NO. 662.—HIGH COURT OF JUSTICE (KING'S BENCH DIVISION).—17TH NOVEMBER, 1926.

COURT OF APPEAL.—11TH, 15TH AND 17TH FEBRUARY, AND 11TH MARCH, 1927.

HOUSE OF LORDS.—27TH AND 30TH JANUARY, AND 9TH MARCH, 1928.

LYSAGHT *v.* THE COMMISSIONERS OF INLAND REVENUE.[1]

Income Tax—Residence—Ordinary residence—Income Tax Act, 1918 (8 & 9 *Geo.* V, *c.* 40), *Rule* 2 (*d*) *of the General Rules applicable to Schedule C, and Section* 46 (1)—*Finance Act*, 1924 (14 & 15 *Geo.* V, *c.* 21) *Section* 27.

Until 1919 *the Appellant lived in England where he was engaged in business as director and managing director of a company whose principal works were in the United Kingdom. In that year he partially retired, but retained the post of advisory director of the company; he sold his English residence and his family went to live permanently in Ireland. He himself went to Australia in* 1919 *for the company, and on his return took a furnished house in Somerset, going backwards and forwards to Ireland until* 1920, *when he went to reside with his family in Ireland, and since when he had no definite place of abode in England. He however came every month to directors' meetings in England where he remained on the company's business for about a week each time, staying either at hotels or at his brother's house. The total number of days spent in England for the three years ended the 5th April,* 1923, *5th April,* 1924, *and 5th April,* 1925, *were* 101, 94 *and* 84 *respectively, while he spent* 48 *days there in the period 6th April,* 1925, *to 25th September,* 1925.

He owned a field of three acres in England which he was anxious to sell, he had no business activities in Ireland save the management of his estate, his main banking account was in Ireland although he had a small account in Bristol, and the registered address of his various securities was in Ireland.

The Appellant contended that for the years 1922–23 *and* 1923–24 *he was neither resident nor ordinarily resident in the United Kingdom, and that as being not resident he was entitled to exemption from Income Tax under Rule* 2 (*d*) *of the General Rules applicable to Schedule C in respect of the interest or dividends on any securities*

(1) Reported (K.B.D. and C.A.) [1927] 2 K.B. 55; and (H.L.) [1928] A.C. 234.

of a foreign State or a British Possession owned by him, and that as being not ordinarily resident he was entitled to exemption under Section 46 (1), *Income Tax Act*, 1918, *in respect of the income of certain* 5 *per cent. War Loan of which he was the owner.*

The Special Commissioners, on application being made to them under Section 27, *Finance Act*, 1924, *decided that his claims for exemption failed.*

Held, *that the Appellant was resident and ordinarily resident in the United Kingdom in the years in question.*

CASE

Stated under the Finance Act, 1924, Section 27, and the Income Tax Act, 1918, Section 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on the 25th September, 1925, for the purpose of hearing appeals, Mr. S. R. Lysaght (hereinafter called " the Appellant ") appealed against a decision of the Commissioners of Inland Revenue on the question of his ordinary residence arising under Section 46 of the Income Tax Act, 1918, in respect of his claim to exemption from Income Tax on British Government securities and also against a decision of those Commissioners on the question of his residence arising under Rule 2 (*d*) of the General Rules applicable to Schedule C of the same Act in respect of his claim to repayment of Income Tax on income from foreign and colonial Government securities. Both these claims were for the two fiscal years ended 5th April, 1923, and the 5th April, 1924, respectively.

2. The following facts were admitted or proved in evidence before us.

(1) The Appellant was born in England of Irish parents.

(2) He was engaged from the age of 21 in his uncle's business in England, which was subsequently turned into a limited company called John Lysaght, Limited (hereinafter referred to as " the Company "). He took an active part in the business of the Company up till the year 1919, when he held the position of Director and Managing Director. He then partially retired from the business but retained the post of Advisory Director at a retaining fee of £1,500 a year and Director's fees. The Company have their principal works at Bristol and Newport.

(3) For many years up to 1919 the Appellant owned a property called Backwell Down, Flax Bourton, near Bristol, in which he resided with his family. On his partial retirement from business he sold Backwell Down, and went to live on a family property, "Hazelwood", Mallow, Ireland, which by arrangement with his uncle he had purchased from his cousin in 1916. He had previously inherited from his father in about 1893 an estate at Newmarket, Co. Cork, which was afterwards sold to the tenants thereof. The Appellant's family went to live permanently at Hazelwood immediately the Bristol house was given up in 1919. The Appellant himself went to Australia in 1919 for the Company, and on his return took a furnished house at Burnham, Co. Somerset, England, going backwards and forwards to Ireland until 1920. In 1920 he went to reside at Hazelwood, and from that time on had no definite place of abode in England.

(4) The Appellant comes to England for a meeting of the directors of John Lysaght, Limited, every month and remains for consultations with the other directors and for committee meetings. The Company have a branch business at Scunthorpe, Lincs., and the Appellant has visited this business on several occasions during his visits to England. On the occasion of these visits he spends about a week in England. On two occasions his return to Ireland was delayed by illness. The total number of days spent in England in the respective years has been as follows :—

In the year ended the 5th April,	1923 ...	101 days.
,, ,, ,,	1924 ...	94 ,,
,, ,, ,,	1925 ...	84 ,,
In the period from 6th April till 25th September, 1925		48 ,,

When in England the Appellant generally stays at the Spa Hotel, Bath, at which the meetings of the directors of the Company are held. Occasionally he has stayed at his brother's house at Chepstow. These visits to England are solely for business purposes, and the Appellant's wife never accompanies him on these visits. He owns a field of about three acres near Burnham, purchased many years ago, which he is anxious to sell. He has a few relatives and many friends in England. He has also relatives and friends abroad.

(5) He has no business activities in Ireland except the management of his estate at Mallow, of which 800 acres are in hand.

(6) His banking account is at the Mallow branch of the Bank of Ireland, but he has also a small account at a branch in Bristol of the Westminster Bank. The registered address of his various securities is " Hazelwood ", Mallow. He is a member of the Savile Club, London, but hardly ever goes there. During the past five years he has made three lengthy trips to Australia and South America on behalf of the Company.

3. It was contended by the Appellant :—

(1) That for the years in question he was ordinarily resident in the Irish Free State, and was not ordinarily resident in the United Kingdom.

(2) That though his ordinary residence had been in the United Kingdom, he had left the United Kingdom not merely for the purpose of occasional residence abroad within the meaning of Rule 3 of the General Rules applicable to all Schedules.

(3) That his visits to the United Kingdom were for some temporary purpose only and not with any view or intent of establishing his residence therein, and that he had not spent six months in the United Kingdom in either of the Income Tax years in question ; and

(4) That he was neither ordinarily resident nor resident in the United Kingdom for either of these years.

4. It was contended on behalf of the Crown (*inter alia*) :—

(1) That though the Appellant might be resident and ordinarily resident in the Free State, he was also resident and ordinarily resident in the United Kingdom in the years in question ;

(2) That during each of the years in question the Appellant had in fact resided in the United Kingdom and that his visits to the United Kingdom were in accordance with the regular habits of his life, and were therefore not for a temporary purpose within the meaning of Rule 2 of the Miscellaneous Rules applicable to Schedule D ; and

(3) That therefore the Appellant was for both those years ordinarily resident in the United Kingdom within the meaning of Section 46 (1) of the Income Tax Act, 1918, and liable to tax in respect of his income from British Government securities and was not in the United Kingdom " for some temporary purpose only " so as to relieve him from liability as resident in the United Kingdom in respect of income from foreign or colonial securities.

