[HIGH COURT OF AUSTRALIA.]

FEDERAL COMMISSIONER OF TAXATION . PLAINTIFF;

AND

STEEVES AGNEW AND COMPANY (VICTORIA) PROPRIETARY LIMITED . DEFENDANT.

H. C. OF A. 1951.

MELBOURNE, *March* 22, 29; *June* 1.

Dixon J.

Income Tax (Cth.)—Collection by instalments—Managing director of company—Contract of service—Remuneration by share of profits—Drawings in anticipation of remuneration—No deductions on account of income tax—Drawings in excess of remuneration—Continuing account balanced yearly—"Employee"—"Salary or wages"—"In respect of any week or part thereof"—"In respect of a period of time in excess of one week"—"Time of making payment"—Income Tax Assessment Act 1936-1943 (*No.* 27 *of* 1936-*No.* 10 *of* 1943), *ss.* 221A, 221C (1), (1A), 221E.*

The defendant was a trading company incorporated in Victoria which carried on business in Melbourne as an insurance broker. W. was the managing director of the company, although he was described as manager in the agreements under which he was employed. Throughout the financial year beginning on 1st July 1942 and ending on 30th June 1943 and for the first half of the next financial year he was employed under an agreement dated 10th May 1941. For the second half of the latter financial year he was employed under an agreement dated 12th July 1944 but expressed to take effect from 1st January 1944. Under each of the agreements his remuneration consisted wholly of a share of profits which varied according

* The *Income Tax Assessment Act* 1936-1942 (being the Act of 1936 as amended by various Acts up to and including Act No. 50 of 1942), and also (except as otherwise indicated hereunder) the Act as of 1936-1943, provided, in Part VI., Div. 2:—By s. 221A: "'employee' means any person who receives, or is entitled to receive, any salary or wages"; "'employer' means any person who pays or is liable to pay any salary or wages"; "'salary or wages' means salary, wages, commission, bonuses or allowances paid . . . to any employee as such, and, without limiting the generality of the foregoing, includes any payments made . . . (*b*) by a company by way of remuneration to a director of that company." By s. 221C (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" an amount specified (which varied as the Act was amended from time to time: in the Act of 1936-1942 the amount was three pounds, and in the Act of

to circumstances defined in the agreements. The agreement of 10th May 1941, under which W. was employed for a term of three years from 1st January 1941 unless the agreement should be determined in manner provided during the term, contained no provision specifying a date for payment of remuneration or providing for advances or drawings on account of the remuneration. The agreement of 12th July 1944, however, provided that W. should draw monthly in anticipation of his remuneration, such drawings to be computed on the assumption that the remuneration was £1,000 per annum, and as soon as might be after each half-yearly balancing of the defendant's affairs all necessary adjustments should be made in respect of the remuneration. Throughout the employment W. made drawings on account of his remuneration as he thought fit. In respect of the year 1942-1943 he drew more than the amount to which, as was subsequently ascertained, he was entitled by way of remuneration; and he was debited in the defendant's books with the amount of the excess when it was ascertained. As at 30th June 1944 he was overdrawn in respect of the financial year ending on that day and also the preceding year in the amount of £2,899 17s. 11d. In November 1944 he repaid £2,000. The Federal Commissioner of Taxation sought to recover from the defendant under s. 221E of the *Income Tax Assessment Act* 1936-1943 amounts which he claimed should have been deducted from W.'s drawings under s. 221C of the Act of 1936-1942 (in respect of the period up to 1st April 1943) and under that section as amended by the *Income Tax Assessment Act* 1943, s. 20 (in respect of the ensuing period).

