LORD RUTHERFURD CLARK concurred.

The Court adhered.

Counsel for Appellant (Respondent)—J. P. B. Robertson—Jameson. Agents—Dundas & Wilson, C.S.

Counsel for Respondents (Reclaimers)—Trayner—W. C. Smith. Agent—P. Adair, S.S.C.

Wednesday, March 12.

FIRST DIVISION.

ORR EWING AND OTHERS *v.* ORR EWING'S TRUSTEES (NOTE FOR GEORGE AULDJO JAMIESON, JUDICIAL FACTOR).

(*Ante*, pp. 423 and 475).

Judicial Factor—Possession of Estate—Diligence.

A judicial factor presented a note to the Court stating that he was unable to obtain possession of the trust-estate on which he had been appointed factor, and craved the Court to grant warrant to messengers-at-arms to open lockfast places and recover and deliver to him the documents belonging to the estate. Circumstances in which the Court *granted* the prayer of the note.

Ante, pp. 423, 475. This was a further application by Mr Auldjo Jamieson, as judicial factor on John Orr Ewing's trust-estate, in which he stated that he had exhibited to Messrs M'Grigor, Donald, & Co., the defenders' agents, an extract of the decree of 7th March, and requested delivery of the several documents belonging to the trust-estate; that the documents were shown to him and a list of them made, but that delivery had been refused, and that he then took instruments in the hands of a notary-public; that the Royal Bank had refused payment, on the ground that they could only pay the balance on the current-account on the cheque of Messrs M'Grigor, Donald, & Co., and the sums contained in the deposit-receipts on delivery thereof duly endorsed; that the several companies in which stocks and shares were held had refused to make the transfers required, and to issue any certificate in favour of the factor without delivery to them of the certificates or other vouchers of their respective stocks, shares, and debentures.

The judicial factor therefore craved the Court "to grant warrant to messengers-at-arms to search for, recover, and take possession of the several books, certificates, bonds, and other documents specified in the schedule hereto annexed, and, if necessary for that purpose, to open all shut and lockfast places, and to deliver the said several books, certificates, bonds, and other documents, when recovered, to the said George Auldjo Jamieson, judicial factor foresaid, and to decern; to allow interim extract of the deliverance to be pronounced hereon, and to dispense with the reading in the minute-book, and allow extract to be issued forthwith."

The trustees contended that there was no precedent for such a prayer. A warrant to open lockfast places was only granted as a means of enforcing a decree, but no decree had been here pronounced against them.

At advising—

LORD PRESIDENT—As to the difficulty suggested by Mr Pearson, that this order is not sought for the ordinary purpose of enforcing implement of a decree against the respondents, I do not see that there is any difficulty at all. We instructed the judicial factor to take possession of all "sums of money belonging to the trust-estate, and of the whole writs, titles, and securities, books, papers, and documents of and concerning the same, wheresoever or in whose hands soever the same might be found." He now reports to us that he has ascertained where they are, that he has seen them, and demanded delivery of them from the persons in whose custody they are. Delivery was refused, and thereupon he took instruments in the hands of a notary-public. He now asks us to give him the means of compelling the delivery that was refused, and I do not see how we can possibly refuse his request. If we did, the effect, as Lord Shand has pointed out during the argument, would simply be, that after having ordered him to take possession of these things, he is not to do so, and that is a result that we cannot contemplate for a moment. I am for granting the prayer.

LORD MURE and LORD SHAND concurred.

The Court granted the prayer of the note.

Counsel for Judicial Factor—J. P. B. Robertson—G. Wardlaw Burnet. Agent—F. J. Martin, W.S.

Counsel for Respondents — Pearson—W. C. Smith. Agents—Murray, Beith, & Murray, W.S.

Counsel for Royal Bank (Compearers)—Mackintosh—Dundas. Agents—Dundas & Wilson, W.S.

Wednesday, March 12.

FIRST DIVISION.

[Exchequer Cause.

LLOYD *v.* INLAND REVENUE.

