GAVAN DUFFY J. I agree with the Chief Justice in thinking that the appeal should be dismissed without costs.

Appeal dismissed.

Solicitors for the appellant, *Varley, Evan & Thomson.*

Solicitor for the respondent, *A. J. Hannan*, Crown Solicitor for South Australia.

B.L.

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COMMONWEALTH AGRICULTURAL SERVICE ENGINEERS LTD. (IN LIQUIDATION) *v.* COMMISSIONER OF TAXES (S.A.).

[HIGH COURT OF AUSTRALIA.]

WELLS . . . . . APPELLANT;
INFORMANT,

AND

THE ENGLISH ELECTRIC COMPANY OF AUSTRALIA LTD. . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM A COURT OF QUARTER SESSIONS OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 13.

MELBOURNE, *Oct.* 18.

Knox C.J., Isaacs, Higgins, Gavan Duffy, Rich and Starke JJ.

Defence — Compulsory training — Penalizing employee for absence — Master and apprentice — Adding days of absence to period of service — Defence Act 1903-1918 (*No.* 20 *of* 1903—*No.* 47 *of* 1918), *secs.* 125, 127, 134, 135.

By an indenture of apprenticeship an apprentice bound himself apprentice to the respondent to learn a certain trade for a period of five years and for so many additional days as was therein provided for such term, and the respondent bound itself duly to teach and instruct the apprentice in the trade and to endeavour to make him skilled and expert therein. The apprentice agreed that he would not absent himself without proper consent, and that for every day's absence during the term without such consent he would serve one day at the end of each year of the apprenticeship, and that such year should not be considered complete until the additional day or days had been served. In one of the years of the term the apprentice attended a compulsory camp of instruction pursuant to secs. 125, 127 and 135 of the *Defence Act* 1903-1918

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and was thus absent from his employment for eight days. The respondent did not in fact give any consent to this absence, and required the apprentice to make up the time so lost before proceeding to the next year of his apprenticeship, which carried higher pay.

Held, by *Knox* C.J., *Gavan Duffy* and *Starke* JJ. (*Isaacs*, *Higgins* and *Rich* JJ. dissenting), that it was not established by the facts that the respondent had "penalized" the apprentice, within the meaning of sec. 134 of the *Defence Act* 1903-1918, since it was doubtful whether those acting for the respondent exercised any discretion, or whether they merely did what they considered they were bound to do under the indenture, and also whether any disadvantage was sustained by the apprentice by reason of the act of the respondent.

APPEAL from a Court of Quarter Sessions of New South Wales.

At the Central Police Court, Sydney, before a Stipendiary Magistrate, an information was heard whereby Frank Elwyn Wells charged that in or about the month of April 1925 the English Electric Co. of Australia Ltd., the employer of Neville Alec Palmer, did penalize in his employment the said Neville Alec Palmer, its apprentice under indenture of apprenticeship dated 5th April 1921, for attending camps of instruction appointed to be held by the Head-Quarters of the Second Military District at Liverpool during the months of March 1924 and March 1925, inasmuch as the Company treated Palmer as if every day's attendance by him at such camps was a day's absence during the term of his apprenticeship from attention to the trade, art, business or occupation described in the indenture of apprenticeship without proper consent.

By the indenture Palmer bound himself apprentice "for the space of five years and for so many additional days as is hereinafter provided for such term to be computed from 5th January 1921." He further agreed "that he will at no time absent himself" from the business "without proper consent, . . . and that for every day's absence during the said term from attention to the said trade, art, business or occupation without such consent he shall serve one day at the end of each year of his apprenticeship, and such year shall not be considered complete until the said additional day or days shall have been served." The Company agreed that it would duly teach and instruct Palmer, or cause him to be taught and instructed, in the trade of fitting and turning and would endeavour to make him skilled and expert therein, and also agreed that it would make

payments to Palmer of wages at certain weekly rates, which were increased for each year of service, or such other rates as might from time to time be fixed by the award of any wages board or industrial board or other tribunal having jurisdiction so to do. The minimum weekly rates of wages payable by the Company to its apprentices were, by an award of the Commonwealth Court of Conciliation and Arbitration dated 22nd December 1924, fixed at higher sums than those agreed to be paid by the Company, so that the rate payable for the fourth year of service was £2 15s. per week and for the fifth year £3 10s. Palmer attended compulsory camps of instruction pursuant to the *Defence Act* 1903-1918 for six days in March 1924 and for eight days in March 1925. The Company treated the first absence of six days as extending the third year of the apprenticeship for six days, and the second absence of eight days as extending the fourth year of the apprenticeship for eight days. After hearing evidence the Magistrate convicted the Company and fined it £10. An appeal by the Company to the Court of Quarter Sessions at Sydney was upheld, and the conviction was quashed.

