[HIGH COURT OF AUSTRALIA.]

BROOME . . . . . APPELLANT;
DEFENDANT,

AND

CHENOWETH . . . . . RESPONDENT.
INFORMANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1946.

MELBOURNE, *Oct.* 25, 28, 29; *Dec.* 20.

Latham C.J., Starke, Dixon, McTiernan and Williams JJ.

Income Tax (Cth.)—Deduction by employer from "salary or wages"—Employee receiving "salary or wages in respect of a period of time in excess of one week"—Piece-work—Worker not engaged by relation to periods of time—Income Tax Assessment Act 1936-1945 (*No.* 27 *of* 1936—*No.* 4 *of* 1945), *ss.* 221A*, 221C*, 239, 240.

Criminal Law—Plea—Autrefois acquit—Summary proceedings—Information not disclosing offence—Dismissal "for want of prosecution"—Subsequent information disclosing offence.

B. employed H. to pick and bag onions for 2s. a bag. H. was not bound to work at any particular times or to do any stipulated amount of work, and he did not work continuously. At the end of six weeks B. paid H. £32, being at the rate agreed for the work he had done in the meantime, and did not make any such deduction as would have been required if the case was within s. 221C of the *Income Tax Assessment Act* 1936-1945.

Held, by *Latham* C.J., *Dixon*, *McTiernan* and *Williams* JJ. (*Starke* J. dissenting), that, as the payment was not made in respect of any period of time, s. 221C did not apply.

Per Starke and *Dixon* JJ.: The dismissal "for want of prosecution" of an information which alleged that the defendant had committed an offence against s. 221C but did not disclose what the offence was, and on which the informant was unwilling to proceed, was not a bar to proceedings on a subsequent information which adequately charged the offence; the defendant was not in jeopardy on the earlier information.

Decision of the Supreme Court of Victoria (*Macfarlan* J.): *Chenoweth* v. *Broome* (1947) V.L.R. 1, reversed.

* The material provisions are set out in the judgment of *Latham* C.J., *post*, p. 588.

H. C. OF A. 1946.

BROOME v. CHENOWETH.

APPEAL from the Supreme Court of Victoria.

Alfred Broome, an onion farmer, employed one Healy to pick and bag onions on his farm and agreed to pay 2s. a bag for the onions picked and bagged. The arrangement did not bind Healy to work at any particular times or to do any particular amount of work; he alone determined when he would work; his hours of work were irregular, and on some days he did not work at all. For the work he did between 12th February and 25th March 1945 he was entitled, at the agreed rate per bag, to £32, and Broome paid him that sum on the latter date.

The information of Richard Willmore Chenoweth, Deputy Federal Commissioner of Taxation, dated 31st October 1945, charged that Broome, contrary to s. 221C of the *Income Tax Assessment Act* 1936-1945, on 25th March 1945, being the employer of Healy at wages in excess of two pounds per week, at the time of payment of wages to Healy did fail to make the deduction from such wages prescribed under the Act. On 14th November 1945 the hearing of this information was adjourned.

A further information laid by Chenoweth on 14th February 1946 contained averments which were substantially as follows:—From 12th February to 25th March 1945, both inclusive, Broome was the employer of Healy; on 25th March 1945 Healy received from Broome the sum of £32; this sum was received under an oral contract which was wholly or substantially for the labour of Healy, and by reason thereof the sum was salary or wages within the meaning of s. 221C of the Act; the sum was received in respect of the period from 12th February to 25th March 1945; by reason of the foregoing Healy was deemed to have been entitled on 25th March 1945 to receive from Broome in respect of the week ending on that day £5 6s. 8d. as salary or wages; on that day Broome paid to Healy the sum of £5 6s. 8d. (being part of the sum of £32) and in contravention of s. 221C failed at the time of making such payment to make deductions therefrom at the rates prescribed under the Act.

Both informations were listed for hearing on 26th March 1946 in a court of petty sessions, constituted by a police magistrate, at Colac (Vict.). The informant sought leave to withdraw the earlier information; the magistrate refused leave, but the informant did not proceed with this information, and an order was made which, as appeared in the register of the court, was to the effect that the information was "dismissed for want of prosecution." The informant then proceeded with the later information.

The defendant contended (1) that the dismissal of the earlier information was a bar to the proceedings on the later one; (2) that

the defendant had not contravened s. 221c, because the case was not one in which the employee was entitled to receive salary or wages in respect of a week or part thereof.

The magistrate accepted the second contention and dismissed the information.

On proceedings by the informant by way of order to review in the Supreme Court of Victoria *Macfarlan* J. set aside the order of the magistrate and convicted and fined the defendant.

From this decision the defendant appealed, by special leave, to the High Court.

Barry K.C. (with him *Gowans*), for the appellant. The construction of s. 221c for which the informant contended and which was accepted in the Supreme Court does not give effect to the words " in respect of " in the expressions, in sub-s. (1), " in respect of any week or part thereof," and, in sub-s. (1A), " in respect of a period of time in excess of one week." Where the employee renders services when he feels disposed and is paid in the manner agreed in this case, he is not paid " in respect of " a period of time at all, but is paid in respect of the task done. This construction is not impeded by the expression "(whether at piece-work rates or otherwise)" in the definition of " salary or wages " in s. 221A ; a person may be employed to work for a period of time and, nevertheless, be paid at piece-work rates for what he does in that time. The opposing construction would have the effect that all payments in excess of £2 for personal services are deemed to be payments of salary or wages. Where the legislature has intended such a result, it has used quite a different form of words, one which leaves no doubt as to the intention (*Payroll Tax Assessment Act* 1941-1942, s. 3 (3)). [He referred to *Queensland Stations Pty. Ltd.* v. *Federal Commissioner of Taxation* (1)]. The appellant was entitled to succeed on the plea of *autrefois acquit*. On the first information the defendant could have been convicted on evidence such as was given on the second information ; this being so, it is immaterial that there were variations between the two informations (*R.* v. *Emden* (2) ; *R.* v. *Barron* (3)). The only objection that could have been taken to the first information is that it lacked particularity ; any deficiency in this regard could have been cured (*Justices Act* 1928 (Vict.), s. 196 ; *Income Tax Assessment Act*, ss. 238, 239). It is immaterial whether the dismissal was or was not on the merits. When the defendant answered and pleaded to the first information he was in jeopardy ; he was in the hands of the court,

(1) (1945) 70 C.L.R. 539, at pp. 547, 548, 550.