Held that the commissioner was not entitled to recover any part of the amounts claimed. W.'s agreements with the defendant were contracts of service; and, within the definitions in s. 221A of the Act, W.'s remuneration was "salary or wages" and he was an "employee" of the defendant. W. was not, however, entitled to receive salary or wages "in respect of any week or part thereof" within s. 221C (1) of the Act of 1936-1942. His drawings were advances in anticipation of salary and were not received as salary or wages. They were not "in respect of", or received in respect of, any period

1936-1943 it was 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". In s. 221C of the Act of 1936-1942 the following subsection (to take effect as from 1st April 1943) was inserted by the *Income Tax Assessment Act* 1943, s. 20: "(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 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—(*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 Act of 1936-1942 (and 1943) also provided, by s. 221E (1): "Where an employer fails to make any deduction required to be made by this Division he shall . . . be liable to pay to the Commissioner the amount which he has failed to deduct, and the Commissioner may sue for and recover that amount in any court of competent jurisdiction".

[The provisions of s. 221C above set out have been superseded by a section substituted by Act No. 63 of 1947, s. 13, and amended by Act No. 44 of 1948, s. 21.]

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of time as a period of service so as to fall within s. 221C (1A), and were not "in respect of any week" within s. 221C (1), of the Act of 1936-1943. The drawings could not be considered as payments of salary subject to a condition subsequent; when the drawings were made, the defendant's liability for remuneration had not arisen. It could not be said that after the ascertainment of the amount to which W. had become entitled a payment of the full amount was notionally made by the defendant and W. accounting with one another. There was no evidence of an account between W. and the defendant having been struck and a payment made in satisfaction of the balance, and there was no mutual extinguishment of cross-demands; there was merely a continuing account balanced at yearly intervals. Accordingly, there was no definite transaction which would serve to fix a "time of making payment" within s. 221C (1).

Broome v. *Chenoweth*, (1946) 73 C.L.R. 583, per *Latham* C.J., at p. 592, commented on.

What amounts to "payment" in discharge of a liability where an account is struck in respect of cross-liabilities, considered.

Callander v. *Howard*, (1850) 10 C.B. 290 [138 E.R. 117], discussed.

In re Bayley-Worthington & Cohen's Contract, (1909) 1 Ch. 648, at p. 665, *Perry* v. *Attwood*, (1856) 6 E. & B. 691, at p. 701 [119 E.R. 1021, at p. 1025], *Spargo's Case*, (1873) L.R. 8 Ch. 407, at p. 414, *Commissioner of Stamp Duties (N.S.W.)* v. *Perpetual Trustee Co. Ltd.*, (1929) 43 C.L.R. 247, at pp. 263, 270, 271, *Joseph* v. *Campbell*, (1933) 50 C.L.R. 317, at p. 323, *De Nicholls* v. *Saunders*, (1870) L.R. 5 C.P. 589, at p. 594, and *Copping* v. *Commercial Flour & Oatmeal Milling Co. Ltd.*, (1933) 49 C.L.R. 332, at p. 342, referred to.

TRIAL OF SUIT.

This was a suit in which the Federal Commissioner of Taxation sought to recover from Steeves Agnew & Co. (Victoria) Pty. Ltd. moneys alleged to be due under s. 221E of the *Income Tax Assessment Act* 1936-1943. The facts appear in the judgment hereunder.

B. J. Dunn, for the plaintiff.

A. D. G. Adam K.C. and *K. A. Aickin*, for the defendant.

Cur. adv. vult.

June 1.

DIXON J. delivered the following written judgment:—

This is a suit by the Commissioner of Taxation in the original jurisdiction of the High Court brought in pursuance of s. 221E of the *Income Tax Assessment Act* 1936-1943 for the recovery of an amount which, as the plaintiff alleges, the defendant has failed

to deduct in pursuance of Division 2 of Part IV. of the Act. The claim covers the two years beginning 1st July 1942 and ending 30th June 1944 and is governed by provisions which, by Act No. 63 of 1947, have been replaced by provisions framed in the light of experience. Division 2, which was headed "Collection of Income Tax by Instalments", related to the obligation of an employer to make deductions on account of tax from the salary or wages paid by him to an employee. Section 221C (1) provided that where an employee was entitled to receive from an employer in respect of any week or part thereof salary or wages in excess of £2 the employer should at the time of making payment of the salary or wages make deductions therefrom at such rates as are prescribed. Section 221E (1) provided that where an employer failed to make any deductions required to be made by this division he should, in addition to any penalty for which he might be liable, be liable to pay to the commissioner the amount which he had failed to deduct and the commissioner might sue for and recover that amount in any court of competent jurisdiction.

