

[HIGH COURT OF AUSTRALIA.]

SKITCH APPELLANT ;
DEFENDANT,
AND
PRATT RESPONDENT.
COMPLAINANT,

ON APPEAL FROM A COURT OF SUMMARY JURISDICTION
OF SOUTH AUSTRALIA.

Defence—Enlistment for military service—Form of oath—Filling in prescribed form—
Appropriate words—Defence Act 1903-1939 (No. 20 of 1903—No. 74 of 1939),
secs. 39 (1) (b), 60, 76, Third Schedule—Australian Military Regulations (S.R.*
1927 No. 149), regs. 3, 140A, 140B.
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To a person who was liable compulsorily to serve in the citizen forces under Part IV. of the *Defence Act* 1903-1939 there was tendered the form of oath set out in the Third Schedule to the Act, except that in the form tendered the forces therein mentioned were described as “military” forces and the words “for the term of years” were altered to “until the cessation of the present time of war.” On the person refusing to take the oath as tendered, he was charged under sec. 76 of the Act for refusing to do so and convicted.

Held that the form tendered was not objectionable, although it was not in precisely the same form as in the Third Schedule, and although it did not limit the obligation of the person to whom it was tendered to serve only within the Commonwealth of Australia; accordingly, the person had no grounds for refusing to take the oath and was rightfully convicted.

APPEAL from a Court of Summary Jurisdiction of South Australia.
Ralph Leslie Skitch was called up to serve in the citizen forces of the Commonwealth of Australia pursuant to a proclamation

* The form of oath set out in the Third Schedule to the *Defence Act* 1903-1939 is as follows :—“I swear that I will well and truly serve our Sovereign Lord the King in the Forces of the Commonwealth of Australia for the term of years or until sooner lawfully discharged dismissed or removed and that I will resist His Majesty’s enemies and cause His Majesty’s peace to be kept and maintained and that I will in all matters appertaining to my service faithfully discharge my duty according to law. So help me God !”

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under sec. 60 of the *Defence Act* 1903-1939. Osmond Philip Pratt, an area officer for the locality in which Skitch was called up for service, on 8th January 1940 tendered to Skitch the following form of oath :—" Oath of Enlistment—I Ralph Leslie Skitch swear that I will well and truly serve our Sovereign Lord the King in the *military* forces of the Commonwealth of Australia *until the cessation of the present time of war* or until sooner lawfully discharged dismissed or removed and that I will resist His Majesty's enemies and cause His Majesty's peace to be kept and maintained and that I will in all matters appertaining to my service faithfully discharge my duty according to law. So help me God!"* Skitch refused to take this oath, and he was thereupon charged by Pratt at a court of summary jurisdiction at Adelaide that "being a person liable to enlist for service in the defence force did refuse to take the oath set out in the Third Schedule to the *Defence Act* 1903-1939 when tendered . . . by an officer of the military forces pursuant to the provisions of sec. 76 of the said Act." On 17th September 1940 Skitch was convicted and sentenced to be imprisoned for six weeks.

He appealed to the High Court.

Alderman, for the appellant. The oath tendered was not in the form set out in the Third Schedule to the *Defence Act* 1903-1939. There was no need for the appellant to take the oath at all, because service in the Citizen Forces does not depend on the oath. [He referred to secs. 37 and 38 of the *Defence Act* 1903-1939.] If it were part of the enlistment, then it should have been prescribed by the regulations. The appellant was a member, not of the military forces, but of the citizen forces (Part IV., *Defence Act* 1903-1939). [He referred to sec. 78 of the *Defence Act* 1903-1939.] Sec. 76 of the Act does not apply to the appellant. The appellant has enlisted, although in the information he is charged with failing to enlist. He has done everything save take the oath; he did not refuse to serve but did refuse to take the oath. The Third Schedule was intended to apply to voluntary enlistment (sec. 37 of the Act). An oath should be prescribed for Part IV., but, as none has been prescribed, then a recruit under Part IV. is not bound to take any oath. In any case it should have limited his service to Australia (sec. 49). The insertion of the words in the form in the Third Schedule was also wrongful. The appellant was to be a member of the citizen forces; therefore it was improper to describe the force as the

* Compare form of oath in Third Schedule, *supra*. The words in the form of oath tendered which do not appear in the schedule are italicized.

"military forces" (sec. 30 of the Act). Furthermore, the oath contemplated a term of years which would be applicable to either permanent military or volunteer forces.

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T. W. Smith, for the respondent.

[RICH J. Will you confine your address to the question whether an offence was committed?]

