BETWEEN:

PERCY WALKER THOMSON..... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... RESPONDENT.

1943
Nov. 8
1945
Mar. 10

Revenue—Income—Income War Tax Act, R.S.C. 1927, c. 97, secs. 9 (a), 9 (b), 47—Meaning of terms "residing", "ordinarily resident", "sojourns", "during"—Person must reside somewhere—Constant personal presence not essential to residence—Person can have more than one residence—Whether a person was residing or ordinarily resident in Canada is a question of fact—Where word may have two meanings Court should reject that which would render Act nugatory or lead to absurd results—Appeal from assessment dismissed.

The appellant, a British subject, born at St. John, N.B., lived there and carried on business until 1921 when he moved to the nearby village of Rothesay. There he had a dispute over personal property tax and declared his intention of giving up residence in Canada. In 1923 he went to Bermuda, rented a house, made an affidavit of intention to establish his home and domicile there and obtained a passport. Thereafter he declared himself a resident of Bermuda, although he never made use of the house, was there for only a few days in 1926, 1928 and 1933 and never owned any property or had any assets or bank account there. Between 1923 and 1930 he spent most of his time at Pinehurst, North Carolina in rented houses, but in 1930 he built a $90,000 house there which was his chief place of abode in the United States. He kept a man looking after it all the year round. Between 1923 and 1932 he spent only a few days in Canada in any one year, and in some years was not there at all. In 1932, 1933 and 1934 he rented a summer place at St. Andrews, N.B., not far from St. John, because his wife wanted to come there, having relatives and friends at St. John. In 1934 he built a $90,000 house at East Riverside, near Rothesay, adjacent to the Golf Course, and bought about $16,000 worth of furniture. He built the house so that his wife could be nearer her relatives and friends than St. Andrews. The house was a large one of 15 to 20 rooms. Since 1934 and up to 1942 he spent the summer months there with his wife and family and staff of servants. He thought that if he spent less than 183 days in any year

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in Canada he would not be liable for income tax and his stay never exceeded that number of days. After building these two houses his routine of life was established. His main activity in life was playing golf. After it was too cold to play golf at East Riverside he went south to his home at Pinehurst and then to Florida but when it got too hot to play there he went back north to Pinehurst and then back to East Riverside. As he moved he took his wife and family, his motor cars and his staff of servants with him. He paid the annual taxes and annual maintenance of the East Riverside house and kept a housekeeper and his wife there each winter, the servants' quarters being open all the year round.

In 1940 he entered Canada as a tourist from Bermuda, although he came from Boston, and spent 159 days at East Riverside in the usual way. In 1941 he was requested to file an income tax return for 1940, but on his refusal to do so on the ground that his domicile was in Bermuda and that he was visiting Canada as a tourist, an assessment was levied against him on an assumed income of $50,000. He appealed to the Minister who confirmed the assessment on the ground that the facts disclosed that he was resident or ordinarily resident during the year 1940. An appeal to the Exchequer Court was then lodged.

Held: That a person must reside somewhere.

2. That constant personal presence is not essential to residence there and that a person may continue to be resident in a place although physically absent from it.

3. That while a person can have only one domicile, he can have more than one residence.

4. That the question of whether a person is ordinarily resident in one country or in another cannot be determined solely by the number of days that he spends in each; he may be ordinarily resident in both if his stay in each is substantial and habitual and in the normal and ordinary course of his routine of life. *Levene* v. *The Commissioners of Inland Revenue* (1928) 13 T.C. 486 followed.

5. That the terms "residing" and "ordinarily resident" in section 9 (*a*) of the Income War Tax Act have no technical or special meaning and that the question whether in any year a person was "residing or ordinarily resident in Canada" within the meaning of the section is a question of fact. *Lysaght* v. *The Commissioners of Inland Revenue* (1928) 13 T.C. 511 followed.

6. That the facts are conclusive that in 1940 the appellant was both residing and ordinarily resident in Canada within the meaning of section 9 (*a*) of the Act.

7. That when a word may have two meanings it should be read with reference to its context and the court should adopt that meaning which is in accord with the object of the Act and reject the one that would render the Act nugatory or lead to absurd results.

8. That the words "during such year" in section 9 (*a*) mean merely "in the course of or in such year".

APPEAL under the provisions of the Income War Tax Act.

