

23 C.L.R.]

OF AUSTRALIA.

9

ISAACS J. I agree.

H. C. OF A.
1917.

RICH J. I agree.

CLARKE
v.

Appeal allowed. Order appealed from set aside.

UNION BANK
OF AUS-
TRALIA LTD.

*Defendants to have leave to defend on under-
taking to file their defence within seven days.*

Costs of summons to be costs in the cause.

*Costs of appeal to High Court to be defend-
ants' 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" H. C. OF A.
—Offence against laws of Commonwealth—Trial on indictment before State 1917.
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* MELBOURNE,
(No. 6 of 1903—No. 4 of 1915), sec. 72 (1). March 28.

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.

Isaacs,
Gavan Duffy
and Rich JJ.

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.

H. C. OF A. CASE RESERVED.

1917.

THE KING
v.
O'DONOGHUE.

On the trial at Melbourne before *àBeckett* J. of David Flynn O'Donoghue, that learned Judge reserved a case for the opinion of the High Court which was as follows :—

The accused was tried before me on 27th and 28th February on an information containing eight counts, charging that he, being a Commonwealth officer, to wit, a clerk employed in connection with the Naval Forces of the Commonwealth of Australia, did contrary to the *Crimes Act* 1914-1915 fraudulently convert to his own use certain sums of money specified in the different counts.

The section creating the offence charged, sec. 71 of the *Crimes Act* 1914 (No. 12 of 1914), is as follows :—“ Any person who, being a Commonwealth officer, steals, or fraudulently misappropriates or converts to his own use, any property belonging to the Commonwealth or any public authority under the Commonwealth or any property which has come into his possession by virtue of his employment, shall be guilty of an indictable offence. Penalty : Imprisonment for seven years.”

As to some of the sums mentioned in the information the counts charged that they were property belonging to the Commonwealth.

As to others it was charged that they had come into his possession by virtue of his employment. As to the counts relating to the sums alleged to have been property belonging to the Commonwealth the jury returned a verdict of not guilty, as I directed them to do unless they found that these sums were property belonging to the Commonwealth.

The Court is not asked to answer any question in regard to those counts. The case is stated in relation only to the counts charging that the sums converted to his own use had come into his possession by virtue of his employment.

It appeared by the evidence for the prosecution that the accused was appointed as a clerk in the Navy Office of the Commonwealth in August 1911, and had continued to be employed as such. It also appeared that he had no authority to collect or receive money on behalf of the Navy Office or of the Commonwealth. The sums which he had received as stated in the various counts were sums which he received without any authority or sanction from his

employers. He purported to receive them on behalf of the Navy Office. He obtained them from various persons who had dealings with the Navy Office, pretending that they were indebted to or under an obligation to pay the Navy Office the amounts specified.

H. C. OF A.
1917.
THE KING
v.
O'DONOGHUE.

I think it unnecessary to give the details of the various frauds by which the firms and companies from whom money was thus obtained were induced to pay the accused.

Mr. *Cohen* prosecuted on behalf of the Crown. Mr. *Maxwell* and Mr. *Starke* appeared for the accused. At the close of the case for the prosecution it was submitted on behalf of the accused that there was no case to go to the jury inasmuch as some of the different sums obtained by the accused, alleged to have been "property belonging to the Commonwealth," did not belong to the Commonwealth, and that as to the sums charged to have come into his possession "by virtue of his employment" none of them came into his possession by virtue of his employment within the meaning of the section inasmuch as his employment gave him no right or authority to receive any money on behalf of the Commonwealth.

For the prosecution it was contended that the sums alleged to have been the property of the Commonwealth were such property, and that as to the other sums, those stated to have come into his possession by virtue of his employment, it was immaterial that he had no right or authority to obtain them inasmuch as he had in fact obtained them by virtue of his employment within the meaning of the section, which was intended to include any case in which his employment by the Commonwealth had been the means of obtaining, or had enabled him to obtain.

The following authorities were referred to : *R. v. Houston* (1) ; *Greaves's Criminal Law Acts*, pp. 155, 156 ; *R. v. Cullum* (2).

After hearing argument I stated that I should send the case to the jury and, if necessary, reserve a case for the opinion of the Full Court as to the proper construction of the section.

With regard to the counts as to coming into possession by virtue of his employment I charged the jury as follows:—"It is not necessary that you should find that the accused had any right or authority from the Commonwealth to receive. It appears on the

(1) 27 V.L.R., 111 ; 23 A.L.T., 21.

(2) L.R. 2 C.C.R., 28.

H. C. OF A.
1917.

THE KING

v.

O'DONOGHUE.

evidence that he had none. It will be enough if you feel reasonably sure that he was enabled to obtain the money which came into his possession by reason of his being employed as a Commonwealth officer, or that his employment as a Commonwealth officer induced the persons from whom he obtained the money to place the money in his possession."

The jury convicted the accused on these counts (Nos. 3, 5 and 6).

I respited sentence and admitted the accused to bail pending the answer to the following questions, which I reserve for the consideration of a Full Court of the High Court pursuant to sec. 72 of the *Judiciary Act* 1903-1910 :—

- (1) Was the direction above set out right as matter of law ?
- (2) Should the conviction stand on the counts as to which the direction was given ?

H. I. Cohen, for the Crown. The words "by virtue of his employment" in sec. 71 of the *Crimes Act* 1914 mean "by reason or on account of his employment." If the money is paid to the accused because of the fact that he was an officer of the Commonwealth, that is sufficient to bring the case within the section. *Cf.* secs. 70, 73. It is not necessary that it should have been the duty of the accused to receive the money (*R. v. Dodwell* (1)).

Starke, for the accused. The words "by virtue of his employment" mean that it is part of the duty of the officer to receive the money (*R. v. Snowley* (2); *R. v. Cullum* (3)). The phrase has almost acquired a technical meaning.

[Reference was also made during argument to *R. v. Moah* (4); *Re Welch*; *Ex parte Trustees of Star of the West Lodge of Oddfellows* (5); *Greaves's Criminal Law Acts*, 2nd ed., p. 156.]

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

In this case considerable doubt exists, to say the least of it, whether, in view of the amendment of the *Judiciary Act* made by

(1) 1 Q.L.R. (Pt. I.), 84; Qd. Crim. Rep., 105.
(2) 4 C. & P., 390.

(3) L.R. 2 C.C.R., 28.
(4) Dears. C.C., 626, at p. 639.
(5) 70 L.T., 691; 63 L.J.Q.B., 524.

Act No. 4 of 1915, there was any jurisdiction in the learned Judge to state the case which he has stated for the opinion of this Court. There is no power to grant special leave to appeal inasmuch as there has been no judgment, and therefore there has been no conviction in the strict sense (*Burgess v. Boetefeur* (1)). In the peculiar circumstances of the case, on account of the importance of the matter both to the accused and to the public and of the difficulties which would exist in any case in getting a formal judgment, we do not abstain from answering the questions put by the learned Judge. The Crown has intimated through its counsel that it will act upon the opinion of this Court. We will therefore announce our opinion, without in the circumstances of the case setting out our reasons, leaving the judicial exposition of the section for some future occasion, should it arise. The two questions the learned Judge has asked are (1) whether his direction was right as a matter of law and (2) whether the conviction should stand, the word "conviction" being there used in its popular and not in its strict legal sense. In our opinion the answer to both of those questions should be "No."

H. C. OF A.
1917.
THE KING
v.
O'DONOGHUE.

Questions answered accordingly.

Solicitor for the Crown, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

Solicitors for the accused, *W. H. Croker & Croker*.

B. L.

(1) 7 Man. & G., 481, at pp. 504, 505.