5. We held that the Appellant was both ordinarily resident and resident in the United Kingdom for each of the two years ended the 5th April, 1923, and the 5th April, 1924, respectively.

6. The Appellant immediately upon the determination of the appeal declared to us his dissatisfaction therewith as being erroneous in point of law, and in due course required us to state a Case for the opinion of the High Court pursuant to the Finance Act, 1924, Section 27, and the Income Tax Act, 1918, Section 149, which Case we have stated and do sign accordingly.

(*Signed*) J. JACOB, R. COKE, } Commissioners for the Special Purposes of the Income Tax Acts.

York House,
23, Kingsway,
London, W.C.2.

20th May, 1926.

The case came before Rowlatt, *J.*, in the King's Bench Division on the 17th November, 1926, when judgment was given in favour of the Crown, with costs.

Mr. A. M. Latter, K.C., and Mr. S. R. Benson appeared as Counsel for the Appellant, and the Solicitor-General (Sir Thomas Inskip, K.C.) and Mr. R. P. Hills for the Crown.

JUDGMENT.

Rowlatt, J.—In this case I will not again draw attention to the difficulties, which I am bound to say I feel are rather great, of determining exactly what "residence" means in all the Rules and Sections of the Acts, and of clearly seeing what is the state of the man who is described (and under some circumstances a man must be described) as being "resident" and yet not "ordinarily resident". I will not repeat my difficulties, but I will try and deal with this case.

Rule 2 of the Miscellaneous Rules applicable to Schedule D does not apply to this case at all, because it only deals with foreign possessions and securities. It has reference to the case of a taxpayer who has foreign possessions or securities; but, as Mr. Latter has pointed out, its language has at any rate an illustrative value. It brings before one's mind the conception of a man not acquiring a residence by visits for a temporary purpose only and not with a

(Rowlatt, J.)

view of establishing a residence and so on. I think that is a mode of thought which must be kept in view all the time, although the Rule itself does not apply.

There are one or two matters I think one must put out for consideration in this case. I do not think the position of this gentleman during the years 1922, 1923 and 1924, which are in question here, must be coloured by a reference to his previous life. The circumstance that he had been an undoubted resident in Bristol or the neighbourhood does not show that he had continued to be so, nor does the circumstance that he had made a great change in his domestic habits necessarily help one in considering whether he had made a change in his residence also, for this purpose. I think one must simply consider him as a gentleman who, one now knows, (whatever his past) has his residence in Ireland, and just comes over here. Secondly one must remember —and it is rather a hard thing to bear in mind, because it qualifies one's natural ideas in connection with the word "residence"— that one must not look for an establishment. As the Lord President pointed out (1), a tramp has a "residence" in this country. One must not look for an establishment. If a man chooses to live at hotels instead of in his own house, or even to stay with friends, it really does not affect the question of residence. What I really have to decide in this case, and what the Commissioners had to decide—and I have to see whether they were wrong—is whether or not he was a mere visitor. Mr. Latter says his presence here was not in the character of a resident. I think that is a fair way of putting it. It is putting in other words the same idea as is expressed by the words: "for some temporary purpose only, and "not with any view or intent of establishing his residence". It is not in the character of a resident, Mr. Latter says, that he was present in this country. This gentleman was not one of the tramp class—using that expression, in this connection, not in an offensive sense but in that which the Lord President indicated—whose whole life was a wandering life. If a man has no home in a real sense, but wanders over the world and spends a large time wandering in this country, it is perhaps easier to hold that he is resident here, because there is so little in the way of competing residence, although no competition is necessary. It cannot be said that one place is so clearly his residence that the other places are not significant. So it is a stronger case in favour of the Appellant here, I think, inasmuch as he undoubtedly has a very permanent family home where he mainly lives, in Ireland. Undoubtedly that is in his favour, and it is not

(1) Reid *v.* Commissioners of Inland Revenue, 10 T.C. 693, at p. 679.

(Rowlatt, J.)

as though he merely came over to this country in a series of hotel visits. But what one has to consider, I think, is what was the nature of his stay here, as Mr. Latter said, from a good many points of view. It is not the case, really, of a man who comes as a commercial traveller, quite regularly, for some time, to a place. One has to realise what this gentleman's position really is. Here is the great business, as everybody knows very well, of Lysaght and Company. He is the advisory director of it, at £1,500 a year, and he comes over here every month for an average of a week. He sleeps here and he has to be here doing the business of the company for about a week a month. It is not to be looked at as if one could say: "He has "come; I do not know whether he will come next month; I do "not know whether he will come the month after". As things are, *rebus sic stantibus*, he came this month; he will have to come next month, if illness or something does not prevent him; and he will have to come the month after. He will have to come perfectly regularly and, unless he gives up his position, he could not alter it. He did not come for pleasure; he came in that sort of way; and here he stays for that week. One would think it would require a very energetic man to have his home (if I may use that expression) in Ireland, when he had to do so much work in Bristol, because he has his work in Bristol—fixed, inevitably recurring, important work; not like a visitor, not like a commercial traveller, not like a barrister on a Circuit. He has this fixed call every month which brings him here for a week. Under the circumstances—I do not decide more than this particular case—I cannot differ from the Commissioners when they say that he was resident and the ordinary course of his life made him resident in this country within the Section and the Rule. Therefore this appeal must be dismissed with costs.

I hope no more appeals of this kind will come before me until some higher Court has given some comprehensive ruling upon the point.

Mr. A. M. Latter.—There is an agreement as to costs.

Rowlatt, J.—Then I will make no order as to costs.

An appeal having been entered against the decision in the King's Bench Division, the case came before the Court of Appeal (Lord Hanworth, *M.R.*, and Sargant and Lawrence, *L.JJ.*) on the 11th, 15th and 17th February, 1927, when judgment was reserved.

Mr. A. M. Latter, K.C., and Mr. S. R. Benson appeared as Counsel for the Appellant, and the Solicitor-General (Sir Thomas Inskip, K.C.) and Mr. R. P. Hills for the Crown.

On the 11th March, 1927, judgment was delivered against the Crown, with costs (Lawrence, *L.J.*, dissenting), reversing the decision of the Court below.

JUDGMENT.

Lord Hanworth, M.R.—This is an appeal from Mr. Justice Rowlatt's judgment dated the 17th November, 1926, confirming the decision of the Commissioners that the subject was liable to the assessment made upon him.

The facts are fully stated by the Commissioners. The Appellant sold a residence which he had near Bristol and went with his family to live at Mallow—that is, not far from a residence in County Cork which he had inherited from his father but which was sold to the tenants after he had become possessed of it. It is clear upon the facts that so far as he could do so he changed his home life from England to Ireland. Since then he has come over to England to attend the monthly Board meetings of John Lysaght, Limited. The meetings are held at Bath. He also visits the branch business of the company at Scunthorpe in Lincolnshire. Except for these business visits he remains in Ireland and looks after his estate there of some 800 acres. The Commissioners find that these visits to England are solely for business purposes; the Appellant's wife never accompanies him.