(2) (1808) 9 East 437 [103 E.R. 640].

(3) (1914) 2 K.B. 570.

H. C. OF A. 1946. BROOME v. CHENOWETH.

whose duty it was to go on to determine the matter of the information; the court could have amended the information. [He referred to *Munday* v. *Gill* (1); *Bishop* v. *Cody* (2); *R.* v. *Austin* (3); *Ex parte Toomey* (4); *Justices Act* 1928 (Vict.) s. 88 (2), (8), (10), (17); *Hitchen* v. *Phipps* (5); *Res Judicatae*, vol. 2, p. 210, article by *G. Sawer*; *Mitchell* v. *Berry* (6); *Curyer* v. *Foote* (7); *Haynes* v. *Davis* (8); *Great Southern & Western Railway Co.* v. *Gooding* (9); *R.* v. *Sheen* (10); *Lenthall* v. *Gazzard* (11)].

[LATHAM C.J. referred to *Spencer Bower, Res Judicata*, p. 78].

The rule that after an accused has pleaded not guilty to an indictment he cannot raise *autrefois acquit* is not applicable to proceedings before justices (*Justices Act* 1928, s. 88 (4); *R.* v. *Hare*; *Ex parte Nuttall* (12)).

[WILLIAMS J. referred to *Benson* v. *Northern Ireland Road Transport Board* (13)].

Section 88 (17) of the *Justices Act* does not require that a certificate of dismissal must be produced to support the plea in bar.

T. W. Smith (with him *D. I. Menzies*), for the respondent. In s. 221A, the first part of the definition of "salary or wages" (preceding the lettered paragraphs) covers cases of employment in the strict sense; the lettered paragraphs go further and bring in cases which are not cases of "employment" in the true sense. The present case is a simple one of employment in the true sense. If it is not, it is, nevertheless, caught by the words of par. (*a*) relating to a "contract which is wholly or substantially for the labour of the person to whom the payments are made," which are wide enough to cover the case of an independent contractor if the work is within the description. It is not contended that "labour" in par. (*a*) covers all services; if it did, par. (*d*) would be unnecessary. Perhaps the paragraph leaves an area of uncertainty as to the contracts covered. However, it is limited to cases of work of a kind which as a matter of ordinary usage would be described as "labour"; cases, for instance, in which the work could be delegated, or those in which the contract was predominantly for the supply of goods, would be excluded. The appellant's contention unduly cuts down the effect of the expression "(whether at piece-work rates or otherwise)" in the definition. In

(1) (1930) 44 C.L.R. 38, at p. 86.
(2) (1939) V.L.R. 246, particularly at p. 250.
(3) (1846) 2 Cox C.C. 59.
(4) (1901) 1 S.R. (N.S.W.) 24; 18 W.N. 42.
(5) (1903) 29 V.L.R. 422.
(6) (1922) 22 S.R. (N.S.W.) 363; 39 W.N. 105.
(7) (1939) S.A.S.R. 203.
(8) (1915) 1 K.B. 332.
(9) (1908) 2 Ir. R. 429.
(10) (1827) 2 Car. & P. 634, at p. 640 [172 E.R. 287, at p. 290].
(11) (1895) 16 L.R. (N.S.W.) 22; 11 W.N. 118.
(12) (1885) 11 V.L.R. 235.
(13) (1942) A.C. 520.

s. 221C (1) and (1A) the words "in respect of" are satisfied if the money is earned within the week or other period mentioned. The words of sub-s. (1) are "receive . . . in respect of any week or part thereof salary or wages," while those of sub-s. (1A) are in a different order, "receives . . . salary or wages in respect of a period of time in excess of one week"; but, as sub-s. (1A) is intended to be complementary to sub-s. (1), it cannot have been intended to refer to payments of a different character. The effect of the section is to assign a period to all work to which it relates. The section is directed to the earning rate, not to the terms of the contract of employment. The *Pay-roll Tax Assessment Act* throws no light on the meaning of s. 221C; its scheme is different. Moreover, if, as is submitted, the respondent's construction gives the words of s. 221C their ordinary meaning, it is not to the point that another Act achieves a similar result in a different way. As to the plea of *autrefois acquit*, the first information did not disclose any offence; it omitted the ingredients necessary to make up the offence under s. 221C, and was no bar to the second information (*Spencer Bower, Res Judicata*, p. 36; *R.* v. *Green* (1)). An "acquittal" on an information which does not disclose an offence is nothing more than a statement that the defendant did not do the thing alleged which is not an offence. There is no "information" at all for the purposes of ss. 239, 240, of the *Income Tax Assessment Act* where that which purports to be an information does not disclose an offence. It is not material that the information could have been amended; it must be taken as it stood at the time of the dismissal (*O'Connell* v. *Lee* (2); *Jenkins* v. *Merthyr Tydvil Urban District Council* (3); *Ramm* v. *Gralow* (4); *Anderson* v. *Ayscough* (5); *Halsted* v. *Clark* (6)). The general rule is that a decision on the merits is essential; it is not enough that the defendant was in jeopardy; the issue must have been tried and determined (*Spencer Bower, Res Judicata*, p. 32; *Hough* v. *Causer* (7); *R.* v. *Trench*; *Ex parte Chalmers* (8); *New Brunswick Railway Co.* v. *British and French Trust Corporation Ltd.* (9); *Ex parte Curry* (10); *Haynes* v. *Davis* (11)). [He also referred to *Flatman* v. *Light* (12); *Foreman* v. *McNamara* (13); *Ex parte Spencer*; *Sherwood* v. *Spencer* (14); *Chia Gee* v. *Martin* (15); *Li Wan Quai* v. *Christie* (16); *R.* v. *Cleary* (17); *Dray* v. *Mitchell* (18)].