From that decision the informant now, by special leave, appealed to the High Court.

Other material facts are stated in the judgments hereunder.

Brissenden K.C. (with him *Badham*), for the appellant. To compel an apprentice to serve extra time in respect of days of military training is a penalizing within the meaning of sec. 134 (1) of the *Defence Act* 1903-1918. The indenture of apprenticeship is in the form prescribed by the Schedule to the *Apprentices Act* 1901 (N.S.W.), and by sec. 18 of that Act it is provided that if there is an absence of more than one week the time may be added to the term of the indenture. That is a penalty, and is the only penalty that can be provided in respect of any indenture of apprenticeship. When the indenture was entered into, it must have been contemplated by the parties that the apprentice must under the *Defence Act* be absent from his work for a certain number of days in each year and that those days must necessarily be deducted from the time the apprentice had to serve (see sec. 127). The provision in the indenture for the

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consent of the respondent to the absence of the apprentice does not apply to absence by compulsion of law, but only to absence to which the respondent could or could not consent (*Angelini* v. *Buzacott & Co.* (1)).

Windeyer K.C. (with him *Cassidy*), for the respondent. The Court of Quarter Sessions must have found that no penalty had been imposed and that there had been an absence without proper consent. The respondent did not impose a penalty, but merely enforced what, in its view, was the meaning of the indenture. Service of the full period of apprenticeship is not a matter of prejudice. The apprentice might, as of right, insist on serving the additional days. The word " penalize " connotes an attempt to do what one is not entitled to do. The onus was on the informant to show that Palmer was penalized, and, as the case stands, there is no evidence that what was done was more to the disadvantage of Palmer than to his advantage. Sec. 134 of the *Defence Act* does not apply to the case of apprenticeship, for an apprentice is not an employee within the meaning of the section. That is shown by the use of the words " dismissing him from his employment." [Counsel also referred to *Black* v. *Standard Waygood Hercules Ltd.* (2); *Baxter* v. *New South Wales Clickers' Association* (3).]

Brissenden K.C., in reply, referred to *Boast* v. *Firth* (4).

Cur. adv. vult.

Oct. 18. The following written judgments were delivered :—

KNOX C.J., GAVAN DUFFY AND STARKE JJ. The defendant was charged under sec. 134 of the *Defence Act* 1903-1918 for that it penalized in his employment an apprentice, Palmer, for attending camps of instruction. Palmer had, under an indenture of apprenticeship, bound himself apprentice to the defendant to learn the trade of fitting and turning for a period of five years and for so many additional days as was thereinafter provided for such term, and

(1) (1921) 38 N.S.W.W.N. 46.
(2) (1919) 18 N.S.W.A.R. 92.
(3) (1909) 10 C.L.R. 114, at p. 142.
(4) (1868) L.R. 4 C.P. 1.

the defendant bound itself duly to teach and instruct the apprentice in the trade and to endeavour to make him skilled and expert therein.

One of the terms of the indenture was that the apprentice should at no time absent himself without proper consent, and for every day's absence during the term without such consent he should serve one day at the end of each year of his apprenticeship, and such year should not be considered complete until the additional day or days had been served.

In March 1925 Palmer was called up for training as a cadet pursuant to the *Defence Act* 1903-1918, secs. 125, 127 and 135, and was thus absent from his employment for eight days. The defendant had given no consent to this absence; so it required the apprentice to make up the time so lost before proceeding to the next year of his apprenticeship, which carried higher pay. Its obligation, on the other hand, to teach and instruct the apprentice was proportionally extended.

The construction placed on the indenture by the defendant was, in our opinion, erroneous. The consent required by the indenture cannot and does not extend to absences from employment rendered necessary and compelled by positive law such as the *Defence Act* 1903-1918; so we must consider whether the unauthorized act of the defendant penalized the apprentice in his employment, and, if so, whether he was penalized because of attending a camp of instruction or for some other reason. The onus of proving that the employer penalized the employee is on the informant, but, if that is proved, the provisions of sec. 134 (2) throw the burden of proving the reason for penalizing upon the defendant. The sub-section enacts that "in any proceedings for any contravention of this section "it shall lie upon the employer to show that any employee, proved . . . to have been penalized . . . was so . . . penalized . . . for some reason other than for having rendered or being liable to render the personal service required of him or from attending the camp." To penalize a person means to punish, or subject him to some penalty, detriment or disadvantage, because of a real or supposed dereliction on his part. The person penalizing must have in contemplation something which in sec. 134, sub-sec. 2, is called a "reason" in respect of which the

