L. J. McKean, for the respondent, did not argue that a new trial should not be directed.

H. C. OF A. 1917.

THE KING v. EYLES.

The judgment of the COURT, which was delivered by GRIFFITH C.J., was as follows :—

Having regard to all the circumstances of the case, the Court are of opinion that the proper order to make is that there should be a new trial. It is obviously undesirable to express any opinion as to the merits of the case.

Order appealed from varied by ordering a new trial.

Solicitor for the appellant, *J. V. Tillett*, Crown Solicitor for New South Wales.

Solicitor for the respondent, *W. D. McMahon*, Sydney.

B. L.

[HIGH COURT OF AUSTRALIA.]

CLARKE AND ANOTHER . . . . APPELLANTS ; DEFENDANTS,

AND

THE UNION BANK OF AUSTRALIA LIMITED RESPONDENT. PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1917.

MELBOURNE, *May* 17.

Barton A.C.J., Isaacs and Rich JJ.

Practice (Supreme Court of Victoria)—Specially indorsed writ—Final judgment—Arguable defence—Rules of the Supreme Court 1916 (*Vict.*), *Order XIV., r.* 1.

Guarantee—Security for mortgage—"Mortgagor"—Fluctuating advance—War Precautions (Moratorium) Regulations 1916 (*Statutory Rules* 1916, *No.* 284 *and No.* 324), *regs.* 2, 3, 4.

H. C. OF A. 1917.

CLARKE v. UNION BANK OF AUSTRALIA LTD.

The appellants had given a guarantee to the respondent Bank as security for the repayment by a certain company of the principal and interest owing on a mortgage thereafter given by the company to the respondent Bank in respect of an advance then made by the Bank to the company. The liability of the appellants upon the guarantee was limited to £5,000. The respondent Bank having, by a specially indorsed writ, instituted an action in the Supreme Court of Victoria against the appellants upon the guarantee, and having applied for leave to sign final judgment under Order XIV., r. 1, of the *Rules of the Supreme Court* 1916,

Held, that the appellants should have leave to defend inasmuch as the question whether the *War Precautions* (*Moratorium*) *Regulations* 1916, No. 284 as amended by No. 324, afforded a good defence to the action was arguable.

Jones v. *Stone*, (1894) A.C., 122, followed.

Decision of *Hood* J.: *Union Bank of Australia Ltd.* v. *Clarke*, (1917) V.L.R., 105; 38 A.L.T., 133, reversed.

APPEAL from the Supreme Court of Victoria.

An action was brought in the Supreme Court of Victoria by the Union Bank of Australia Ltd. against Herbert Clarke and Georgina Clarke to recover £5,135 6s. 10d. upon a guarantee. The writ was specially indorsed, and the plaintiff Bank applied by summons for final judgment under Order XIV., r. 1, of the *Rules of the Supreme Court* 1916.

The guarantee, which was dated 12th May 1915, was, so far as is material, as follows :—" In consideration of advances to be made by the Union Bank of Australia Limited to or for or on account of Victorian Estates Proprietary Limited of Melbourne Victoria (hereinafter called 'the said Corporation') either by allowing the said Corporation to overdraw its account or by discounting for the said Corporation bills of exchange or promissory notes or by any means whatsoever we jointly and severally undertake to pay to the said Bank all such advances and all debts now or hereinafter owing or accruing from the said Corporation to the said Bank and all interest on the same respectively in case the said Corporation shall make default in payment of such advances debts and interest or of any part thereof respectively after payment of the whole amount then due from the said Corporation to the said Bank shall have been demanded by the said Bank by notice in writing to the said Corporation delivered or left at or posted to the last known office or place of business of the said Corporation in Melbourne Victoria. This guarantee is to be a

continuing guarantee irrespective of any sum or sums which may at any time or times be paid into the said Bank to the account of the said Corporation . . . And we agree that the balance shown to be due in the account of the said Corporation on each half-yearly balancing day of the said Bank shall be considered as a new debt owing by the said Corporation to the said Bank as upon an account stated and shall be secured with interest by this guarantee . . . Provided always the amount at any time payable by us under this guarantee shall not exceed five thousand pounds and interest."