The case appears to be one analogous to that of the merchant who goes to a place to attend a market regularly as often as that market is held, or to that of the barrister who regularly attends the Assizes at a particular town. The reason for the visit of the merchant or barrister is that it is paid to the locality where his business requires him. In the present case, if the Board of Directors determined to hold their meetings at Bristol or Cardiff or Lincoln, the Appellant's visits in England would be paid to one of those towns as readily as to Bath and Scunthorpe. In my judgment a man may come repeatedly to the country and yet not acquire a residence, for he may go to a place to which duty or business calls him and whither he resorts for such space of time only as that duty calls and compels him to remain or the business requires his attendance. That is a place which is fixed not by himself alone but is determined by other considerations than his own desire or volition—a visit to which is necessitated and determined by causes exterior to his mere will and might have led him somewhere else if the path of duty had lain in a different direction.

Such visits may have other characteristics and so justify a finding of a residence in relation to them. But tested by the considerations or factors to which I have made reference in *Levene's* case(1), the present case appears to me to fall on the other side of the line.

(1) Page 495 *ante*.

(Lord Hanworth, M.R.)

There remains however the question that has given me some concern—that is, is the matter so much a question of fact that it is not open to this Court to review the decision of the Commissioners? Mr. Justice Rowlatt in his judgment felt unable to differ from the Commissioners. They have found the facts; but in paragraph 5 " held " upon those facts that the Appellant was both ordinarily resident and resident in the United Kingdom for each of the years in respect of which the claim to exemption arises. They thus applied the law, as they thought it should be interpreted, to the facts they had found.

It is unnecessary to go through the many cases decided on this point, for in the *Great Western Railway* v. *Bater*, [1922] 2 A.C., Lord Wrenbury states the course to be followed succinctly in a sentence(1). " It was for the Special Commissioners to find " and state all the facts . . . It was not for the Court to " question those facts in any way. But the question for the " Court was whether, upon those facts, Mr. Hall held an office " or employment of profit *within the meaning of the Act*. That " is a question of law. What does the Act mean? What is the " true construction? " Emphasis is added to the decision of the House that the question before it was one of law and not of fact merely because of its divergence from the decision of the Court of Appeal who had decided otherwise. Lord Sterndale had plainly stated in his judgment that the Court of Appeal could not interfere with the result of the facts found(2).

Applying the decision in *Bater's* case in the House of Lords to the present, I am satisfied that this Court can review the result which the Commissioners had held to follow in law upon the facts found. The meaning of " residence " in the Income Tax Act must be a question of law; and upon the facts found by the Commissioners the Courts must determine whether the subject has brought himself within the terms of the exemption in the Act, rightly construed.

In my judgment therefore this Court can reconsider the case upon the question of the meaning of " residence " in law, and ought to hold that the facts found do not satisfy that meaning and constitute residence. The result is that the subject is entitled to the exemption claimed. The appeal will be allowed with costs here and below and the Commissioners will be directed to allow the exemption.

Sargant, L.J.—In this case the Appellant is seeking a relief from taxation similar to that in the case of *Levene* v. *The Commissioners of Inland Revenue*(3). I need not repeat the remarks

(1) 8 T.C. 231, at p. 254. (2) 8 T.C. at p. 239.
(3) Page 486 *ante*.

(Sargant, L.J.)

I have made in that case as to the meaning of the word " resident " and the phrase " ordinarily resident ", but I should add that in this case, as in that, I see no reason for drawing any distinction between the word and the phrase. Everything here, as there, has followed an ordinary course.

So far, this case is analogous to the *Levene* case, but the facts here are very different. Here there is the very important distinction that, throughout the whole period during which the Appellant is alleged to have been in course of becoming resident in the United Kingdom, he has undoubtedly been keeping up a home in Southern Ireland and residing there in the ordinary sense of the word. His visits to England have been for short periods of a week only in each month, have been for strictly business purposes only, and have not been in the society of his wife. They have for the most part been to Bath and Bristol but have sometimes extended to Scunthorpe when the exigencies of business have rendered this further journey necessary or advisable. There has been no choice by him of England as a desirable abode, and no intention of being present here otherwise than in the course of his duties; and no one could, I think, predicate of the Appellant with accuracy that he ever had the intention of making England his home in any ordinary sense of the word. It is of course possible that a man may have two residences during the same period of assessment, but it is far less likely that he should have a second residence here when he, throughout and apart from temporary absences, is continuously residing and keeping a continuous home elsewhere.

I put the case during the argument of a man living in a house or lodgings at some such place as Richmond or Reigate and travelling to the City every week-day to earn his living there. In such a case everyone would say that he resided at the place where he slept and that he worked or earned his living in the City; and I think that this would be so though his tenure of his office in the City might be much more permanent than that of his house or lodgings in the country, or though he might arrange to sleep in town occasionally when he was kept specially late at work. One element in arriving at this conclusion would be that residence would ordinarily be determined by the place where he slept, not where he worked, but another element would, I think, be that the place where he slept and lived would be determined by his own choice and in view of the social amenities he might expect to enjoy in that district; while the place where he worked would be much less dependent on his own volition and independent of social considerations. But be this as it may, he would in ordinary language be said to be resident in Richmond or Reigate and not to be resident in the City, though a greater part of his waking hours was passed in the City than in his suburb.

(Sargant, L.J.)

In the present case, owing to the greater distance between his home and the scene of his work, the Appellant is forced to remain in the United Kingdom for several days and nights continuously. But, on the other hand, the periods during which he is at his home in Southern Ireland are far longer, and I think that in this case, at least, as much as in the hypothetical case of the City worker, the Appellant would be considered in ordinary parlance to have his residence at his home in Southern Ireland, and not to have a second residence in the United Kingdom by reason of his recurrent occupational presence there. Further, the purpose of the presence of the Appellant in the United Kingdom may, in my view, be fairly described as " temporary ", notwithstanding its being of a regularly recurrent character, and it certainly has not been with any " view or intent of establishing his residence " therein "; and thus he appears to fall within the exemption granted by Rule 2 of the Miscellaneous Rules applicable to Schedule D.

Accordingly, with great respect to the learned Judge, I differ in this case from the result at which he and the Special Commissioners have arrived, and think that the appeal to this Court should succeed.

In doing so I do not think that I am differing from the Special Commissioners on any question of fact. As I read their decision they have carefully found the facts, and have segregated them from any question of law; and the facts so found I entirely accept. But they have then gone on to decide a question of law on those facts and have " held " that on the facts found the Appellant resided in the United Kingdom. This is a conclusion of law within the principles of Lord Wrenbury's reasoning in the *Great Western Railway* v. *Bater*(1); and it is solely as to this conclusion of law that I differ from them and from Mr. Justice Rowlatt.

Lawrence, L.J.—In this case I have the misfortune to differ from my colleagues and I need hardly say that in view of the judgments which have just been delivered I profoundly distrust my own opinion.

The Appellant claims exemption from Income Tax on British Government Securities under Section 46 of the Income Tax Act, 1918, and repayment of Income Tax on Foreign and Dominion Government Securities under Rule 2 (*d*) of the General Rules applicable to Schedule C of the same Act; both these claims are in respect of the two fiscal years ending 5th April, 1923, and 5th April, 1924, respectively.

(1) 8 T.C. 231.

(Lawrence, L.J.)

In order to succeed in these claims the Appellant has to prove to the satisfaction of the Commissioners of Inland Revenue that during the years in question he was neither resident nor ordinarily resident in the United Kingdom.