(1) (1856) 26 L.J. M.C. 17.
(2) (1922) S.A.S.R. 320.
(3) (1899) 80 L.T. 600.
(4) (1932) 2 A.T.D. 6.
(5) (1905) 23 W.N. (N.S.W.) 54.
(6) (1944) K.B. 250.
(7) (1933) V.L.R. 201.
(8) (1883) 9 V.L.R. (L.) 55.
(9) (1939) A.C. 1.
(10) (1905) 21 W.N. (N.S.W.) 260.
(11) (1915) 1 K.B. 332.
(12) (1946) K.B. 414, at p. 418.
(13) (1897) 23 V.L.R. 501.
(14) (1905) 2 C.L.R. 250.
(15) (1905) 3 C.L.R. 649.
(16) (1906) 3 C.L.R. 1125.
(17) (1914) V.L.R. 571.
(18) (1932) Q.S.R. 18, at p. 31.

H. C. OF A. 1946. BROOME v. CHENOWETH.

[STARKE J. referred to *Magnus* v. *National Bank of Scotland* (1)]. In Victoria the plea cannot be founded on the dismissal unless a certificate of dismissal is produced ; in New South Wales the Act is different in material respects.

Barry K.C., in reply. As s. 221C originally stood, the emphasis was on the receipt of wages *for* a week's work ; the amendments have not departed from that conception. As to what is within the description of " labour ", see *Iredell* v. *Skinner* (2). As to the plea in bar, it is submitted that the first information did disclose the offence charged in the second. The matters averred in the second information could have been established by evidence in support of the first, and thus any deficiency in it would have been cured. [He referred to *O'Donnell* v. *Hitchen* (3) ; *Preston* v. *Donohoe* (4) ; *R.* v. *Duff* (5) ; *Banks* v. *Watford* (6) ; *Cooper* v. *Hamilton* (7) ; *Police Offences Act* 1928 (Vict.), s. 38 ; *Offences Against the Person Act* 1861 (24 & 25 Vict. c. 100), s. 45 ; *Tunnicliffe* v. *Tedd* (8) ; *Vaughton* v. *Bradshaw* (9) ; *Reed* v. *Nutt* (10)].

Cur. adv. vult.

The following written judgments were delivered :—

Dec. 20.

LATHAM C.J. Appeal by special leave from an order of the Supreme Court of Victoria made upon the return of an order to review a decision of a Court of Petty Sessions at Colac setting aside an order of that court dismissing an information for an offence alleged to have been committed by the appellant Alfred Broome against s. 221C of the *Income Tax Assessment Act* 1936-1945.

Division 2 of Part VI. of the Act provides for the collection of income tax by instalments. Section 221A contains special definitions of " employer " and " employee " and of " salary or wages." Section 221C (1) and (1A) are as follows :—

" (1) Where an employee is entitled to receive from an employer in respect of any week or part thereof salary or wages in excess of Two pounds, the employer shall, at the time of making payment of the salary or wages, make deductions therefrom at such rates as are prescribed.

Penalty : Twenty pounds.

(1A) For the purposes of this section, where an employee receives from an employer salary or wages in respect of a period of time in

(1) (1888) 57 L.J. Ch. 902.
(2) (1909) V.L.R. 108, at p. 111.
(3) (1902) 27 V.L.R. 711.
(4) (1906) 3 C.L.R. 1089.
(5) (1921) 41 W.N. (N.S.W.) 23.
(6) (1922) V.L.R. 531.
(7) (1888) 6 N.Z.L.R. 598.
(8) (1848) 5 C.B. 553 [136 E.R. 995].
(9) (1860) 9 C.B. N.S. 103 [142 E.R. 40].
(10) (1890) 24 Q.B.D. 669.

excess of one week, the employee shall be deemed to be entitled to receive in respect of each week or part of a week in that period an amount of salary or wages ascertained by dividing that salary or wages by the number of days in the period and multiplying the resultant amount —

(a) in the case of each week—by seven ; and

(b) in the case of a part of a week—by the number of days in the part of a week."

The rates of deductions prescribed under the Act at the relevant time (see S.R. 1943 No. 80) increase with the amounts paid and vary according to the number of dependants of the employee.

It was established by averments made in the information (see Act, s. 243), and also by evidence, that from 12th February 1945 to 25th March 1945 the defendant Broome was the employer of one James Healy, and that on 25th March he paid Healy £32 for work performed by Healy under an oral contract which was wholly or substantially for the labour of Healy. Healy was employed to pick and bag onions at 2s. per bag. He worked or abstained from work as he chose. On some days during the forty-two days he did not work at all and his hours of work were quite irregular and were determined by himself. It was alleged by the informant that the " said sum of £32 was received in respect of the period from the 12th February to the 25th March "—a period of forty-two days. The informant claimed that s. 221c (1a) was applicable and that therefore Healy was entitled on 25th March to receive from the defendant " in respect of the week ending 24th March the sum of £5 6s. 8d. as salary or wages "—i.e. $\frac{7}{42}$ of £32. When the defendant paid Healy the sum of £32 on 25th March he did not make any deduction, and accordingly, it was contended, was guilty of an offence under s. 221c.