Revenue — Income Tax — Residence in United Kingdom—Foreign Merchant—Property Tax Act 1842 (5 *and* 6 *Vict. cap.* 35), *sec.* 1, *sched. D—Income Tax Act* 1853 (16 *and* 17 *Vict. cap.* 34), *sec.* 2, *sched. D—Customs and Inland Revenue Act* 1882 (45 *and* 46 *Vict. cap.* 41), *secs.* 9 *and* 10.

A person was assessed for the year 1883-84 under sec. 2, sched. D, of the Income Tax Act 1853, in respect of his profits from trading as a merchant in Italy. He was the proprietor of an estate in Scotland, which he had purchased in 1875, and where he and his family resided during the year of assessment from 6th July till 31st October. He and his family had been settled at Leghorn for many years, where he had a town and a country house, and where he carried on business. He had no place of business in Britain. *Held* that he was a person "residing in the United Kingdom" within the meaning of schedule D, and that the assessment had been properly made.

Observations (*per* Lord President and Lord Shand) on section 39 of the Property Tax Act 1842 (5 and 6 Vict. cap. 35).

Process—Amendment—Taxes Management Act 1880 (43 *and* 44 *Vict. cap.* 19), *sec.* 59.

Held that a Case stated by the Commissioners of Income Tax under section 59 of the Taxes Management Act 1880 could competently be amended at the bar of consent.

Thomas Lloyd, merchant, Leghorn, Italy, and of Minard, in the county of Argyle, appealed to the Commissioners of Income Tax for the districts of Argyle and Knapdale against an assessment on £20,000 made upon him under section 2, schedule D, of the Income Tax Act (16 and 17 Vict. cap. 34), on the ground that he was not a person "residing in the United Kingdom" within the meaning of schedule D.

By that section and relative schedule duty is payable "for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any profession, trade, employment, or vocation, whether the same shall be respectively carried on in the United Kingdom or elsewhere."

This section and schedule re-enact section 1, schedule D, of the Property Tax Act 1842 (5 and 6 Vict. cap. 35), which contains the rules for the computation of the duty, and in addition makes the provisions therein contained applicable to Ireland as well as Great Britain.

Section 39 of the Property Tax Act 1842 enacts "That any subject of Her Majesty whose ordinary residence shall have been in Great Britain, and who shall have departed from Great Britain and gone into any parts beyond the seas for the purpose only of occasional residence at the time of the execution of this Act, shall be deemed, notwithstanding such temporary absence, a person chargeable to the duties granted by this Act as a person actually residing in Great Britain." The same section further provides "That no person who shall on and after the passing of this Act actually be in Great Britain for some temporary purpose only, and not with any view or intent of establishing his residence therein, and who shall not actually have resided in Great Britain at one time or several times for a period equal in the whole to six months in any one year, shall be charged with the said duties mentioned in schedule D as a person residing in Great Britain in respect of the profits or gains received from or out of any possessions in Ireland or any other of Her Majesty's dominions, or any foreign possessions, or from securities in Ireland or any other of Her Majesty's dominions, or foreign securities; but nevertheless every such person shall, after such residence in Great Britain for such space of time as aforesaid, be chargeable to the said duties for the year commencing on the sixth day of April preceding."

The assessment was made under the Customs and Inland Revenue Act 1882 (45 and 46 Vict. cap. 41), sec. 9, which contains a grant of the duties of income tax for the year ending 5th April 1884, and section 10, which contains the provisions for charging and levying the duties contained in the previous statutes.

The Commissioners were of opinion that the appellant was liable to assessment as a person residing in the United Kingdom within the meaning of the Act, and refused the appeal as regards the question of liability, but in respect that the assessment was alleged to be in excess of the profits, continued the case for adjustment of the amount in conformity with the rules of the Act.

The appellant having expressed his dissatisfaction with this decision, as erroneous in point of law, the Commissioners stated this Case for the opinion of the Court, under section 59 of the Taxes Management Act 1880 (43 and 44 Vict. cap. 19).

The following facts were stated in the Case:—

"(2) The appellant is a subject of Her Majesty, and is proprietor of the castle and estate of Minard, in the county of Argyle, which he acquired by purchase in the year 1875.