The Commissioners for the Special Purposes of the Income Tax Acts having held that the Appellant was both resident and ordinarily resident in the United Kingdom in each of the two years in question, the Appellant required them to state a Case for the opinion of the High Court.

In the Case the Special Commissioners, after setting out the facts and the contentions of the parties, state their conclusions as follows: " We held that the Appellant was both ordinarily " resident and resident in the United Kingdom for each of the " two years ending the 5th April, 1923, and the 5th April, 1924, " respectively ".

I have found some difficulty in reconciling the various decisions and judicial dicta (which will be found conveniently catalogued in Dowell's Income Tax Laws, 9th Edition, pages 231 to 236) on the question how the Court ought to deal with a Case Stated for its opinion in the form adopted in the present case.

The Solicitor-General contended that as the Appellant had not shown that the Commissioners had taken an erroneous view of the construction of the Act no question of law had arisen, and further that as there was evidence upon which the Commissioners could have reached their conclusions there was no jurisdiction to review their findings of fact that the Appellant was resident and ordinarily resident in the United Kingdom. This contention finds support in many judicial utterances including the speech by Earl Loreburn, Lord Chancellor, in *Farmer* v. *Cotton's Trustees*(1), [1915] A.C. at page 930, where it is stated that the Commissioners' determination is conclusive unless erroneous in point of law and that there is no jurisdiction to review it upon any issue of fact, but that the Court could interfere if it were clear that the Commissioners had proceeded upon a wrong construction of the Act or if there were no evidence upon which their decision could be supported.

Mr. Latter on the other hand contended that the question whether the Appellant was resident or ordinarily resident in the United Kingdom in any given period within the meaning of the relevant Section and Rule was a mixed question of fact and law, the question of fact being moreover a compound fact (to use the expression of Sir George Jessel, Master of the Rolls, in *Erichsen* v. *Last*, 4 T.C. 422) depending upon the true effect of a number of instances, and that it is for the Court to decide as a matter of

(2) 6 T.C. 590, at p. 599.

(Lawrence, L.J.)

law whether upon a consideration of the facts found in the Case the Appellant was or was not resident or ordinarily resident in the United Kingdom during the periods in question. This contention also finds support in many judicial utterances, including the speech by Lord Parker of Waddington in the case of *Farmer* v. *Cotton's Trustees*, where the following passage occurs(1): "The views from time to time expressed in this "House have been far from unanimous, but in my humble "judgment where all the material facts are fully found, and the "only question is whether the facts are such as to bring the "case within the provisions properly construed of some statutory "enactment, the question is one of law only".

In the present case Mr. Justice Rowlatt went into the facts which were stated in the Case to have been admitted or proved before the Commissioners, and directed his mind to the point whether the Commissioners were right in law in holding that the Appellant was resident and ordinarily resident in the United Kingdom. The course so taken by the learned Judge is in accordance with that adopted by all the Courts in the case of the *American Thread Company* v. *Joyce* (6 T.C., pp. 1 & 163), and in other cases, and is in my opinion the right method of dealing with the present case, as it is hardly to be supposed that the Commissioners intended to state the Appellant out of Court, especially as they were careful in stating their conclusion to use the words "we held" and not "we found as a fact".

In these circumstances I am of opinion that the question for this Court is whether upon the facts stated in the Case the Commissioners and the learned Judge were right in law in holding that the Appellant was resident and ordinarily resident in the United Kingdom within the true meaning of the Section and Rule in question, and I propose to confine my judgment to this point.

The words "reside", "resident" and "residence" are flexible terms and may have different meanings according to the context in which they are used.

Both in Section 46 and in Rule 2 (*d*) of Schedule C the expression "resident in the United Kingdom" is used in contrast to "resident out of the United Kingdom"—the Section and Rule are not concerned with residence at any particular place or places within the United Kingdom. When speaking of a person being resident in a certain country at large as distinguished from being resident at some particular spot or in some particular town, the expression does not in my opinion necessarily connote that the person has a fixed place of abode in the country in which for

(1) 6 T.C. 590, at p. 600.

(Lawrence, L.J.)

the time being he is resident. The expression in my opinion bears much the same meaning as in the sentence : " During his " comparatively short residence in England he was unable to " master the English language ". That the expression is used in this wide sense is I think confirmed by the provisions of Rule 2 of the Miscellaneous Rules applicable to Schedule D which exempts a person from the charge to tax under that Schedule as a person residing in the United Kingdom in respect of profits or gains received in respect of possessions or securities out of the United Kingdom who *is* in the United Kingdom for some temporary purpose only and not with any view or intent of establishing his residence there and who has not *actually resided* in the United Kingdom at one time or several times for a period of 6 months in the whole, but enacts that if any such person *resides* in the United Kingdom for the aforesaid period he shall be chargeable for that year. This Rule (which does not apply to cases under Section 46 or under Schedule C) seems to me to show that but for its provisions a person would or might be chargeable to tax under Schedule D as a person residing in the United Kingdom although such person were only in the United Kingdom for a temporary purpose and although he actually stayed in the United Kingdom for less than 6 months; and it further shows that a person actually staying in the United Kingdom for 6 months is resident therein for the purposes of the charge to tax under Schedule D although he is only staying therein for a temporary purpose and not with any intention of making his home therein.

Whether a person is resident in the United Kingdom within the meaning of the enactments in question in the present case is no doubt a question of degree and depends on a due consideration of all the facts, but in my opinion a person who regularly comes to, and stays for a substantial period in, the United Kingdom is prima facie resident therein within the meaning of these enactments although he may not have any fixed place of abode therein and the onus is upon him to satisfy the Commissioners or the Court that he is not so resident.

The expression " ordinarily resident in the United Kingdom " in Section 46 necessarily bears a narrower meaning than the expression " resident in the United Kingdom " in Rule 2 (*d*). It assumes that the person is resident in the United Kingdom but contemplates that he may not be " ordinarily " resident therein. I agree with the opinion expressed by the Lord President in *Reid's* case (10 T.C. 673) and by Mr. Justice Rowlatt in *Levene's* case[1] as to the meaning of the qualifying adverb " ordinarily ", which in my opinion is used in its primary and

(1) Page 491 *ante*.

(Lawrence, L.J.)

natural sense of " in conformity with rule or established custom " or practice " or " as a matter of regular practice or occur- " rence ". In this sense " ordinarily " is in contrast with " casual " or " occasional " and I did not understand Mr. Latter to quarrel with this construction.

I now come to consider whether the facts stated in the Case justify the conclusion reached by the Special Commissioners and by Mr. Justice Rowlatt.

The Appellant has his home in Ireland where he resides with his family when in Ireland, he has no dwelling house in the United Kingdom and generally stays at the Spa Hotel, Bath, when he comes to England. These facts although important are not conclusive. The Act itself contemplates that a person may be resident and ordinarily resident in more places than one (see e.g. Rule 4 of the Miscellaneous Rules applicable to Schedule D). As regards staying at the Spa Hotel I have already expressed my opinion that in order to be resident in the United Kingdom within the meaning of the Section and Rule it is not essential that a person should have a fixed place of abode or an intention of making his home therein. At the present time, owing to various causes, even persons who admittedly are permanently resident in the United Kingdom frequently live altogether in hotels or boarding houses and move about from place to place.

