[HIGH COURT OF AUSTRALIA.]

INGAMELLS . . . . . APPELLANT;
INFORMANT,

AND

PETROFF . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *March* 13; *May* 8.

Rich, Starke, Dixon, Evatt and McTiernan JJ

Factories and Shops—Information against employer—Determination of Wages Board—Contravention of—Arrears of pay—Order for—Not limited to times disclosed in information—Evidence as to other periods admissible—Factories and Shops Act 1928 (*Vict.*) (*No.* 3677), *sec.* 237.

Sec. 237 of the *Factories and Shops Act* 1928 (Vict.), which empowers a Court of Petty Sessions to order payment to an employee of arrears of pay in addition to imposing a penalty for a contravention of the provisions of the Act, enables a Court of Petty Sessions after conviction for such contravention to hear evidence as to arrears of pay in respect of times not disclosed in the information for the offence and to order payment of such arrears, if any.

Decision of the Supreme Court of Victoria (Full Court): *Ingamells* v. *Petroff*, (1933) V.L.R. 447, reversed.

APPEAL from the Supreme Court of Victoria.

The appellant, Harry Norman Ingamells, an inspector of factories and shops, laid an information against the respondent, Angel Petroff, manufacturer, alleging that the respondent, after the coming into operation of a certain determination of the Boot Board, being a wages board appointed by the Governor in Council under the powers in that behalf conferred upon him by the *Factories and Shops Act* 1928 did, in respect of the period commencing on 10th February 1933 and ending on 16th February 1933 both inclusive, unlawfully employ one Lazo at a lower rate of wages than the rate determined

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by the Board. Endorsed upon the information was the following notice:—"Take notice that if you are convicted of the offence herein mentioned application will be made for an order for such sum as the Court may consider to be due for arrears."

A Police Magistrate, sitting as a Court of Petty Sessions at Fitzroy, heard and determined the information in the usual manner and the defendant was convicted and fined £10. Thereupon the Police Magistrate upon the application of the informant proceeded to hear evidence as to wages or other moneys said to be due by the defendant to Lazo in respect of a period or periods of service commencing considerably before the period named in the information. This was done upon the alleged authority of sec. 237 of the *Factories and Shops Act* 1928, without any complaint having been made or any summons issued in respect of the claim, and, consequently, without any knowledge on the part of the defendant of the facts and matters alleged against him in respect of this new claim. As a result of the inquiry the defendant was ordered to pay a further sum of £30 16s. 6d. for arrears of wages and £5 5s. for costs, in default distress, and to be imprisoned for one month in default of distress. From this decision the respondent appealed to the Court of General Sessions at Melbourne, which took the same view of the meaning of sec. 237 of the *Factories and Shops Act* 1928 as the Police Magistrate and confirmed the order of the Court of Petty Sessions. The respondent thereupon obtained an order nisi under sec. 147 (3) of the *Justices Act* 1928 calling upon the Chairman of General Sessions to show cause why he should not state a case for the opinion of the Supreme Court. On the return of the order nisi the matter was referred by *Lowe* J. to the Full Court. It was thereupon agreed between the parties that the question to be argued before the Full Court should be as to the validity of the order for payment of arrears of wages. The question at issue was whether under sec. 237 of the *Factories and Shops Act* 1928 the Police Magistrate had power to inquire into and award an amount for arrears of wages in respect of a period outside the dates mentioned in the information, or whether such inquiry was limited to the period disclosed in the information. The Full Court took the latter view of the section and set aside the order for the payment of arrears and made an order in lieu thereof for

payment of the amount of the arrears proved for the period set out in the information: *Ingamells* v. *Petroff* (1).

