[HIGH COURT OF AUSTRALIA.]

KRYGGER . . . . . APPELLANT;
DEFENDANT,

AND

WILLIAMS . . . . . RESPONDENT.
INFORMANT,

ON APPEAL FROM A COURT OF PETTY SESSIONS OF VICTORIA.

H. C. OF A. 1912.

MELBOURNE, *October* 15.

Griffith C.J., and Barton J.

Defence—Compulsory military training—Religious objection to bear arms—Validity of Act—Exemption—Excuse—Defence Act 1903-1910 (*No.* 12 *of* 1904—*No.* 37 *of* 1910), *secs.* 61, 125, 135, 138, 143—*The Constitution* (63 & 64 *Vict. c.* 12), *sec.* 116.

The provisions of the *Defence Act* 1903-1910 imposing obligations on all male inhabitants of the Commonwealth in respect to military training do not prohibit the free exercise of any religion, and, therefore, are not an infringement of sec. 116 of the Constitution.

A person who is forbidden by the doctrines of his religion to bear arms is not thereby exempted or excused from undergoing the military training and rendering the personal service required by Part XII. of the *Defence Act* 1903-1910.

Decision of Court of Petty Sessions of Victoria affirmed.

APPEAL from a Court of Petty Sessions of Victoria.

At the Court of Petty Sessions at Ballarat before a police magistrate an information was heard whereby Alfred Willoughby Williams charged that Edgar Roy Krygger did, during the year of service 1911-1912, without lawful excuse fail to render the personal service required by Part XII. of the *Defence Act* 1903-1911.

At the hearing evidence was given by the informant that the defendant was liable to render military service as a senior cadet and had not attended any drills during the year. The magistrate then asked the defendant what explanation he had to give, and the defendant said: "I decline to render military service because it is opposed to the will of God. I spend all my time reading the Scriptures." The defendant then went into the witness-box and, having made an affirmation, was asked by the magistrate: "What are the grounds of your objections to military training?" The defendant answered: "All my spare time is occupied in reading the Scriptures. It is against my conscience and the Word of God to attend drill." The magistrate asked: "Why is it against the Word of God?" The defendant answered: "The Scriptures tell us 'if thine enemy smite thee on the one cheek turn to him the other also.' We have to do good to those who hate us, and especially we are told in the Bible that in the last days there shall be wars and rumors of wars, but the children of God are not to be troubled by these things. We are told that we are to be in the world but not of the world. Those that take the sword must perish by the sword." The magistrate then said: "Have you any witnesses?" The defendant answered: "No." The magistrate again asked: "Do you affirm that it is your honest belief that it is wrong to serve as a cadet." The defendant answered: "Yes, if I want to obey God." The case was then adjourned, and on the further hearing the defendant, who was then represented by his solicitor, went into the box and gave the following evidence:—"Attendance at drill is against my conscience and the word of God. If thine enemy smite thee on the one cheek turn to him the other is part of my religion. The Lord Jesus Christ has purchased me with His own body. He delivered me and gave me power to become a son of God, and left me a free agent to choose whether to serve Him or not. Anything therefore such as compulsory military training is anti-Christ, and is not following the Lord Jesus. Therefore I can have no part in the matter whatever. I put military training on the same footing as gambling. To me it is as much a sin in the sight of God as gambling, racing, or any other sin; no matter what it might be God makes no allowance for sin. If I went to military training I would be

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prohibited from the free exercise of my religion. My object in life is to follow the Lord Jesus Christ the same as the Apostles did, and when I have been thoroughly taught, to go forth and do the same works as Jesus did—destroy the works of the Devil, not with armies and navies, but with the power of the Word. Military training would cut me off from God. Sixty-four hours drill a year would prohibit the free exercise of my religion."

The magistrate having convicted the defendant ordered him to be committed to confinement in the custody of a sergeant-major for the period of 64 hours, being the time of personal service not rendered. From this decision the defendant now appealed to the High Court, by way of an order *nisi* to review, on the following grounds:—

1. That the provisions of the *Defence Act* 1903-1911, under which the defendant was convicted, are unconstitutional, *ultra vires*, and contrary to the provisions of sec. 116 of the Constitution.

2. That the provisions of the *Defence Act*, if valid and constitutional, should be read as limited by the provisions of sec. 116, and the evidence showed that the defendant was not guilty of any offence against the provisions of the Act when so limited.

3. That the fact that military training is unlawful according to the religious convictions of the defendant is a lawful excuse within the meaning of sec. 135 of the *Defence Act*.

