PERCY WALKER THOMSON... APPELLANT; 1945 *Oct. 16, 17

AND

THE MINISTER OF NATIONAL REVENUE..... RESPONDENT. 1946 *Jan. 24

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Income tax—Liability for—Income War Tax Act (R.S.C. 1927, c. 97, and amendments), s. 9 (1) (a) (b) (before its amendment in 1942)—"Residing or ordinarily resident" in Canada "during" year—"Sojourns".

Sec. 9 (1) of the Dominion *Income War Tax Act* (as it stood before amendment in 1942) required payment of a tax "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" 183 days "during such year".

Appellant was born in the province of New Brunswick. He had retired from business by 1923, and in that year, owing to a dispute over a village assessment, he sold his home in New Brunswick, declared Bermuda to be his domicile, went there and leased a house but didn't stay, and went to the United States and lived there, chiefly at Pinehurst, North Carolina, where in 1930 he built an expensive dwelling. From 1925 to 1931 he made some visits to Canada, mostly short. In 1932 he rented a house in New Brunswick where he spent a summer season in each of the years 1932, 1933 and 1934, of 134, 134 and 81 days, respectively; and in 1934, as his wife enjoyed being near her relatives and friends in New Brunswick, he built an expensive house there, and from 1935 to 1941 (inclusive) spent (in the warmer part of the year) an average of 150 days in each year (159 days in 1940, the year in question). The rest of the year the house was closed except quarters for his wife and house-keeper which were open the year round. In 1941 the Dominion authorities asked him to file an income tax return for the year 1940, and, on his not doing so, fixed a tax against him, under s. 47 of the Act. His liability to the Dominion of Canada for income tax was the question in dispute.

Held (Taschereau J. dissenting): Appellant was "residing or ordinarily resident" in Canada "during" the year 1940, within the meaning of said s. 9 (1) (*a*), and was liable for income tax in Canada.

The meaning of "residing", "ordinarily resident", "sojourns", "during", discussed. *Commissioners of Inland Revenue v. Lysaght,* [1928] A.C. 234; *Levene* v. *Commissioners of Inland Revenue,* [1928] A.C. 217, and other cases, discussed.

The word "during" in s. 9 (1) (*a*) meant "in the course of" rather than "throughout". (No ground against such construction was afforded by the fact that by subsequent amendment, in 1942, the words "at any time in" were substituted for "during").

*PRESENT:—Kerwin, Taschereau, Rand, Kellock and Estey JJ.

1946

THOMSON v. MINISTER OF NATIONAL REVENUE

Per Kerwin J.: The frequency with which appellant came to Canada, his "routine of life" in that regard, the family ties of his wife, if not of himself, the erection and occupancy of his house, retention of servants, together with all the surrounding circumstances, make it clear that he was "residing" rather than merely staying temporarily in Canada. Assuming that he was a resident of the United States for the purposes of income tax there, a man may be a resident of more than one country for revenue purposes.

Per Rand J.: The mode or nature of appellant's living in Canada brought him within the language of s. 9 (1) (*a*). Apart from any question of domicile, which would appear to be still in New Brunswick, his living in Canada was substantially as deep rooted and settled as in the United States, though in terms of time his home in the United States might take precedence. He was at his place in Canada as at his "home", and the mere limitation of time did not qualify that fact. That brought him within the most exacting of any reasonable interpretation of "resides" or "ordinarily resident".

Per Kellock J.: There was no difference been appellant's use of his Canadian home and that of his United States home or homes. The establishments were essentially of the same nature and were equally regarded by him as "homes" in the same sense. His residence in each was in the ordinary and habitual course of his life and there was no difference in the quality of his occupation, though he occupied each at different periods of the year. He came within the terms "residing" and "ordinarily resident" in Canada.

Per Estey J.: Appellant selected the location for his residence in Canada, built and furnished it for his wife's enjoyment of her relatives and friends and his own enjoyment of golf nearby; his residence there was, in successive years, in the regular routine of his life; and, taking such facts into consideration, the conclusion must be that he was "ordinarily resident" there, within the meaning of s. 9 (1) (*a*). A person may have more than one residence, and the fact of his residence in the United States in no way affected the determination of the issue.

Per Taschereau J., dissenting: Appellant had in 1923 ceased to be a resident of Canada and his visits thereafter were of a temporary nature and did not justify a finding that he was "residing" or "ordinarily resident" in Canada; he was really a resident of the United States making occasional visits to Canada; and was not subject to income tax in Canada.

APPEAL from the judgment of Thorson J., President of the Exchequer Court of Canada (1), dismissing the present appellant's appeal from the decision of the Minister of National Revenue affirming an assessment levied upon him for the taxation year 1940 under the provisions of the *Income War Tax Act* (R.S.C. 1927, c. 97, with amendments, as it stood prior to amendment in 1942).

(1) [1945] Ex. C.R. 17; [1945] 3 D.L.R. 45; [1945] C.T.C. 63.

The Minister's affirmance of the assessment was on the ground that "the facts disclose that the taxpayer was resident or ordinarily resident in Canada during the year upon him for the taxation year 1940 under the provisions by paragraph (*a*) of section 9 of the Act". Thorson J. in his judgment put the question in the case as follows:

> 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*).

and came to the conclusion that, on the facts, and the proper construction of the said Act, the appellant was both "residing" and "ordinarily resident" in Canada "during" the said year 1940.

The facts are discussed at length in the reasons for judgment in this Court now reported, and also in the reasons for judgment of Thorson J. in the Exchequer Court (above cited).

