . ." *Id.*, 549-550.

[19] In *Dean* v. *Heisler* [1942] 2 All E.R. 340 it was argued that a company director for the purpose of reg. 91 of the Defence (General) Regulations included a *de facto* director. The regulation provided that directors were criminally liable for certain offences committed by their companies unless they could prove that those offences had been committed without their knowledge. A unanimous Divisional Court (Viscount Caldecote C.J., Tucker and Birkett JJ.) rejected this argument. No cases were referred to in the reasons for judgment. Furthermore,

The most important case on the topic appears to be *R.* v. *Brewer*,[20] decided by the High Court in 1942. Brewer was charged with having bribed Ritchie, a Commonwealth public servant, contrary to the Secret Commissions Act 1905. One of his defences was that the Crown had failed to prove that Ritchie was a public servant. To this defence, Rich J. responded:

> . . . I feel no doubt that . . . *de facto* service under the Crown is sufficient to make a person obnoxious to the provisions of the Act irrespectively of whether the service was rendered under a regularly constituted contract of employment.[21]

These remarks certainly suggest that if it had been Ritchie who was being prosecuted for having taken the bribe, rather than Brewer for having given it, Rich J. would have adopted the approach referred to by Coke and Hawkins and employed in the English cases cited *supra* and held that public servants, not only *de jure* but also *de facto*, were criminally liable under the statute.

However the other two judges who heard the case, Latham C.J. and McTiernan J., did not deal with the matter in the same way as Rich J. They began by saying that "[a]cting in a public office is evidence of due appointment to that office, not only in civil proceedings but also in a criminal case",[22] and then cited *Lawson's* case, already discussed, as authority for this proposition. It must be said that this reliance on *Lawson's* case as authority for the quoted proposition reveals a complete misunderstanding of the holding in that case. That case had nothing to do with whether evidence of acting in a public office is relevant to prove that the actor is a *de jure* officer. Instead, as has already been made clear, it held that proof that a person was a *de jure* officer was unnecessary under the legislation in question, because it applied to people who were merely *de facto* officers.[23] Quite apart from this criticism of the judgment, the reasoning of Their Honours was:

> Acting in a public office is evidence of due appointment to that office, not only in civil proceedings but also in a criminal case . . . The presumption that his appointment was duly made is not met

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the case is distinguishable from *Gibson's* and *Lawson's* cases because of the reverse onus clause. As well, the rule laid down by the case was overruled by an amendment to the regulation to include *de facto* directors. See *English & Empire Digest* (Green-Band Series) XVII, Defence, para. 297.

[20] (1942) 66 C.L.R. 535.

[21] *Id.*, 555.

[22] *Id.*, 548.

[23] Latham C.J. and McTiernan J. were correct, however, in suggesting that *Lawson's* case dealt with a public, as opposed to private, office. Jowitt, *Dictionary of English Law* (1959) 1438, says of the term "public officer" that it "is also used to denote an officer of a joint stock company . . ." When used in this sense, the term "seems to be derived from the Country Bankers Act, 1826, which provided for the appointment of public officers of banking companies, and empowered such companies to sue and be sued in the name of any such officer, although the companies themselves were not incorporated." See also *McMillan* v. *Guest* [1942] A.C. 561 in which the House of Lords held that a director of a private company holds a public office within the meaning of the Income Tax Act 1918 (U.K.).

> by any rebutting evidence . . . The conclusion, therefore, is that Ritchie was appointed . . .[24]

Thus they would have acquitted Brewer if he had offered convincing evidence that Ritchie had not been appointed a public servant. It is submitted that this is not a sound approach to the matter and that the approach of Rich J. was preferable. After all, as was said in a famous American judgment on the matter (a judgment which will be referred to again):

> If . . . [the recipient] be good enough officer to be bribed, ought he not to be held good enough officer to answer the designation of the statute in order to punish the briber?[25]

However, I am not so concerned to consider the attitude of Latham C.J. and McTiernan J. towards Brewer as to speculate what their attitude towards Ritchie would have been if it had been he who was being prosecuted rather than Brewer. Perhaps it can be argued that in that situation they would have taken the same view as it has been suggested Rich J. would have taken and that, while they were prepared to acquit Brewer if the Crown could not prove that Ritchie was a *de jure* officer, they would not have given Ritchie the same benefit, since he had been the person who had acted as the officer. Whether this ground of distinction would have appealed to them cannot be known.