The appellant answered the description set out in sec. 76 of the *Defence Act* 1903-1939, as he was a member of the defence force (sec. 30), and the vital question therefore, was as to the form of the oath. It was in the proper form, as the appellant's obligation to serve arose under sec. 60 of the *Defence Act* 1903-1939, and the question as to what is prescribed under sec. 60 is decided by regs. 140A and 140B of the Australian Military Regulations. He has to serve in the military citizen forces. The construction of sec. 47 of the *Defence Act* determines the period of service. It would be absurd to think that the legislature did not require that men enlisted under Part IV. should take an oath whereas volunteers enlisted under Part XII. in the citizen forces should take an oath (sec. 132A (2)). Sec. 39 (1) (b) of the *Defence Act* 1903-1939 determines when a soldier in the citizen forces under Part IV. shall be discharged.

Alderman, in reply.

The following judgments were delivered:—

RICH J. In this case the defendant was charged under sec. 76 of the *Defence Act* 1903-1939 that being a person liable to enlist for service in the defence force he did refuse to take the oath set out in the Third Schedule to the said Act when tendered to him by an officer.

It is conceded that the defendant was a person who fell within the description contained in the section, he being in fact a person who had been called upon by proclamation under sec. 60 of the Act to serve in the citizen forces. It is also conceded that a form of oath was tendered to the defendant by an officer and that he refused to take it.

The principal question raised is whether the oath which was tendered was in the form set out in the Third Schedule, and two objections were taken to the form tendered. The first objection was that the insertion of the word "military" in the blank space appearing in the schedule immediately before the words "Forces of the Commonwealth" was improper. In my opinion the word "military" was the correct word to insert in this space. The

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defendant's obligation as stated in sec. 60 of the Act was "to enlist and serve as prescribed." What was prescribed appears in reg. 140A of the Australian Military Regulations, which states that every person called upon in pursuance of sec. 60 of the Act to enlist and serve in the citizen forces shall after enlistment, if so required by notice, serve within the Commonwealth during the time of war as a member of the citizen forces. The meaning of the expression "citizen forces" in this clause is defined by reg. 3 of the Australian Military Regulations (Statutory Rules of 1927, No. 149) as being citizen military forces. I think that it is sufficient if there is inserted in the blank space in question the name of that one of the three branches of the defence force in which the person taking the oath is to serve and that it is not necessary to indicate in the form of oath whether he is a member of the permanent forces or the citizen forces. I think, therefore, that the word "military" was the correct word to insert in the blank spaces in question.

The second objection was that in the form of oath tendered to the defendant the words "until the cessation of the present time of war" were inserted in place of the words "for the term of years" which appear in the schedule. The schedule contemplates that the person tendering the oath shall insert in it a correct statement of the period for which the person taking the oath is to serve, and in the defendant's case that period is fixed by sec. 39 (1) (b) of the Act, which provides that subject to that section a soldier shall be entitled to be discharged, if serving under Part IV. of the Act, when the time of war has ceased to exist. Although the form in the schedule contemplates that the period of service will be capable of being expressed as a term of years, I do not think that the provisions of sec. 76 should be held to be inapplicable to a person like the defendant whose period of service cannot be so expressed. The description in the section of the persons to whom it applies is quite general and in terms includes persons called up under sec. 60, and it is difficult to see what reason could exist for distinguishing, when imposing an obligation to take the oath, between persons called up under sec. 60 and other persons who have enlisted or are liable to enlist.

I think, therefore, that the person tendering the oath is authorized, in the case of persons called up under sec. 60, to insert in the form of oath the period of their service as defined by sec. 39 (1) (b). The second objection therefore fails.

A further objection taken is that the form of oath should have included words limiting the obligation of the defendant to serving within the Commonwealth: See reg. 140A of the Australian

Military Regulations. In my opinion, however, this matter is sufficiently provided for by sec. 49 of the Act itself, and it is not necessary to include in the form of oath the words suggested.

The conviction should therefore be affirmed, but on the question of penalty I am of opinion that in the circumstances the sentence of imprisonment should be set aside and that instead the defendant should be fined the sum of £1. The defendant will be ordered to pay to the respondent the sum of ten guineas for the respondent's costs of this appeal.

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STARKE J. I agree.

McTIERNAN J. I agree with the order proposed by *Rich J.* However, I think that there is room for grave doubt as to whether the form of oath tendered was appropriate to the defendant's case. The difficulty has arisen from the failure of the authorities to include in the regulations under Part IV. a form of oath to be administered to persons called up for service under that Part.

Order as indicated in judgment of Rich J.

Solicitors for the appellant, *Alderman, Reid & Brazel.*

Solicitor for the respondent, *H. F. E. Whitlam*, Commonwealth Crown Solicitor.

O. J. G.