C. F. Inches K.C. and *E. F. Newcombe K.C.* for the appellant.

R. Forsyth K.C. and *E. S. MacLatchy* for the respondent.

KERWIN J.—The sole point for determination in this appeal is whether, during the year 1940, the appellant was "residing or ordinarily resident in Canada" within the meaning of section 9 (1) (*a*) of the *Income War Tax Act* as it stood in 1940, or whether he was merely sojourning there within the meaning of section 9 (1) (*b*). No question is raised as to the amount of the assessment. The relevant parts of section 9 are as follows:—

> 9. There shall be assessed, levied and paid upon the income during the preceding year of every person
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> (*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;

There is no definition in the Act of "resident" or "ordinarily resident" but they should receive the meaning ascribed to them by common usage. When one is considering a Revenue Act, it is true to state, I think, as it is put in the Standard Dictionary, that the words "reside"

1946

THOMSON v. MINISTER OF NATIONAL REVENUE

Kerwin J.

and "residence" are somewhat stately and not to be used indiscriminately for "live", "house" or "home". 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 or 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."

The House of Lords has adopted the everyday meaning as a test in applying the terms "resident" and "ordinarily resident" in the British *Income Tax Act*. *Levene* v. *Commissioners of Inland Revenue* (1); *Commissioners of Inland Revenue* v. *Lysaght* (2). Under the British Act that is of particular importance where 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 they could have arrived at their conclusion. Under our Act no such question arises, but the remarks of the peers who took part in the two judgments mentioned are of assistance. Rule 3 of the General Rules applicable to all the Schedules of that *Income Tax Act* may have had an effect in the result arrived at in some of the cases. In the *Levene* case (1), Viscount Cave, at page 224, points out that if a man sought to be taxed is a British subject regard must be had to that rule

> which provides that every British subject whose ordinary residence has been in the United Kingdom shall be assessed and charged to tax notwithstanding that at the time the assessment or charge is made he may have left the United Kingdom, if he has so left the United Kingdom for the purpose only of occasional residence abroad;

and as a matter of fact, at the foot of the same page the Lord Chancellor, after agreeing that it was plainly open to the Commissioners to find that Mr. Levene was resident in the United Kingdom, stated that it was probable that Rule 3 applied to him. Viscount Sumner refers, at p. 227, to the soundness of the Commissioners' conclusion on Rule 3.

(1) [1928] A.C. 217. (2) [1928] A.C. 234.

On the other hand, the decision of the First Division of the Court of Exchequer (Scotland) in *Cooper* v. *Cadwaladar* (1), was referred to with apparent approval by Viscount Cave at page 223 of the *Levene* case (2) and by Viscount Sumner at page 244 of the *Lysaght* case (3). There, the person held liable to tax was a citizen of the United States, where he resided and practiced his profession, but rented a house and shooting rights in Scotland where he spent about two months in each year. I refer to this decision because I find it difficult to imagine that it would be held in Canada that a citizen of the United States, residing in that country, but owning a summer home in Canada which he occupied for four or five months in each year, was, by reason of the latter facts, a resident of this country within the meaning of our Act.

However, that is not the case before us. No quarrel is found with the statement of facts contained in the reasons for judgment of the President of the Exchequer Court and I do not, therefore, repeat all of them. The appellant was born in Saint John, New Brunswick, and is still a citizen of Canada. Notwithstanding the absence of a provision corresponding to Rule 3 of the General Rules referred to above, that is a fact to be considered. I agree with the President that the appellant's motions in going to Bermuda, making an affidavit as to his intention, renting a house which he never used, and obtaining a passport, were a pure farce; that the appellant never became a resident of Bermuda; but that, whether that be so or not, he was certainly not a resident of Bermuda in the year 1940. The appellant had not been there since 1933 and his entry to Canada as a tourist from Bermuda was fictitious. The residence he built at Pinehurst in North Carolina, presumably with his other activities in the United States, convinced the tax authorities of that country that he was a resident there for the purposes of its Income Tax Act. Assuming that to be a fact, a man may be a resident of more than one country for revenue purposes. The frequency with which he comes to Canada and what the

(1) (1904) 5 Tax Cas. 101.
(2) [1928] A.C. 217.
(3) [1928] A.C. 234.

1946

THOMSON v. MINISTER OF NATIONAL REVENUE

Kerwin J.

President described as the routine of his life are important matters in coming to a conclusion, and I agree with that arrived at by the President.

The appellant seeks to make himself a sojourner as he carefully remained in Canada for a period or periods amounting to less than 183 days during each year. This attempt fails. The family ties of his wife, if not of himself, the erection of a substantial house, the retention of the servants, together with all the surrounding circumstances, make it clear to me that his occupancy of the house and his activities in Canada comprised more than a mere temporary stay therein.

The appellant developed an argument based upon the words "during such year" at the end of paragraph (*a*). These words were added by the commissioners charged with the duty of the 1927 revision of the statutes and were continued until the amendment of 1942. That amendment is in the following terms:—

9. (1) There shall be assessed, levied and paid upon the income during the preceding year of every person, other than a corporation or joint stock company,

(*a*) residing or ordinarily resident in Canada at any time in such year; or

(*b*) who sojourns in Canada in such year for a period or periods amounting to one hundred and eighty-three days;

Attention was called to the change from "during" to "at any time in." This amendment does not, of course, govern, since it is the year 1940 in respect of which the appellant is assessed, but it is argued that the amendment shows that a change was intended to be made. That this is not the case appears by subsections 2 and 3 of section 21 of the *Interpretation Act*, R.S.C. 1927, chapter 1:—

2. The amendment of any Act shall not be deemed to be or to involve a declaration that the law under such Act was, or was considered by Parliament to have been, different from the law as it has become under such Act as so amended.