The appeal was heard before the Honourable Mr. Justice Thorson, President of the Court, at Ottawa.

C. F. Inches, K.C. and E.F. Newcome, K.C. for appellant.

R. Forsyth, K.C. and E. S. McLatchy for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

THE PRESIDENT. now (March 10, 1945) delivered the following judgment:

This is an appeal under the Income War Tax Act, R.S.C. 1927, chap. 97, from an assessment for the year 1940 and turns on the question whether the appellant was residing or ordinarily resident in Canada during such year.

The appellant was born at St. John, New Brunswick, 1872. He lived there and carried on business as a steamship owner until 1918, when he retired and became interested in a public utility company until 1921. On his retirement he moved to Rothesay, a village near St. John. In 1922 he had a dispute with the village tax authorities over personal property tax and decided to leave Canada. He announced his intention of giving up residence in Canada to the New Brunswick Cabinet and to his friends and notified the Rothesay tax authorities.

In 1923 he went to Bermuda, rented a house there, made an affidavit in which he says he declared that he had come to Bermuda to establish his home and domicile there and that he intended to stay there indefinitely, and obtained a passport for 10 years. He took out a new passport on December 8, 1933, from the British Consulate at Savannah, Georgia, in which he stated his domicile as St. Georges, Bermuda, which was renewed by the British Consulate at Baltimore until December 8, 1943. He took out a fresh passport from the same consulate on February 7, 1943. He made his arrangements for the rental of a house in Bermuda because he thought it necessary to do so to establish residence there, but, although he paid rent for 1 or 2

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years, he never occupied the house or did anything with it. Apart from his short stay in 1923 to make the arrangements mentioned he spent only 6 days in Bermuda in 1926, 8 in 1928 and 6 in 1933, and has not been there at all since 1933. He never owned any property or had any assets or bank account there. He has, however, consistently, since 1923, described himself as a resident of Bermuda.

The appellant appeared at the hearing and gave detailed particulars of his movements from January 1, 1925, to December 31, 1941, compiled from his diaries, in which he recorded the temperatures and his golf scores. He stated that he roamed all over to play golf and this appears to be his main activity in life, together with an interest which he takes in improving at his own expense the golf courses over which he plays.

Between 1923 and 1932 the appellant spent only the following days in Canada; none in 1924, 101 in 1925, none in 1926, 8 in 1927, 2 in 1928, 15 in 1929, 64 in 1930 and 2 in 1931. The 2 days spent in 1928 were in connection with a visit made to Ottawa to collect some money from the Custodian of Alien Enemy Property and to settle an income tax account for the year 1923. He paid $180.40 in full of this account on October 8, 1928, and on November 5, 1928, Mr. C. S. Walters, who was then Commissioner of Income Tax, wrote to him at an address in Boston as follows:

> With reference to our conversation on the 25th September last, the District Inspector of Income Tax at St. John has forwarded to this office the Return which you have now filed for the year 1923, in respect of which you have paid the sum of $180.40. This will advise that your liability under the Income War Tax Act up to and including the calendar year 1927 has been discharged.
>
> You will not become taxable again under The Income War Tax Act until
>
> (*a*) you again take up residence in Canada;
> (*b*) you sojourn in Canada for a period or periods amounting to 183 days during a calendar year;
> (*c*) you are employed in Canada;
> (*d*) you carry on business in Canada; or,
> (*e*) you derive income for services rendered in Canada.
>
> In any such case you would become liable to taxation in Canada, and would be required to again file a Return for taxation purposes.

Up to this time the appellant had spent most of his time at Pinehurst in North Carolina, living in one rented house after another. In 1930, however, he built a house at Pinehurst, costing approximately $90,000. He then

moved his furniture to Pinehurst from Rothesay, having disposed of his residence there. The new house at Pinehurst was his chief place of abode in the United States, his wife and only son living there with him. He kept a man looking after it the whole year, even when he was away playing golf somewhere else. The house was always open and available to him.