The defendant was a trading company incorporated under the *Companies Acts* of Victoria. It carried on business in Melbourne as an insurance broker. The principal shareholders resided in London and the chief operations of the company seem to have been the securing of insurance business in Australia to be placed with Lloyds' underwriters in London. The commissioner alleges that during each of the two financial years ending respectively on 30th June 1943 and 30th June 1944 the defendant failed to make any deductions from the salary paid to a person in its employment named Welch. In respect of the first of the two financial years a claim is made for £3,072 11s. 0d., calculated on a total remuneration paid to Welch of £4,576. In respect of the second year the claim is for £2,464 16s. 0d., calculated on a total remuneration paid to Welch of £3,993.

Welch was the managing director of the company. Throughout the whole of the first of the two financial years and for the first half of the second financial year he was employed under an agreement dated 10th May 1941. For the second half of the second financial year his relations with the defendant were governed by an agreement actually dated 12th July 1944 but expressed to take effect from 1st January 1944. Although according to the oral evidence he was managing director the agreements employed him as manager. The agreement of 10th May 1941 provided that the company would employ Welch and he would serve the company as the manager of its business within the State of Victoria and

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elsewhere for a term of three years from 1st January 1941 unless the agreement should be determined during the term in accordance with its other provisions. The agreement contained usual clauses relating to such matters as the discharge of the manager's duties, the keeping of books of account, secrecy and serving the company exclusively. The remuneration of the manager, which consisted wholly of a share of profits, was governed by clause 6. That clause provided in effect that the manager should receive as remuneration for his services out of the net income of the company the following—(a) the whole of the net income earned in any one year from its business up to £500; (b) fifty per cent of the net income earned in any one year from the business over £500 and up to £1,000; (c) three-fifths of the income earned in any one year in excess of £1,000. Clause 7 of the agreement authorized the manager, subject to the consent and approval of the directors to appoint sub-agents to conduct business throughout Victoria and elsewhere. A fourth head of his remuneration was to consist of three-fifths of any further sum received by the company as additional remuneration and received by it from underwriters through the London brokers of the company, but out of that sum he was to be liable for the payment of the commissions of such underwriters to any agent appointed subject to clause 7. The agreement contained no provision specifying the date upon which he was to be paid his salary or providing for advances or drawings on account of salary.

The agreement of 12th July 1944 operating from 1st January contained provisions similar to, if not identical with, those of the earlier agreement, but it introduced a clause upon the subject of drawings. Clause 6B provided that the company should make to (the manager) and the manager should accept payment of the remuneration thereinbefore provided for in the following manner—(a) the manager should draw monthly in anticipation of the remuneration to be paid to him by the company; (b) such monthly drawings should be computed on the assumption that the remuneration to be paid to the manager was £1,000 per annum; (c) as soon as might be after the half-yearly balancing of the company's affairs to be made on 30th June and 31st December in each year of the term of employment all necessary adjustments should be made in respect of the remuneration of the manager. Sub-clause (d) then provided for the case of its becoming apparent that the remuneration payable to the manager would not amount to £1,000 a year, but it has no importance in the circumstances of this case.