"(3) From 1875 to 1878 inclusive, the appellant resided at Minard for several months—less than six—in the summer and autumn of each year, and was assessed anually under schedules A and B of the Income Tax Act, as proprietor and occupier of Minard castle and grounds, &c. He was also assessed annually under schedule D for each of these years, in conformity with his own returns, on the income or profits annually brought into Great Britain from abroad to meet his expenditure during his residence in Minard and elsewhere in Great Britain.

"(4) From Whitsunday 1879 to Whitsunday 1883 the appellant let the castle of Minard furnished, with the shootings, &c., to Mr Henderson of Glasgow, and did not personally reside there during these years. He was, however, during that period assessed annually under schedules A and B as proprietor and occupier of the home farm of Minard and woodlands, and under schedule D for the profits derived from letting the house furnished, and on the rent of the shootings, and also from the year 1878 to 1883 on the profits derived from the trading smack 'Jacobina' of Glasgow, now sold, of which he was the registered owner.

"(5) In the year 1879 the appellant rented a furnished house at Folkestone, where he resided with his family from 1st June to 15th October of that year. The appellant did not again reside in Great Britain until the month of August 1881, when he took a furnished house in London, as he again did in the year 1882, and resided there for some months each year.

"(6) In the valuation roll of the county of Argyle the appellant is entered as proprietor of the estate of Minard, and as occupier of the castle, home farm, and policies and woodlands, &c. His name appears also in the register of persons entitled to vote in the election of a member to serve in Parliament for the county of Argyle, and he is a Commissioner of Supply and Justice of the Peace for the county; but he has not acted in either of these latter capacities. He is also possessed of and employs the territorial designation 'of Minard,' as being proprietor of that estate.

"(7) During the currency of said lease to Mr Henderson, neither the appellant nor his family were at Minard, and that lease having expired in May 1883, the appellant and his family, during the current year, 1883-4 (the year for which the present assessment is made), have resided at Minard from 6th July till 31st October. The appellant, although he did not go to Minard till 6th July, arrived in England on or about the 19th June, and remained in an hotel till he left for Minard. He left London for Leghorn on 21st November, and does not intend to return to Great Britain till after April 1884.

"(8) The appellant's family have been for

many years settled at Leghorn, in Italy. His father carried on an extensive business as a merchant and died there. During his father's lifetime the appellant was associated with him in the business, and after his father's death in March 1867 succeeded him, and has since carried on the business at Leghorn, where besides his business premises he has two residences—one a furnished town house, the other a furnished country villa. He has no place of business in Great Britain, but while residing at Minard Castle he continues to direct or govern his business at Leghorn through his chief clerk or manager there. As a person occupying dwelling-houses and carrying on business at Leghorn, the appellant is assessed for and pays all taxes corresponding to his position there, including taxes on the profits of his said business there.

"(9) During the whole of the appellant's stay in Great Britain, as above detailed, he has maintained and kept open, ready for his return, his town and country residences in Leghorn, to which he could have returned at any time."

Argued for the appellant—The appellant was not a person "residing in the United Kingdom" within the meaning of sec. 2, sched. D of the Act of 1853. It was competent to look at the terms of sec. 39 of the Act of 1842 in order to ascertain the meaning of the word "residence." Under that section only those persons were to be assessed whose ordinary residence was in Great Britain, or who had resided there for six months; but the appellant's ordinary residence was at Leghorn, and he had not resided in the United Kingdom for six months in the year of assessment—*Brown* v. *M'Callum*, February 14, 1845, 7 D. 423; *Young* v. *Inland Revenue*, July 10, 1875, 2 R. 925; *Rogers* v. *Inland Revenue*, June 28, 1879, 6 R. 1109.

Argued for the respondent — The character of the residence was to be looked at, which did not require to be continuous or actual, but might be constructive—*e.g.*, by the family. The statute left the duration undefined. The point had been decided in a case under the old Act 46 Geo. III. cap. 65—*Attorney-General* v. *Coote*, June 13, 1817, 4 Price 183.