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

Phillips, for the appellant. The Police Magistrate was not limited to the time covered by the information when awarding arrears of wages, and was right in receiving evidence of the total amount of wages due although they were due for a period outside that alleged in the information. Sec. 232 of the *Factories and Shops Act* 1915 was amended in consequence of the decision in *Howard* v. *Wonthaggi Co-operative Distribution Society Ltd.* (2). Sec. 232 of the 1915 Act as amended is now sec. 237 of the 1928 Act. The effect of this decision was defeated by the amendment of sec. 232 of the 1915 Act. There is no inconsistency between secs. 232 and 237 of the Act of 1928.

Ashkanasy, for the respondent. The contention for the appellant is that under sec. 237, as soon as the employer is convicted of any offence under that section, the Court can embark on a new inquiry and order the employer to pay perhaps twelve months' arrears. This is a penal offence carrying a penalty of imprisonment, and as to the claim for arrears he has had no information. Sec. 237 does not authorize such a procedure. Such interpretation would deprive employers of all notice of the charge made against them for arrears. The Court of Petty Sessions is limited to the amount of arrears proved up to the time of conviction, or by the evidence tendered in support of the information. The punishment of imprisonment for non-payment of arrears is put in as part of the penalty for the offence. Moreover, the offence with which the employer may be charged may be of a very trifling character and the arrears may amount to a very substantial sum, and non-payment of that sum may lead to the employer's imprisonment. [He referred to *Howard* v. *Springvale Saw Milling and Building Co. Pty. Ltd.* (3) and *Findlay* v. *Good* (4).]

Cur. adv. vult.

(1) (1933) V.L.R. 447.
(2) (1928) 49 A.L.T. 151; (1928) A.L.R. 64.
(3) (1923) V.L.R. 518; 45 A.L.T. 31.
(4) (1929) V.L.R. 145.

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The following written judgments were delivered :—

RICH J. It sometimes happens that Courts of law adopt an interpretation of legislative enactments which is thought to be at variance with the policy upon which they are bottomed. It has been remarked that in statutes marking a new departure in procedure or practice from the common course of legal administration the unwillingness of the Courts to interpret them as going the full length which the policy of the legislature demanded has sometimes led to a conflict between the actual will of the legislature and the interpretation which the Courts placed upon its expression. This does not proceed from any desire on the part of the Courts to give less than full effect to the legislative intention, but from the opposite assumptions which those who have the task of framing the legislation and those who interpret it tacitly make. The history of the legislation which we are called upon to interpret in this case appears to me to afford an example. Sec. 237 of the *Factories and Shops Act* 1928 in definite words authorizes a Court of Petty Sessions when imposing a penalty for any contravention of the provisions of the Act to order the offender to pay to any person in respect of whom he has been convicted, and who was in his employ, such sums for arrears of pay or overtime or tea-money (for any period not exceeding twelve months) as the Court may consider to be due to such person.

This legislation contains nothing express which requires prior notification to the defendant that an order will be sought against him or which requires the Court to take further evidence or which restricts it to cases in which the contravention relates to pay or overtime or tea-money, and it enables the Court at the instance of the prosecutor to make an order, not in favour of the prosecutor, but of a stranger or strangers to the prosecution. Further, although sec. 232 restricts the civil remedy of an employee whose wages have been underpaid by requiring that he must make a demand in writing and proceed within two months of the demand and within twelve months of the accrual of the liability, sec. 237 empowers the Court to award a full twelve months' wages and says nothing about notice in writing. To my mind the explanation of these facts lies in the assumption on the part of the Legislature that a Court of Petty Sessions would proceed with fairness and discretion and upon proper