The defendant relied upon two defences ; first that the payment made by Broome to Healy was not a payment made in respect of any period, and more specifically that it was not a payment made " in respect of a period of time in excess of one week " so as to bring s. 221c (1a) into operation. This contention was upheld by the magistrate but was rejected by the Supreme Court. The other defence was that the defendant had previously been charged with the same offence and that the information had been dismissed for want of prosecution. He contended that such a dismissal was a bar to the subsequent prosecution. The magistrate did not uphold this contention, and it was rejected also in the Supreme Court. The order dismissing the information was set aside and the defendant was convicted and fined £1.

H. C. OF A. 1946. BROOME v. CHENOWETH. Latham C.J.

Section 221C (1) requires an employer to make a deduction as prescribed from salary or wages at the time of making payment thereof in cases " where an employee is entitled to receive from an employer in respect of any week or part thereof salary or wages in excess of Two pounds." Section 221C (1A) provides means of reducing to a weekly basis salary or wages received in respect of a period of time in excess of one week.

It is contended for the informant that a payment of salary or wages is made in respect of a week when it is made for work performed during a week, and that a payment is made in respect of a period of time in excess of one week when it is made for work performed during a period of time in excess of one week. As all work which is done must be done at some particular time, the result would be that s. 221C would apply to all payment for work done under any contract where a sum of £2 or more was earned and paid—because all work done (whatever the terms of the contract may be under which it is done) must be done at some time and during some period and therefore during some week and during some part of some week.

For the appellant, on the other hand, it is contended that s. 221C applies only where wages are paid in respect of time, that is where there is an employment as for a period and payment is made as for a period.

Section 221C applies to all cases of receipt of " salary or wages " in respect of any week or part thereof. The section must therefore receive an interpretation which makes it possible to apply it in all cases of payment of " salary or wages " in respect of a week or part of a week, or of a period in excess of a week.

" Salary or wages " is defined by s. 221A (as in force in March 1945) as follows :—

" ' salary or wages ' means salary, wages, commission, bonuses or allowances paid (whether at piece-work rates or otherwise) to any employee as such, and without limiting the generality of the foregoing includes any payments made—

(*a*) under any contract which is wholly or substantially for the labour of the person to whom the payments are made ;

(*b*) by a company by way of remuneration to a director of that company ;

(*c*) by way of superannuation pension or retiring allowance ; or

(*d*) by way of commission to an insurance or time-payment canvasser or collector,

but does not include payments of exempt income."

In the first place, it was contended for the informant that the reference in the definition of " salary or wages " to piece-work rates brings the present case within s. 221C because the payment to Healy was at the piece-work rate of 2s. a bag. But the inclusion of payments made at piece-work rates in the definition of " salary or wages " shows no more than that employment at piece-work rates may—not " must "—involve a payment which an employee is entitled to receive from an employer in respect of a week or part thereof. Instances of such employment are to be found where a person is employed at piece-work rates by the week or month or other period—a common form of factory employment. But it is equally clear that, as in the present case, there may be employment at piece-work rates with no reference to any period whatever.

In cases falling under par. (*a*) of the definition the contract of employment may contain a reference to a period, but there are many such contracts which contain no reference to any period as, for example, when a man is employed simply to do a particular job, with no provision as to time of work or period within which the job is to be completed.

Under par. (*c*) of the definition, relating to payments made by way of superannuation, pension or retiring allowance, it is clear that the payments referred to are made specifically in respect of periods without reference to anything done during the periods.

Where payments are made expressly in respect of a week's work or so many days' work there is no difficulty in applying s. 221C. But when payments are made merely for a quantity of work (which has necessarily been performed at some time in some week or weeks), and the payment is made without reference to any particular period of time, it is difficult to find a satisfactory means of applying the section. In the present case, for example, the employer paid the employee £32 after he had worked, off and on, during a period of forty-two days. The employer happened to make the payment on the forty-second day. The informant took $\frac{7}{42}$ of £32 and allocated the amount (£5 6s. 8d.) to a particular period of 7 days, relying upon s. 221C (1A). But if the employer had paid the same sum, not after the expiration of forty-two days from the first day upon which Healy had begun to work, but after (let it be supposed) a further period of 100 days had elapsed, the calculation would have worked out in quite a different way and, although the same amount of money had been paid for the same amount of work, the amount appropriated to each week would have been less than £2, and there would have been no obligation to make any deductions at the time of payment.

H. C. OF A. 1946. BROOME v. CHENOWETH. Latham C.J.

Other instances can be given of difficulties arising upon the construction of the section contended for by the informant. If A works for B on 1st February and earns £1 and again works for B on 1st April and earns £1 10s., and B pays him £2 10s. on 1st May, what is the period in respect of which the payment is made? If the employment was by the hour or the day no difficulty arises. But if the period during which the work was done is what is important, then what is that period? Are there two periods each of one day, or one period of two months (1st February to 1st April) or one period of three months (1st February to 1st May)? The work was in fact done during all of these periods. It is of interest to note that in the present case, though the conviction is for failing to make a deduction from £5 6s. 8d. (which treats the relevant "period" as being one of six weeks), *Macfarlan* J. in the Supreme Court said that he was "inclined to think that Healy was employed for three weeks." Upon this view the deduction to be made by the employer would be greater (according to the prescribed scale) than if the period is regarded as being one of six weeks.

The contention for the informant really means that, as all work must be done within a period, and as any period can be subdivided into weeks or parts of weeks, deductions must be made whenever any payment (over £2) is made for any work done. In my opinion this view of the section attaches no real significance to the words "in respect of any week or part thereof." In my opinion these words mean that the salary or wages which the employee is entitled to receive is money which can properly be described as due (so that he is "entitled" to it) in respect of a week or part of a week, i.e. for the reason that a week or part of a week has expired. This is the only condition which is relevant in all cases—wages and pension payments etc. In order to earn wages the employee must work, and in order to be entitled to receive a pension the pensioner must live. Section 221c, because it applies only to payments of "salary or wages" as defined, assumes that such conditions or other relevant conditions have been satisfied and then makes the obligation to make deductions dependent upon whether the payment under consideration was made in respect of a particular period. Such an interpretation is necessary in order to apply the section to payments by way of superannuation, pension or retiring allowance. The words should be given the same meaning in the other cases which are covered by the definition of "salary or wages."