The Taxes Management Act 1880, sec. 59, provides that the Court "shall have power, if they think fit, to cause the Case to be sent back for amendment, and thereupon the same shall be amended accordingly, and judgment shall be delivered after it shall have been amended."

During the argument the Court, of consent of both parties, allowed the Case to be amended by adding the following statements:—That the appellant's family consisted of his wife and five children under age. That when he visited Minard he did not bring any of his servants from Leghorn, but they remained there in the houses belonging to the appellant, and when he left Minard he dismissed all the servants he had hired for the time he was there except two housemaids who remained in Minard Castle as care-takers. The appellant's wife, however, brought her lady's-maid to Minard, and took her back to Leghorn when she returned there. A gamekeeper and gardener are permanently kept at Minard, but during Mr Henderson's tenancy were Mr his servants and paid by him.

At advising—

LORD PRESIDENT — This gentleman Mr Lloyd is charged with income tax for the year 1883–84, the current year, and during that year he has resided in Scotland at Minard Castle from 6th July to 31st October 1883. It rather appears to me that that fact is conclusive of the whole case, because the authority for laying on this assessment upon Mr Lloyd is that a charge is to be made "for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any profession, trade, employment, or vocation, whether the same shall be respectively carried on in the United Kingdom or elsewhere." Now, the only question which can be raised upon that is whether Mr Lloyd was for the year 1883–84, to which alone this case applies, "residing" in the United Kingdom. There is no mention in this taxing clause of the character of the residence as being ordinary residence, or temporary residence, or residence for any particular part of the year, or proportion of it; "residing in the United Kingdom" are the only words we have to guide us. 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. He can have a residence in the country and a residence in town; he can have a residence in Scotland and another in England; or he may have three or more residences. We know some persons in exalted stations who have so many residences that they find them a very great encumbrance. And yet 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. That is a place of residence, and if he occupies that place of residence for a portion of a year he then is, within the meaning of this clause, as I read it, residing there in the course of that year.

A great deal of argument has been founded upon the 39th section of the previous statute of 5th and 6th Vict., which no doubt is still in operation; and it is necessary to advert to that for a single moment in order to clear away any embarrassment or misunderstanding which may have arisen about it. There are two parts of that section, one of which regards the effect of what is called an ordinary residence from which the person who possesses it is absent; and the other regards a certain exemption, as I shall venture to call it, notwithstanding the doubt thrown upon the expression, in regard to certain persons who come to this country for a temporary purpose, but which second portion of the section is admittedly not applicable to the present case, because it does not apply to the income tax laid on upon profits accruing from trade or professions. Now, as regards the first part of section 39, it is enacted "that any subject of Her Majesty, whose ordinary residence shall have been in Great Britain and who shall have departed from Great Britain and gone into any parts beyond the seas for the purpose only of occasional residence at the time of the execution of this Act, shall be deemed,

notwithstanding such temporary absence, a person chargeable to the duties granted by this Act, as a person actually residing in Great Britain." Now, that is a very important provision as extending the meaning of the words in the taxing clause, "residing in the United Kingdom." It extends it 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 long continued that absence may be. That disposes of the first part of section 39. Now, with regard to the second part, it provides that any person who shall actually be in Great Britain for some temporary purpose only, and not with the view of establishing a residence, and who shall not have remained there for a period on the whole amounting to six months within the year of taxation, shall be exempted from a certain portion of the income-tax. I have said it does not apply to the present case; but an argument has been founded upon it for the purpose of showing that coming to Great Britain for a temporary purpose is not considered by the statute to be residing in Great Britain. Now, I consider that is a fallacy. The meaning of it is this—if a foreigner comes here for merely temporary purposes connected with business or pleasure or something else, and does not remain for a period altogether within the year of six months he shall not be liable for a certain portion of taxation imposed by schedule D. He would have been liable but for this exemption; he would have been a person *de facto* residing in Great Britain. But it is thought that it would be rather hard to charge him when it is merely a visit here for a temporary purpose, and therefore this exemption is introduced. But that, so far from derogating from the force of the words by which the tax is laid on in schedule D, only confirms the view which I have taken of the true force of these words, because it shows that residence for a temporary purpose would have subjected to the tax if it had not been for this clause of exemption. Therefore I am very clear on the whole matter that this charge has been properly sustained, and that the appeal should be dismissed.