proofs, and that where the object in view was the protection of the employee from underpayment of a prescribed wage it was just and proper that an employer found to have contravened the State Industrial Code in any particular should then and there be exposed to an investigation of the amount by which he had underpaid the employee in question, regardless of any claim or failure to claim by the employee. If, however, the section is approached with the assumptions that regularity of legal procedure according to the common course, the mutual civil rights of the employer and employee independently of public interest, and the enactment of remedies harmoniously directed to that single end, were the main or exclusive aim of the Legislature, a very different interpretation may be placed on the provision. In *Howard* v. *Wonthaggi Co-operative Distribution Society Ltd.* (1), the Full Court of Victoria decided that the provisions were impliedly restricted by reason of the limitations contained in sec. 237, with the result that a Court of Petty Sessions could award only wages or the like in respect of which two months' notice had been given. With respect, I consider that no such implication is called for and the decision depends upon assumptions which the Legislature did not make. The Court described the provision as one "designed . . . to avoid the necessity of re-trying the same issue upon a claim by the employee," and as "not intended to give the employee a greater right than he would have in a proceeding in his own name" (*Howard* v. *Wonthaggi Co-operative Distribution Society Ltd.* (2)). The Legislature immediately displaced the effect of the decision by enacting that nothing in the relevant portion of sec. 232 should in any way limit or affect the jurisdiction conferred by the provisions now contained in sec. 237. Notwithstanding these circumstances, the Supreme Court has now in the present case adopted another implication imposing another limitation upon the jurisdiction conferred by sec. 237. This limitation is upon the words of the provision "as the Court may consider to be due." In the judgment of the Court their Honors say: "We feel no doubt that the proper meaning to be attributed to these words under this section is 'as the Court may find to be due

(1) (1928) 49 A.L.T. 151; (1928) A.L.R. 64.

(2) (1928) 49 A.L.T., at p. 153; (1928) A.L.R., at p. 65.

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upon the evidence adduced upon the hearing of the information for the offence charged ' " (1). This limitation means that the Court of Petty Sessions is not at large over the arrears for twelve months, the period named in the section, but is further restricted to the period specified in the information as that during which the offence was committed. During the argument it was suggested that this made no matter because the information could be framed to cover the whole period. Perhaps there may be some provisions by which continuous offences are created of underpayment of wages and such a device, if it was not considered unworthy of the Department, might be resorted to in prosecutions under them. But in many provisions, either because they do not create continuous offences or because they relate to offences other than underpayment, this device is out of the question. But the important thing is that the enactment has again been limited by implication. One of the grounds of the implication is the decision in *Howard* v. *Wonthaggi Co-operative Distribution Society Ltd.* (2) describing the object of the section. Although the exact effect of that decision was set aside by the amendment, its reasoning has again contributed to a restrictive interpretation of the section. With great respect to the learned Judges whose careful and elaborate reasoning led to this conclusion, it fastens upon the enactment restrictions completely foreign to the legislative plan. In my opinion the language of the Legislature exactly expresses its intention, and no implications are warranted by the considerations upon which the judgment of the Full Court depends, reasonable and even strong though those matters may appear if one does not look beyond the course of legal proceedings in which we are all immersed. The Legislature had, I believe, a completely different standpoint. The appeal was taken to this Court at the instance of the Crown, I have no doubt, because of the divergence between the interpretation adopted by the Supreme Court and twice applied restrictively, and that which appears to have been adopted elsewhere in the administration of the Act and confirmed, as I think, by the amending legislation.

I am unable to agree with the judgment of the Supreme Court and I think the appeal should be allowed.

(1) (1933) V.L.R., at p. 451. (2) (1928) 49 A.L.T. 151; (1928) A.L.R. 64.

STARKE J. One Petroff—a Bulgarian, we are told—was charged on information for that, in respect of the period commencing on 10th February 1933 and ending on 16th February 1933, both inclusive, he did unlawfully employ one Nick Lazo—also a Bulgarian—at a rate of wages lower than that determined by the Boot Board appointed pursuant to the *Factories and Shops Act* 1928 of the State of Victoria. In the margin of the information there was a notice that if Petroff were convicted of the offence charged, application would be made for an order for such sum as the Court might consider due for arrears of wages. Petroff was convicted, and fined £10, and he was further ordered to pay the sum of £30 16s. 6d. for arrears of wages and in default of payment to be imprisoned for a period of one month.