There is one other relevant Australian case to be mentioned and that is *R.* v. *O'Ferrall*[26] decided in Victoria in 1875. O'Ferrall had been charged with embezzling money from the Crown while a public servant. The Crown proved his having acted as a public servant, but did not prove his appointment. Its failure to do so provided one of the grounds of his defence. The Crown's response to this ground was that, having acted as a public servant, O'Ferrall was "estopped" from denying that he had that status. Barry J. rejected the Crown's argument. He said:

> . . . the real mode of describing his [O'Ferrall's] position is not that he was estopped (an expression with a definite legal significance not commonly employed in criminal cases), but that there was *prima facie* evidence, by admissions on his part, against him, that he was in the employment of the Government. His admissions afforded *prima facie* evidence against him, but that evidence might have been rebutted . . .[27]

Thus Barry J. would have acquitted O'Ferrall if he had offered convincing evidence that he was not a *de jure* officer. Obviously, I believe this view to have been wrong.

Clearly, the Crown should not have introduced the concept of estoppel into its argument, but it could certainly have argued that the legislation which created the offence was intended to apply to *de facto* officers as well as *de jure* ones. Unfortunately, it could not have relied

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[24] (1942) 66 C.L.R. 535, 548.
[25] *State* v. *Gardner* (1896) 42 N.E. 999, 1005 *per* Spear J. (Ohio S.C.).
[26] (1875) 1 V.L.R. (L.) 81.
[27] *Id.*, 92. Fellows and Stephen JJ. delivered separate concurring judgments.

on *Gibson's* case in support of this argument, because that case had undoubtedly not yet reached the colony,[28] but it could have relied on Coke and Hawkins. Some of the latter's words relating to *de facto* gaolers were particularly apposite to O'Ferrall, even if he were only a *de facto* public servant:

> [T]he crime is in both cases [*viz*, whether the officer is *de facto* or *de jure*] of the very same ill consequence to the public; and there seems to be no reason that a wrongful officer should have greater favour than a rightful, and that for no other reason but because he is a wrongful one.[29]

To sum up the position, there were available at the time of *Davison's* case a number of English authorities which could have been used to found an argument that a *de facto* officer could be criminally liable. This argument had apparently been looked on with favour by one High Court judge. The standing of contrary Australian authorities was weak; the remarks of Latham C.J. and McTiernan J. in *Brewer's* case were not directly on point, while the Crown had not made the proper argument in *O'Ferrall's* case.[30]

If we assume then that the High Court could have been persuaded in 1954 to hold that a *de facto* officer could be criminally liable, would this have assisted the Crown in *Davison's* case? I believe that it would have done so. Although, admittedly, bankruptcy is not an office, yet the rule of criminal liability is just as appropriate no matter what the status assumed by the defendant, whether an office or not. The position from society's point of view is just the same. A person has, it is admitted for the sake of argument, assumed a status he does not have and has obtained benefits as a result. Now he is being prosecuted for an offence which depends on his having the status and he wants to deny the status. He should not be allowed to do so.

Confirmation of the suggested rule that a *de facto* bankrupt can be criminally liable is to be found in the English case of *Director of Public Prosecutions* v. *Ashley*[31] which unfortunately was not available at the time of *Davison's* case, having been decided some months afterwards.[32] In *Ashley's* case the accused was charged with two

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[28] *Gibson's* case had been decided on 24 April 1875. See (1875) L.R. 10 Q.B. 329. *O'Ferrall's* case was argued and decided on 24, 25 and 26 June 1875. See (1875) 1 V.L.R. (L.) 81.

[29] *Hawkins' Pleas of the Crown* (1st ed., 1721) II, Ch. 19, s. 23.

[30] It may be pointed out that the criminal liability of *de facto* officers in America is established beyond doubt. See, *e.g.*, "De facto status of officer as affecting his criminal responsibility or liability to punishment for contempt" (1929) 64 Am. L. Rep. Ann. 534 which refers to over two dozen cases. The earliest case referred to in the annotation which is directly in point is *State* v. *Maberry* (1848) 34 S.C.L. 144 (S. Carolina). See also "Criminal offence of bribery as affected by lack of legal qualification of person assuming or alleged to be an officer" (1938) 115 Am. L. Rep. Ann. 1263. The most recent case applying the principle referred to in the annotations appears to be *State* v. *Mayeux* (1955) 81 So. 2d 426 (La. S.C.).

[31] Noted in [1955] *Crim. L. Rev.* 565.

[32] *Davison's* case was decided in September, 1954. See (1954) 90 C.L.R. 353. *Ashley's* case was argued and decided in March, 1955. See [1955] *Crim. L. Rev.* 565.

bankruptcy offences, an essential element of each of which was that he had been a bankrupt at the relevant time. Before proceedings were commenced, however, his bankruptcy order had been annulled pursuant to the provisions of the Bankruptcy Act 1914, and he therefore argued that the indictment was bad in law. The Court rejected this argument, holding, in effect, that a bankrupt, for the purposes of the legislation creating the offences, included a person in respect of whom a void bankruptcy order had been made.

