

way Company liable, or has it arisen in the ordinary course of business? The Railway Company admits that for final investment in the purchase of land or otherwise they will be liable. They do not say that there has been anything unreasonable in the action of the petitioner. All they say is that it is his own voluntary act, and arises from his sale of the fee-simple property upon which this money was secured. They do not say that that is in itself an unreasonable thing to do. Having found that it was necessary in carrying out the transaction of sale to disburden this property, the petitioner has found another temporary investment and says that the Railway Company should bear any expense incident to making it. It seems to me there is nothing unreasonable in that. I could quite understand that if a man were uneasy and unsettled in making his investments, and were constantly coming back to the Court and asking reinvestment at the expense of the company, the discretion of the Court to check such proceedings would arise. But the fact that thirty years have elapsed since the original temporary investment was made does not seem to me to indicate caprice on the part of the petitioner. It rather seems to me that he has allowed this investment to lie as long as in reason he could. Accordingly, while of opinion that the discretion of the Court will arise in any future application for reinvestment of this money in a temporary form, I cannot hold that on this particular occasion there has been anything capricious or unreasonable in the conduct of the petitioner. Therefore I shall hold that the Railway Company are liable in the expenses."

Counsel for the Petitioner—Macmillan.
Agent—W. B. Rainnie, S.S.C.

Counsel for the Railway Companies—
Cooper. Agents—Hope, Tod, & Kirk, W.S.
—John C. Brodie & Sons, W.S.

Tuesday, October 25.

SECOND DIVISION.

[Exchequer Cause.]

TURNBULL v. SOLICITOR OF INLAND REVENUE.

Revenue — Income-Tax — Liability to be Assessed for Income-Tax—“Residing in the United Kingdom”—*Income-Tax Act 1842 (5 and 6 Vict. cap. 35), sec. 39, and Income-Tax Act 1853 (16 and 17 Vict. cap. 34), sec. 2.*

✕ A merchant who had carried on business in Madras for forty years had a residence there in which he usually resided. His wife for a number of years resided with their children in the United Kingdom, and he latterly visited them for a shorter or longer period nearly every year. On 30th December 1901, after a stay of eight

months in this country he went to India with his wife and eldest daughter, and was not again in the United Kingdom until June 1903, when, along with his wife, he took up his abode at a house in Edinburgh purchased by his wife in 1900, in which since 1900 he had usually resided when in the United Kingdom. Thus during the year ending 5th April 1903 he was not in the United Kingdom at any time, but during the whole of that year the children, except the eldest daughter, and the servants occupied the Edinburgh house, the household expenses and the education of the children being defrayed by him.

Held that he was not liable to assessment for income-tax for the year ending 5th April 1903, as during that year he was not a person residing in the United Kingdom within the meaning of the Income Tax Acts.

The Income-Tax Act 1842, section 39, enacts—“Any subject of Her Majesty whose ordinary residence shall have been in Great Britain” (now the United Kingdom—Income-Tax Act 1853, sec. 5), “and who shall have departed from Great Britain and gone into any parts beyond the seas, for the purpose only of occasional residence, at the time of the execution of this Act, shall be deemed, notwithstanding such temporary absence, a person chargeable to the duties granted by this Act as a person actually residing in Great Britain. . . . Provided always that no person who shall on or after the passing of this Act actually be in Great Britain for some temporary purpose only, and not with any view or intent of establishing his residence therein, and who shall not actually have resided in Great Britain at one time or several times for a period equal in the whole to six months in any one year, shall be charged with the said duties mentioned in Schedule D as a person residing in Great Britain in respect of the profits or gains received from or out of any possessions in *(Ireland or) any other of Her Majesty’s dominions or any foreign possessions or from securities in *(Ireland or) any other of Her Majesty’s dominions or foreign securities, but nevertheless every such person shall, after such residence in Great Britain, for such space of time as aforesaid, be chargeable to the said duties for the year commencing on the sixth day of April preceding. [* Words in brackets repealed by 37 and 38 Vict. c. 96.]”

The Income-Tax Act 1853, section 2, enacts that the duty charged under Schedule D of the Acts is payable “for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom, from any profession, trade, employment, or vocation, whether the same shall be respectively carried on in the United Kingdom or elsewhere.”

In November 1903 Stewart Robertson Turnbull, merchant, Madras, appealed to the Commissioners of Income-Tax for the county of Edinburgh against an assess-

ment of £720 for the year ended 5th April 1903 made upon him under Schedule D of the Income-Tax Acts, in respect of profits received in the United Kingdom from foreign possessions. The ground of his appeal was that he was not a "person residing in the United Kingdom."