The case has received consideration from no less than four Courts —Petty Sessions, General Sessions, the Supreme Court of Victoria, and this Court. There is little in it that warrants such protracted litigation. The decision of the Supreme Court was final, but the Department administering the *Factories and Shops Acts* represented to this Court that the decision affected vital interests and the proper administration of the Acts, and obtained the indulgence of special leave to appeal, on undertaking to pay the costs of the appeal in any event.

It was once the practice of this Court that special leave to appeal would not be granted unless some important matter of law or some question of general public importance was involved, but we seem to have departed from this practice and now often grant special leave to appeal in trivial cases. Our present practice is as unwise as it is burdensome to litigants: *Interest reipublicæ ut sit finis litium.* It cannot even be said that the procedure adopted in this case was the only method of recovering the arrears of wages due to a workman, for, under sec. 232 of the *Factories and Shops Act* 1928, the workman, if he makes a demand in writing on his employer within two months after his wages become due, may within twelve months after such moneys become due take proceedings in any Court of competent jurisdiction to recover the same. However, the matter is now before this Court, and we must dispose of it.

The case depends upon the proper interpretation of sec. 237 of the *Factories and Shops Act* 1928, which, so far as relevant, is in these

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words:—" A Court of Petty Sessions in addition to imposing a penalty for a contravention of any of the provisions of this Act . . . or of a determination of a wages board . . . may order the offender to pay to any person in respect of whom he has been convicted of a contravention as aforesaid and who is or has been in his employ such sums for arrears of pay . . . (for any period not exceeding twelve months) as the Court may consider to be due to such person and any such sum may be recovered by distress and in default of payment the offender shall be liable to imprisonment with or without hard labour for a term of not more than three months. Nothing in section two hundred and thirty-two of this Act after the words 'the price or rate so determined' shall in any way limit or affect the jurisdiction conferred by this section."

The latter clause appears to have been added to sec. 237 to meet the decision in *Howard* v. *Wonthaggi Co-operative Distribution Society Ltd.* (1), in which the Supreme Court held that sec. 237 gave no greater right or remedy than a workman would have had in a proceeding in his own name under sec. 232. The learned Judges of the Supreme Court thus interpreted sec. 237 as amended:—" Much trouble and uncertainty have naturally been caused by the vague phrase 'as the Court may consider to be due.' We feel no doubt that the proper meaning to be attributed to these words under this section is 'as the Court may find to be due upon the evidence adduced upon the hearing of the information for the offence charged.' It is as this Court has already decided 'a provision designed to avoid the necessity of re-trying the same issue upon a claim by the employee, and is not intended to give the employee a greater right than he would have in a proceeding under his own name' . . . The opposing contention is that the Legislature has by the indefinite phrase already quoted authorized the Court of Petty Sessions upon an information for one offence committed during the course of a week to hear evidence of facts extending over twelve months if necessary, and to make an order upon a claim made in Court for the first time, which may have no relation whatever to the information upon which the defendant has been brought to Court, so long as the

(1) (1928) 49 A.L.T. 151; (1928) A.L.R. 64.

claim is made by a person 'in respect of whom' the defendant has been convicted" (1).