3. The repeal or amendment of any Act shall not be deemed to be or to involve any declaration whatsoever as to the previous state of the law.

Reliance was placed upon the decisions in *The Queen* v. *Anderson* (1), and *Bowes* v. *Shand* (2), but these decisions were concerned with entirely different matters and

(1) (1846) 9 Q.B. 663. (2) (1877) 46 L.J.Q.B. 561.

do not affect what is to be determined here. "During such year" cannot certainly mean throughout the whole year, as the same phrase is used in (*b*). In each case it refers back to "the preceding year" in the body of section 9; that is, the year for which the assessment on income is to be made is the same as that in which the residing or sojourning occurs.

The appeal should be dismissed with costs.

TASCHEREAU J. (dissenting)—This is an appeal from a judgment rendered by the Honourable Mr. Justice Thorson, President of the Exchequer Court of Canada.

It raises the important and difficult question of determining the true meaning of the words "residing or ordinarily resident in Canada", that are found in the *Income War Tax Act*. The facts that brought about this litigation are the following:—

The appellant, Percy Walker Thomson, was born in Saint John, N.B., and lived there until he retired from business. He then became a resident of Rothesay, in the County of Kings, a short distance from Saint John, where he lived in 1923. During that year, he had a dispute with the tax assessors, and decided to leave Canada and establish his home in a different country.

The evidence reveals that, since moving from Canada, he spent most of his time in the United States, living in Pinehurst, originally in rented houses and later in a house that he built himself, at a cost of nearly $100,000. From 1925 to 1931, he paid very few visits to Canada, but from 1932 to 1941 inclusive, he spent the summers in Canada, first in St. Andrews, and from 1935, in a house that he built at Riverside, N.B. It was while he was occupying that house in 1941 that the Income Tax Department at Saint John, N.B., requested him to file a return for the year 1940. The appellant denied his liability, stating that as he understood the Canadian law, he was not compelled to file any income tax statement here, because he was visiting Canada only as a tourist. The Income Tax Department decided then to issue an arbitrary assessment against him for the year 1940, based on a yearly income of $50,000; with this letter was an official bill imposing a tax

1946

THOMSON v. MINISTER OF NATIONAL REVENUE

Taschereau J.

of $21,122, with interest amounting to $480.31, making a grand total of $21,602.31, the whole payable as of October 13th, 1941.

The appellant gave notice of appeal pursuant to section 58 of the *Income War Tax Act,* and on April 6th, 1942, the Minister of National Revenue issued his decision, affirming the said assessment, on the ground that the facts disclosed that the appellant was *"residing 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 *Income War Tax Act.* The appellant appealed to the Exchequer Court of Canada but his appeal was dismissed with costs.

Section 9 reads in part as follows:—

> 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.

The learned President reached the conclusion that the appellant had spent the following number of days in St. Andrews, N.B., since 1935: 1935—156 days, 1936—138 days, 1937—169 days, 1938—145 days, 1939—166 days, 1940—159 days, 1941—115 days. He also stated 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, but that 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.

According to his views the terms "residing" and "ordinarily resident" found in the *Income War Tax Act* have no technical or special meaning, and 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. He finally came to the conclusion that in 1940 the appellant was "residing or ordinarily resident" in Canada. On this point he says:—

> 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 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 or casual 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.

Many cases have been cited by the respondent, but in examining these cases which are all British cases, it is very important to find out if the law applicable is the same as the one which governs us, and if the words that have been the subject of interpretation by the British courts have the same meaning as those used in our Statute.

The first distinction that must be taken note of is that in England the finding of the Commissioners on a question of fact is final, and not subject to review by the higher courts, the jurisdiction of which is limited to questions of law. It was held by the House of Lords that the question whether a person was a resident of England or not was a question of fact for the sole determination of the Commissioners. And in many of those cases their Lordships felt that, although they would have probably come to a different conclusion had they been the Commissioners, they could not possibly intervene. The situation before this Court is, of course, entirely different, and it is clearly open to us to hold that certain facts, not contested by the parties, satisfy or not the meaning of a particular word found in the provisions of an Act of Parliament.

Another distinction of paramount importance between the British and the Canadian Acts is that the words "residing" and "ordinarily resident" have not, in my judgment, a similar meaning. In the former case, they are singled out, and have been taken in their ordinary

1946

THOMSON v. MINISTER OF NATIONAL REVENUE

Taschereau J.

meaning, while in the Canadian Statute, being grouped together, they have a technical signification, which may not be ignored.

As it has already been said, these words are very flexible and elastic. They take colour in the context in which they are used, and may have a great variety of meanings according to the subject matter and the purposes of the Legislature, and the courts must consequently attribute to them a signification that will give effect to the legislative will.

In *Commissioners of Inland Revenue* v. *Lysaght* (1), Lord Buckmaster said at page 391:

> 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 in *Sifton* v. *Sifton* (2), Lord Romer said at page 675:—

> Their Lordships' attention was called during the arguments to numerous authorities in which the Court has been called upon to consider the meaning of the words "reside" and "residence", and the like. But these authorities give their Lordships no assistance in construing the present will. The meaning of such words obviously depends upon the context in which the words are used. A condition, for instance, attached to the devise of a house that the devisee should reside in the house for at least six weeks in a year can present no difficulty. In some contexts the word "reside" may clearly denote what is sometimes called "being in residence" at a particular house. In other contexts it may mean merely maintaining a house in a fit state for residence.