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Knox C.J. Gavan Duffy J. Starke J.

penalty is to be inflicted, a desire to inflict the penalty for that reason and an intention to effectuate that desire. There must also be an actual infliction of the penalty in pursuance of such intention —that is to say, the causing of some detriment or disadvantage to the person penalized. A person whose intention is merely to treat another in the way that the public law or their contractual relations require and who acts in pursuance of that intention cannot be said to penalize that other though he may know, and even be pleased to know, that the result of his action will be a detriment or disadvantage to that other.

The Stipendiary Magistrate before whom the information was heard convicted the defendant, but on appeal to Quarter Sessions the conviction was quashed. We do not know the reasons for the decision of the learned Judge in Quarter Sessions. It may be that the informant did not prove to his satisfaction that the apprentice was penalized in his employment, or that he was satisfied that the employer had penalized the apprentice for a reason other than attendance at camp. Once the meaning of the *Defence Act* is ascertained, the case turns largely upon the view one takes of the facts, and that view is not decisive of any other case. Every case depends upon its own circumstances. In the present case the act of the defendant might delay the apprentice in proceeding to the fifth year of his apprenticeship at slightly higher pay, and to the status of a tradesman ; but he would, if so delayed, obtain the benefit and advantage for an identical period of skilled instruction and practice.

The legal rights of the apprentice were not altered, his wages for the time he was attending the camp of instruction were payable by the employer under the provisions of sec. 134, sub-sec. 1A, and, despite the act of the defendant, he could have enforced his rights and have insisted upon the termination of his apprenticeship on the day fixed by the indenture without serving the additional days required by the defendant. So the actual disadvantage, if any, sustained by the apprentice would seem to be the loss of the use of the money temporarily withheld by the employer.

If the learned Judge in Quarter Sessions had explicitly stated that these facts did not establish to his satisfaction any penalization

of the apprentice, we should not have been prepared to disturb his decision; but as we do not know his reason, and as it is our duty to form some independent opinion upon the subject, we must say that the evidence fails to satisfy us that the apprentice was penalized in the ordinary signification of that term. The evidence leaves us doubtful whether those acting for the defendant exercised any discretion or whether they merely did that which they considered they were bound to do under the agreement, and also whether any disadvantage was sustained by the apprentice by reason of the act of the defendant.

The question of the reason for the penalization, if there was any penalization, is therefore immaterial, but it may be desirable to say a few words upon the subject. The defendant knew that the apprentice had attended the camp and required him to serve his additional days because of the hours he was away from his work during that attendance. If by doing so it penalized the apprentice, it may well be that it penalized him for such attendance within the meaning of the section, though the real reason for the requirement was, not that the apprentice had attended a camp of instruction, but that he had been away from his work; but for the reasons already assigned the decision in Quarter Sessions should not, we think, be disturbed, and this appeal should be dismissed.

ISAACS J. This appeal, in my opinion, should be allowed. The matter, though confessedly a test case governing the rights of innumerable employees in Australia, appears to me quite simple, and my only difficulty has been to find any room for doubt. Sec. 134 of the *Defence Act* says that "no employer shall . . . penalize . . . or attempt to penalize . . . any employee . . . for attending" any camp of military instruction. The employer did, in fact, insist on paying his apprentice, because of his absence through compulsory attendance at such a camp, the lower rate of 55s. per week instead of the rate of 70s. per week, to which the apprentice was normally entitled—that is, the employer deducted 15s. a week from the rightful wages of this employee—and the employer further insisted on treating the camp instruction period as a period of absence without proper