It is now contended that the construction adopted by the Supreme Court is not only wrong, but also would lead to inconvenience, because the charge must then be confined, in most cases, to some wage period, as a day or a week or a month, or else be bad for duplicity. *Cussen* J., however, in *Jones* v. *Lorne Saw Mills Pty. Ltd.* (2), expressed the opinion that non-observance of a determination was a continuing act, and in this I am disposed, as at present advised, to agree with that learned Judge. Consequently, an information would not be bad for duplicity if it charged non-observance of a determination in not paying the proper rate of wages over a period of twelve months—and that notwithstanding the provision of sec. 229 (*a*) of the *Factories and Shops Act*. In this view, the present appeal is the veriest formality, for if the information had charged non-observance of the determination during a period (not exceeding twelve months) in respect of arrears of pay, the case would fall within the terms of the judgment given by the learned Judges of the Supreme Court. That judgment has much, in my opinion, to recommend it, as regards both convenience and the practical administration of the Act. But if the Act be explicit to the contrary, then it must prevail. The only express limitation found in sec. 237 is in the words "arrears of pay . . . for any period not exceeding twelve months," and it is difficult, in the face of these words, to infer any other. Then the amendment referring to sec. 232 explicitly alters the construction given to sec. 237 in *Howard* v. *Wonthaggi Co-operative Distribution Society Ltd.* (3)—that the latter section does not give any right or remedy greater than an employee would have had in a proceeding under his own name. The result may be inconvenient in practice, and may compel the hearing of further evidence, and matters of defence, quite irrelevant to the offence charged. But I do not think any violation of the principles of natural justice need take place, for the Court of Petty Sessions must mould its procedure so as to do justice. The defendant would be entitled to fair notice of the precise arrears claimed, and reasonable

(1) (1933) V.L.R., at p. 451. (2) (1923) V.L.R. 58; 44 A.L.T. 111.
(3) (1928) 49 A.L.T. 151; (1928) A.L.R. 64.

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time to prepare his defence. The Act is, I think, explicit, though unusual and embarrassing, and the decision of the Supreme Court therefore cannot be supported. But the appellant, an officer of the Department administering the *Factories and Shops Acts*, has the privilege of paying all the costs of the appeal from the decision of the Supreme Court, which it regards—though I do not—as of importance in the administration of the Act.

DIXON J. This appeal is brought by special leave from an order of the Supreme Court of Victoria. The order appealed from sets aside five orders made by a Court of Petty Sessions and confirmed by the Court of General Sessions at Melbourne requiring an employer to pay to employees, whose wages were governed by a determination of a wages board, amounts of wages underpaid during a period of four weeks. For the orders so set aside the Supreme Court substituted orders for payment of wages underpaid during a period of one week only. The ground upon which the Supreme Court proceeded in making this order is that, upon the proper interpretation of sec. 237 of the *Factories and Shops Act* 1928, under which the Court of Petty Sessions acted, its power to order payment of arrears of pay is restricted to wages payable in respect of the period covered by the information against the employer for the contravention of the Act, regulations, or determination. I am unable to agree in this interpretation of the enactment. Sec. 237 provides that a Court of Petty Sessions, in addition to imposing a penalty for a contravention of any of the provisions of the Act, or the regulations, or of a determination, may order the offender to pay to any person in respect of whom he has been convicted of a contravention as aforesaid, and who is or has been in his employ, such sums for arrears of pay or overtime or tea-money (for any period not exceeding twelve months) as the Court may consider to be due to such person. The section goes on to authorize enforcement of the order by distress and imprisonment. The learned Judges of the Supreme Court (*Mann* A.C.J., *Lowe* and *Gavan Duffy* JJ.) said in reference to this provision: —"Much trouble and uncertainty have naturally been caused by the vague phrase 'as the Court may consider to be due.' We feel no doubt that the proper meaning to be attributed to these words

under this section is 'as the Court may find to be due upon the evidence adduced upon the hearing of the information for the offence charged' " (1). This interpretation restricts by implication general words conferring a power. As the power is conferred upon a Court of law and relates to the enforcement of a liability depending upon facts, it follows that it must be exercised upon evidence. But the point of the restriction which has been implied, lies, not in the requirement of evidence, but in the exclusion of all evidence except that adduced upon the hearing of the charge, so that no wages could be awarded in respect of any period beyond that covered by the information for the contravention. In my opinion, this restriction is not warranted by the considerations set out in the judgment appealed from or by any others which the provisions or subject matter of the enactment supply. The fact that the power conferred is exercisable upon the conviction of an offender was not relied upon as in itself a sufficient reason for restraining it to the period covered by the offence. The main reason by which the implication was supported consists in the injustice of allowing the conviction to be made the occasion of determining a claim against the defendant, which may be made without notice to him, may cover a period of time as long as twelve months, and may have no immediate relation to the offence laid in the information. It may be conceded that the words of the provision understood in their natural meaning do confer a power or jurisdiction which would not be exceeded if a defendant was dealt with in the manner supposed. But jurisdiction must always be exercised according to principles of law governing the administration of justice, and, however wide the jurisdiction might be in subject matter or time, a defendant, who was not afforded an adequate opportunity of meeting an unexpected claim, might upon an order to review obtain the discharge of an adverse determination so given. But the decision would be open to attack by order to review, not because of the absence of jurisdiction, but because of the manner of its exercise. The plain general words ought not upon such considerations to be subjected to a restrictive interpretation. On the other hand, the existence in the section of an express restriction, which confines the power