Moreover, in the majority of these cases, the taxpayer was held liable, not because his visits to England were of such a nature that they were considered sufficient to qualify him as a "resident", but for the reason that he had never ceased to be a resident of England, and that his occasional absences had never deprived him of his status of British resident.

For instance, in the case of *Lloyd v. Sulley* (3), it was held that the taxing provisions extended to a person who is not for a time actually residing in the United Kingdom, but who has constructively his residence there, because his ordinary place of abode and his home is there, although he is absent for a time from it, however

(1) (1928) 97 L.J.K.B. 385.
(2) [1938] A.C. 656.
(3) (1884) 2 Tax Cas. 37.

long continued that absence may be. It was found that Lloyd's ordinary residence was at Leghorn, England, and therefore he was chargeable under the Act.

A more striking example of the application of this principle may be found in the case of *Levene* v. *Inland Revenue Commissioners* (1). In that case Viscount Sumner said, speaking of Mr. Levene:—

> The evidence as a whole disclosed that Mr. Levene continued to go to and fro during the years in question, leaving at the beginning of winter and coming back in summer, his home thus remaining as before. *He changed his sky but not his home.* On this I see no error in law in saying of each year that his purpose in leaving the United Kingdom was occasional residence abroad only.

But in the case at bar, the facts are entirely different. The appellant left Canada in 1923, after having severed all his business connections, and after having made public his intention of ceasing to be a resident of Canada. Since moving from Canada, he lived with his family mostly in the United States, as indicated by the following figures: 201 days in 1925; 240 in 1926; 238 in 1927; 351 in 1928; 353 in 1929; 321 in 1930; 319 in 1931; 199 in 1932; 227 in 1933; 182 in 1934; 209 in 1935; 195 in 1936; 196 in 1937; 220 in 1938; 199 in 1939; 206 in 1940; 250 in 1941.

For some years he lived in rented houses in Pinehurst, North Carolina, building a house there in 1930, and for the years 1930 to 1942, he paid the United States income taxes as a resident of the United States. From 1925 to 1931 he spent the following number of days in Canada: 102 days in 1925; nil in 1926; nil in 1927; 2 in 1928; 12 in 1929; 44 in 1930; 2 in 1931.

It seems clear that since 1923 he had definitely left Canada and this fact was coupled with his avowed intentions of doing so permanently. In 1928, when he came back to Canada for a period of two days, it was for the purpose of settling with the proper authorities a balance of $180.40 which he owed for income tax. At that time, he was told that all his liability under the Act up to 1927 had been discharged, and that he would not become taxable until his status had changed. It was acknowledged that having left Canada, with a permanent purpose, with

(1) (1928) 97 L.J.K.B. 377.

1946

THOMSON v. MINISTER OF NATIONAL REVENUE

Taschereau J.

what has been called the *animus manendi* in his new settled abode, he had unquestionably ceased to be a resident of this country.

It is now claimed that because from 1932 to 1934, he spent the summers at St. Andrews, and from 1935 to 1941, at East Riverside, he falls within the provisions of the *Income War Tax Act,* having become a "resident or ordinarily resident" of Canada.

With this view I cannot agree. Of course, during that period of time, Thomson had a dwelling place in Canada, a temporary residence. But this is far from saying that he was "residing or ordinarily resident in Canada".

It is clear, I think, that in the charging section of the Act the words "ordinarily resident" mean "in most cases", "usually", "commonly", and is obviously stronger than "temporarily" which is the qualification that may be given to the occasional visits that Thomson made when he came to his country house to spend the summer in Canada.

The context further indicates that the words "ordinarily resident" are broader than the word "residing", and that the former were used to cover a field that the latter did not occupy. The aim of Parliament was to tax, not only the residents of Canada, those who have here their permanent home, their settled abode, but also those who live here most of the time, even if they are absent on temporary occasions. The first group comes under the classification of "residents", and the second under that of "ordinarily residents".

The fundamental error of the court below has been, I believe, to consider Thomson as a resident of Canada, making occasional visits to the United States, when he should have been classified as a resident of the United States, making occasional visits to Canada. The retaining of his Canadian citizenship has no bearing upon the matter. Nationality is not an ingredient for the purpose of the Act. Residents are taxed, not Canadians; but residents within the meaning of the Act, and not persons who have left this country since several years, and who, like many citizens of the United States and other countries, come here as tourists to enjoy the climate of our summer months. As Viscount Sumner said in the *Levene*

case (1) "they change their sky, but not their home". The status of "residents or ordinarily residents" is not acquired by these periodical visits to Canada.

I do not think that it has ever been the intention of Parliament to say so, and it would take much clearer words than those used in the Statute, to convince me that the present appellant and those who have residences or lodges in Canada, and who elect to occupy them at regular annual intervals, are subject to income tax.

There are two other cases with which I would like to deal before concluding. The first one is the case of *Inland Revenue Commissioners* v. *Lysaght* (2), decided by the House of Lords. I may say that I do not think that this case is binding. Lysaght was held liable, but their Lordships came to the conclusion that they could not review the finding of facts of the Commissioners, and some of them expressed the view that they would not have necessarily reached the same conclusion if their jurisdiction had not been limited to questions of law.

The case of *Cooper v. Cadwaladar* (3), decided by the First Division of the Court of Exchequer (Scotland), is the case of an American citizen living in the United States, who owned shooting rights in Scotland, where he spent a few months annually, and who was held liable in Scotland for income tax. I feel quite confident that no Canadian court, in similar circumstances, would hold that such a person, in view of the provisions of our Act, is a "resident" and therefore liable.