In 1932 the appellant spent 134 days at St. Andrews, a summer resort not far from St. John. He rented a house and brought his wife, son and grandson with him. His wife wanted to come there, having relatives and friends at St. John. This was the reason, according to the appellant, why he established a summer place there. He paid $700 per year for it and, although he was only a tenant, put in new bathrooms and other improvements. As he put it he was "stuck with a house and had to make it comfortable". He came back to the same rented house in 1933 and 1934, spending 138 days there in 1933 and 81 in 1934. In 1934, however, he built a house at East Riverside, a place near Rothesay, adjacent to the Golf Club, which cost him close to $90,000, and bought about $16,000 worth of furniture with which to furnish it. The house was a large one consisting of from 15 to 20 rooms. The appellant gave as his reason for building this house the fact that he had no desire to come to Canada himself, but his wife's relatives were in New Brunswick and she enjoyed "sojourning" with them during the summer months. His wife's relatives and friends lived in St. John and at Rothesay and it was her desire to be nearer to them than St. Andrews. Since then and up to 1942 the appellant spent his summers in this house with his wife and family together with his staff of servants. There the appellant spent 156 days in 1935, 138 in 1936, 169 in 1937, 145 in 1938, 166 in 1939, 159 in 1940 and 115 in 1941. He stated that after receiving the letter from Mr. Walters he thought that if he did not spend more than 183 days in Canada in any one year he was not liable for income tax. He placed the house in the name of a company which he incorporated as Property at East Riverside Limited, in which he, his wife and his son had one share each in trust, the balance being held by another company called Prospect Mining Company

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Limited, a company which he incorporated in Newfoundland, the shares of which were owned by himself, his wife and his son. The appellant paid for the house and furniture, paid the annual taxes on the property and paid for its annual maintenance. He kept a housekeeper and his wife there each winter. The servants' quarters were open all the year round but the rest of the house was closed after he left in the fall until he came back the following summer.

His routine of life was now established. After it was too cold to play golf at East Riverside he went south to his house at Pinehurst; then he frequently went to Florida, where he had a house at Belleair, but when it got too hot to play there he went back north to Pinehurst and then back to East Riverside. As he moved from place to place he took his family, his motor cars and his staff of servants with him.

In 1940 the appellant entered Canada as a tourist from Bermuda although he came from Boston, and brought his automobiles with him under tourist permits for six months. He remained at his house at East Riverside with his wife and family as in previous years from May 8 to October 25, with the exception of two brief trips to Boston and one to Perth and then returned to Pinehurst as usual.

In the United States the appellant paid income tax as a non-resident from 1930 to 1940, but since then he has been forced to pay as a resident. He said that the United States authorities put a lien on everything he had and that he compromised with them because he had to do so. Since 1940 he has paid income tax in the United States on the full amount of his income, without exception, but it took strong action on the part of the authorities to compel him to do so.

The appellant returned to East Riverside in 1941, but this time as a visitor from the sterling area. While he was there he received a letter from the acting inspector of income tax at St. John, dated August 11, 1941, requesting him to make his income tax returns for 1940, showing his income from all sources, and advising him that consideration would be given to a portion of taxes paid in the United Kingdom and in the United States.

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He replied that as he understood the Canadian law he was not compelled to file any income tax statement as his domicile was in Bermuda and that he was visiting Canada as a tourist. In consequence of his refusal to file any return an assessment amounting to $21,122.00 tax and $480.31 interest was levied against him for the year 1940, based upon an assumed income of $50,000. The Minister determined the amount of the tax to be paid under the authority of section 47 of the Income War Tax Act. From the assessment the appellant took an appeal to the Minister in which he stated that he was a resident of Bermuda, his residence dating as far back as 1923 and that during 1940 he sojourned in Canada for 161 days. No objection was raised as to the amount of the assessment, the only contention being a denial of liability under section 9 or any other section of the Act. The Minister affirmed the assessment on the ground that the facts disclosed that the taxpayer was resident or ordinarily resident in Canada during the year 1940 and hence was subject to income tax as provided by paragraph (*a*) of section 9 of the Act. After notice of dissatisfaction by the appellant and the reply of the Minister, an appeal from the assessment was duly lodged in this Court.