On the other hand the Appellant is in the regular employ of John Lysaght, Limited, as advisory director at a fixed salary. The head office and works of John Lysaght, Limited, are in England and the Appellant's employment necessitates his regular presence in England for about one week in every month of the year. Further the Appellant has a banking account at a bank in Bristol and is a member of the Savile Club in London.

The case is near the line but in my opinion the determining factor is that the post which the Appellant holds in John Lysaght, Limited, causes him to come regularly to England and to stay in the United Kingdom for a substantial period in each year. The fact that the Appellant stays regularly in England for about 3 months of the year for the discharge of his duties as the servant of an English company in my opinion constitutes him a person who is both resident and ordinarily resident in the United Kingdom.

In these circumstances I find myself unable to hold that the Commissioners were bound as a matter of law to be satisfied that the Appellant was neither resident nor ordinarily resident in the United Kingdom for the years in question.

In my opinion the decision of Mr. Justice Rowlatt was right and the appeal ought to be dismissed, but as my colleagues take the contrary view the appeal will be allowed with costs.

The Solicitor-General.—My Lord, in this case your Lordship said that the Order would be that the costs here and below should be the Appellant's. In this case below there was an arrangement by which it was unnecessary to make an Order as to costs.

Lord Hanworth, M.R.—That prevails here. Yes, I remember.

The Solicitor-General.—The Order will be for costs of the appeal only?

Mr. Latter.—Yes, in this Court only. The arrangement did not extend further.

Lord Hanworth, M.R.—Yes. I noticed that.

The Crown having appealed against the decision in the Court of Appeal, the case came before the House of Lords (Viscount Cave, *L.C.*, Viscount Sumner and Lords Atkinson, Buckmaster and Warrington of Clyffe) on the 27th and 30th January, 1928, when judgment was reserved.

The Attorney-General (Sir Douglas Hogg, K.C.), the Solicitor-General (Sir Thomas Inskip, K.C.) and Mr. R. P. Hills appeared as Counsel for the Crown, and Mr. A. M. Latter, K.C., and Mr. S. R. Benson for Mr. Lysaght.

On the 9th March, 1928, judgment was delivered in favour of the Crown, with costs (the Lord Chancellor dissenting), reversing the decision of the Court below and restoring the decision of the King's Bench Division.

JUDGMENT.

Viscount Sumner.—My Lords, what has to be decided in this case is really the meaning of the word " resident " in the Income Tax Act, 1918, and the mode in which that meaning is to be settled in particular cases. The Respondent, who lives in the Irish Free State, claimed exemption from tax, as to some of his securities because he was " not ordinarily resident in the United Kingdom " within Section 46 (1), and as to others because he was not " resident " in the United Kingdom " within the General Rules applicable to Schedule C, No. 2 (*d*). The Commissioners for Special Purposes decided against him in both cases. Section 46 (1) provides that the non-residence there mentioned is to be shewn " in manner " directed by the Treasury ", while Rule No. 2 (*d*) of the General Rules exempts a taxpayer for non-residence " where it is proved " to the satisfaction of the Commissioners of Inland Revenue ", but no distinction has been drawn nor has any point been taken on this ground.

There is, however, a preliminary question on the form of the Commissioners' decision. Their Case Stated is framed thus: " 2. The following facts were admitted or proved in evidence

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" . . . . 3. It was contended by the Appellant . . . . 4. It was " contended on behalf of the Crown . . . . 5. We held that the " Appellant was both ordinarily resident and resident in the United " Kingdom . . . . ."

Paragraph 2 sets out under six heads the circumstances of various kinds relevant to the issue of Mr. Lysaght's way of life and particularly of his visits to England. It was contended that this paragraph and this alone stated the facts found by the Commissioners and that paragraph 5 found no fact but only stated their opinion of the consequences in law which followed from their previous finding. In that case, if residence, ordinary or otherwise, is a question of fact, the Case must have gone back to be completely stated; if it is purely a question of law, the whole case would be open for your Lordships' decision as to the consequences legally arising from the facts found.

It is certainly much to be wished that the Commissioners should be scrupulously careful to say that they " find " a conclusion of fact, arrived at from other facts found, or, if they only mean to apply the law as they understand it to be and not to draw any conclusion of fact, should say that they hold so and so in accordance with what they conceive to be the law, for a debate on the meaning of a Case Stated is an unsatisfactory prelude to a debate on the general law applicable. I have, however, no doubt as to the Commissioners' meaning here. Their experience makes them fully conversant with the wide scope of their functions and with their limits and it is most unlikely that they intended to leave unfound the ultimate fact of residence, which was the substance of the whole case before them. It is as though a jury, fully directed by the trial judge, had found a special verdict stating the points which the evidence had proved to their satisfaction, and had concluded " we hold this to have been careless and unreasonable " conduct on the Defendant's part and we find for the Plaintiff ".

It is well settled that, when the Commissioners have thus ascertained the facts of the case and then have found the conclusion of fact which the facts prove, their decision is not open to review, provided (*a*) that they had before them evidence, from which such a conclusion could properly be drawn, and (*b*) that they did not misdirect themselves in law in any of the forms of legal error which amount to misdirection.

My Lords, the word " ordinarily " may be taken first. The Act on the one hand does not say " usually " or " most of the " time " or " exclusively " or " principally ", nor does it say on the other hand " occasionally " or " exceptionally " or " now and " then ", though in various Sections it applies to the word

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" resident ", with a full sense of choice, adverbs like " tempor- " arily " and " actually ". I think the converse to " ordinarily " is " extraordinarily ", and that part of the regular order of a man's life, adopted voluntarily and for settled purposes, is not " extra- " ordinarily ". Having regard to the times and duration, the objects and the obligations of Mr. Lysaght's visits to England, there was in my opinion evidence to support, and no rule of law to prevent, a finding that he was ordinarily resident, if he was resident in the United Kingdom at all. No authority was cited which requires special consideration on this head.

Grammatically the word " resident " indicates a quality of the person charged and is not descriptive of his property, real or personal. To ask where he has his residence is often a convenient form of inquiry but only as leading to the question : " Then where " is he resident himself? " I think this distinction, though often pointed out, has too often been overlooked in the arguments in the reported cases. No doubt, on the authority of the merchant seamen's cases, Mallow was Mr. Lysaght's home and he resided there. There were his family seat and his demesne lands, his wife and family, his farming and his sport, and though some people may be able to make themselves at home from home anywhere, I do not suppose that the Spa Hotel, Bath, however excellent, was much of a home to Mr. Lysaght. This, however, is not conclusive. Who in New York would have said of Mr. Cadwalader : " His " home's in the Highlands; his home is not here? " After all, many nomads are homeless folk, though they may reside continually, here and there, within the limits of the United Kingdom. Property obviously is no conclusive test. Whether Mr. Lysaght resides in his own or in a hired house in Ireland cannot have much to do with it, nor is a person precluded from being resident because he puts up at hotels, and not always the same hotel, and never for long together. It was said in *Cadwalader's* case[1] that an establishment was set up in the United Kingdom. None was set up here and in fact Mr. Lysaght had closed his English establishment some years before; but although setting up an establishment in this country, available for residence at any time throughout the year of charge, even though used but little, may be good ground for finding its master to be " resident " here, it does not follow that keeping up an establishment abroad and none here is incompatible with being " resident here " if there is other sufficient evidence of it. One thinks of a man's settled and usual place of abode as his residence, but the truth is that in many cases in ordinary speech one residence at a time is the underlying assumption and though a man may be the occupier of two houses, he is thought of as only resident in the one he lives in at the time in question. For Income

(1) Cooper v. Cadwalader, 5 T.C. 101.