For the above mentioned reasons, I believe that the appellant is not liable, and that the appeal should be allowed with costs throughout.

RAND J.—The appeal raises a question of interpretation of the charging section of the *Income War Tax Act*. The appellant has been assessed on income received for the year 1940 and his liability depends on whether he is within the following provisions of section 9:

> 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.

(1) [1928] 97 L.J.K.B. 377.
(2) (1928) 97 L.J.K.B. 385.
(3) (1904) 5 Tax Cas. 101.

1946

THOMSON v. MINISTER OF NATIONAL REVENUE

Rand J.

He claims that during 1940 he was neither residing nor ordinarily resident in Canada, nor did he sojourn here for the number of days specified.

The material facts may be shortly stated. Born in Saint John, New Brunswick, in 1872, the appellant lived in that city and later at the village of Rothesay, a short distance from it, until 1923 and in that time had become a man of means. As the result of a dispute over assessment by the village, he took up arms against what has become a sea of taxing troubles, sold his home, declared Bermuda to be his domicile, and proceeded to that island; and at the end of a week, armed with a British passport obtained there, returned to the mainland to set up residence in the United States. This continued until 1930, with his chief abode at Pinehurst, North Carolina. There in that year he built an expensive dwelling which ever since has been kept in readiness for occupancy. In 1932, marking his return to Canada, he rented a house at St. Andrews, New Brunswick, where he spent a summer season of 134 days. This was repeated during the next two years, with 134 days in 1933 and 81 days in 1934. In the latter year he built a house at East Riverside near Rothesay, costing, with furniture, close to $90,000. The reason given for this was his wife's desire to be near her relatives and friends in New Brunswick, but he protests against harbouring any like sentiment. Since then and up to 1942, between May and October he has spent there an average of 150 days each year. After the season at East Riverside, his life has centered around Pinehurst, with a stay of a month or two at Belleair, Florida. During that time, the New Brunswick house is closed except the quarters of a housekeeper and wife which are open the year around; but it could at any time become a winter or all year home if desired. With him in these mass movements are his wife and only child, motor cars and servants, and at all three places he indulges himself as an addict of golf, to which he devotes most of his time and a substantial part of his money. His passport was renewed in 1933 for a further period of ten years at a British Consulate in the United States, and on it his domicile was again stated to be in Bermuda. Apart from the brief visit in 1923, leasing a house for one or two

years which he never occupied, a stay of six days in 1926 and eight in 1938, that island was stranger to him for the twenty years after leaving Rothesay. From 1930 to 1941 he was taxed on income in the United States as a non-resident: but in 1942 he was classed as a resident and taxed accordingly.

The President of the Exchequer Court properly, I think, characterizing his motions in relation to Bermuda as "pure farce", found him to be ordinarily resident in Canada for the year in question and maintained the action; and from that judgment this appeal is brought.

The judgment treats as relevant a number of authoritative decisions on the *Income Tax Act* of the United Kingdom, including *Cooper v. Cadwalader* (1), *Levene* v. *Commissioners of Inland Revenue* (2), and *Lysaght* v. *Commissioners of Inland Revenue* (3), as they bear upon the interpretation of the words "residing" and "ordinarily resident". Mr. Inches, in an able argument, challenges the validity of that application on the ground that in the English Act these expressions, found in schedules, are in all cases used singly and in differing contexts and that there was raised no question of their effect upon one another in the collocation in which we have them in section 9, and their modification both by the phrase "during such year" and the word "sojourns" in paragraph (*b*). Before dealing with this contention, I think it desirable to refer briefly to the effect of those decisions upon the two expressions and, in the connotations so found, to consider them in the juxtaposition in which they appear in our own Act.

As interpreted, the English Act uses the word "residing" or the expression "ordinarily resident" in the sense of the general acceptation, without special or technical meaning; and the Tax Commissioners find first the actual circumstances of a case and then as fact whether they are within that acceptation. An appeal is allowed on a point of law, and where the person charged is appealing, the question invariably is whether there was any evidence to justify the finding. This strictly limited jurisdiction prevents us from assuming that a court sitting in appeal

(1) (1904) 5 Tax Cas. 101.
(2) (1928) 13 Tax Cas. 486.
(3) (1928) 13 Tax Cas. 511.

1946

THOMSON v. MINISTER OF NATIONAL REVENUE

Rand J.

generally would have come to the same view of liability; and there are frequent intimations by individual judges that their own finding might have been different. But notwithstanding this limited function, these decisions reveal many aspects of residence under modern conditions and the extreme scope of interpretation to which the courts have felt themselves driven by the generality of the terms used and from the wide administrative jurisdiction conferred upon the Commissioners.

In *Lysaght* v. *Commissioners, supra,* "residing" was examined by the House of Lords and it must, I think, be said that the language of "plain men" was stretched to the breaking point to encompass the facts that had been found by the Commissioners to be residence. The enquiry lies between the certainty of fixed and sole residence and the uncertain line that separates it from occasional or casual presence, the line of contrast with what is understood by the words "stay" or "visit" into which residence can become attenuated; and the difference may frequently be a matter of sensing than of a clear differentiation of factors.

The gradation of degrees of time, object, intention, continuity and other relevant circumstances, shows, I think, that in common parlance "residing" is not a term of invariable elements, all of which must be satisfied in each instance. It is quite impossible to give it a precise and inclusive definition. It is highly flexible, and its many shades of meaning vary not only in the contexts of different matters, but also in different aspects of the same matter. In one case it is satisfied by certain elements, in another by others, some common, some new.