(1) (1933) V.L.R., at p. 451.

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to awarding twelve months arrears of wages, appears to me almost to exclude the possibility of implying a further restriction which, in substance, affects the period covered by the order. The implied restriction proposed is made still more difficult by the provisions of sec. 229 (*a*) which, except in cases in the trade of furniture manufacture, limit the time for laying an information to two months from the commission of the offence. Then the history of the legislation supports the view that the provisions now contained in sec. 237 were adopted for the purpose of enabling the Court of Petty Sessions to award, upon a successful prosecution, wages for the same period as the employee might recover in civil proceedings, namely, for twelve months. When the provisions now contained in sec. 237 were introduced by sec. 12 of the *Factories and Shops Act* 1909 (No. 2241), the provisions now contained in sec. 232 did not include the requirement that the employee within two months of proceeding to recover arrears should demand them in writing, but gave an unqualified right to twelve months' arrears. (See sec. 114 of the *Factories and Shops Act* 1905 (No. 1975), sec. 225 of the *Factories and Shops Act* 1912 (No. 2386), and the amendment made by sec. 39 of the *Factories and Shops Act* 1914 (No. 2558) introducing the requirement of a two months' written demand.) But the limitation of two months upon prosecutions then existed (sec. 162 of the *Factories and Shops Act* 1905). In *Howard* v. *Wonthaggi Co-operative Distribution Society Ltd.* (1), the Supreme Court decided that, under the provisions now contained in sec. 237, the Court could order payment only of arrears recoverable by the employee under the provisions now contained in sec. 232, so that notice in writing was a condition precedent in both cases. Thereupon the Legislature enacted that the latter provision should not in any way limit or affect the jurisdiction conferred by the former (sec. 32 of the *Factories and Shops Act* 1927 (No. 3573)). The purpose of a consolidating Act, which is to reduce all the previous legislative enactments on a subject into a single consistent and coherent statement, which will operate as the exclusive expression of the statutory law upon that subject, should not be defeated by recourse to the prior legislation

(1) (1928) 49 A.L.T. 151; (1928) A.L.R. 64.

in order to control or determine the effect of the consolidating enactment (see, per Lord *Watson*, *Administrator-General of Bengal* v. *Prem Lal Mullick* (1)). But, where the natural meaning of the language of the consolidating statute is said to be restrained by implications arising from its context or subject matter, or obscurities or ambiguities are found in the consolidating provisions, it must often happen that the difficulties cannot be dispelled without examining the course of legislation in order "to call in aid the ground and cause of making the statute," in the phrase of *Tindal* C.J. (*Sussex Peerage Case* (2)). (Compare *Macmillan & Co.* v. *Dent* (3), per *Fletcher Moulton* L.J.)

In the present instance, the history of the legislation raises a strong presumption that the restriction implied by the Supreme Court is contrary to the actual intention of the enactment. But, apart from this consideration, I do not think it finds support in the provisions of the consolidating enactment. The general words "as the Court may consider to be due" were intended, I think, to empower the Court of Petty Sessions to order payment of what it finds to be due in respect of any period not exceeding twelve months. In the exercise of the power that Court may, and in many if not most cases should, take evidence after the decision to convict the defendant has been reached. It must not, of course, deny him a proper opportunity of being informed of and answering the claim for wages made against him.