Lord Mure—In the view I take of it, this case is within the principle of the rule laid down in the case of *Coote;* and I do not think that the cases of *Young* and *Rogers* which we decided some time ago have any direct bearing upon it, because these were cases of sailors who had no residence on land except the residence of captains of vessels in Glasgow. But as I read the case of *Coote*, it appears to me to bear out the rubric of the report which is—"A statute imposing a duty on the property of persons residing in Great Britain applies to persons residing there for any length of time, however short, although they may at the same time have a more permanent residence elsewhere." Now, that has been laid down with reference to an Act of Parliament which contains a clause very much the same as the clause we have here, and that being so, the question is whether there is any difference in the expression used in the Acts of 1842 and 1853 from the Act of Parliament which was in operation in 1817. Now, the appellant resided in Minard, as I understand it, or in the United Kingdom, in 1883-84 somewhere nearly five months. It appears that he and his family for that year came to Minard about 6th July—they arrived in London on 19th June—and stayed in this country until 31st October, and they did not leave London again until 21st November, so that they were in the United Kingdom five months. During that time they had certainly all the appearance of a regular residence at Minard for the purpose for which he resided there, upon his own property; and that suggests to me that the position of matters for the year brings him within the operation of the general clause in section 2 of the Act of 1853 with reference to liability to the assessment which has been laid upon him. I think the five months' residence of that sort brings the case within the decision in the case of *Coote*. I was at first a little startled with the provision of exemption in the latter part of the 39th section of the statute, but I am now satisfied that that exemption does not expressly apply to the particular gains or profits that we are dealing with here, and in these circumstances I am of opinion that Mr Lloyd having resided five months in the United Kingdom in 1883-84 this assessment is properly laid on. It is a very special case in its features. Mr Lloyd has his residence at Minard, and beyond all question at Leghorn too, and he lives there now. Still the expression in the 2d section of the Act of 1853 about residence, and the decision in the case of *Coote* on a similar clause, compel me to come to the conclusion that for this particular year the assessment was well laid on.

Lord Shand—The question to be determined in this case arises under section 2 of the Act 16 and 17 Vict., which provides that the duty is payable "for and in respect of the annual profits and gains arising or accruing to any person residing in the United Kingdom from any profession, trade, employment, or vocation, whether they shall be respectively carried on in the United Kingdom or elsewhere;" and the question for the Court to determine is, What is the meaning of these words—"any person residing in the United Kingdom." But while that is so, I think it is legitimate, in considering the meaning to be attached to the words "residing in the United Kingdom," to refer to the other sections of the statute in which residence is referred to. And so I think in the argument which has been submitted for the respondents it was quite legitimate to refer to two expressions occurring in different parts of section 39 of the same statute. In the first part of this section we find a provision intended to meet the case of persons subjects of this realm and living in this country usually, who have gone abroad for a longer or shorter time—it is provided "that any subject of Her Majesty, whose ordinary residence shall have been in Great Britain, and who shall have departed for a time," and so on. I think the appellant is right in saying that the expression "ordinary residence" ought to be read in connection with section 2 of the statute, and that from the use of that expression in section 39 it may fairly be inferred that the residence referred to in section 2 is the ordinary residence of the person charged. And again I find in the proviso, also in section 39, there is another expression with regard to residence, distinguishing the case of

persons who reside for some temporary purpose only from that of persons who have the view or intent of establishing their residence. I think all of these three expressions, "residing in the United Kingdom," "having his residence in the United Kingdom," or being a person residing, but "not with any view or intent of establishing his residence in the United Kingdom" may be legitimately referred to, and ought to be in the view of the Court in settling the meaning of the words "residing in the United Kingdom" in the principal clause which is the subject of construction; and I am disposed to hold that a person is not liable to the assessment which has been here imposed unless it can be fairly said that he has his ordinary residence within the United Kingdom—an ordinary residence I shall rather say within the United Kingdom during the period for which the taxation is imposed.