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Tax purposes such meanings are misleading. Residence here may be multiple and manifold. A man is taxed where he resides. I might almost say he resides wherever he can be taxed.

There is again the circumstance that Mr. Lysaght only comes over for short visits. Does this make any conclusive difference? If he came for the first three months in the year for the purpose of his duties and then returned home till the next year, would there not be evidence that he was resident here, and, if so, how does the discontinuity of the days prevent him from being resident in England, when he is here in fact, though the obligation to come as required is continuous and the sequence of the visits excludes the elements of chance and of occasion? If the question had been one of " occasional residence " abroad in the language of General Rule 3 these facts would have satisfied the expression, for residence is still residence, though it is only occasional, and I see no such fundamental antithesis between " residence " and " temporary " visits " as would prevent Mr. Lysaght's visits, periodic and short as they are, from constituting a residence in the United Kingdom, which is " ordinary " under the circumstances.

My Lords, I think it is the shortness of the aggregate time during which Mr. Lysaght is here that constitutes the principal, though by no means the only point in his favour, but the question of a longer or a shorter time, like other questions of degree, is one peculiarly for the Commissioners. I do not say that time might not be so short, or again so long, as to make it right to hold, no matter what other evidence there was, that, as the case might be, there was either no evidence of residence or that the evidence was all one way in favour of it, but these questions are not before us.

It is attractive to say, as in substance was the opinion of the Court of Appeal, that " resident " in this case is a matter of law, as being a matter of interpretation, but that does not cover the ground. Interpretation only says what the Act itself refrains from telling us, namely, the meaning of the word " resident ", but, as that meaning is its meaning in the speech of plain men, the question still remains, whether plain men would find that the result of the facts found was " residence " in its plain sense, and I do not doubt that the Commissioners understood the word not otherwise than in its correct legal signification and so applied it. Accordingly, I do not think that their decision can be interfered with.

It remains to notice an argument founded on the Finance Act, 1924, Section 27. This Section provides that, in the case of questions as to " ordinary residence " under Section 46 (1) of the Income Tax Act, 1918, or as to " residence " in Rule 2 (*d*) of the General Rules applicable to Schedule C, a person aggrieved by the decision of the Commissioners of Inland Revenue can apply to have

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his claim for relief determined by the Special Commissioners, who are to proceed as on an appeal against an assessment under Schedule D, subject to all the provisions of the Income Tax Acts relating to such an appeal. This was what Mr. Lysaght did, and the Section is supposed to show that " residence " and " ordinary " residence are questions of law. I do not think it does. It only shows that they are questions which the Special Commissioners are competent to review, leaving the distinction between questions of law and questions of fact untouched. True, the Special Commissioners can state a Special Case for the opinion of the High Court on a question of law, but the Section does not say that " residence " and " ordinary " residence in themselves are such questions of law, and it is only on such questions as may arise, if any, that the Case can be stated. The Commissioners are not required to find out or to formulate such questions. If, as here, they say : " The " Appellant immediately upon the determination of the appeal " declared to us his dissatisfaction therewith as being erroneous in " point of law, and in due course required us to state a Case . . . . " which Case is here stated ", they have done their duty; and it is open to your Lordships to say that, not having misdirected themselves in point of law and not having proceeded without evidence on which they could properly find as they have found, their determination is not erroneous in point of law. This satisfies the Section. It does not say, expressly or by implication, that " resident ", whether " ordinarily " or otherwise, raises a question of law in itself.

Viscount Cave, L.C. (read by Lord Warrington of Clyffe).—My Lords, the facts in this case as found by the Special Commissioners may be very shortly stated. The Respondent, Mr. S. R. Lysaght, who was born in England of Irish parents, was formerly the managing director of a company called John Lysaght, Limited, which has works at Bristol and Newport, and while he was so engaged owned a property near Bristol and resided there with his family. In the year 1919 he partially retired from the business but was appointed an advisory director. Thereupon he sold his property near Bristol and went to live on a family property at Mallow in Ireland which he had purchased in the year 1916, and from that time he has had no definite place of abode in this country, but he comes to England from time to time in circumstances detailed in the following paragraphs from the Case stated by the Commissioners : " (4) The Appellant comes to England for a " meeting of the directors of John Lysaght, Limited, every month " and remains for consultations with the other directors and for " committee meetings. The Company have a branch business at " Scunthorpe, Lincs., and the Appellant has visited this business " on several occasions during his visits to England. On the

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" occasion of these visits he spends about a week in England. On " two occasions his return to Ireland was delayed by illness. The " total number of days spent in England in the respective years has " been as follows :—In the year ended the 5th April, 1923, " 101 days; in the year ended the 5th April, 1924, 94 days; in " the year ended the 5th April, 1925, 84 days; in the period from " 6th April till 25th September, 1925, 48 days. When in England " the Appellant generally stays at the Spa Hotel, Bath, at which " the meetings of the directors of the Company are held. " Occasionally he has stayed at his brother's house at Chepstow. " These visits to England are solely for business purposes, and the " Appellant's wife never accompanies him on these visits. He " owns a field of about three acres near Burnham, purchased many " years ago, which he is anxious to sell. He has a few relatives " and many friends in England. He has also relatives and friends " abroad. (5) He has no business activities in Ireland except the " management of his estate at Mallow, of which 800 acres are in " hand. (6) His banking account is at the Mallow branch of the " Bank of Ireland, but he has also a small account at a branch " in Bristol of the Westminster Bank. The registered address " of his various securities is ' Hazelwood ', Mallow. He is a " member of the Savile Club, London, but hardly ever goes there. " During the past five years he has made three lengthy trips to " Australia and South America on behalf of the Company."

The Respondent, having been assessed by the General Commissioners to Income Tax in respect of the tax years 1922-23 and 1923-24 in respect of income from foreign and colonial government securities and War Loan, claimed exemption from tax under Rule 2 (*d*) of the General Rules applicable to Schedule C of the Income Tax Act, and Section 46 (2) of the same Act, on the ground that during the years in question he was neither resident nor ordinarily resident in the United Kingdom; but the claim was disallowed, and on appeal to the Special Commissioners they confirmed the decision of the General Commissioners subject to a Case stated for the opinion of the High Court. After stating the facts and the contentions of the parties, the Case proceeds as follows :— " We held that the Appellant was both ordinarily resident and " resident in the United Kingdom for each of the two years ended " the 5th April, 1923, and the 5th April, 1924, respectively." On the case being argued, Mr. Justice Rowlatt refused to disturb the Commissioners' decision, but the Court of Appeal (by a majority) took a different view. The Crown now appeals to this House.

My Lords, this case differs in an essential respect from the case of *Levene* v. *The Commissioners of Inland Revenue*(1), which your Lordships have just decided. In that case the Appellant,

(1) Page 486 *ante*.

(Viscount Cave, L.C.)