The claim of the plaintiff Bank contained particulars in the form of an account between the plaintiff Bank and the Victorian Estates Proprietary Ltd., which showed on the debit side in addition to the £5,000 a number of entries in respect of interest, half-yearly charges for keeping the account, &c., and on the credit side a number of entries of payment into the account. The defendants by their affidavit stated that in May 1915 the Victorian Estates Proprietary Ltd., having purchased a station property which was mortgaged to the plaintiff Bank for £5,000, and desiring to take over the liability in respect of the mortgage, entered into negotiation with the plaintiff Bank, that the plaintiff Bank agreed to advance to the Victorian Estates Proprietary Ltd. £5,000 upon mortgage of the land provided that the defendants gave their guarantee, and that the guarantee and the mortgage were accordingly given. The mortgage purported to be in consideration of the advance of £5,000 and interest thereon and of any future loans or advances and interest thereon, and by it the Victorian Estates Proprietary Ltd. agreed to pay on demand the amount of the balance which might be owing to the plaintiff Bank for principal and interest upon the mortgage.

The summons was heard by *Hood* J., who made an order giving the plaintiff Bank leave to sign final judgment for the amount claimed : *Union Bank of Australia Ltd.* v. *Clarke* (1).

From that decision the defendants appealed to the High Court.

Pigott (with him *Starke*), for the appellants. The mortgage and the guarantee were part of the one transaction, and inasmuch as

(1) (1917) V.L.R., 105 ; 38 A.L.T., 133.

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CLARKE v. UNION BANK OF AUSTRALIA LTD.

payment of the mortgage debt could not be enforced except pursuant to r. 4 of the *War Precautions* (*Moratorium*) *Regulations* 1916 (No. 284, as amended by No. 324), the liability upon the guarantee was also suspended. The appellants are mortgagors within the definition of that word in reg. 2. Reg. 3 does not apply, for the advance was not a fluctuating one. Having regard to the arguable nature of the grounds of defence raised, the appellants should have had leave to defend : *Jacobs* v. *Booth's Distillery Co.* (1).

[ISAACS J. referred to *Jones* v. *Stone* (2).]

Mitchell K.C. (with him *Eager*), for the respondent. The advance was a fluctuating one, and that was shown by the particulars of the claim. If the advance could as a matter of law be fluctuating, or if as a matter of fact it did fluctuate, then it falls within reg. 3.

BARTON A.C.J. It is not my duty to say anything which can be construed as a decision by this Court on the construction of the *Moratorium Regulations*. This is not the time to discuss the correctness of the opinion of the Court below on that question. It is enough, so far as this appeal is concerned, to say that this is a case that ought to be heard. I think that the principle to be applied cannot be better stated than it was by Lord *Halsbury* in *Jones* v. *Stone* (3). Speaking of Order XIV., he said :—"The proceeding established by that order is a peculiar proceeding, intended only to apply to cases where there can be no reasonable doubt that a plaintiff is entitled to judgment, and where, therefore, it is inexpedient to allow a defendant to defend for mere purposes of delay. The present case is not one of that kind." That is what I think of the case now before us. I think that there is an arguably good defence open to the defendants, and, therefore, that they ought to be heard.

The order appealed from should be set aside, and the defendants should have leave to defend, on undertaking to file their defence within seven days. I think also that the costs of the summons should be costs in the cause, and that the costs of this appeal should be the defendants' costs in the cause.

(1) 85 L.T., 262.

(2) (1894) A.C., 122.

(3) (1894) A.C., at p. 124.

ISAACS J. I agree.

RICH J. I agree.

Appeal allowed. Order appealed from set aside. Defendants to have leave to defend on undertaking to file their defence within seven days. Costs of summons to be costs in the cause. Costs of appeal to High Court to be defendants' costs in the cause.

Solicitors for the appellants, *Corr & Corr.*

Solicitors for the respondent, *McLaughlin & Eaves.*

B. L.

[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

O'DONOGHUE.

Criminal Law—Larceny—Commonwealth Officer—"By virtue of his employment"—Offence against laws of Commonwealth—Trial on indictment before State Court—Jurisdiction to reserve question of law for High Court—Crimes Act 1914-1915 (*No.* 12 *of* 1914—*No.* 6 *of* 1915), *sec.* 71—*Judiciary Act* 1903-1915 (*No.* 6 *of* 1903—*No.* 4 *of* 1915), *sec.* 72 (1).

Quære, whether on a trial on indictment for an offence against the laws of the Commonwealth before a Court of a State the Court has jurisdiction under sec. 72 (1) of the *Judiciary Act* 1903-1915 to reserve a question of law for the consideration of a Full Court of the High Court.

Semble, that property does not come into the possession of an officer of the Commonwealth "by virtue of his employment," within the meaning of sec. 71 of the *Crimes Act* 1914-1915, unless he had authority as such officer to receive it.