In the present case the payment of £32 made to Healy was not a payment in respect of any week or in respect of a part of any week

or in respect of any period. It was a payment for picking and bagging onions at 2s. a bag, quite irrespective of the period during which the work was done; there was no provision in the contract for the employment of Healy for any period for the purpose of doing that work. In my opinion the section does not apply to such a case and, accordingly, for this reason, the magistrate was right in dismissing the information. Upon this view it is unnecessary to consider the other defence, namely that the dismissal of the first prosecution constituted a bar to the second prosecution. In my opinion the appeal should be allowed, the decision of the Supreme Court set aside and the order of the magistrate restored.

STARKE J. Appeal by special leave from the Supreme Court of Victoria making absolute an order nisi to review an order of a Court of Petty Sessions dismissing an information wherein the appellant was defendant, and the respondent, informant, and convicting the appellant.

The information charged that the appellant paid to one, Healy, the sum of £5 6s. 8d. being part of a sum of £32 and in contravention of s. 221c of the *Income Tax Assessment Act* 1936-1945 failed at the time of making such payment to make deductions therefrom at the rates prescribed by the Act. Healy was employed by the appellant to pick onions and bag them not at so much per day or for any specified time but for 2s. per bag. He was so employed from 12th February 1945 to 25th March 1945, both days inclusive, (six weeks) but he did not work continuously. He was paid £32 on 25th March 1945 in respect of the work done by him. The sum of £5 6s. 8d. is one sixth of £32.

It is provided by s. 221c that where an employee is entitled to receive from an employer in respect of any week or part of a week salary or wages in excess of £2, the employer shall make certain deductions therefrom as prescribed. And for the purposes of the section where an employee receives from an employer salary or wages in respect of a period of time in excess of one week, the employee shall be deemed to be entitled to receive in respect of each week or part of a week in that period an amount of salary or wages ascertained by dividing the salary or wages by the number of days in the period and multiplying the resultant amount in the case of each week by seven and in the case of part of a week by the number of days in the part of a week.

The argument for the appellant is that Healy never received payment of any wages in respect of a week or part thereof but only in respect of the onions bagged by him and consequently that he

H. C. OF A. 1946.

BROOME v. CHENOWETH.

Starke J.

was not bound to make any deduction pursuant to the section. Standing alone, the words " in respect of any week or part thereof " or " in respect of a period of time in excess of one week " in s. 221C according to the grammatical and ordinary meaning of those words support the argument. But they do not stand alone. Salary and wages according to the definition in s. 221A means salary, wages, commission, bonuses or allowances paid whether at piece-work rates or otherwise and includes payments under any contract for the labour of the person to whom the payments are made and so forth. And the Commissioner therefore argues that the section applies to payments in respect of work done during a week or part of a week and is not limited to payments calculated on a time basis. *Macfarlan* J. acceded to this view and I think he was right. Salary and wages as defined include payments that are not related to periods of time for instance piece-work rates, commission, bonuses and allowances. The grammatical and ordinary meaning of the words in s. 221C do not give effect to the definition and cannot therefore be accepted.

Penal statutes it was said, however, must be construed strictly; but the duty of the Court in all cases is to ascertain the intention of the legislature from the language employed, having regard to the context in connection with which it is employed (*Attorney-General* v. *Carlton Bank* (1); *Craies, Statute Law*, 4th ed. (1936), pp. 454-456). I should add that the appellant did not contend that the sum of £5 6s. 8d. was not properly calculated on the facts of this case.

Another argument made for the appellant is summed up in the maxim, *Nemo debet bis vexari pro una et eadem causa*. The appellant was charged upon an information in October 1945 which was not proceeded with and was dismissed for want of prosecution. It is unnecessary, for my purposes, to consider the legal operation of the words " for want of prosecution " for, in my opinion, the information disclosed no offence under s. 221C. The 238th section of the Act provides that all informations shall suffice if the offence is set forth as nearly as may be in the words of the Act. But the information was not drawn in accordance with this provision. It merely alleged that the appellant, on 25th March 1945, contrary to the provisions of s. 221C of the Act, being the employer of Healy at wages in excess of £2 per week at the time of payment of wages to Healy, failed to make the deduction required from such wages as prescribed by the regulations made under the Act. And as the information did not follow the words of the Act then it should have stated the facts and circumstances which constituted the offence with certainty and precision.

(1) (1899) 2 Q.B. 158, at p. 164.

There is no allegation that Healy was entitled to receive wages, or of the amount of the wages or of the work in respect of which he was entitled to receive the wages. And these allegations were necessary, I think, to constitute the offence charged. "Generally it may be laid down that whenever, by reason of some defect in the record . . . the prisoner was not lawfully liable to suffer judgment for the offences charged against him in the first indictment as it stood at the time of its finding, he has not been in jeopardy, in the sense which entitles him to plead the former acquittal (or conviction) in bar of a subsequent indictment" (*Archbold's Criminal Pleadings*, 31st ed. (1943), p. 138). Substantially the same principle is applicable, I think, to informations before justices (*R.* v. *Marsham*; *Ex parte Pethick Lawrence* (1)). *Halsted* v. *Clark* (2) is a decision upon the special facts stated in that case.

The result is that this appeal should be dismissed.