Mitchell K.C. (with him *à Beckett*), for the appellant. The words "without lawful excuse" in sec. 135 refer to some excuse other than an exemption under the provisions of the Act, and a conscientious objection to bear arms based on religious grounds is a lawful excuse. Under sec. 143 (3) the appellant's only obligation is to be trained in non-combatant duties, and the evidence shows that he was required to attend to be trained in combatant duties. [He also referred to secs. 61, 138, 142.] The Act, so far as it compels persons to undergo military training is an infringement of sec. 116 of the Constitution, in that it prohibits the free exercise of religion. The word "religion" in that section is not limited to the performance of religious rites, but includes the

acting in a manner which is dictated by religion. To compel a person, an essential part of whose religion is to abstain from taking part in anything connected with warfare, to undergo military training is, therefore, to prohibit him the free exercise of his religion. See *Davis* v. *Beason* (1).

McArthur K.C. (with him *Arthur*), for the respondent. That a person is forbidden by the doctrines of his religion is not a lawful excuse within the meaning of sec. 135. This is made clear because of the manner in which the subject of religious objections is dealt with in the Act. None of the provisions of the Act complained of prohibit the free exercise of any religion, though they may compel a man to do that which he has religious objections to do. [He referred to *Mormon Church* v. *United States* (2).]

GRIFFITH C.J. We heard Mr. *McArthur* not because we had any doubt about the matter, but because the appellant seems to treat the matter as a more serious one than I am disposed to do. I will deal first with the suggested constitutional objection. Sec. 116 of the Constitution provides that "the Commonwealth shall not make any law for . . . prohibiting the free exercise of any religion"—that is, prohibiting the practice of religion—the doing of acts which are done in the practise of religion. To require a man to do a thing which has nothing at all to do with religion is not prohibiting him from a free exercise of religion. It may be that a law requiring a man to do an act which his religion forbids would be objectionable on moral grounds, but it does not come within the prohibition of sec. 116, and the justification for a refusal to obey a law of that kind must be found elsewhere. The constitutional objection entirely fails.

It is then said that under the Act itself the appellant has a lawful excuse for refusing to be trained. Sec. 135, under which he was charged, provides that "every person who in any year, without lawful excuse, evades or fails to render the personal service required by this Part shall be guilty of an offence." Sec. 125 provides that "all male inhabitants of Australia (excepting those who are exempted by this Act), who have resided

(1) 133 U.S., 333, at p. 342. (2) 136 U.S., 1, at p. 49.

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therein for six months, and are British subjects, shall be liable to be trained as prescribed." The only exemption that has been suggested as applying to this case is that contained in sec. 143 (3) which provides that "all persons liable to be trained under paragraphs (*b*), (*c*) and (*d*)" (which include the appellant) "of sec. 125 of this Act who are forbidden by the doctrines of their religion to bear arms shall so far as possible be allotted to non-combatant duties." As that section appears in Part XIV., which relates to registration and enrolment for naval and military training, probably it means that the training which such persons are to receive shall so far as possible be in non-combatant duties. But they must attend to be trained.

Careful provision has been made by the legislature for the case of those who really have conscientious objections to war. Sec. 61, which relates to exemption from service in time of war, exempts, amongst others, "persons who satisfy the prescribed authority that their conscientious beliefs do not allow them to bear arms," but that exemption does not extend to duties of a non-combatant nature. No one can doubt that the defence of his country is almost, if not quite, the first duty of a citizen, and there is no room for doubt that the legislature has power to enact laws to provide for making citizens competent for that duty. Without training an army is inefficient, to say the least, and everybody knows that in warfare not all the duties are of a combatant nature. I will only take as an illustration the ambulance corps, the duty of which is not to take life but to save it. The legislature, therefore, may enact that the training shall be, not only in combatant, but also in non-combatant duties, and persons must go to be trained accordingly. When they are asked to do anything which the law does not allow, it will be time enough to take objection.

The real objection taken by the appellant is not to being trained so as to become efficient for taking life, but to being trained so that in time of war he may be competent to assist in saving life, and that is called a conscientious objection. For my own part, I do not think that such an objection is any excuse for a refusal to obey a positive law. All our laws, I think, where there is any ground for thinking that real conscientious objection

may exist, make careful provision for the protection of people's consciences, as does this Act. But to base a refusal to be trained in non-combatant duties upon conscientious grounds is absurd. I am therefore of opinion that the appeal fails.