Welch, being in command of the company, made drawings on account of his salary apparently as he thought fit. For the year ended 30th June 1943 the ledger account shows drawings amounting to £5,856 13s. 5d. Of this sum £2,746 was a transfer from his loan account, whence it was drawn in five sums during the first four months of 1943. A further amount of £2,203 4s. 2d., forming part of the total of £5,856 13s. 5d., was drawn by Welch in cash on some date after 30th June 1943. The cheque passed through the bank on 5th August 1943. This drawing involved an overpayment as it afterwards turned out. According to the evidence entries were subsequently passed between the London brokers and the company resulting in a reduction of the company's income. The consequence was that Welch had overdrawn by £1,280 12s. 2d., a sum duly debited to his ledger account. Including the drawing of £2,203 4s. 2d. made after the end of the financial year and the drawings from the loan account making up the sum of £2,746 transferred to his ledger account, Welch appears to have made eight drawings in respect of the financial year ending 30th June 1943. In the financial year ending 30th June 1944 he drew in fact a sum of £5,612 5s. 9d. But the amount of his actual earnings for the year ending 30th June 1944 was ascertained at only £3,993. This meant that, with the overdrawing of £1,280 12s. 2d. for the previous year, he was overdrawn as at 30th June 1944 in the amount of £2,899 17s. 11d. In November 1944, that is after the period with which this action is concerned, he is credited with a payment of cash £2,000. His drawings during the year ended 30th June 1944 appear to have been made with more regularity than in the previous twelve months. During July 1943 he drew £1,550 in three sums, in August £80 in four sums of £20, in September £80 in weekly payments of £20, together with a sum of £500. In subsequent months he seems to have continued a drawing of £20 a week with intermediate drawings of larger sums, one sum of £300, one sum of £500, and three sums of £600. These, together with a small sum of £2 5s. 9d. drawn on 19th May 1944 make up the £5,612 5s. 9d.

An amendment of s. 221C was made by Act No. 10 of 1943, s. 20, to take effect as from 1st April 1943. It will be necessary to consider the effect of this amendment, the material part of which consisted in the insertion of sub-s. (1A) in s. 221C. The insertion of this provision makes it desirable in stating the facts to distinguish between the drawings before and after that date. In the period of nine months from 1st July 1942 to 1st April 1943 the important drawings made consisted of £1,000 on 3rd July 1942, £400 on

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8th January and from the loan account £1,000 on 11th January, £500 on 26th January, £246 on 12th February, £500 on 23rd February. The remaining drawings for the year ending 30th June 1943 were made after 1st April.

No deductions whatever on account of tax were made from the amounts drawn by Welch. He seems to have regarded himself as outside s. 221C and until the company's income-tax returns were sent in and as a result the commissioner communicated with the company upon the subject, it is probable that it did not occur to anybody else connected with the company that it might be necessary to make deductions in respect of Welch's remuneration.

The question for decision is whether, as the legislation stood, the omission on the part of the defendant company to make deductions on account of tax from the payments received by Welch as drawings, when they were so received, or to effect some recoupment or deduction at some subsequent point of time, involved a failure to comply with s. 221C with the consequence that the company incurred a liability under s. 221E (1), and if so how that liability is to be calculated.

The application of s. 221C initially turns upon the definition of the words "employee", "employer" and "salary or wages". "Employee" is defined by s. 221A to mean any person who receives or is entitled to receive any salary or wages, and "employer" is defined to mean any person who pays or is liable to pay any salary or wages. These definitions thus depend on the definition of "salary or wages". The expression "salary or wages" is defined to mean salary, wages, commission, bonuses or allowances paid (whether at piece-work rates or otherwise) to any employee as such. Without limiting the generality of the foregoing it is to include certain specified payments of which it is enough to mention two, viz.—"(*b*) by a company by way of remuneration to a director of that company"; (*d*) "by way of commission to an insurance or time-payment canvasser or collector". Paragraph (*d*) is not directly in point, but indicates the width of the definition. It is clear enough that the remuneration calculated in the manner of Welch's remuneration is within the definition of "salary or wages". It is also clear that his agreements with the company were contracts of service and that he was employed within the meaning of the definition.

The difficulty, however, in the way of the commissioner, lies in the character of the payments actually made. There can, in my opinion, be no doubt that the sum transferred from the loan

account represented payments by way of loan. The other payments to Welch's debit in the ledger account, his drawings, appear to me in fact to have been advances.