On 28th June 1904 the Commissioners refused the appeal, and on the application of the appellant stated a case for the opinion of the Court.

The case set forth:—"1. The following facts were admitted or proved—(a) The appellant is a subject of His Majesty. He has carried on business for forty years as a merchant in Madras, where, besides his business premises, he has a residence, in which he usually resides. His wife has for a number of years resided with their children in the United Kingdom, and the appellant has latterly visited them for a shorter or longer period nearly every year. (b) The appellant was not in the United Kingdom in the year ending 5th April 1899. He visited and resided in it for in all more than six months in the year ending 5th April 1900, for three and a-half months in the year ending 5th April 1901, and for eight months in the year ending 5th April 1902. Accompanied by his wife and eldest daughter he left this country for India on 30th December 1901, and was not again in the United Kingdom until June 1903, when, along with his wife, he took up his abode at No. 2 Corrennie Gardens, Edinburgh, where since the year 1900 he has usually resided when in the United Kingdom. (c) For a number of years prior to Whitsunday 1900 the appellant's wife rented furnished houses in this country, in which she and the children resided, but in that year she purchased a dwelling-house, known as No. 2 Corrennie Gardens, Edinburgh, the money being provided partly by the appellant and partly by his wife. The conveyance to the house was taken to the appellant's wife and her heirs and assignees. In the valuation roll of the city of Edinburgh for the year 1902-3 Mrs Turnbull is entered as owner and occupier of the house. (d) The appellant and his wife were not in the United Kingdom at any time during the year of assessment, that is, the year ending 5th April 1903, but during the whole of that year the children, except the eldest daughter, and the servants, in charge of a lady superintendent, who also lived in the house, occupied the house at No. 2 Corrennie Gardens, Edinburgh. (e) The amount received in the United Kingdom from the profits of the business in Madras for defraying the cost of his household expenses and the education of his children in this country was estimated to be £720, on an average of three years preceding the 5th April 1902. . . . 5. The appellant contended that he was not resident in the United Kingdom during the year of assessment according to the legal construction of the Income-Tax Acts, his only residence being in Madras, where his business is, and where he actually lived during the whole year of assessment, and that the residence of his children in Edinburgh was not in the circumstances his

residence; and further, that in the years in which he came to this country it was only for a temporary purpose, and not with the intention of establishing any residence here for himself, and that therefore he came under the scope of exemption contained in the proviso to section 39 of 5 and 6 Vict. c. 35. Alternatively, in the event of its being held that he had a constructive residence in this country prior to the year of assessment, then the appellant contends that he departed from Great Britain and beyond the seas for the purpose of resuming his permanent residence, and remained abroad during the whole year of assessment. 6. In support of the assessment the Surveyor of Taxes (Mr Francis Foster) contended that in the circumstances set forth the appellant had and maintained a residence in the United Kingdom during the year of assessment, and must be deemed to be a person residing in the United Kingdom within the meaning of the Income-Tax Acts, and as such liable to the assessment, and further that the exemption referred to by the appellant did not apply, being limited in its terms to any person who shall be in Great Britain for a temporary purpose only, and not with any view or intent of establishing his residence therein, whereas the appellant established a residence in the United Kingdom in 1900, in which he has personally resided from time to time as suited his convenience, and which was occupied by his family and servants during the year of assessment. In support of his contention the Surveyor referred to *Lloyd v. Sulley*, 1884, 11 R. 687, 21 S.L.R. 482, 2 Tax Cases 37."

Argued for the appellant—The appellant had not been in the United Kingdom at any time during the year of assessment. The case of *Lloyd v. Solicitor of Inland Revenue*, March 12, 1884, 11 R. 687, 21 S.L.R. 482, did not support the view that having a residence for his children in the United Kingdom for their education was residence on the part of the appellant; that case proceeded on the fact that Lloyd had a residence and had resided in the United Kingdom.