The appeal should be allowed and the order appealed from discharged. The appellant, pursuant to his undertaking given on obtaining special leave, should pay the costs of the appeal. But the respondent should pay the costs of the proceedings of the reference to the Full Court. Otherwise the parties should abide their own costs of the proceedings in the Supreme Court.

Evatt J. This appeal raises the question whether the Supreme Court of Victoria was right in the interpretation it placed upon sec. 237 of the *Factories and Shops Act* 1928. That section gives power to a Court of Petty Sessions to order an offender to pay to

(1) (1895) L.R. 22 Ind. App. 107, at p. 116.

(2) (1844) 11 Cl. & Fin. 85, at p. 143; 8 E.R. 1034, at p. 1057.

(3) (1907) 1 Ch. 107, at p. 120.

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the person in respect of whom he has been convicted of a defined contravention, such arrears " as the Court may consider to be due." The Supreme Court held as follows :

> " We feel no doubt that the proper meaning to be attributed to these words under this section is ' as the Court may find to be due upon the evidence adduced upon the hearing of the information for the offence charged ' " (1).

It was also said that

> " the opposing contention is that the Legislature has by the indefinite phrase already quoted authorized the Court of Petty Sessions upon an information for one offence committed during the course of a week to hear evidence of facts extending over twelve months if necessary and to make an order upon a claim made in Court for the first time which may have no relation whatever to the information upon which the defendant has been brought to Court, so long as the claim is made by a person ' in respect of whom ' the defendant has been convicted " (1).

In my opinion, what is here called " the opposing contention " is correct, and I entirely agree with the reasons for adopting it which have been given by my brother *McTiernan* in his judgment.

The case is one of considerable importance and the Attorney-General of Victoria was well warranted in endeavouring to have the Supreme Court's decision reviewed before this Court. The section is obviously designed to secure to employees their arrears of wages when their employer has been convicted of an offence in relation to wages or some other provision of the Act or wages board determinations. It is impossible to limit in advance the discretion of the Court of Petty Sessions. It will be exercised in the light of all the circumstances of the case, and, although there may be a conviction against an employer for non-payment of the fixed wages in respect (say) of one week only, the Court will, before ordering payment of arrears, afford the employer a reasonable opportunity of testing the question whether such arrears are owing.

I see no hardship in the provision when fairly administered, as, no doubt, it is. It will protect an honest and scrupulous employer against the competition of any employer who belongs to a different category. The former class of employer, by obedience to the Act and regulations, will be able to ascertain without delay or difficulty exactly what wages have been paid and so what remain unpaid. The section is analogous in some respects to sec. 50 (2) of the New

(1) (1933) V.L.R., at p. 451.

South Wales *Industrial Arbitration Act*, because that sub-section, although it relates only to convictions in respect of a failure to pay wages, enables the Court to order the payment of six months arrears, although the conviction may be in respect of a failure to pay in one week. And, under such provision, the order may be made without any proceedings having to be instituted by the employee himself, and, indeed, without any further application or motion on the part of the person succeeding in the proceedings for breach.

I agree that the appeal should be allowed.

McTIERNAN J. This appeal raises an important question as to the construction of sec. 237 of the *Factories and Shops Act* 1928 of Victoria. This Act contains, *inter alia*, provisions for fixing and enforcing the payment of a minimum rate of wages to employees in various trades. A wages board may be appointed to determine the lowest rates which may be paid to any person employed in any trade (secs. 136 and 145). An employee may sue an employer in any Court of competent jurisdiction for any arrears of wages due to him under any such determination (sec. 232). It is a condition precedent to this action that the employee should make a demand in writing upon the employer within two months after such money became due, and the action must be brought within twelve months after the money sued for became due (sec. 232).