The expression "ordinarily resident" carries a restricted signification, and although the first impression seems to be that of preponderance in time, the decisions on the English Act reject that view. It is held to mean residence in the course of the customary mode of life of the person concerned, and it is contrasted with special or occasional or casual residence. The general mode of life is, therefore, relevant to a question of its application.

For the purposes of income tax legislation, it must be assumed that every person has at all times a residence.

It is not necessary to this that he should have a home or a particular place of abode or even a shelter. He may sleep in the open. It is important only to ascertain the spatial bounds within which he spends his life or to which his ordered or customary living is related. Ordinary residence can best be appreciated by considering its antithesis, occasional or casual or deviatory residence. The latter would seem clearly to be not only temporary in time and exceptional in circumstance, but also accompanied by a sense of transitoriness and of return.

But in the different situations of so-called "permanent residence", "temporary residence", "ordinary residence", "principal residence" and the like, the adjectives do not affect the fact that there is in all cases residence; and that quality is chiefly a matter of the degree to which a person in mind and fact settles into or maintains or centralizes his ordinary mode of living with its accessories in social relations, interests and conveniences at or in the place in question. It may be limited in time from the outset, or it may be indefinite, or so far as it is thought of, unlimited. On the lower level, the expressions involving residence should be distinguished, as I think they are in ordinary speech, from the field of "stay" or "visit".

In that view, it is scarcely open to doubt that if the word "residing" or the expression "ordinarily resident" had been used as in the English statute, it would have been impossible not to hold the appellant in the year in question both residing and ordinarily resident at East Riverside for the full 160 days of living there. His life is a good example of what Viscount Sumner in the *Levene* case [*supra*] had in mind when he spoke of the "fluid and restless character of social habits" to which modern life has introduced us. His ordinary residence throughout the year 1940 was indisputably within a strip of North America bordering on the Atlantic and running from Florida to New Brunswick. In that area, enabling him to keep pace with a benign climate, he had at least two and possibly three dwelling places, each of which coupled with his presence for the time being constituted, so far as he had any, his home. When he moved to East Riverside, he moved not only himself but that home; ambu-

1946

THOMSON v. MINISTER OF NATIONAL REVENUE

Rand J.

latory over a considerable part of the Continent, it became residence where so set up. From each radiated his living and interests and from them in turn he might make occasional departures or visits or temporary stays amounting even to limited residence.

Giving to "residing" in paragraph (*a*) the fullest signification of which it is capable, "ordinarily resident" becomes superfluous. Mr. Inches contends for a construction of both and of "sojourns" purely in terms of time: that "residing * * * during such year" means a permanent residence throughout the year, without even temporary absence: "ordinarily resident * * * during such year" a predominant residence in Canada throughout the year but subject to temporary absences not amounting to residence elsewhere: and "sojourns" connoting temporary residence.

This view is based largely on the expression "during the year", the legal meaning of which is argued to be "throughout the year". The case cited for this, *The Queen* v. *Anderson* (1), was a decision on the Poor Law, but the statutes are not *in pari materia.* In general the language of a taxing statute is to be taken in its colloquial or popular sense, and "during the year" in that acceptation signifies rather "within the year" or "in the course of the year" than "throughout". Although consistency of language is no longer a jewel in such legislation, yet the adoption of that expression for the various paragraphs of the section by the amendment in 1927 would appear to intend the same sense in all of them. Obviously "throughout" is inappropriate to paragraphs (*b*) and (*e*), and the others would be unwarrantably restricted in application by such a construction. I think the suggested meanings are quite artificial and that nothing in the context of the section or in the Act requires us to give them to the expressions used. This makes it unnecessary to consider whether "ordinary residence" must be capable of being extended in a fictional sense over the entire taxing year.

I am not greatly concerned by overlapping or superfluous or even the virtual equivalence of terms. The language of the two paragraphs may not be a model of

(1) (1846) 9 Q.B. 663, 115 E.R. 1428.

precision or artistry, and if redundancy is of such a nature as might raise serious doubt of the intention of Parliament, some interpretative modification should be given; but when an intention to guard against omissions can fairly be drawn and there is no inconsistency or repugnancy, that would seem to make an end of the matter. If I may, I would adopt the language of Lord Selborne, L.C., in *Hough v. Windus* (1):

> I adhere to an opinion, expressed by myself in the House of Lords more than ten years ago in *Giles v. Melsom* (2) which, unless I am much deceived, I have also heard in substance expressed by great masters of the law, that "nothing can be more mischievous, than the attempt to wrest words from their proper and legal meaning, only because they are superfluous".

It is sufficient for the purposes of this case that the mode or nature of the appellant's living in Canada brought him within the language of paragraph (*a*) and strictly it is unnecessary to deal further with paragraph (*b*). But in justice to Mr. Inches' argument, I think I should say that I differentiate the circumstances of this case from those contemplated, say, by rule 2 of Miscellaneous Rules applicable to Schedule D under the English Act:

> 2. A person shall not be charged to tax under this 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 therein, and who has not actually resided in the United Kingdom at one time or several times for a period equal in the whole to six months in any year of assessment, but if any such person resides in the United Kingdom for the aforesaid period he shall be so chargeable for that year.