The case for the plaintiff commissioner was, I think, presented in three ways. Primarily it was contended simply that the drawings by Welch each answered the description of " payments of the salary " made to him, so as to fall within s. 221C (1). Next it was put that each was at all events a conditional or provisional payment of salary which became absolute when the earnings of Welch for the year were ascertained and that s. 221C (1) applied to payments of such a character. Thirdly it was said that when the accounts were made and a balance struck the discharge of the company's liability to Welch for his remuneration was effected and this amounted to a payment of salary to which s. 221C applied. But, apart from the difficulties which arise on the words " at the time of making payment of the salary or wages " in s. 221C (1), there is the further question whether it can be said that Welch was entitled to receive in respect of a week or part thereof salary or wages within the meaning of the provision. For the purposes of that question it now becomes necessary to distinguish between the period before and the period after 1st April 1943. For the payments made within the earlier period the question depends on the operation of s. 221C (1) before sub-s. (1A) was introduced. For the later it depends also upon the operation of sub-s. (1A). Subsection (1) provides for the case of an employee who is entitled to receive from an employer in respect of any week or part thereof salary or wages and it requires the employer at the time of making the payment of the salary or wages to make deductions therefrom at the rates prescribed. It is necessary for the commissioner to establish, in order to show that the defendant company was under a duty to make deductions from the payments received by Welch prior to 1st April 1943, that those payments were made in discharge of an obligation under which Welch was entitled to receive from the defendant company salary or wages in respect of any week or part of a week. This, in my opinion, the commissioner cannot do. The agreement did not entitle Welch to receive salary or wages in respect of any week or part of a week. Had the agreement made his salary referable to a week or part of a week, it is doubtful whether before sub-s. (1A) came into force a payment made in a lump sum but not in respect of a particular week or weeks would have come within sub-s. (1). But however that may have been it is not the present case. Speaking of s. 221C after sub-s. (1A) had been introduced into it, *Latham* C.J. said,

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in *Broome* v. *Chenoweth* (1), that the words "in respect of any week or part thereof" meant that the salary or wages which the employee is entitled to receive were money which could properly be described as due (so that he was 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 had expired. The remuneration of Welch was not based on any such conception and on no view can I see how he can be said to have been entitled to receive salary or wages in respect of a week or part of one. Sub-section (2) of s. 221C provided that where salary or wages for any week or part of a week was or were paid in two separate sums, all sums so paid should, for the purpose of computing the amount of deduction under this section, be treated as one sum and the employer might at his option make the deduction wholly from one sum or in part from each of any two or more sums. But since sub-s. (2), at all events as it stood at that date, could not apply unless the salary or wages were salary or wages for any week or part of a week it therefore could not help the commissioner in the application of s. 221C to the sums paid to Welch, at all events those paid before 1st April 1943. The condition which s. 221C (1) lays down is that the employee shall be entitled to receive in respect of a week or part thereof salary or wages. In strictness, therefore, what is to be considered is his right in respect of a week, not the character of the actual payments made. But if the latter were to be considered, then, as I have already said, I think that the sums drawn must be treated as advances on account of salary and not as definite payments in respect of salary. They are drawings on account of an expected obligation which did not become a complete obligation under the first agreement until the accounts were made up at the end of the year and the amount of remuneration ascertained. Although the second agreement refers to making up accounts at the end of six-monthly periods, it would appear from the evidence that the company in fact made up its accounts annually. So far as concerns the first and second of the three ways in which I have said the plaintiff commissioner's case was presented on this point enough has been said to dispose of it for the period before 1st April 1943. Sub-section (1A), which applies to the period after 1st April 1943, provides that for the purposes of s. 221C, 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 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

(1) (1946) 73 C.L.R. 583, at p. 592.

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.