The only question to be determined is whether the appellant in 1940 was "residing or ordinarily resident in Canada during such year", within the meaning of section 9 (*a*) of the Income War Tax Act, as it was in force in 1940, or whether he was merely sojourning there within the meaning of section 9 (*b*). Section 9 provides in part as follows:

> 9. There shall be assessed, levied and paid upon the income during the preceding year of every person
>
> (*a*) residing or ordinarily resident in Canada during such year; or
>
> (*b*) who sojourns in Canada for a period or periods amounting to one hundred and eighty-three days during such year; or

The terms "residing" and "ordinarily resident" are not defined in the Act, and apart from *In re Income Tax Act* (1), there is a dearth of Canadian authority on the question under review. There are, however, many cases in the United Kingdom, in which the terms, as they appear in the Income Tax Acts of Great Britain, have been considered, that are helpful.

(1) (1933) 41 M.R. 621.

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The words are common English words and resort may be had to dictionaries to determine their meaning. The word "sojourns" may be dealt with in the same way. The Shorter Oxford English Dictionary gives the meaning of "reside" as being "To dwell permanently or for a considerable time, to have one's settled or usual abode, to live, in or at a particular place". By the same authority "ordinarily" means "1. In conformity with rule; as a matter of regular occurrence. 2. In most cases; usually, commonly. 3. To the usual extent. 4. As is normal, usual". On the other hand the meaning of the word "sojourn" is given as "To make a temporary stay in a place, to remain or reside for a time." Sojourning is the temporary, from day to day stay of a transient or visitor, whereas residing implies a regular and usual relationship.

The cases, as it will be seen, really carry one no further than the dictionary, and, in the main, are but useful illustrations of the circumstances under which a person may be considered as residing or ordinarily resident in a place or country.

The cases clearly indicate that a person must reside somewhere. *Rogers* v. *Inland Revenue* (1). When it is a question whether a man is resident in a country, it is not necessary that he should have a fixed place of abode therein, for even a homeless tramp in a country may be a resident of it. *Reid* v. *The Commissioners of Inland Revenue* (2). Residence in a place must indicate something more than mere presence as Lord Hanworth, M.R. said in *Levene* v. *The Commissioners of Inland Revenue* (3). Indeed, it has been established, ever since *In re Young* (4), that constant personal presence in a place is not essential to residence there, and that a person may continue to be resident in a place although physically absent from it. In that case, a master mariner, trading between Glasgow and foreign ports, having a house for his wife and family in Glasgow, was held to be "residing in Great Britain" and liable for assessment on his salary, notwithstanding that he was abroad for the greater part of the year. At page 59, the Lord President (Inglis) said:

(1) (1879) 1 T.C. 225.
(2) (1926) 10 T.C. 673.
(3) (1928) 13 T.C. 486 at 496.
(4) (1875) 1 T.C. 57.

anything like continuous residence is not a thing that this statute can be held to contemplate at all, if by continuous residence were meant constant personal presence in one place.

and later:

I have no doubt myself that if a man has his ordinary residence in this country, it does not matter much whether he is absent for a greater or a shorter period of each year from that residence or from the country itself. That is a thing that depends a good deal on a man's occupation, or it may be on his tastes and habits, especially in the latter case, if he is a man not requiring to be engaged in business for his maintenance.

The appellant's contention that he has been a resident of Bermuda since 1923 may be dismissed curtly. His motions in going there, making an affidavit as to his intentions, renting a house, which he never used, and obtaining a passport were a pure farce. In my view, he never became a resident of Bermuda, but whether that is so or not, he was certainly not a resident of Bermuda in 1940. He had not been there since 1933 and his entry into Canada as a tourist from Bermuda was purely fictitious. Even if he were a resident of Bermuda that would not prevent him from being a resident of Canada as well for it is well established that while a person can have only one domicile, he can have more than one residence. *Lloyd* v. *Sulley* (1). In that case a merchant carrying on business in Italy where he ordinarily resided also owned a place of residence in the United Kingdom, at which he dwelt with his family for several months in the year. He was held to be a resident in the United Kingdom and liable to income tax in respect of the profits of the business carried on abroad. At page 41, the Lord President (Inglis) said:

Now if a man could only be resident in one place in any particular year there might be a great difficulty, but surely there is nothing more familiar to one's mind than that a man has during a particular year or during a course of years, residences in different places existing at the same time. A man cannot have two domiciles at the same time, but he certainly can have two residences.

And later he said of the various residences a man may have:

these are all residences in the proper sense of the term, that is to say, they are places to which it is quite easy for the person to resort as his dwelling place whenever he thinks fit, and to set himself down there with his family and establishment.

(1) (1884) 2 T.C. 37.

