

[HIGH COURT OF AUSTRALIA.]

CROSS PLAINTIFF ;

AGAINST

THE COMMONWEALTH DEFENDANT.

Defence—Military Forces—Officer—Cancellation of commission—Action against Commonwealth—Right to show cause against cancellation—Mandatory or directory provision—Sufficiency of notice—Defence Act 1903-1918 (No. 20 of 1903—No. 47 of 1918), sec. 16.

H. C. OF A.
1921.

—
SYDNEY,
Mar. 22, 30.

—
Knox C.J.

Sec. 16 of the *Defence Act* 1903-1918 provides that "Officers shall hold their appointments during the pleasure of the Governor-General, but the commission of an officer shall not be cancelled without the holder thereof being notified in writing of any complaint or charge made and of any action proposed to be taken against him, nor without his being called upon to show cause in relation thereto."

Held, that it is a sufficient compliance with the provision in that section that the officer shall be called on to show cause if the officer is in the first instance afforded an opportunity of stating in writing or verbally any reason why his commission should not be cancelled.

Held, also, that the provisions of that section which are introduced by the word "but" are directory only, and do not constitute conditions precedent to the exercise by the Governor-General of the right to cancel a commission.

A Court of Inquiry under the *Defence Act* having been held to inquire into an accusation against the plaintiff, an officer of the Commonwealth Military Forces, a letter was written to and received by the plaintiff informing him that the Court of Inquiry had found the offence charged to have been proved, and that the Adjutant-General had issued instructions that he, the plaintiff, was to be called upon to show cause under sec. 16 of the *Defence Act* why his commission should not be cancelled. The letter went on to clearly define the offence charged, and stated that the matter was to be treated as urgent.

Held, that the letter was a sufficient compliance with the provision in sec. 16 of the Act that the officer should be called upon to show cause in relation to the charge.

H. C. OF A. HEARING of points of law.

1921.

CROSS

v.

THE COMMONWEALTH.

An action was brought by Algernon Reginald Pegus Cross against the Commonwealth, the pleadings in which are sufficiently stated in the judgment hereunder.

An application was now made to dispose of the points of law raised in pars. 7 and 8 of the defence, and was heard by *Knox* C.J. The matter was argued as a demurrer to the whole statement of claim.

Evatt, for the plaintiff.

E. M. Mitchell and *Bowie Wilson*, for the defendant.

[During argument reference was made to *Shenton v. Smith* (1); *Ryder v. Foley* (2); *Gould v. Stuart* (3); *Davis v. Spence* (4); *Mason v. Bolton's Library* (5); *Williamson v. The Commonwealth* (6); *Sydney Corporation v. Harris* (7); *Vestry of St. James, Clerkenwell, v. Feary* (8); *Defence Act 1903-1918*, secs. 13, 16, 44, 109.]

Cur. adv. vult.

Mar. 30.

KNOX C.J. read the following judgment:—This was an application to dispose of the points of law raised in pars. 7 and 8 of the statement of defence in this action. By his statement of claim the plaintiff claims (par. 12) a declaration that his commission in the Commonwealth Military Forces was not validly cancelled, and an order for payment of salary on that footing, or alternatively damages for breach by the servants or agents of the Commonwealth of statutory duties towards him imposed by sec. 16 of the *Defence Act 1903-1918*. He alleges that in December 1918 he was an officer of the Commonwealth Military Forces holding the rank of major, and that in that month a Court of Inquiry was held at Sydney to inquire into an accusation that the plaintiff had written a certain article and attempted to have it published in a newspaper. The statement of claim then proceeds:—

(1) (1895) A.C., 229.

(2) 4 C.L.R., 422, at p. 433.

(3) (1896) A.C., 575.

(4) 1 C.P.D., 719, at p. 721.

(5) (1913) 1 K.B., 83, at p. 90.

(6) 5 C.L.R., 174, at p. 180.

(7) 14 C.L.R., 1.

(8) 24 Q.B.D., 703, at p. 709.

4. On 28th January 1919 a letter was forwarded to the plaintiff from the Assistant Adjutant-General for New South Wales and was received by the plaintiff on the following day. Such letter was in the following terms:—"The Court of Inquiry recently held to inquire whether you had written a certain article, produced to the Court, have found that the said manuscript article was written by you although you on oath denied that you had written that article. In view of the above, the Adjutant-General has issued instructions that you are to be called upon to show cause under sec. 16 of the *Defence Act* why your commission should not be cancelled. The Adjutant-General has written as follows:—"The Court found that the manuscript article was written by Major Cross although he denied on oath that he was the author of the article in question. The writing of such an abusive and insulting letter which is absolutely subversive to all discipline is a most serious offence, and the offence has been increased by the fact that Major Cross published it by handing it to a non-commissioned officer from whose custody it was eventually produced." The matter is to be treated as urgent."

H. C. OF A.
1921.
~
CROSS
v.
THE COM-
MONWEALTH.
Knox C.J.

5. On 1st February 1919 a report was sent by the plaintiff to the Officer Commanding the Royal Australian Garrison Artillery at the request of such Officer Commanding for a reply.