The Canadian Act taxes the person "residing" on the whole of his income, and provides only for a deduction of the amount of tax which the taxpayer may have been compelled to pay in a foreign country on the income arising from sources there. In the English Act, on the contrary, there is an elaborate classification of income with varying taxibilities and to hold a person liable for income from foreign possessions beyond what was received in the United Kingdom it is necessary under Schedule D to find not only that he resides in the United Kingdom but where he is a British subject, that he is both ordinarily resident and domiciled there. These taxes are, in theory, justified

(1) (1884) 12 Q.B.D. 224 at 229 (2) L.R. 6 H.L. 33, 34.

1946

THOMSON v. MINISTER OF NATIONAL REVENUE

Rand J.

by the protection to life and property which the laws of the country imposing them may give. They are conceived to be intended to apply fairly and equally to all persons and an apparent gross violation of that assumption is relevant to the enquiry into what Parliament by its general language has intended. That a person should be liable for tax upon the whole of his income even with the deduction mentioned merely because he has spent, say, two months in Canada as a temporary change of scene, whether or not part of his routine of life, is too unreasonable an intention to attribute to the language of Parliament unless it is beyond doubt. I would, therefore, treat the word "sojourns" as applying to presence in Canada where the nature of the stay is either outside the range of residence or is what is commonly understood as temporary residence or residence for a temporary purpose.

But that qualified stay is not the character of the appellant's. Apart from any question of domicile which would appear to be still in New Brunswick, his living in Canada is substantially as deep rooted and settled as in the United States. In terms of time, Pinehurst may take precedence but at best it is a case of *primus inter pares*. He is at East Riverside as at his "home"; and the mere limitation of time does not qualify that fact: *Attorney-General* v. *Coote* (1). That brings him within the most exacting of any reasonable interpretation of "resides" or "ordinarily resident".

For these reasons I would dismiss the appeal with costs.

KELLOCK J.—The facts have been sufficiently stated and it is not necessary to repeat them. The question for decision upon the facts is as to whether or not the appellant is, by reason of sec. 9(1) (*a*) of the statute, liable to be assessed for income tax. Clauses (*a*) and (*b*) of section 9, subs. (1), are as follows:

> 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;

(1) (1817) 4 Price 183.

To "sojourn" is defined in Murray's New English Dictionary as, to "make a temporary stay in a place," "to make stay," "to tarry," "to delay," while "reside" is defined as, "to take up one's abode or station," "to dwell permanently or for a considerable time," "to have one's settled or usual abode," "to live in or at a particular place."

"Ordinarily" is defined as "in conformity with rule or established custom or practice," "as a matter of regular practice or occurrence," "in the ordinary or usual course of events," "usually," "commonly," "as is normal or usual."

"Sojourn" in clause (*b*) is to be contrasted with "resident" in clause (*a*). A mere sojourn is not within the section unless the sojourn continues beyond the stated period. In my opinion, the appellant is not to be described as a sojourner in respect of the years in question but as a person residing in Canada within the meaning of clause (*a*). There is not the slightest difference between his use of his Canadian home and that of either of his two American homes. All three establishments are essentially of the same nature and are equally regarded by him as "homes" in the same sense. The appellant's residence in each is in the ordinary and habitual course of his life and there is no difference in the quality of his occupation in any one of them, although he may and does occupy each at different periods of the year.

With respect to the collocation of the word "residing" and the phrase "ordinarily resident" in clause (*a*), the phrase would seem to assume that a person may be resident in Canada without being "ordinarily resident." It is not necessary to consider just what the distinction may be in any particular circumstances. The appellant is residing and is ordinarily resident here in respect of the years in question. Even if in no case could any distinction be drawn between "residing," and "ordinarily resident" so that the phrase must be treated as superfluous, there is in law no objection to so doing, as has been pointed out by my brother Rand in the course of his judgment, citing *Hough* v. *Windus* (1), per Lord Selborne, L.C., at 229.

(1) (1884) 12 Q.B.D. 224.

1946

THOMSON v. MINISTER OF NATIONAL REVENUE

Kellock J.

As to the appellant's argument that the phrase "during such year" is to be interpreted as meaning "throughout the whole year," I do not agree. It would not be possible to apply the appellant's interpretation to the phrase as it appears in clause (*e*), and there is no reason to suppose that it was intended it should not have the same meaning wherever it appears in the subsection. The phrase is used throughout with reference to the phrase "the preceding year" in the early part of the subsection and in my opinion means "in the course of."

I would dismiss the appeal with costs.

ESTEY J.—This is an appeal from a judgment rendered in the Exchequer Court. The learned President of that Court has embodied in his judgment an exhaustive statement of the facts, and as a consequence only a summary of the more relevant facts will be mentioned here.

The appellant resided at Saint John, New Brunswick, where he retired from business in 1921. Thereafter he resided in Rothesay, New Brunswick, until 1923 when, following a dispute with the taxing authorities, he left Canada, announcing that he intended to take up residence in Bermuda. He did not remain in Bermuda and during the next few years did a good deal of travelling. Eventually he selected Pinehurst, North Carolina, where in 1930 he built a residence which he still occupies.

In 1932 he spent the summer months at St. Andrews, New Brunswick, and again in 1933 and 1934. In the latter year he built and furnished another residence, at a cost of approximately $90,000, at East Riverside near Rothesay, New Brunswick. This residence at East Riverside was built in order that his wife might have the opportunity of visiting and enjoying the friendship of her relatives and friends in Saint John and Rothesay, and that he himself might enjoy the golf course near the residence. He employed a family who occupied the servants' quarters throughout the year, and though the rest of the house was closed during the appellant's absence, they looked after the premises. His practice was to move

into this residence in the Spring and remain until some time in the Fall of each year. From 1935 to 1941, inclusive, he spent the following number of days in Canada:

	days
1935	156
1936	138
1937	169
1938	145
1939	166
1940	159
1941	115

This residence at East Riverside was maintained in a manner that made it always at his disposal and available at any time. When there his activities of life were centred about that point. It was to and from there he made his visits to other places. He and his family were then living there. It would appear that the appellant was maintaining more than one residence to which he could and did come and go as he pleased.