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The same view was taken in *Cooper* v. *Cadwalader* (1). There an American ordinarily resident in New York with no place of business in the United Kingdom rented a house and shooting rights in Scotland where he spent about two months continuously in each year. It was held that he was a person "residing in the United Kingdom" and liable to income tax assessment.

The words "ordinarily resident" have been considered in a number of cases. In *Reid* v. *The Commissioners of Inland Revenue* (2), the facts were striking. For a number of years prior to May, 1916, the appellant, a British subject, shared a house in Glasgow with two sisters, but partly for considerations of health was in the habit of travelling abroad for the greater part of the year spending only the summer months in the United Kingdom. In May, 1916, the house was given up and the furniture sold, and from that time the appellant lived in hotels in Glasgow or London until July, 1919, when she again went abroad. Except for a four day visit to London in September, 1919, she remained abroad, travelling about from place to place on the continent of Europe, till the end of June, 1920. She then came back and stayed at a hotel in London until October 14, 1920, when she returned to the continent and remained abroad until after April 5, 1921, when she returned to London. While on the continent she had no place of residence in the United Kingdom or any apartments reserved for her use, but she had a banking account in London, and her personal effects were stored there. The appellant contended that she was not ordinarily resident in the United Kingdom for the two years ending April 5, 1921, and claimed exemption from Income Tax for those years under a section of the Income Tax Act of 1918 granting such exemption to a person who was not "ordinarily resident in the United Kingdom." The Special Commissioners found that the appellant was ordinarily resident in the United Kingdom for the years in question and, on an appeal being taken, it was held that there was evidence upon which the Commissioners could come to their decision and that they had not misdirected themselves in law.

(1) (1904) 5 T.C. 101.

(2) (1926) 10 T.C. 673.

At page 680, the Lord President (Clyde), after setting out the facts, said:

> It was contended on her behalf that, even if these facts are consistent with her being held to "reside" in the United Kingdom, they are inconsistent with the view that she "ordinarily" so resides. And here again the argument was that the meaning of the word "ordinarily" is governed —wholly or mainly—by the test of time or duration. I think it is a test, and an important one; but I think it is only one among many. From the point of view of time, "ordinarily" would stand in contrast to "casually". But the appellant is not a "casual" visitor to her home country; on the contrary she regularly returns to it, and "resides" in it for a part—albeit the smaller part—of every year. I hesitate to give the word "ordinarily" any more precise interpretation than "in the customary course of events" and anyhow I cannot think that the element of time so predominates in its meaning that, unless the Appellant "resided" in the United Kingdom for at least six months and a day, she could not be said "ordinarily" to reside there in the year in question.

In *Levene* v. *The Commissioners of Inland Revenue* (1), the facts were that the appellant, a British subject, leased a house in London until March, 1918. He then surrendered his lease, sold his furniture, and until January, 1925, had no fixed abode but stayed at hotels either in England or abroad. Until December, 1919, he stayed in England and it was admitted that up to that date he was both resident and ordinarily resident in the United Kingdom. In that month he went abroad and did not return until July, 1920, and from that date until January, 1925, he spent between four and five months each year in the United Kingdom, the reason for his visits being to obtain medical advice for himself and his wife, to visit relatives and the graves of his parents, to take part in certain Jewish religious observances and to deal with his Income Tax affairs. In January, 1925, he leased a flat abroad and expected to continue to make visits to the United Kingdom though not to such an extent as in the past. The appellant contended that for the years 1920-21 to 1924-25 he was neither resident nor ordinarily resident in the United Kingdom and that he was entitled to certain exemptions in consequence thereof. The Special Commissioners came to the conclusion that he was resident and ordinarily resident in the United Kingdom in the years in question and the Courts refused to reverse this conclusion. Rowlatt J. dismissed the appeal

(1) (1928) 13 T.C. 486.

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and both the Court of Appeal and the House of Lords unanimously agreed with his judgment in so doing. At page 493, Rowlatt, J. said:

> Now it seems to me what the phrase "ordinary residence" means is this: I think that "ordinary" does not mean preponderating, I think it means ordinary in the sense that it is habitual in the ordinary course of a man's life, and I think a man is ordinarily resident in the United Kingdom when the ordinary course of his life is such that it discloses a residence in the United Kingdom, and it might disclose a residence elsewhere at the same time. Therefore, I think, as has been thought in Scotland, that a man can have two ordinary residences not because he commonly is to be found at those places, but because the ordinary course of his life is such that he acquires the attribute of residence at those two places.