Let us now assume that, even without *Ashley's* case to assist it, the Crown had argued that *de facto* bankrupts were criminally liable under the Bankruptcy Act. What would Davison's response to this argument have been? Perhaps he would have argued that the legislation could not be interpreted to include *de facto* bankrupts, because, if it were, it would be unconstitutional.

Now the bankruptcy offences legislation could only be justified under section 51(xvii) of the Constitution, the bankruptcy and insolvency power. Would that power support a law with respect to offences by people who held themselves out as bankrupts after the making of void voluntary sequestration orders in respect of their estates even though they were not? I believe that it would, just as Rich J. apparently believed that the federal legislative power with respect to the Commonwealth public service[33] would allow the federal government to render *de facto* public servants criminally liable. If, however, it were held that the power would not support such a law, that the Commonwealth could only regulate the conduct of *de jure* bankrupts and not *de facto* ones, would the Crown have had any other argument with which to overcome Davison's defence and persuade the High Court that it ought not to rule on the constitutionality of the legislation which conferred powers on Deputy Registrars in Bankruptcy?

I believe that it would have had such an argument. The courts will not allow a person to make a direct attack on the constitutionality of legislation unless he can establish his standing to do so. Furthermore, even if he does establish his standing, the courts retain a discretion not to grant him his remedy. The existence of this discretion was once referred to in the High Court in the context of a suit for a declaration, although it is obviously not limited to situations in which that remedy is being sought. In *Crouch* v. *Commonwealth*,[34] Latham C.J. said:

> The Court has a discretion to determine whether a declaration as to the rights of a plaintiff shall be made. . . As a general rule the Court would not make a declaration so as, in effect (though not in form), to intercept proceedings in a criminal court by passing upon the validity of a statute . . . with an offence against which an accused person was charged.[35]

Obviously, if a person is seeking, as Davison was, to make a collateral attack on the constitutionality of legislation in a criminal

[33] For a discussion of the source of this power see Howard, note 2 *supra*, 123-132.

[34] (1948) 77 C.L.R. 339.

[35] *Id.*, 348.

proceeding, no question of his standing can arise. I submit, however, that, just as in the case of a direct attack on the constitutionality of legislation, the courts retain a discretion to forbid the defendant to raise his defence and that the Court ought to have exercised this discretion against Davison because he was seeking to attack the constitutionality of legislation on whose validity he had earlier relied and under which he had obtained benefits.

While there are no Australian authorities on the point, such an approach has been taken in American cases. Consider, for instance, *State* v. *Duncan*.[36] A statute of the State of Indiana required the boards of commissioners of the various counties within the state to appoint road engineers from their respective counties or, if that was not possible, from elsewhere in the State. The board of Lawrence county appointed Duncan, a non-resident. After having acted as engineer for some time, he was charged with soliciting a bribe while holding an office of trust and profit under state law. His defence was that he did not hold such an office, because the statute under which he had purportedly been appointed was unconstitutional. The provision of the State Constitution on which he relied to found this argument was one which prohibited the appointment of non-resident county officers.

The Indiana Supreme Court responded: "Being an officer *de facto*, appellee will not be permitted to raise the question whether or not he was an officer *de jure*."[37] Thus it prevented a party with undoubted standing (because he was a criminal defendant) from challenging the constitutionality of a statute on which his status depended, even though if he did not have the status, he could not be guilty of the offence with which he had been charged.

This approach of the Indiana Supreme Court had been foreshadowed a few years earlier by the Ohio Supreme Court in *State* v. *Gardner*,[38] from which I have already quoted. *Gardner's* case was referred to in *Duncan's* case and has since become a leading American authority.[39] Gardner was charged with having offered a bribe to a public officer and he defended by arguing that the statute under which the offeree had been appointed was unconstitutional. The Court refused to allow him to make the argument. In the course of his judgment, Spear J., anticipating the facts of *Duncan's* case, said: "Could [the offeree] . . ., had he accepted the bribe, be heard to say he was not an officer? Surely not."[40] He also said:

> Courts uniformly decline to consider the alleged unconstitutionality of an act of the general assembly unless it becomes necessary to a disposition of the case before them. The first inquiry is, therefore, as to the right of the defendant to make the question of the constitutionality of the statute under review. If he cannot

[36] (1899) 54 N.E. 1066 (Indiana S.C.).
[37] *Id.*, 1067.
[38] (1896) 42 N.E. 999.
[39] It was so described by the Illinois Supreme Court in *People* v. *Woodruff* (1956) 137 N.E. 2d 809, 813.
[40] Note 38 *supra* at 1006.