Such report was in the following terms:—" (1) With reference to correspondence Secret No. 33/1/2 in which I have been called upon to show cause why my commission as an officer should not be cancelled because the Court of Inquiry recently held have found that a certain manuscript article had been written by me, I beg to submit that this finding has been recorded on the mere opinion of handwriting experts alone, and I again deny that I wrote the article in question. (2) It is also submitted that the only evidence of the alleged publication is the unsupported word of Acting Bombardier Wedd, who not only has evidenced malice towards me, but it is contended is, on his own admissions, unworthy of any credit. (3) I can only reiterate my previous denial on oath, and it is most respectfully submitted that the character of the evidence before the Court of Inquiry is not such as to require me to show cause why my commission should not be cancelled; in the unfortunate event

H. C. OF A. however of the authorities holding a contrary opinion I would
 1921. respectfully ask for the decision of a Court-Martial on this matter.”
 ~~~~~  
 CROSS 6. On 24th March 1919 a letter was sent to the Officer Command-  
 v. ing R.A.G.A. by the Assistant Adjutant-General for New South  
 THE COM- Wales. The plaintiff was informed of such letter, which was in the  
 MONWEALTH. following terms :—“ With further reference to my 33/1/2 of 28th  
 KNOX C.J. January 1919 I am directed to inform you that the Minister has  
 decided on the recommendation of the Military Board to cancel  
 Major A. R. P. Cross’ commission as from 31st March 1919, and that  
 an Order in Council to give effect to the above is now being prepared.  
 Will you please inform this officer accordingly.”

On 17th April 1919 an Executive Order made by the Governor-General in Council purporting to cancel the plaintiff’s commission was published in the *Commonwealth Government Gazette*.

Pars. 7 and 8 of the statement of defence are as follows :—

7. The defendant submits as a matter of law that an officer in the Commonwealth Military Forces is not entitled to sue the Commonwealth for arrears of salary whilst he is such officer, and that the facts and matters disclosed in the statement of claim do not give the plaintiff any right in law to the relief claimed in par. 12 (a), (b), (c) and (d) of the statement of claim.

8. The defendant further submits as a matter of law that the plaintiff held office at the pleasure of the Governor-General and that, as the statement of claim discloses that before his commission was cancelled he was notified in writing of the complaint or charge made against him and of the action proposed to be taken against him and was called upon to show and did show cause in relation thereto, and that at all material times the plaintiff was on war service within the meaning of the *Defence Act* 1903-1918, the plaintiff is not entitled to the relief claimed alternatively in par. 12 (a), (b) and (c) of the statement of claim.

Having regard to the provisions of sec. 13 of the Act, the claim for salary cannot be maintained, and Mr. *Evatt* did not seriously press it, but he contended that the plaintiff was entitled to the declaration claimed or, under the alternative claim, to such damages as he might be found to have sustained.

The plaintiff in order to succeed in this action must establish : (1)



that he was not called on to show cause against the proposed cancellation of his commission within the meaning of sec. 16, and (2) that he has a right of action for damages in respect of such omission. Failure to establish either proposition is fatal to the plaintiff's claim. The defendant contends that the letter of 28th January 1919 set out in par. 4 of the statement of claim was a sufficient compliance with the provisions of sec. 16, and that in any event the provisions of that section as to giving notice are merely directory, and that a failure to observe them does not invalidate the cancellation and gives rise to no cause of action. In my opinion both points must be decided in favour of the defendant. The letter of 28th January 1919, after stating that the Adjutant-General had issued instructions that Major Cross was to be called on to show cause under sec. 16 why his commission should not be cancelled, quotes an extract from the Adjutant-General's letter which clearly defines the offence charged to be "the writing of such an abusive and insulting letter which is absolutely subversive to all discipline," and states that the offence has been increased by the fact that Major Cross published the letter by handing it to a non-commissioned officer. The letter concludes with an intimation that "the matter is to be treated as urgent." I am satisfied that this letter should be regarded by the recipient of it as calling on him to give any explanation of the conduct alleged against him which he might be able to give, or to assign any reason why his commission should not be cancelled in consequence of such conduct; and in my opinion nothing more is necessary to comply with the provision requiring an officer to be "called upon to show cause." That plaintiff regarded this letter as calling on him to show cause against the cancellation of his commission is clear from his reply of 1st February 1919; and the request for a Court-Martial contained in par. 3 of this letter appears to me to be consistent with the fact that the plaintiff so regarded it. Mr. *Evatt* argued that the notice to show cause should in effect call on the plaintiff to appear or offer him a right of audience before some tribunal in order to state his case, but I see nothing in the section requiring this to be done. It is, in my opinion, sufficient if the officer concerned is in the first instance afforded an opportunity

H. C. OF A.  
1921.  
CROSS  
v.  
THE COM-  
MONWEALTH.  
Knox C.J.

H. C. OF A.  
1921.  
CROSS  
v.  
THE COM-  
MONWEALTH.  
Knox C.J.

of stating either in writing or verbally any reason why his commission should not be cancelled. The plaintiff availed himself of the opportunity given him, by stating as reasons against the proposed cancellation of his commission (1) that the finding of the Court of Inquiry was based on the opinion of experts only, (2) that he still denied the writing of the letter, (3) that the evidence of publication was unworthy of credit. The fact that he then asked for a Court-Martial, to which it is now admitted he was not entitled, in no way affects the question whether the notice given to him was sufficient, and in my opinion there was in this case a substantial compliance with the provisions of sec. 16 of the Act. This is enough to dispose of the case, and with regard to the second point I need say no more than that in my opinion the provisions in sec. 16 which are introduced by the word "but" are directory only, and do not constitute conditions precedent to the exercise by the Governor-General of the right of cancellation of a commission. Having regard to the words which precede these provisions, there is no ground for the contention that an action for damages for wrongful dismissal will lie against the Commonwealth by an officer whose commission has been cancelled, even though the provisions in question have not been observed. In principle this question is covered by the decisions in *Shenton v. Smith* (1) and *Ryder v. Foley* (2).

The matter having been argued on the footing of a demurrer to the whole of the statement of claim, I dismiss the action, and order that judgment be entered for the defendant with costs, including the costs of this application.

*Action dismissed with costs.*

Solicitors for the plaintiff, *Minter, Simpson & Co.*

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

B. L.

(1) (1895) A.C., 229.

(2) 4 C.L.R., 422.