DIXON J. The facts upon which the prosecution rests are to be collected from some not very full or complete evidence given before the magistrate, but they appear to be as follows. The defendant is an onion farmer. He made an arrangement with one Healy, among other men, to pick onions on his farm and agreed to pay two shillings a bag for the onions picked and bagged. No conditions bound Healy to work at any particular time or times or on any particular day or days or at any particular rate. He could work day after day and week after week if he chose, but continuity was not incumbent upon him. He did not so choose. There was a wine shanty in the vicinity with attractions superior to onion picking and his work appears to have been inconsecutive. The evidence states that Healy "worked between 12th February and 25th March 1945." Both days inclusive, this makes forty two days or six weeks.

There seems to have been no arrangement as to the time of payment but, as with the other men, Healy could draw when he wanted money for stores or other expenses. In fact he was paid £32 on 25th March 1945 for the onion picking and bagging he had done.

No deduction for income tax was made under Div. 2 of Part VI. of the *Income Tax Assessment Act* 1936-1945.

As a consequence the defendant was charged with an offence under s. 221C (1) and (1A). The substance of the charge is that by virtue of sub-s. (1A), Healy is deemed to have been entitled on 25th March 1945 to receive from the defendant in respect of the week ending on 24th March £5 6s. 8d. as salary or wages and that on 25th March the defendant paid to Healy the amount of £5 6s. 8d. as part of the

(1) (1912) 2 K.B. 362. (2) (1944) K.B. 250.

H. C. OF A. 1946.

BROOME v. CHENOWETH.

Dixon J.

sum of £32, failing at the time to make the deductions at the prescribed rates. The amount of £5 6s. 8d. was obtained by dividing the total £32 by six as the number of weeks over which the work extended. March 25th was a Sunday, so that it probably does not matter that forty-one days and not forty-two is the period stated in the charge contained in the information.

Sub-section (1A) provides that for the purposes of the section, where an employee receives from an employer salary or wages in respect of a period of time in excess of one week, the employee shall be deemed to be entitled to receive in respect of each week or part of a week in that period an amount of salary or wages ascertained by dividing the salary or wages by the number of days in the period and multiplying by seven in the case of a week and by the number of days in the case of part of a week.

The purpose of deeming the employee so to be entitled is to bring cases falling under sub-s. (1A) within sub-s. (1). Sub-s. (1) provides that, where an employee is entitled to receive from an employer in respect of any week or part thereof salary or wages in excess of £2, the employer shall, at the time of making payment of the salary or wages, make deductions therefrom at such rates as are prescribed. So far as concerns the basis of the charge the question for decision is whether, upon the facts of the case, it can be correctly said that Healy in the £32 received salary or wages in respect of a period of time in excess of one week within the meaning of sub-s. (1A), and, by consequence, must be deemed to have been entitled to receive in respect of a week (that ending Saturday 24th March) salary or wages in excess of £2. The question depends upon the effect of the words "in respect of a period of time in excess of one week" considered with the corresponding words, "in respect of any week or part thereof."

It will be noticed that these words are adverbial and modify the word "receive"; they are not adjectival, qualifying "salary or wages," as might appear if sub-s. (1A) were read apart from sub-s. (1).

Did Healy receive any payment in respect of a period of time, a period in excess of a week? Could he be said, at any point, to be entitled to receive a payment in respect of a week or part thereof? There is no connection between the payment or the work and any interval of time. There is no condition governing the relations between the defendant and Healy to which any period of time, whether fixed or recurring, is relevant. How much Healy is paid is independent of the lapse of time. When he is paid is independent of any period of time whether recurring or not and whether regular or not. Neither the work done within a period nor the results in

bagged onions produced within a period need be measured for any purpose of the contract. In these circumstances no relation between the payment and the term of forty-one days adopted can be found except that at the beginning of the forty-one days Healy had done no work for the defendant and at the end he had picked three hundred and twenty bags of onions, for which he was entitled to two shillings a bag but in respect of which he had so far received no payment.

It is contended for the informant that this relation is enough to satisfy the provisions of s. 221C. His counsel maintains that a study of the definition of " salary or wages " contained in s. 221A in combination with s. 221C (1A) shows that Div. 2 must so intend. Otherwise, it is said, the reference to piece-work rates, to commission and bonuses, to payments under contracts for labour, to payments by way of directors' fees and to payments to canvassers or collectors on commission could not have the full and complete effect the legislature must be taken to have desired.

Macfarlan J. felt that the purpose of sub-s. (1A) was to overcome the difficulty arising from many such payments that had no reference to a week or part of a week. If so, it is, of course, unfortunate that in the sub-section the words " receives . . . in respect of a period of time in excess of one week " should have been introduced.

In the *Pay-roll Tax Assessment Act* 1941-1942 the object claimed for sub-s. (1A) was attained very differently. By sub-s. (3) of s. 3 it was provided that wages paid for a service should, for the purposes of that Act, be deemed to have been paid in respect of a period of time in which that service was performed. However probable it may seem that it was desired to produce the same result by the provisions of, and particularly by the amendments made in, Div. 2 of Part VI. of the *Income Tax Assessment Act*, I have come to the conclusion that no such intention has been actually expressed. Only by inference or deduction can the meaning be placed upon the Division and then it must be at the expense of the primary meaning of the phrases critical to the question.

In a penal provision in a taxing Act such a method of interpretation is misplaced. An obligation is imposed to deduct tax at the source of certain payments, otherwise due, with a corresponding direct liability to the Crown. No larger application should be given to the definition of the payments covered than clear language or unmistakably necessary intendment requires. Where the words of the statute leave the intention obscure, they should be construed as they stand with only such extraneous light as is reflected from within the statute itself; a mere conjecture that Parliament entertained a purpose which, however natural, has not been embodied

H. C. OF A. 1946. BROOME v. CHENOWETH. Dixon J.

in the words literally interpreted is no sufficient reason for departing from the literal interpretation; to adhere to the literal construction unless the context makes it plain that it cannot be put on the words, is a rule especially important in cases of statutes which impose taxation: per *Lord Haldane* in *Lumsden* v. *Inland Revenue Commissioners* (1). I, therefore, think that the information failed because the facts did not bring the transaction within s. 221C.