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consent, and thereby requiring the apprentice to serve an additional period of eight days as apprentice, thus losing at the end for that period his freedom and his status and wages of journeyman if he so long lived. If he should not live so long, his loss of wages in the meantime is definite and certain. How this can be considered anything but penalization in fact is more than I can understand. It is suggested that it is not penalization because it will be better for him in the end. That is a species of philosophy very common when applied to the misfortunes of others. But it is putting too severe a tax on my credulity to try to convince me that that was the real motive or belief of the employer. To force such a so-called benefit on an objecting employee—who is quite capable as a free individual to judge for himself—and to force it upon him—be it observed at his expense—does not, to my mind, savour of altruism. It is not even the unselfish act of a parent who thrusts an unpleasant draught down the throat of an unwilling child with the assurance that it is going to do him good. The industrial system to-day is not based on parental dictation. The employer's act was in reality flat penalization: the employee suffered in more ways than one. His employer must have intended that the inconvenience and business loss occasioned by the employee's military service should fall, not on the employer, but on the employee. No ingenious suggestion of problematic future advantage can alter the position. The employee claims the right to "take the cash and let the credit go, nor heed the rumble of a distant drum." In ordinary cases of injury that is the law, and why not in this case? Why, if penalization in fact, is it not penalization within the meaning of sec. 134? There is nothing occult about that section. It is a plain requirement that, merely because a cadet in his duty to his country is compelled by the supreme law of Australia to attend a military camp, he shall not be made to suffer in his employment. He is not to be dismissed, he is not to have his wages reduced, and he is not to be made to suffer in any other manner. The words of the Legislature are of the widest as well as of the plainest description, and unless their plain meaning is to be refined away by judicial alchemy I should have thought them incapable of being misunderstood. The respondent contends that the deed of apprenticeship requires the

apprentice to make up additional time if he absents himself without proper consent. But when a superior law supervenes and requires public service, obedience to that law is not "absenting himself without proper consent." Both employer and employee must respect that law. The section being directed to afford practical protection against penalization in *fact*, it matters not whether the penalization was justifiable by the State law or not. In either case, if the employer, whatever his own opinion of the law may be, consciously commits the acts which the law forbids, he contravenes the law, and, so far as *mens rea* is necessary, it exists (*Bank of New South Wales* v. *Piper* (1)). It would be unjust, not merely to the employees, but also to other employers, that the self-same acts should be permissible to one employer and punishable if done by another, because of their varied internal notions or impressions of right and wrong. If the employer's conduct is justifiable so far as State law is concerned, then no remedy under State law can be obtained, because no wrong against the law has been suffered. But, as it is still unjustifiable under Federal law passed for defence purposes, the remedy exists according to that law. If his conduct is unjustifiable so far as State law is concerned, a remedy exists under that law for the breach of contractual relations, that is, for the State wrong, but the public Federal obligation and its contravention are outside that sphere, and must still be satisfied or punished independently. The State breach and remedy are irrelevant. The Federal law as to defence is broken just the same whatever the State obligations may be, and the Federal law must be vindicated. Mr. *Windeyer* was right in not contesting this position.

The appeal from the District Court should, in my opinion, be allowed and the Magistrate's decision restored.

HIGGINS J. I am of opinion that this appeal should be allowed. To pay the lad less money for a week in April because in March he has been attending camp for a week is clearly to penalize him in his employment for attending camp ; and the Act does not sanction such a novel set-off as that of any advantage which he may have gained by an extra week's training. The penalizing is proved ;

(1) (1897) A.C. 383, at p. 390.

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but the pecuniary advantage (if any), and the amount thereof, derived from another week's training as an apprentice instead of another week's training as a journeyman, has not been proved.

The lad Palmer was apprenticed to this Company for five years, by an indenture of 5th April 1921. By the indenture he agreed "that he will at no time absent himself from the trade . . . without *proper consent* . . . and that for every day's absence during the said term from attention to the said trade . . . without such consent he shall serve one day at the end of each year of his apprenticeship and such year shall not be considered complete until the said additional day or days shall have been served."

In March 1924 the lad had to attend camp for six days, under compulsion of the *Defence Act* 1903-1918; and, under the same compulsion, he had to be in camp for eight days in March 1925. The Company has treated the first absence of six days in the third year of apprenticeship as extending that third year for six days, and the second absence of eight days in the fourth year of apprenticeship as extending the fourth year by eight days. This means less pay to the lad during the periods of extension than if there were no such extension. The minimum weekly payment prescribed for apprentices is less in the third year (37s.) than in the fourth (55s.); and less in the fourth year (55s.) than in the fifth (70s.); and less in the fifth year than when he becomes a full journeyman (113s. 6d.). Therefore the lad was made to suffer for doing his duty to his country under the *Defence Act*.

Looking now at the latter part of sec. 134 (1) of the *Defence Act*, we find it provided: "No employer shall in any way penalize or prejudice in his employment . . . any employee for rendering or being liable to render such personal service, or for attending such camp, either by reducing his wages or by dismissing him from his employment *or in any other manner*." To my mind it is clear that by its action the Company has both "penalized" and "prejudiced" the lad in his employment for doing his military duties. It has been suggested that the information in this case uses the word "penalized" and not the word "prejudiced," that the word "penalize" connotes some punishment, and that there was no punishment here, but an observance of the provisions of the indenture.