Section 20 of Act No. 10 of 1943, which placed sub-s. (1A) in s. 221C, also amended sub-s. (2) of that section. The amendment consisted in the insertion in sub-s. (2), after the words "where salary or wages for", the words "or deemed to have been received in respect of" so that sub-s. (2) read: "Where salary or wages for, or deemed to have been received in respect of, any week is or are paid in two separate sums" &c. An inspection of sub-s. (1A) will show that its operation depends upon the fulfilment of conditions which make it necessary (1) that the employee shall receive from his employer salary or wages, (2) that the salary or wages so received shall be in respect of a period of time, and (3) that the period of time shall be in excess of one week. When these requirements are fulfilled the consequence that ensues relates to the condition upon which the operation of sub-s. (1) depends, the preliminary condition expressed by the opening words of that sub-section, namely, "Where an employee is entitled to receive from an employer in respect of any week or part thereof salary or wages". The consequence which ensues is that that condition is deemed to have been fulfilled. It is deemed to be fulfilled in the manner stated in sub-s. (1A) and according to the calculation the sub-section prescribes. It will be seen that, while the opening words of sub-s. (1) relate to the description of salary or wages to which the employee is entitled, sub-s. (1A) makes not what he is entitled to receive, but what he receives, the test of the artificial presumption it creates for the purpose of satisfying the condition so laid down by sub-s. (1).

The amendment made in sub-s. (2) nevertheless confuses this distinction, because it speaks of what is "deemed to have been received", though obviously referring to the presumption required by sub-s. (1A). But this is an accidental confusion and it does not alter the application of the express language of sub-s. (1) or of sub-s. (1A).

Now when the conditions contained in the earlier words of sub-s. (1A) are examined with reference to their possible application to the facts of this case, more than one difficulty appears. Can it be fairly said that any of the drawings made by Welch consisted of salary or wages in respect of a period or of salary or wages received in respect of a period? Were they salary or wages? In respect of what period? They were, as I think, advances in

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anticipation of salary. In the case of both financial years the advances exceeded in the event the remuneration ultimately found to have accrued. It is true that in respect of the first year the drawing which took the advances beyond the amount of Welch's remuneration was made after 30th June; but that hardly robs the fact of its significance as an illustration of the character of the drawings as advances against an expected but uncertain liability of the defendant company to Welch for remuneration. To call the drawings provisional payments of salary, as the plaintiff commissioner proposed to do in support of one of his contentions, does not overcome the difficulty. The expression "provisional payments" either means that the drawings constituted payments made as and for salary but subject to a condition subsequent, or it is another description of the same thing and means that they were advances in anticipation of an unascertained future liability for salary. But, in my opinion, they cannot be considered payments of salary subject to a condition subsequent. When the drawings were made the defendant company's liability for remuneration had not arisen. Even in the case of rent a voluntary payment in advance has not the quality of rent. "For payment of rent before it is due is not a fulfilment of the obligation of the covenant to pay rent, but is, in fact, an advance to the landlord with an agreement that on the day when the rent becomes due such advance shall be treated as a fulfilment of the obligation to pay the rent"—per *Willes* J., *De Nicholls* v. *Saunders* (1); cf. *Copping* v. *Commercial Flour and Oatmeal Milling Co. Ltd.* (2). But if the drawings could be considered salary or wages there is the greatest difficulty in applying to them the description "salary or wages in respect of a period of time" or "salary or wages received in respect of a period of time". Until August 1943 there is nothing except the terms of the agreements themselves to connect the payments with any period and the terms of the agreements contemplate in the one case a year and in the other a half-year, and then rather as an accounting period, a recurring interval for the purpose of computation, than as a period of service to be rewarded. It is true that from August 1943 Welch drew £20 in effect once a week as well as larger sums. But if this fact were treated as enough to establish that these drawings constituted salary or wages in respect of a period of time, or received in respect of one, then the odd position would arise that they were in respect of a period not in excess of a week and therefore outside sub-s. (1A). At the same time they would not fall within sub-s. (1) because Welch was

(1) (1870) L.R. 5 C.P. 589, at p. 594. (2) (1933) 49 C.L.R. 332, at p. 342.