The defendant relied upon a second defence in addition to the contention with which I have dealt. He said that before the hearing of the information now in question, an information for the same offence had been laid against him; that he had appeared before the Court of Petty Sessions to answer it and that it had been dismissed by that court.

An information which was intended to contain the same charge was in fact laid against the defendant. After the informant and he had appeared by counsel and after an adjournment, counsel for the informant, considering that the information was so defective or so unsatisfactory in form that he should not proceed upon it, sought leave to withdraw it. The defendant's counsel opposed the withdrawal upon the ground that, under s. 88 (2) and (14) of the *Justices Act* 1928 (Vict.), he was entitled to a hearing of the charge and to a decision thereon. Thereupon, the magistrate being of opinion that he should not allow a withdrawal, but being ready to dispose of the matter by "dismissing the information for want of prosecution," counsel for the informant accepted a determination of the proceedings in those terms. The register of convictions orders and proceedings was, accordingly, entered up: "Dismissed for want of prosecution." Counsel for the informant then went on with the information now in question.

In refusing to permit the withdrawal of the first information, the magistrate was influenced by the doubt expressed by *Lowe* J. in *Bishop* v. *Cody* (2), as to whether such a course is open, at all events after a hearing has been entered upon. But his reasons for refusing to allow a withdrawal are not material. What is material is that defects existed in the information which made the prosecutor unwilling to proceed and that the ground of the dismissal was his failure further to prosecute it. The expression in the minute "want of prosecution" was used to mean the failure of the informant to support the information though appearing before the court, not his failure to appear. It is not an expression with any distinct meaning or consequences in proceedings before justices. It is not a term of art

(1) (1914) A.C. 877, at pp. 887, 892, 897.

(2) (1939) V.L.R. 246, at p. 250.

or a recognized form of judgment, like a judgment of nonsuit, of *non pros.* or a judgment after a *nolle prosequi* before verdict, well understood at common law to amount to a termination of proceedings without an adjudication and creating no bar to a subsequent suit. In a minute in the Register of Petty Sessions the expression amounts to no more than a statement of the reason for the order. There is, therefore, nothing in the terms in which the minute is framed to prevent the order of the magistrate operating as such a discharge of the defendant from the earlier information as to bar any subsequent proceedings for the same offence.

The rule against double jeopardy requires for its application not only an earlier proceeding in which the defendant was exposed to the risk of a valid conviction for the same offence as that alleged against him in the later proceedings but that the earlier proceeding should have resulted in his discharge or acquittal. This last requirement may be satisfied by something less than an actual adjudication upon the truth of the allegations contained in the charge or upon the existence of some exculpatory fact. It may be enough if the judgment or order pronounced in favour of the person who stands in jeopardy must, according to its legal construction, imply a failure upon the part of the prosecution to make out the charge or some ingredient therein or even a preliminary condition legally indispensible to a conviction, that is if the condition is of a kind that cannot be fulfilled after the failure of the earlier charge and before the laying of the later charge.

In the present case the proceedings had advanced to a stage when it became incumbent upon the prosecutor to support his information by proof, or evidentiary presumption, in order to avoid a dismissal. That being so, I see no reason why the actual order dismissing the information, although expressed to be for want of prosecution, should not amount to a sufficient discharge affording a bar to further prosecution, if the other requirements are satisfied upon which a defence of prior acquittal depends.

There can be no question that the information, upon which, by the order absolute of the Supreme Court, the defendant was convicted, charged the same offence upon the same facts, upon the same date, against the same person as the dismissed information intended to do. So far, therefore, a case of double jeopardy is made out. But there is left the question whether upon the earlier information there could have been a valid conviction. If a conviction in that proceeding could not have been effective, the defendant never did stand in jeopardy upon the earlier charge. In substance, therefore, the question is whether counsel took the correct view in refusing to proceed upon the earlier information as too defective. The material

H. C. OF A. 1946.

BROOME v. CHENOWETH.

Dixon J.

part of that information charged that the defendant, contrary to the provisions of s. 221C of the *Income Tax Assessment Act* 1936-1945, on 25th March 1945, being the employer of Healy at wages in excess of £2 per week, at the time of payment of wages to the said Healy did fail to make the deduction required from such wages as prescribed by the regulations made under the said Act. The charge does not pursue the language of s. 221C. Sub-section (1A) of s. 221C is framed in such a way that it may be relied upon in support of a charge under sub-s. (1), although an information does not contain an allegation of the facts which bring a case within the application of sub-s. (1A). But, even so, a comparison of the information now under consideration with sub-s. (1) will show that it contains no express allegation of two ingredients in a charge under sub-s. (1). First, it does not allege that Healy was entitled to receive salary or wages. Secondly, it does not allege that it was in respect of a week or part of a week that Healy was entitled so to receive salary or wages. As against this, however, it does contain a statement of facts evidencing these facts or raising an inference in favour of their occurrence. For it states that the defendant was the employer of Healy at wages in excess of £2 per week and that there was a payment of wages to Healy. The statement of these evidentiary facts cannot stand in place of an allegation of the ultimate facts they tend to prove, but their statement bears on the nature and extent of the insufficiency of the information. That it is defective, however, is undeniable.

The old rule was that, if the defendant could have taken a fatal objection to the earlier indictment or information, his discharge or acquittal thereon could not afford a bar. "The point in discussion always is whether, in fact, the defendant could have taken a fatal exception to the former indictment; for, if he could, no acquittal will avail him, but if he could not, it is always competent for him to shew the offences to be really the same, though they are variously stated in the proceedings" (*Chitty's Criminal Law* 1st ed. (1816), vol. 1 p. 455).