BARTON J. The charge is laid under sec. 135, for failure to render personal service, without lawful excuse. The first provision to which I wish to refer is sec. 125, which makes all male inhabitants of Australia, except those who are exempted under the Act, liable to be trained; and the appellant is within clause (*b*) of that section; being between the ages of 14 and 18 years. Being clearly included, is he exempted by any other provision? The exemptions are stated in sec. 61, which applies only in time of war. Paragraph (*i*) of that section relieves "persons who satisfy the prescribed authority that their conscientious beliefs do not allow them to bear arms." Clearly, then, the appellant, if he satisfies the prescribed authority of that fact, will be exempt from service in time of war, but it does not follow that he is exempted from being trained, because the Act draws a distinction between service in time of war and training in time of peace. Sec. 138 exempts certain persons from training in time of peace "so long as the employment, condition, or status on which the exemption is based is still continuing." The only portion of that section which gives exemption from training to any person on the ground of a religious objection, if it comes within the class of religious objections, is sub-sec. (3), which provides that "persons who are students at a Theological College as defined by the Regulations or theological students as prescribed, may, while they remain such students, on application be exempted by any prescribed authority from the prescribed training, but shall on ceasing to be such students undergo such equivalent training as prescribed, unless exempted by some provision of this Act. That is a conditional exemption, that is to say, a person has to apply to a competent authority for exemption which the authority may then grant him, and as soon as he ceases to be a student he must undergo the prescribed training unless he is otherwise exempt. Clearly, then, the appellant, who does not profess to be a theological student, is not exempt in time of peace, although, if he

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complies with paragraph (*i*) of sec. 61, he may gain exemption in time of war—that is, exemption from such service as a combatant must render.

We come then to sec. 143 (3) which provides that all persons liable to be trained under paragraphs (*b*), (*c*) and (*d*) of sec. 125 who are forbidden by the doctrines of their religion to bear arms shall so far as possible be allotted to non-combatant duties. Assuming that the appellant, who is within paragraph (*b*) of that section, is forbidden by the doctrines of his religion to bear arms, the position is this, that it is incumbent upon the authorities as far as possible to allot him to non-combatant duties. Assuming again that the allotment of non-combatant duties is intended to apply to time of peace, the appellant's right is that he be allotted if possible to some such branch of the service as the Army Service Corps or the Army Medical Corps. The subsection does not imply that he is exempt from training altogether, merely because he is a person who is forbidden by the doctrines of his religion to bear arms. He has a right to be allotted to non-combatant duties as far as possible, but that is not a right to refuse to be trained at all.

As Mr. *McArthur* pointed out, whether a person is to be a combatant or is to be allotted to non-combatant duties, it is still necessary for him to undergo training. Training is just as necessary for saving as for taking life. An undisciplined ambulance or commissariat service would be of little use for its purpose. There cannot be an efficient service for provisioning the troops or tending the wounded unless training is undergone and discipline thereby attained. In any case, therefore, notwithstanding the provisions about the doctrines of his religion, the appellant is liable to be trained, at least in non-combatant duties. But he has refused to undergo any training whatever, and has virtually set the Act at defiance. It is plain that he is not in a position to take up that stand. If he does, he must suffer the penalty prescribed. So much for the first ground.

As to the constitutional objection, the *Defence Act* is not a law prohibiting the free exercise of the appellant's religion, nor is there any attempt to show anything so absurd as that the appellant could not exercise his religion freely if he did the

necessary drill. I think this objection is as thin as anything of the kind that has come before us.

In my opinion, both of the objections fail, and the appeal must be dismissed.

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Appeal dismissed.

Solicitor, for the appellant, *E. E. Dillon.*

Solicitor, for the respondent, *C. Powers*, Crown Solicitor for the Commonwealth.

B. L.

[HIGH COURT OF AUSTRALIA.]

COCK AND OTHERS . . . . . APPELLANTS; DEFENDANTS,

AND

AITKEN AND ANOTHER . . . . RESPONDENTS. PLAINTIFFS,

Trustee—Life tenant and remainderman—Corpus and income—Costs paid by trustee under order of High Court—Decision of High Court reversed on appeal by one party to Privy Council—Effect on rights of parties not appealing—Indemnity of trustees—Rights of assignee of life tenant.

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MELBOURNE, *Oct.* 11, 14, 21, 22.

Griffith C.J., Barton and Isaacs JJ.

An action was brought in the Supreme Court by a life tenant under the will of A. against the trustees of A.'s estate and the trustees of B.'s estate, claiming against the latter trustees in respect of breaches of trust whereby the income of A.'s estate was diminished, and against the former trustees the determination of the respective rights of himself and the remaindermen. Th Court having dismissed the action with costs, the High Court on appeal gave relief against both sets of trustees and directed the costs of the plaintiff and the remaindermen to be provided for out of the corpus of A.'s estate.