I may say in passing, although it may not directly bear closely upon the question we have now to decide, that it occurs to me that although the provision in section 39 is in the language of exemption, yet, as I have indicated in the course of the argument, it rather appears to me to be a section of an explanatory nature which is intended to impose liability or to show that liability exists in certain circumstances upon persons who come to this country, but who are the subjects of other realms. For although no doubt the language there used is the language of exemption, it concludes with words which impose liability, viz., that "nevertheless every such person shall, after such residence in Great Britain for such space of time as aforesaid, be chargeable to the said duties for the year commencing on the sixth day of April preceding;" and the clause in itself provides that persons who have been "in Great Britain for some temporary purpose only, and not with any view or intent of establishing a residence therein, and who shall not actually have resided in Great Britain at one time or several times for a period equal in the whole to six months in any one year, shall be charged with the said duties mentioned in schedule D as a person residing in Great Britain in respect of the profits or gains received from or out of any possessions in Ireland, or any other of Her Majesty's dominions, or any foreign possessions," and so on, exempting—if you take it as an exemption—only from liability for profits from possessions as distinguished from profits or gains in respect of the carrying on of a profession or vocation or trade. If it be an exempting clause only, the result would be that a person coming for a temporary purpose only, with no view of establishing a residence, and who does not remain for six months in all, would nevertheless be liable for income tax upon profits upon any trade or vocation, which I do not think is the meaning of this section.

But that I state only in passing with reference to the proviso in the clause. The question here to be determined on—the meaning of the words "residing in the United Kingdom"—is whether Mr Lloyd, the appellant, has had an ordinary residence as distinguished from a temporary residence in Great Britain during the period in question. If he had been merely a temporary resident without any characteristic of settled residence about the occupation of his house at Minard, there would have been no liability; but I agree with your Lordship in holding that ordinary residence may be had in several countries—that a person may in the same year have an ordinary residence in several countries. It is obvious, as your Lordship has pointed out, that many persons have an ordinary residence in Scotland during one part of the year, and a residence, which might equally well be described as an ordinary residence, in London—a house, his own property, regularly resorted to for a considerable part of the year, and equally properly described as an ordinary residence. And so, as has been stated in argument, the same thing holds good in reference to different countries, that a person may have an ordinary residence in Scotland and another abroad where he has property, and a house to which he resorts many months in the year regularly. It appears to me that this case is of that class. Mr Lloyd no doubt has his ordinary residence at Leghorn. He is there the greater part of the year, carries on his business there, and has his home there undoubtedly; but I think equally he came to an ordinary residence when he came to his property at Minard in this country. He came to it as his home with his family and establishment, the only distinction being that in Scotland he was not carrying on business. I think, however, that although not carrying on business in Scotland he was residing in Scotland within the meaning of the Act, and occupying an ordinary residence for the time, and that therefore the deliverance of the Commissioners ought to be affirmed.

Lord Deas was absent.

The Court affirmed the determination of the Commissioners, and refused the appeal, with expenses.

Counsel for Appellant — Trayner— Jameson. Agents—Pearson, Robertson, & Finlay, W.S.

Counsel for Respondent — Mackintosh — Lorimer. Agent — Crole, Solicitor of Inland Revenue.

Friday, March 14.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

M'BRIDE (BOYLE'S FACTOR) *v.* STEVENSON.

Bankruptcy — Composition-Contract — Secured Creditor— Valuing and Deducting Security— Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. c.* 79), *sec.* 65.

It is an implied condition of the composition-contract that secured creditors must value and deduct their securities, and claim a composition only on the balance.

The creditors of a bankrupt having accepted a composition, he was discharged from the sequestration. Thereafter a secured creditor who had not claimed in the sequestration sued him for the amount of the composition on his debt without deducting the value of the security. *Held* that he was only