In the House of Lords, Viscount Cave, L.C. said, at page 506:

> The suggestion that in order to determine whether a man ordinarily resides in this country you must count the days which he spends here and those which he spends elsewhere, and that it is only if in any year the former are more numerous than the latter that he can be held to be ordinarily resident here, appears to me to be without substance.

And at page 509, Lord Warrington of Clyffe made this important statement:

> I do not attempt to give any definition of the word "resident". In my opinion it has no technical or special meaning for the purposes of the Income Tax Act. "Ordinarily resident" also seems to me to have no such technical or special meaning. In particular it is in my opinion impossible to restrict its connotation to its duration . . . . . If it has any definite meaning I should say it means according to the way in which a man's life is usually ordered.

It is, I think, settled that the question of whether a person is ordinarily resident in one country or in another cannot be determined solely by the number of days that he spends in each, he may be ordinarily resident in both if his stay in each is substantial and habitual and in the normal and ordinary course of his routine of life.

The last important United Kingdom case is *Lysaght* v. *The Commissioners of Inland Revenue* (1). In that case the appellant until 1919 lived in England where he was engaged in business as director and general manager of a company. In that year he partially retired but retained the post of advisory director; 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

(1) (1928) 13 T.C. 511.

1920, when he went to reside with his family in Ireland. Since then he had no definite place of abode in England. He however came every month to director's meetings in England where he remained on the company's business for about a week each time, staying either at holels or at his brother's house. The total number of days spent in England for the three years ended April 5, 1923, April 5, 1924, and April 5, 1925, were 101, 94 and 84 respectively, while he spent 48 days there in the period from April 5, 1925, to September 25, 1925. He owned a small three acre field 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 was entitled to the exemptions which such a status would give him. The Special Commissioners decided that his claims for exemption failed and this conclusion was finally sustained by the House of Lords. Rowlatt J. felt that he could not differ from the Commissioners in their finding that the appellant was both resident and ordinarily resident in the United Kingdom for each of the two years in dispute and dismissed the appeal. The Court of Appeal reversed this judgment, Lawrence L.J. dissenting, but it was restored by the House of Lords, Viscount Cave, L.C. dissenting.

The *Lysaght Case* (*supra*) is important for a number of reasons. In the first place, it shows how far, on the facts, the authorities in the United Kingdom have gone in finding that a person is resident or ordinarily resident in the United Kingdom. Then, it clearly establishes that a person may reside in a country, not as a matter of free choice on his part, but because he is compelled to do so. At page 535, Lord Buckmaster dealt with this question and also the term "ordinarily resident". He said:

> 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;

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and later:

> 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.

The real importance of the case, however, lies in the fact that it finally established that the question whether a person is resident or ordinarily resident in the United Kingdom within the meaning of the Income Tax Acts of that country is a question of fact. It seems to have been assumed in the earlier cases that it was a question of law to be applied to the facts of the case in question. In *Reid* v. *The Commissioners of Inland Revenue* (supra), the Lord President (Clyde) pointed out the difficulties involved in defining the terms. At page 678, he said:

> 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 law 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.

This reasoning implied that the question was one of mixed law and fact, but mainly fact. The matter came to a head in the *Lysaght Case* (*supra*). Rowlatt J. really regarded the finding of the Commissioners as one of fact. In the Court of Appeal a contrary view prevailed. Lord Hanworth, M.R. held at page 519:

> The meaning of "residence" in the Income Tax Act must be a question of law;..... 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.

Sargant L.J., also agreed that the conclusion of whether a man is resident was a conclusion of law, and Lawrence, L.J., although dissenting in the result, was of the same view. In the House of Lords the dispute was settled by the majority of the members of the Court. Lord Buckmaster's judgment was read by Lord Atkinson, who concurred in it. At page 533, Lord Buckmaster is reported as follows:

> 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 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.

Lord Warrington of Clyffe took the same view. At page 536, he said:

> 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.

I see no reason why the same view should not be taken in Canada and hold the terms "residing" and "ordinarily resident" in section 9 (*a*) of the Income War Tax Act have no technical or special meaning and that the question whether in any year a person was "residing or ordinarily resident in Canada" within the meaning of the section is a question of fact.