Mr. Levene, was during the period in question a homeless man living at different hotels in the United Kingdom and abroad. In the present case the Respondent, Mr. Lysaght, has a permanent home in Southern Ireland where he lives with his family; but he comes to England once a month for business purposes, stays at an hotel and, when his business (which usually occupies about a week) is concluded, he returns home. It is unnecessary for me to repeat the observations which I have made in the previous case as to the meaning of the expressions "reside" and "ordinarily "reside"; and it is enough to say that, on the view which in that case I have taken as to the meaning of those expressions, there appears to me to be no reason whatever for holding that the Respondent is resident or ordinarily resident in this country. It is true that he comes here at regular intervals and for recurrent business purposes; but these facts, while they explain the frequency of his visits, do not make them more than temporary visits or give them the character of residence in this country. That he has a small account at a bank in Bristol—doubtless for use during his visits to this country—and a club in London to which he hardly ever goes, appear to me to be trivial circumstances which cannot affect the decision. If the Respondent is held to reside here and to be taxable accordingly, there would appear to be no reason why those many foreigners who periodically visit this country for business purposes, and having concluded their business go away, should not be made subject to a like burden.

But it was argued—and this was the point mainly insisted upon on behalf of the Crown—that the conclusion of the Special Commissioners that the Respondent was both resident and ordinarily resident in the United Kingdom was a finding of pure fact, and accordingly could not be disturbed by the Court of Appeal. No doubt the rule is well established that a finding of the Commissioners on a question of pure fact cannot be reviewed by the Courts except on the ground that there was no evidence on which the Commissioners could as reasonable men have come to their conclusion, and this although the Court of review would, on the evidence, have come to a different conclusion. But it does not appear to me that the conclusion of the Commissioners in the present case was a finding of pure fact. It is true, as Mr. Justice Rowlatt said in *Pickles* v. *Foulsham* (9 Tax Cases at page 274) that where a man resides is a question of fact to be determined on proper legal principles; and it is true also, as he said in the same case, that when you get a case on the border line, i.e., where there is evidence both ways which is nearly balanced—it becomes very essentially a question of fact. A good instance of this is the case of *Levene* to which I have referred. But, as Lord Parker said in

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Farmer v. *Cotton's Trustees*[1] ([1915] A.C. at page 932), it is not always easy to distinguish between questions of fact and questions of law for the purposes of the taxing Acts; and I venture to express my concurrence with the protest made by Lord Atkinson in *Great Western Railway* v. *Bater*[2] ([1922] 2 A.C. at page 12) against the attempt which is often made to secure for a finding on a mixed question of law and fact the unassailability which belongs only to a finding on a question of pure fact. In the present case the Commissioners appear to me to have so framed their Case as to prevent (if possible) any confusion of that kind. They have carefully and fully stated all the material facts found by them to exist and then, after setting out the rival contentions of the parties (some of them being contentions of law), they have " held " that the Appellant was both ordinarily resident and resident in the United Kingdom in the years in question. This seems to me to mean on the facts already found by them and on their view of the law they were prepared to draw the inference of residence. In short, it is a mixed finding of fact and law; and unless such a finding is open to review by the Courts little benefit will accrue to the subject from the right which is given to him to have a Case stated for the opinion of the King's Bench Division. In my opinion this argument fails.

I feel compelled to add that, if the Commissioners' decision is to be taken as a finding on the facts only, then it appears to me that there was on their own showing no evidence upon which that finding could properly be based.

For these reasons I would dismiss this appeal.

Lord Atkinson.—My Lords, I am about to read the judgment of my noble and learned friend **Lord Buckmaster**, who is engaged elsewhere, and I concur in that judgment.

Lord Buckmaster (read by Lord Atkinson).—My Lords, the real question that arises in this case is whether the finding of the Commissioners that the Respondent was resident and ordinarily resident in England is a finding of fact which cannot be disturbed, or whether it is open to examine the circumstances set out by the Commissioners for the purpose of seeing whether the conclusion they drew is one that this House will accept. The distinction between questions of fact and questions of law is difficult to define, but according to the Respondent whether a man is resident or ordinarily resident here must always be a question of law dependent upon the legal construction to be placed upon the provisions of an Act of Parliament. I find myself unable to accept this view. It may be true that the word " reside " or " residence " in other Acts

(1) 6 T.C. 590, at p. 600. (2) 8 T.C. 231, at p. 244.

(Lord Buckmaster.)

may have special meanings, but in the Income Tax Acts it is, I think, used in its common sense and it is essentially a question of fact whether a man does or does not comply with its meaning. It is, of course, true that if the circumstances found by the Commissioners in the Special Case are incapable of constituting residence their conclusion cannot be protected by saying that it is a conclusion of fact since there are no materials upon which that conclusion could depend. But if the incidents relating to visits in this country are of such a nature that they might constitute residence, and their prolonged or repeated repetition would certainly produce that result, then the matter must be a matter of degree ; and the determination of whether or not the degree extends so far as to make a man resident or ordinarily resident here is for the Commissioners and it is not for the Courts to say whether they would have reached the same conclusion. This case is an excellent illustration of this particular point. The Appellant's home is in Ireland and he has no definite place of abode in England, as found by the Commissioners : " (4) The Appellant comes to England for a meeting " of the directors of John Lysaght, Limited, every month and " remains for consultations with the other directors and for com- " mittee meetings. The Company have a branch business at Scun- " thorpe, Lincs., and the Appellant has visited this business on " several occasions during his visits to England. On the occasion " of these visits he spends about a week in England. On two " occasions his return to Ireland was delayed by illness. The total " number of days spent in England in the respective years has been " as follows :—In the year ended the 5th April, 1923, 101 days. " In the year ended 5th April, 1924, 94 days; in the year ended " the 5th April, 1925, 84 days; in the period from 6th April till " 25th September, 1925, 48 days. When in England the Appellant " generally stays at the Spa Hotel, Bath, at which the meetings " of the directors of the Company are held. Occasionally he has " stayed at his brother's house at Chepstow. These visits to " England are solely for business purposes, and the Appellant's wife " never accompanies him on these visits. He owns a field of about " three acres near Burnham, purchased many years ago, which he " is anxious to sell. He has a few relatives and many friends in " England. He has also relatives and friends abroad."

It could not, I think, be denied that, even although the Respondent had his home in Ireland, his sojourn in this country might be so prolonged as to place his residence here beyond dispute, but none the less I understand the judgment of the Court of Appeal to mean this, that they regard the purpose of his visits sufficient to show that he could not be regarded as resident. They state that it was not of his own free choice but in obedience to the necessities

(Lord Buckmaster.)

of his position in relation to the company of John Lysaght, Ltd., that he was over here, from which it would appear that the element of choice is regarded by the Court of Appeal as a factor of great, if not of final, consequence in determining residence. In my opinion this reasoning is not sound. A man might well be compelled to reside here completely against his will; the exigencies of business often forbid the choice of residence and though a man may make his home elsewhere and stay in this country only because business compels him, yet none the less, if the periods for which and the conditions under which he stays are such that they may be regarded as constituting residence, it is open to the Commissioners to find that in fact he does so reside, and if residence be once established " ordinarily resident " means in my opinion no more than that the residence is not casual and uncertain but that the person held to reside does so in the ordinary course of his life.

Lord Warrington of Clyffe.—My Lords, this case raises under different circumstances the same questions as those raised in *Levene's* case(1) just decided by your Lordship's House, viz., whether the Respondent (as he is in this case) was in either of the years of assessment, viz., 1922–23 and 1923–24, resident and ordinarily resident in the United Kingdom.