In the light of these circumstances, the officials of the Department of National Revenue asked the appellant to file an income tax return for the year 1940, and when he did not do so the Minister, by virtue of section 47, fixed the tax at $21,122.

The appellant does not question the amount but takes the position that he is not liable for income tax in Canada. The relevant sections of the Act are:

> 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 appellant contends that he is not ordinarily resident in Canada under section 9 (*a*), but that he merely sojourns in Canada for a period less than 183 days in each year and is therefore not taxable under 9 (*b*).

A reference to the dictionary and judicial comments upon the meaning of these terms indicates that one is "ordinarily resident" in the place where in the settled routine of his life he regularly, normally or customarily lives. One "sojourns" at a place where he unusually,

1946

THOMSON v. MINISTER OF NATIONAL REVENUE

Estey J.

casually or intermittently visits or stays. In the former the element of permanence; in the latter that of the temporary predominates. The difference cannot be stated in precise and definite terms, but each case must be determined after all of the relevant factors are taken into consideration, but the foregoing indicates in a general way the essential difference. It is not the length of the visit or stay that determines the question. Even in this statute under section 9 (*b*) the time of 183 days does not determine whether the party sojourns or not but merely determines whether the tax shall be payable or not by one who sojourns.

The words of Viscount Sumner in *Inland Revenue Commissioners* v. *Lysaght* (1), are indicative:

> 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 "extraordinary".

Lord Buckmaster, with whom Lord Atkinson concurred, in the same case, at p. 248:

> * * * 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 appellant selected the location, built and furnished the residence for the purpose indicated, and has maintained it as one in his station of life is in a position to do. In successive years his residence there was in the regular routine of his life acting entirely upon his own choice, and when one takes into consideration these facts, particularly the purpose and object of his establishing that residence, the conclusion appears to be unavoidable that within the meaning of this statute he is one who is ordinarily resident at East Riverside, New Brunswick, and is therefore liable for income tax under section 9 (*a*).

It is well established that a person may have more than one residence, and therefore the fact of his residence in Pinehurst or Belleair does not assist or in any way affect the determination of this issue.

The appellant then contends that even if he be properly described as one ordinarily resident in Canada, he is not within the terms of section 9 (*a*) because he is not "ordin-

(1) [1928] A.C. 234 at 243.

arily resident in Canada during such year." He submits that the word "during" means throughout. As I understand his contention, it is that one must be a resident through the entire year and that when the appellant leaves Canada to go back to North Carolina or Florida he goes back to his residence in the United States, and is not then resident in Canada, and is therefore not resident in Canada throughout the year.

In the Oxford Dictionary "during" is defined as: "Throughout the whole continuance of; in the course of". In the Concise Oxford Dictionary it is defined as: "Throughout, at some point in, the continuance of". This term "during" appears several times throughout the Act and not only does it appear in subsections (*a*) and (*b*) of section 9, the clauses with which we are concerned, but also in other subsections of this same section. Apart from a specific provision or necessary implication, it would be assumed that Parliament intended these terms to have the same meaning throughout these subsections, and indeed throughout the Act.

I agree with the learned President of the Exchequer Court that the word "during" means, as used in this statute, "in the course of." Particularly in subsection (*b*) I do not know how any other meaning could be attributed thereto. If one sojourns in Canada 183 days or more he is taxable; if less than that time he is not taxable. If he were here for only 184 days it would not matter where he was throughout the rest of the year. He would be in Canada a taxable period of 184 days during that year. Moreover, that appears to be the clear meaning of the word in certain other subsections and is the natural meaning, it seems to me, throughout the statute.

The appellant submitted two cases in support of his contention. *Bowes* v. *Shand* (1), where the contract called for the shipment of rice "during the months of March and/or April". In fact the rice was shipped in February. The Lord Chancellor in the course of his judgment:

> Therefore, dwelling merely on the natural sense of the words, I must without hesitation conclude that the meaning of the contract must be one of these two things, either that the rice shall be put on board

(1) (1877) 46 L.J.Q.B. 561 (H.L.).

1946

THOMSON v. MINISTER OF NATIONAL REVENUE

Estey J.

during the two months, *i.e.* not before the 1st of March nor after the end of April, or (and this construction would require evidence of usage) the shipment must be made in a manner which has been described as continuous, and be completed during one of these months, and that the bill of lading should be given for the whole and complete shipment at that time.

The appellant particularly relied upon the remark of Lord Hatherly to the effect that "during those months" implied "a continuous act of shipping". It is obvious from reading the report that that did not mean continuous throughout the entire period of two months. It seems to me that a reading of the case supports the view that the word "during" should be interpreted as "in the course of".

The other case, *The Queen v. Anderson* (1), the words are found in a statute, and, having regard to the provision of that statute, Lord Denman, C.J., gave to the word "during" the meaning that the appellant here contends for, but that is a very different statute and one which does not assist in the construction of the word as it appears in the *Income War Tax Act*.

I agree with the conclusions arrived at by the learned President of the Exchequer Court and would therefore dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *C. F. Inches.*

Solicitor for the respondent: *H. H. Stikeman.*

(1) (1846) 9 Q.B. 663.