not entitled to receive, in respect of a week, any of them. Up to 1st January 1944 he had no contractual right to make any drawings, though doubtless he relied justifiably upon obtaining reasonable advances against salary. For the period after 1st January 1944 he became entitled to receive monthly advances, assuming, as well may have been the case, that the agreement of 12th July 1944 only reduced to writing terms agreed upon before the period commenced or during its currency. In any case it does not follow from the fact that Welch drew £20 every week that it was salary or wages in respect of a week. It is one thing for advances to be regularly made in order to meet the regular needs of the recipient and another to pay salary or wages in respect of a weekly period of employment. The former is not concerned with remuneration for service or work done over a period of time, while it is the very foundation of the latter.

I have said that the terms of the agreements do contemplate a year and a half-year respectively, even if only as accounting periods. It may be said that every payment made was made in respect of the entire period of twelve months or of six months. That would produce a strange result in the calculation of the amount of the deductions, for it would be necessary to divide each of the payments by 365 days in the one case and by 183 days in the other before multiplying it by seven to obtain the amount referable to a week. It is not in that sense that sub-s. (1A) uses the expression " received from an employer salary or wages in respect of a period of time in excess of one week ". If it were, however, there would be comparatively few payments in excess of the £2, the minimum provided for by s. 221C, and the amount of tax upon those few payments would be small. But the short answer to the case of the plaintiff commissioner when he seeks, as he does, to treat the drawings as the payments from which deductions ought to have been made is that in fact they were not salary or wages and were not received as salary or wages and were not " in respect of " or " received in respect of " any period of time as a period of service so as to fall within sub-s. (1A) and not " in respect of any week " within sub-s. (1).

There is, however, still another aspect in which the commissioner's case is presented. This final presentation of the case of the commissioner seems to me to depend upon the theory that after the ascertainment of the amount to which Welch had become entitled a payment of the full amount was notionally made by the defendant company and Welch accounting with one another. Reliance was placed upon the doctrine explained and illustrated by *Callander*

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v. *Howard* (1). In that case the Court of Common Pleas held good a plea to an action on bills of exchange that the defendant and the plaintiff accounted together and an account was then stated between them of and concerning the causes of action and of and concerning certain other claims and demands of the plaintiff against the defendant and other claims and demands of the defendant against the plaintiff and on that accounting a certain sum named and no more was then found to be and was due and owing from the defendant to the plaintiff, which sum of money the defendant then in consideration of the premises promised the plaintiff to pay him on request and thereupon the defendant afterwards did so pay the plaintiff and the plaintiff accepted that sum. It may be doubted whether the plea was upheld as a plea of payment, although towards the close of the judgment it is said that in certain decided cases no satisfactory reason had been suggested why the plea should not be regarded as amounting to a plea of payment. Actual payment of a residue appears to be essential to such a plea if so regarded: see *Callander* v. *Howard* (2), and *Re Bayley-Worthington and Cohen's Contract* (3). In the course of the argument in *Perry* v. *Attwood* (4), Lord *Campbell* C.J. said of *Callander* v. *Howard* (5) that it could hardly be a plea of payment: it did not show that what was claimed by the declaration had been paid. But if it did amount to payment it is what Lord *Rolle* described as a payment by way of retainer in the passage cited in *Callander* v. *Howard* (6), and that is hardly the kind of payment s. 221C referred to. But be that as it may, I do not think that the facts of the present case make out such a state of affairs as would amount to the making of a payment after the end of either financial year or at the end of both financial years. In the first place, Welch was overdrawn. He was debited with the amount of his overdrawing and he appears to have paid a sum on account of that overdrawing. There is no evidence of an account between Welch and the defendant having been struck and a payment made in satisfaction of the balance. There was in this case no mutual extinguishment of cross-demands. If cross-liabilities in sums certain of equal amounts immediately payable are mutually extinguished by an agreed set-off, that amounts to payment for most common-law and statutory purposes. "Nothing is clearer than that if parties account with each other, and sums are stated to be due on one side, and sums to an equal amount