In the present instance I think that, unless the information had been amended, the defects I have mentioned are such that a conviction in its terms could not have been sustained.

Sections 239 and 240 of the *Income Tax Assessment Act* 1936-1945 moderate the strict rules of the common law, the one as to informations, and the other as to the validity of convictions &c. Section 239 is based upon the proviso of s. 1 of *The Summary Jurisdiction Act* 1848 (*Jervis' Act*), but it contains, in addition, a very full power of amendment, probably a more ample power of amendment than that contained in the corresponding section in s. 196 of the Victorian *Justices*

Act 1928. See, too, the *Crimes Act* 1914-1941, s. 21A. Section 240 provides that a conviction shall not be held void for any defect therein or want of form.

Whether an information disclosing no offence can be amended has been the subject of some difference of judicial opinion. Some Victorian cases will be found discussed by *Cussen* J. in *Knox* v. *Bible* (1), and the matter is very fully examined by *Clark* J. in *Davies* v. *Andrews* (2), where cases from other jurisdictions are collected. Probably it is necessary to deal with the question as a matter of degree and not by a firmly logical distinction. An offence may be clearly indicated in an information, but, in its statement, there may be some slip or clumsiness, which, upon a strict analysis results in an ingredient in the offence being the subject of no proper averment. Logically it may be said in such a case that no offence is disclosed and yet it would seem to be a fit case for amendment, if justice is not to be defeated. By contrast, at the other extreme, an information may contain nothing which can identify the charge with any offence known to the law. Such a case may not be covered by the power of amendment. It is, perhaps, enough to say that I think that the earlier information in the present case, although defective, was not outside the power of amendment conferred by s. 239 (1). But that does not establish that the defendant must be considered so to have stood in jeopardy upon the information as to be able to avail himself of his discharge therefrom as an answer to the subsequent charge. For in fact the information was not amended. In *R.* v. *Green* (3), the judges upon a case reserved decided that, upon a plea of *autrefois acquit*, they should consider the former indictment as it was and not as it might have been made by amendment. At first sight, perhaps, it may appear not easy to reconcile *Halsted* v. *Clark* (4) with this view, and it may be thought to be a view which fails to give effect to the reality of the situation of a prisoner tried upon a defectively drawn indictment which, upon objection taken, he may be sure would be amended. But the two cases were very different. In *Green's case* (3) the acquittal was the result of the error in the indictment. In *Halsted* v. *Clark* (4) the dismissal of the information was upon the ground that the commission of the offence was not proved, even if the charge were to be amended.

This brings the case now before us to the final point. The dismissal was upon the footing that the information remained unamended. The adjudication was that it should be dismissed because, in its defective form, the prosecutor did not support or pursue it. The defendant never incurred the risk of a hearing upon an amended

(1) (1907) V.L.R. 485, at pp. 498-500.
(2) (1930) 25 Tas.L.R. 84, at pp. 91-110.
(3) (1856) Dears. and B. 113 [169 E.R. 940].
(4) (1944) K.B 250.

H. C. OF A. 1946.

BROOME v. CHENOWETH.

Dixon J.

information or even of an amendment being made. The form of the information is enough to account for, and in fact does account for, the dismissal.

If the record alone is looked at, consisting of the information and dismissal, it does not show that the defendant might have been validly convicted. This position cannot be bettered by going beyond the bare record because to go beyond it would show that the dismissal was due to the prosecutor's treating the information as insufficient to support the intended charge. On the whole, therefore, I think that the discharge does not afford a bar to the later information.

The view I take means that I think that the prosecutor's counsel was right in supposing that the information was so defective that it would not support a conviction and that, as it was not amended, but, on the contrary, was dismissed because the prosecution refused to support it as an effective charge, the proceeding did not place the defendant in jeopardy of a valid conviction. Suppose an application to amend the information had been made and refused and, thereupon, the prosecutor had submitted to the dismissal of the information as too defective to support a conviction. In that case I should think that the defendant could not avail himself of his discharge upon the bad information as an answer to the later charge. The principle upon which the case of *R.* v. *Green* (1) depends would apply. If that had happened in *Halsted* v. *Clark* (2), it is difficult to suppose that the same decision would have been given. Nor does it appear that *Murray* C.J. would have decided *Curyer* v. *Foote* (3) as he did, if the information had been bad and the amendment there refused had been essential to its sufficiency to support a conviction. I do not see why a different result should ensue in the present case because no amendment was applied for and, on the ground of its insufficiency, the prosecutor did not support his information and submitted to its dismissal.

It is only necessary to add that I do not think that s. 240 of the *Income Tax Assessment Act* 1936-1945 can affect the present case. A conviction in the language of the information could not have stood without amendment and it comes back to the same question.

For my part, therefore, I would not be prepared to sustain the appeal on the ground that the defendant appellant had twice been put in jeopardy. But I think, for the reasons already given, that the prosecutor failed to bring the defendant within s. 221c of the *Income Tax Assessment Act* 1936-1945 and, on that ground, the appeal should be allowed.

(1) (1856) Dears. and B. 113 [169 E.R. 940].

(2) (1944) K.B. 250.

(3) (1939) S.A.S.R. 203.

I would allow the appeal with costs, set aside the order of the Supreme Court and, in lieu thereof, discharge the order nisi to review with costs.

McTIERNAN J. I agree with the judgment and reasons of the Chief Justice.

WILLIAMS J. I have had the advantage of reading the reasons for judgment of the Chief Justice and agree substantially with his reasons and conclusions. I would allow the appeal.

Appeal allowed with costs including reserved costs. Order of Supreme Court set aside. In lieu thereof discharge order nisi with costs.

Solicitor for the appellant: *P. Arundell*, Colac, by *N. J. Shankly*.
Solicitor for the respondent: *G. A. Watson*, Acting Crown Solicitor for the Commonwealth.

E. F. H.