It should, perhaps, be noted that the determination of this question does not assume the same importance in Canada as it does in the United Kingdom, where there is no appeal from the Special Commissioners except on questions of law and the Courts do not review their findings of fact. In Canada the situation is different for under the Income War Tax Act the taxpayer has the same right of appeal, unless it has been taken away by some specific section of the Act, in respect of questions of fact as he has in respect of those of law.

As I view the facts, they present no difficulty and I agree with the conclusion of the taxing authorities that they disclose that in 1940 the taxpayer was residing or ordinarily resident in Canada. There is no substance in the appellant's contention that when he was at East Riverside he was merely sojourning there. There was nothing of a transient character about his stay there. He lived there regularly with his wife and family and his staff of servants. The house at East Riverside was a permanent one. He kept a housekeeper and his wife there throughout the year and the house was always available to him as his place of abode. The fact that he chose to stay there only while the weather made it pleasant to play golf is quite immaterial and does not affect the question. His liability to income tax assessment based upon residence cannot be determined by the fact that when it was too cold to play

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golf at East Riverside, he chose to go to Pinehurst to play golf there. Nor is the question of residence determined by the number of days spent at East Riverside. The regular and usual relationship implied in the term "residing" is present in this case. He stayed at East Riverside during a substantial part of each year, and his stay was habitual. Moreover he resided at East Riverside in the ordinary course of his life. There was nothing of an unusual character about it. He lived and played there as long as it suited his pleasure to do so. His residence at East Riverside was in the course of the regular, normal and usual routine of his life. In my opinion the facts are conclusive that in 1940 the appellant was both residing and ordinarily resident in Canada within the meaning of section 9 (*a*) of the Act and I so find. Section 9 (*b*) has nothing to do with the matter.

That being so, the only question that remains is the meaning of the words "during such year" in section 9 (*a*) of the Act. The word "during" may have two meanings, one being "throughout the whole continuance of" and the other "in the course of". It was contended on behalf of the appellant that the term must be given the former meaning and that, consequently, the appellant was not liable, even if he was residing or ordinarily resident in Canada, since such residence was not throughout the whole continuance of the year. While it is established that a taxing Act must be construed strictly, this does not mean that the canons of construction to be applied to it should be different from those applicable to any other Act. In all cases the true intent of the Act must be ascertained. It may perhaps be noted that the words "during such year" were not in the Act prior to the Revised Statutes of Canada, 1927, but were inserted by the Commissioners in charge of the Revision. It is, I think, clear that they are referable to the words "during the preceding year" in the earlier part of the section and were meant to make certain that the assessment upon income should be for the same year as that of the residence. That was, I think, the purpose of inserting the words. They were intended to indicate the year of the incidence of liability to assessment, not to make any change in its nature or extent. Ordinarily, a word is used in the same sense wherever it appears

in an Act. In that view, it would be as reasonable to contend that there should be no liability to assessment upon income in a case where it was received only in the course of a year and not during the whole continuance of it as to advance the contention put forward by the appellant. Section 9 clearly intended to draw a distinction between residents and sojourners, the former being subject to tax apart from any factor of time, but the latter being liable only if their sojourn exceeded a certain number of days. The adoption of the appellant's contention would not only import into the terms "residing" and "ordinarily resident" the necessity of continuous physical presence, a connotation which they do not carry, but would open the door to wholesale tax evasion and make the section largely nugatory; the sojourner for 183 days would be subject to tax, but a resident for a much longer period would be free; indeed, he would escape liability altogether if he took up residence outside of Canada for even a small portion of the year. This would be an absurd result. It is well settled that when a word may have two meanings it should be read with reference to its context and the Court should adopt that meaning which is in accord with the object of the Act and reject the one that would render the Act nugatory or lead to absurd results. In my view, the words "during such year" in section 9 (*a*) mean merely "in the course of, or in such year." In 1942 the words were changed to read "at any time in such year". The change removed all possibility of ambiguity but was, I think, merely declaratory of what was always the true intendment of the previous words.

The appellant's contentions in this appeal are quite untenable. The surprising thing is that the taxing authorities did not catch up with him sooner. The appeal is dismissed with costs.

Judgment accordingly.