But though the word "penalize," as a matter of origin, comes from the Latin for punishment, it is habitually used in a much wider sense —*uti loquitur vulgus*; and that is the sense which we must give to such non-technical words. According to the *Oxford Dictionary*, there is a general meaning as well as the meaning of origin—the meaning "to subject to some comparative disadvantage, to handicap." A newspaper is quoted as saying: "in order to raise revenue . . . the poor man is penalized at almost every point of the Customs compass." Even if the word had to be so pedantically treated as suggested, the details given in the information are probably sufficient to cure the information—for the information states specifically that the Company "treated the said Neville Alec Palmer as if every day's attendance at the camp aforesaid was a day's absence during the term of his apprenticeship from attention to the trade . . . described in the indenture of the apprenticeship, without proper consent." The Company was under no compulsion from the indenture to add the extra days, for it has merely to give its consent to the absences. The evidence is that in 1924 the foreman, on being told by the lad that he had to go into camp, said "all right"; and in 1925 the charge-hand and the foreman said "all right." I should have thought it quite arguable that consent was actually given; but counsel for the appellant does not so contend. But even assuming that proper consent was not given, it was the duty of the Company not to withhold consent and thereby penalize or prejudice the lad for going into camp. No one denies that the Act of Parliament can override any provision in the indenture that is inconsistent; but there is no inconsistency if there is no obligation under the indenture on the employer to withhold his consent. The indenture, if construed naturally within its four corners, means obviously by "proper consent" the consent of the employer or the staff; there is no exception made for absence under the *Defence Act*. But the indenture and the Act can both be obeyed, if the consent required be given; and then the lad can attend camp without losing any of his wages. The same result would follow if the Act were read as meaning that the lad may attend camp without loss of wages "notwithstanding any agreement to the contrary"; but in this case such a reading seems to me to be unnecessary.

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Higgins J.

I cannot at all concur with the view that to support a conviction under sec. 134 the prosecutor must show not only that the employer docked the lad of part of his pay for his eight day's attendance at camp, but also that the employer did so for the purpose and with the desire of punishing him for attending camp. The *mens rea* is completely established when it is shown that the employer did the forbidden act intentionally, that is, with the intention to do that act. The cases are collected in *Stroud* on *Mens Rea*, pp. 13-20. In my opinion, a purpose to punish is not essential to the offence. The employer's motive or desire has nothing to do with the question. The " reason," referred to in sec. 134 (2) does not mean the motive or desire or any internal workings of the employer's spirit ; it means the objective ground for inflicting the loss ; and the burden lies on the employer to show that the ground is other than that of absence from military training.

It has been urged also that an apprentice is not an " employee " within the meaning of sec. 134 (1). Here again the ordinary vernacular use of the word is to guide us ; but in addition we have the Company itself confirming the view that an apprentice may be called an employee, by applying " employment " and " employer " to the relation of apprentice and master : " Should the said masters be unable to provide continuous *employment* to the said apprentice the apprentice may be transferred to some other *employer*."

The Stipendiary Magistrate, at the Central Police Court, convicted the Company, and inflicted a penalty of £10 with costs. The learned Judge in Quarter Sessions quashed the conviction ; but we have not been furnished with a statement of his reasons. If we are at liberty to infer what his reasons were from the grounds stated in the notice of appeal to this Court, it would appear that the Judge held (1) that the lad's absence from employment was without the proper consent of the employer ; (2) that the lad was not in fact penalized in his employment, and (3) that he was not penalized within the meaning of sec. 134 of the *Defence Act*. I am unable to agree with reasons (2) and (3).

In my opinion, the conviction in the Police Court should be restored.

RICH J. "Penalize," the only word chosen for the information laid under sec. 134 of the *Defence Act* 1903, is not, in my opinion, used in the classical or strict sense, but should be given the secondary or popular meaning of hampering or hindering. In sport the word penalty is not used in the first but in the secondary sense, and in the section under consideration a punishment or fine is not contemplated, but rather a weight or impost which handicaps the employee in his course. In that sense the employer attached conditions to the appellant's absence for training purposes which retarded him in his progress to the next year. The appellant was obliged to make good the eight days' absence in camp, and his full term as apprentice was thus lengthened by that space of time and the higher wages payable during the fifth year were denied to him. The appellant was, in my opinion, hampered or hindered in his employment and the employer has not sustained the onus laid upon him in sub-sec. 2 of sec. 134 of showing that the employee was penalized for some reason other than absence owing to attendance at camp.

In my opinion the appeal should be allowed.

Appeal dismissed.

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

Solicitors for the respondent, *Salwey & Primrose.*

B. L.