(1) (1850) 10 C.B. 290 [138 E.R. 117].
(2) (1850) 10 C.B., at p. 301 [138 E.R., at p. 119].
(3) (1909) 1 Ch. 648, at p. 665.
(4) (1856) 6 E. & B. 691, at p. 701 [119 E.R. 1021, at p. 1025].
(5) (1850) 10 C.B. 290 [138 E.R. 117].
(6) (1850) 10 C.B., at p. 298 [138 E.R., at p. 121].

due on the other side on that account, and those accounts are settled by both parties, it is exactly the same thing as if the sums due on both sides had been paid. Indeed, it is a general rule of law, that in every case where a transaction resolves itself into paying money by A. to B., and then handing it back again by B. to A., if the parties meet together and agree to set one demand against the other, they need not go through the form and ceremony of handing money backwards and forwards" (per *Mellish* L.J., *Spargo's Case* (1)): see *Commissioner of Stamp Duties (N.S.W.)* v. *Perpetual Trustee Co. Ltd.* (2); *Joseph* v. *Campbell* (3). But for the application of these principles there must be cross-liabilities and agreement, express, tacit or implied, and the cross-liabilities must be equal. If they are not equal payment of the residue must be effected by other means. A continuing account balanced at yearly intervals is not the same thing. The point is that there was no definite transaction amounting to payment which would form an occasion when the obligation to make deductions attached to the defendant company so that unless the deductions were then and there made, the company had failed to make a deduction required by Div. 2 within the meaning of s. 221E; in other words, there was no "time of making payment" within s. 221C (1). No doubt if Welch had sued the defendant company, for example, in 1945, to recover salary for either or both of the two financial years in question, the company could have made out a complete defence to the action under a plea of payment. But that would be because the implications involved in Welch's drawings in advance of the liability bound him to apply the advances in satisfaction of the liability when and if it was ascertained and due and in fact his drawings exceeded the amount so ascertained. But such a situation was the result of a course of dealing which included no specific occasion or occasions upon which the liability to deduct prescribed amounts fell upon the defendant company. Section 221C appears to be directed to the making of deductions from sums of money paid over and not to the discharge of an obligation for salary or wages by other means. It is not necessary in the present case to decide what would have been the operation of s. 221C if an employee had been found to owe his employer a large sum of money upon some extraneous transaction and an agreement between them was made, treating the obligation to pay him wages as operating in discharge of his liability *pro tanto* or entirely.

(1) (1873) L.R. 8 Ch. 407, at p. 414.
(2) (1929) 43 C.L.R. 247, at pp. 263, 270, 271.
(3) (1933) 50 C.L.R. 317, at p. 323.

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Perhaps this would be considered a "time of making payment" within s. 221C (1) and the employer could not bring in the wages to extinguish *pro tanto* the cross-obligation without reducing the amount of the wages by the prescribed deduction. But in the present case the drawings were advances on account of wages and were applicable in satisfaction of wages independently of the employer. They were debited against Welch either in the ledger account or the loan account as the case might be and the account ran on until finally at the end of 1945 drawings ceased apparently, leaving him a debtor to the company in £298. It is true that the figures are balanced at the end of every year, but that is not enough to bring the case within the principle relied upon. There was no definite transaction after the remuneration was ascertained amounting to payment, and as such affording a specific occasion for the making of the deductions at the rates prescribed. The result may be thought to show that the legislature failed to cover all the possible contingencies occurring within the scope of its general policy. But it is to be remembered that s. 221C in its then form was found to be misconceived and inadequate and that it is for that reason that the legislation upon which this decision depends is no longer in force, s. 221C having been re-cast.

In my opinion the commissioner's suit fails.

Suit dismissed with costs.

Solicitor for the plaintiff, *D. D. Bell*, Crown Solicitor for the Commonwealth.

Solicitors for the defendant, *Pavey, Wilson, Cohen & Carter.*

E. F. H.