> be heard to raise that question, then the issue of constitutionality is not before us.[41]

It was this first inquiry which the Crown neglected to urge in *Davison's* case and which, if made, ought to have led the High Court to prevent Davison from raising the constitutional question. The relevant considerations in this inquiry would have been that Davison had relied on the constitutionality of the statute authorizing Deputy Registrars in Bankruptcy to make sequestration orders when petitioning for such an order and that he had obtained such an order and received benefits thereunder. These considerations were similar to those which led the Court in *Duncan's* case to prevent a person who had acted as a public officer from denying the constitutionality of the statute under which he had been appointed when charged with an offence which depended on his being a public officer.

If it be accepted that the High Court ought to have given effect in *Davison's* case to the approach adopted in *Duncan's* case, had it been argued by the Crown, the last question to be asked is whether the Court ought to have disposed of *Davison's* case on the same basis as *Duncan's* case even though the Crown did not make the relevant argument.

I believe that it ought to have done so. An instructive comparison in this respect is *Lambert* v. *Weichelt*[42] decided four days after *Davison's* case by the same members of the High Court who decided *Davison's* case. Weichelt was prosecuted before a magistrate for selling timber at retail at a price higher than the maximum fixed by the Prices Commissioner, contrary to the Victorian Prices Regulation Act 1948. He raised two defences: first, the sale in question was not at retail; secondly, it was in the course of interstate commerce and protected by section 92 of the Constitution. His second defence was successful, the first not even being considered by the magistrate in his reasons for judgment. The prosecution then obtained an order *nisi* to review the decision in the Supreme Court. Before the return day, however, Weichelt successfully applied under section 40 of the Judiciary Act[43] to have the cause transferred to the High Court for hearing. It was agreed by the parties that Weichelt would not raise in the High Court the question whether the sale in respect of which he had been charged was at retail, but would only rely on his section 92 argument. Nevertheless, the High Court discharged the prosecution's order *nisi* on the ground that the record disclosed that Weichelt's sale had not been at retail and therefore did not fall within the terms of the statute. Dixon C.J., for a unanimous Court, said:

> As we think that . . . the evidence is in such a condition that a conviction would not be proper, the question confronts us whether we ought to go on to consider the constitutional question.

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[41] *Id.*, 1001. Bradbury J. delivered a separate concurring judgment. Shauck J. dissented.

[42] (1954) 28 A.L.J. 282.

[43] Judiciary Act 1903 (Cth) s. 40.

> It is not the practice of the Court to investigate and decide constitutional questions unless there exists a state of facts which makes it necessary to decide such a question in order to do justice in the given case and to determine the rights of the parties. On the record as it appears before us that is not the situation in the present case.[44]

Thus *Weichelt's* case was one in which a party wanted to make a constitutional argument and had expressly agreed with the other party not to make a non-constitutional one. Nevertheless, the High Court held that he succeeded on the non-constitutional ground, which was disclosed by the record, and refused to consider his constitutional argument.[45] The Court could easily have followed this approach in *Davison's* case. The record disclosed a non-constitutional ground upon which the case could have been disposed of, namely, Davison's having relied on the constitutionality of the statute previously and his having received benefits thereunder. The Crown had not relied on this ground, but that ought not to have mattered. On the record, it was unnecessary to decide the constitutional question in order to do justice in the case. In fact, I believe it was necessary not to decide the constitutional question in order to do justice in the case.

To conclude, I believe that both counsel for the Crown and the Court erred in *Davison's* case and that an unworthy litigant was allowed to obtain a decision which he did not deserve on the constitutionality of legislation. He should have been denied this decision, either because it was irrelevant to his prosecution or because his previous conduct justified the Court's exercising its discretion not to make the decision.[46]

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[44] *Lambert* v. *Weichelt* (1954) 28 A.L.J. 282, 283. An identical rule is applied in the American Supreme Court: *Neese* v. *Southern Rwy.* (1955) 350 U.S. 77, 78: "We need not consider respondent's contention that only the jurisdictional question was presented by the petition for certiorari, for in reversing on the above ground we follow the traditional practice of the Court of refusing to decide constitutional questions when the record discloses other grounds of decision, whether or not they have been properly raised before us by the parties."

[45] See also the address of Dixon C.J. on taking the oath as Chief Justice in 1952, reprinted in Dixon, *Jesting Pilate* (1965) 248: "The methods of the Court have greatly changed during the period with which I have been connected with it . . . now . . . there is . . . a tendency to work out new and possibly unexplored solutions of cases after the argument has finished."

[46] As a result of *Davison's* case the Commonwealth Parliament passed a validating statute, the Bankruptcy Act 1954, which came into force on 18 November 1954. Section 13(2)(c) of that Act would seem to have authorized the continuation of the prosecution against Davison as though he had been a *de jure* bankrupt at the time the prosecution had commenced. Whether this was done is not known.