The Respondent was entitled to certain securities of British possessions, the interest on which was payable in the United Kingdom and to British War Loan Stock issued with the condition mentioned in Section 46 of the Income Tax Act, 1918.

Having been assessed to Income Tax on both classes of security he appealed to the Special Commissioners, who decided that he was resident in the case of one class and was ordinarily resident in the case of the other.

A Case was thereupon stated by the Commissioners for the opinion of the High Court. The case was heard before Mr. Justice Rowlatt who affirmed the decision of the Commissioners. The Respondent appealed to the Court of Appeal, who by a majority (Lord Hanworth, Master of the Rolls, and Lord Justice Sargant, Lord Justice Lawrence dissenting) allowed the appeal and set aside the judgment of Mr. Justice Rowlatt and the decision of the Commissioners, being of opinion that the Respondent was not at the material times either resident or ordinarily resident in the United Kingdom.

The argument of the Attorney-General in this House was rested exclusively on the contention that the questions to be determined are both questions of degree and therefore of fact, and that there was on each question evidence on which the Commissioners might reasonably come to the conclusion at which they arrived, and consequently their decision was not subject to review.

(1) Page 486 *ante*.

(Lord Warrington of Clyffe.)

I have reluctantly come to the conclusion that it is now settled by authority that the question of residence or ordinary residence is one of degree, that there is no technical or special meaning attached to either expression for the purposes of the Income Tax Act, and accordingly a decision of the Commissioners on the question is a finding of fact and cannot be reviewed unless it is made out to be based on some error in law, including the absence of evidence on which such a decision could properly be founded.

In *Bayard Brown* v. *Burt*, 5 Tax Cases 667, page 670, Mr. Justice Hamilton after mentioning the finding of the Commissioners that the Appellant was resident in the United Kingdom said : " That only raises a question of law if it can be contended " that it is impossible to draw that conclusion of fact as to residence " in the United Kingdom from the facts set out in the Case ". This view was affirmed in the Court of Appeal. The same view was expressed by Mr. Justice Rowlatt in *Pickles* v. *Foulsham*, 9 Tax Cases 261, page 274. The point was not raised in the Court of Appeal.

In *Reid* v. *The Commissioners of Inland Revenue*, 10 Tax Cases 673 (a Scotch case), the Lord President (Lord Clyde), at page 678 said : " It is obvious that the more general and wide the scope " of expressions used in a Statute, the more difficult it may become " to convict those whose duty it is to interpret it of an error or " misdirection in applying it to a given state of facts. It may be " possible in such cases to predicate of a particular state of facts " that they lie outside the scope of the expressions used, although " it may really be an impossible task to define that scope positively " and with exact accuracy. The expression ' resident in the United " ' Kingdom ' and the qualification of that expression implied in " the word ' ordinarily ' so resident are just about as wide and " general and difficult to define with positive precision as any " that could have been used. The result is to make the question " of law become (as it were) so attenuated, and the field occupied " by the questions of fact become so enlarged, as to make it difficult " to say that a decision arrived at by the Commissioners with " respect to a particular state of facts held proved by them is " wrong ".

In the same case Lord Sands said(1) : " When a Statute uses " ordinary non-technical language in describing a person or thing " in general or ambulatory terms, and it becomes merely a matter " of impression or opinion whether, in relation to the special " circumstances, a person or thing falls within the expression, " the tendency of the law is to treat a finding upon the matter " as a finding of fact." He concurred in refusing to disturb the

(1) 10 T.C. at p. 681.

(Lord Warrington of Clyffe.)

determination of the Commissioners though he was not sure that he would have been prepared to differ had they decided the other way.

See also the opinion of Lord Halsbury in *Smith* v. *The Lion Brewery Company*(1), [1911] A.C. 150, page 155, and that of Lord Buckmaster in *Malcolm* v. *Lockhart*(2), [1919] A.C. 463, at page 466, and my own remarks in the Court of Appeal in *Cooper* v. *Stubbs*(3), [1925] 2 K.B. 753, at page 768.

In the present case after stating that certain facts set forth in detail were either admitted or proved the Commissioners " held " that the present Respondent was both ordinarily resident and resident in the United Kingdom for each of the two years in question.

The most material fact in the present case in favour of a finding contrary to that of the Commissioners was that the Respondent had a permanent family home in Southern Ireland. His visits to this country were for business purposes as advisory director of John Lysaght, Ltd., of which he had previously been director and managing director; they were frequent and regular and the number of days spent in this country in the two years in question was 101 and 94 respectively.

I cannot say that there was no evidence on which the Commissioners could properly arrive at their conclusion though I am not sure I should have taken the same view.

I think the appeal ought to be allowed with costs here and below and the judgment of Mr. Justice Rowlatt restored.

Mr. Reginald Hills.—My Lords, before the Questions are put, may I mention the matter of costs ? There has been an agreement come to between the parties so far as the costs in this House are concerned. The parties have been in communication with the Irish Free State authorities on the subject, and the only order for costs that is necessary, if your Lordships are willing to make it, in order to give effect to that agreement, is that the costs of both parties in the appeal to your Lordships' House should be taxed, but there should be no order for payment. The arrangement actually made is that the costs should be shared equally between the parties when the amount is arrived at.

Viscount Sumner.—That is agreed between you ?

Mr. Reginald Hills.—Yes, my Lord.

Mr. S. Benson.—Yes.

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(1) 5 T.C. 568 at p. 591. (2) 7 T.C. 99, at p. 105.
(3) 10 T.C. 29, at p. 51.

Viscount Sumner.—It will come to this—that the judgment of Mr. Justice Rowlatt will be restored and the costs of both parties here and in the Court of Appeal be taxed.

Mr. Reginald Hills.—If your Lordships will follow out the arrangement made you will not make any order as to the costs of the appeal, except that the appeal be allowed with costs in the Court of Appeal. The arrangement does not refer to the Court of Appeal and presumably the Crown will get their costs in the Court of Appeal now.

Viscount Sumner.—Then the Order will be: That the Respondent do pay to the Appellants their costs in the Court of Appeal, and, as to the costs here, that they be taxed, and then dealt with as the parties have agreed?

Mr. S. Benson.—My Lords, I am very sorry to go into this matter again, but, with regard to the costs in the Court of Appeal, I would desire that your Lordships should not make even that Order, because if there be an agreement—as to which I am entirely indebted to my learned friend for telling me—naturally that agreement would be carried out with regard to the Court of Appeal as well as here, and possibly it will be more convenient if your Lordships will make the Order with regard to the costs here to be taxed and make no mention of the Court of Appeal.

Viscount Sumner.—If the costs are only to be taxed they may never be paid. If there is an agreement you will tell it to us and we will frame our Order so as to leave you to give effect to your agreement, but, in so far as there is no agreement, we must take the usual course.

Mr. Reginald Hills.—My Lords, there is no agreement with regard to the costs in the Court of Appeal.

Mr. S. Benson.—I am not instructed that there is actually such an agreement.

Viscount Sumner.—Very well.

Questions put:

That the Order appealed from be reversed.

The Contents have it.

That the judgment of Mr. Justice Rowlatt be restored and that the Respondent do pay to the Appellants their costs in the Court of Appeal, and that the costs in your Lordships' House be taxed and thereafter dealt with by the parties in accordance with their agreement.

The Contents have it.

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