But the Legislature did not leave the enforcement of a determination of this public authority, which it set up to fix a minimum wage, solely to employees who choose to avail themselves of this right of action. Sec. 233 makes it an offence for an employer to pay less than such minimum wage to an employee, and sec. 227 empowers the Minister to direct that proceedings be taken for this offence, and provides that such proceedings may be taken by any member of the police force or by any inspector. Sec. 226 directs that the proceedings are to be instituted before a Court of Petty Sessions. A person guilty of an offence against sec. 233 is liable to a penalty not exceeding £10 for the first offence, and to penalties of increasing severity for subsequent offences.

While the institution of an action under sec. 232 by the employee would leave out of account the public interest which is involved in

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McTiernan J.

the due enforcement of the determination of the Wages Board, the prosecution of the offender at the instance of the Executive, and the imposition of a penalty upon him, would leave out of account the particular interest of the employee and fail to secure redress for him. The interest of the employee is recognized by sec. 237. This section confers jurisdiction on the Court of Petty Sessions to make an order for the payment of arrears of wages and other moneys due to an employee in addition to imposing a penalty on the offender. Sec. 237 is in these terms :—" A Court of Petty Sessions in addition to imposing a penalty for a contravention of any of the provisions of this Act or the regulations made thereunder or of a determination of a wages board or of the Court of Industrial Appeals may order the offender to pay to any person in respect of whom he has been convicted of a contravention as aforesaid and who is or has been in his employ such sums for arrears of pay or overtime or tea-money (for any period not exceeding twelve months) as the Court may consider to be due to such person and any such sum may be recovered by distress and in default of payment the offender shall be liable to imprisonment with or without hard labour for a term of not more than three months. Nothing in section two hundred and thirty-two of this Act after the words ' the price or rate so determined ' shall in any way limit or affect the jurisdiction conferred by this section."

Sec. 229 provides that an information for the offence, which is the subject of the informations respectively in the present case, must be laid within two months after the commission of the offence. But sec. 237 enacts that the jurisdiction thereby conferred to make an order for the payment of the sums therein mentioned to an employee in respect of whom the offender has been convicted shall not be subject to the conditions imposed by sec. 232 on the right of an employee to sue his employer. It is said, notwithstanding, that sec. 237 does not empower the Court to order payment of any arrears of wages which fell due prior to the commission of the offence with which the employer is charged. In this view, if an employer were convicted, for example, of contravening a determination of a wages board, by refusing to pay tea-money to an employee on a particular day, the Court, in addition to imposing a penalty, may order him to pay what was due in respect of that

day, but could not lawfully inquire whether the employer had also failed to pay such money on any prior occasion, even on the preceding day, and include such other sums, if found to be due, in the order. But the only express limitation in sec. 237 is that the Court may not order payment of any sum for arrears of pay, overtime, or tea-money for any period exceeding twelve months. The intention of the Legislature is, in my opinion, too definitely expressed to warrant the view that it must be taken to have necessarily intended to empower the Court to make an order for a period not exceeding that covered by the information, rather than, as is expressly enacted, for a period not exceeding twelve months.

Sec. 237 enacts that any sum which the Court orders to be paid pursuant to it may be recovered by distress and, in default of payment, the offender shall be liable to imprisonment with or without hard labour for a term of not more than three months. It is said that the limitation of the jurisdiction of the Court to the period covered by the information is warranted by the consideration that it is not to be assumed that the Legislature intended to revive imprisonment for debt. But, assuming that this contention were one of substance, it would not assist the respondent in the present case for, if the jurisdiction intended to be conferred is limited, as he contends, to making an order in respect of the period covered by the information, an order made for that period is also enforceable, in default of payment, by imprisonment.

The appeal should, in my opinion, be allowed.

Appeal allowed. Order of the Supreme Court set aside. In lieu thereof order that the order nisi be discharged.

Solicitor for the appellant, *F. G. Menzies*, Crown Solicitor for Victoria.

Solicitor for the respondent, *William Harrison*.

H. D. W.