Argued for the respondent—The appellant's residence in the United Kingdom was of the same character as that which he had in Madras; both were places where he "usually resided." The Commissioners had rightly held the appellant to be within the Act—*Attorney-General v. Coote*, 1817, 4 Price 183; he did not cease to have residence in the United Kingdom merely by reason of absence during the entire fiscal year in question—*Rogers v. Solicitor of Inland Revenue*, June 28, 1879, 6 R. 1109, 16 S.L.R. 682; *Lloyd v. Solicitor of Inland Revenue*, *cit. sup.*

LORD JUSTICE-CLERK—I think that the deliverance of the Commissioners here is wrong. We are dealing with a case in which during a whole year—the year of assessment—the person who was to be assessed as residing in this country was never in this country. I think that would require a very strong case indeed. The

only case that has been quoted to us is a case in which the person was residing in this country for a certain time during the year, and that completely differentiates the circumstances from those in this case. This gentleman has a usual residence in Madras, where he carries on business, and he was in that usual residence for the whole of the year of the assessment. It seems to me in these circumstances that it is not according to the sound reading of the statute to hold that his usual residence during the whole of that year was in the United Kingdom.

LORD YOUNG concurred.

LORD TRAYNER—I concur. I think the sections of the statute quoted to us along with the admission in the statement by the Commissioners afford an answer to the question put to us. It is admitted that this gentleman has a residence and place of business in Madras where he usually resides. I take it, and it was conceded at the bar, that when you talk of a man's usual residence you talk of his "ordinary residence." If that is so, then section 39 of the Act of 1842 covers the case—"Any subject of Her Majesty whose ordinary residence shall have been in Great Britain" shall be liable; but this gentleman had not his ordinary residence in Great Britain, for *ex confesso* his ordinary residence was in Madras. Section 2 of the Act of 1853, which is the charging section, says duties shall be payable "for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom." The test of liability is not having a residence in the United Kingdom—it is residing in the United Kingdom. I think that to suggest that this gentleman was residing in the United Kingdom is contrary to the plain meaning of the admission to which I have already referred, and is contrary to the fact, for during the whole year of assessment he was residing in Madras, and not in Great Britain at all. I therefore think with your Lordship that the Commissioners were wrong.

LORD MONCREIFF—I am of the same opinion. During the year of assessment ending 5th April 1903, this gentleman was not residing in this country at all. I do not think that that fact taken by itself would be by any means conclusive, because if he had been travelling, or had been a mariner and had been absent the whole of the year, I do not think that would have prevented him from having a residence in this country. But, then, in addition to that, we find that his business is in Madras, and that I take to be his usual place of residence. It is quite true that between the years 1899 and 1901 he occasionally visited this country for longer or shorter periods. That was for the purpose of seeing his wife and children, who I presume resided here because they were unable to stand the climate of India. Looking to the whole of the facts taken together, I think the fair inference is that his residence in

the sense of the statute was not in this country.

The Court reversed the determination of the Commissioners, and found that the appellant was not liable to the assessment in question.

Counsel for the Appellant—T. B. Morison. Agents—Webster, Will, & Co., S.S.C.

Counsel for the Respondent—The Solicitor-General (Dundas, K.C.)—A. J. Young. Agent—Philip J. Hamilton Grierson, Solicitor for Board of Inland Revenue.

Tuesday, May 24.

OUTER HOUSE.

[Lord Pearson,

TAIT & JOHNSTON v. HOPE'S
JUDICIAL FACTOR.

Prescription — Triennial Prescription — Charge for Written Demand for Payment of Account not Continuation of Account—Act 1579, c. 83.

Held (per Lord Pearson, Ordinary) that a written demand made by a creditor on a debtor for payment of an account, and entered as an item of the account in the books of the creditor, could not be regarded as a continuation of the account so as to prevent the operation of the triennial prescription.

On 5th November 1903 Tait & Johnston, S.S.C., Edinburgh, raised an action for £65, 0s. 2d. against Adam Davidson Smith, C.A., judicial factor on the estate of the late Mrs Hope, to which office he had been appointed on 11th April 1900 in succession to the late John Brewis, C.A., who died on 11th February of that year.

The sum sued for was the amount of a business account which the pursuers averred had been incurred to them by the late Mr Brewis.

The last item in this account as originally sued on was dated 11th May 1900.

The defender pleaded, *inter alia*—“(2) The account sued for has undergone the triennial prescription. (3) The constitution and resting-owing of the account sued for can be proved only by the writ of the late John Brewis.”

In order to elude this plea the pursuers at the adjustment of the record added the following items to their account:—“31st July 1900, agent's fee for audit, 6s. 8d.; 23rd July 1903, writing Mr John Macmillan, S.S.C. (the defender's agent), with our account and for payment, 3s. 4d.; 22nd September 1903, do., 3s. 4d.; 13th October 1903, do. 3s. 4d.; 15th October 1903, do. 3s. 4d.”

On 24th May 1904 the Lord Ordinary (PEARSON) sustained the second and third pleas-in-law for the defender.

Opinion.—“This is an action by a firm of law-agents for payment of a business