No. 469.—IN THE HIGH COURT OF JUSTICE (KING'S BENCH DIVISION).—22ND AND 23RD NOVEMBER, 1921.

COURT OF APPEAL.—27TH AND 28TH APRIL, AND 30TH MAY, 1922.

HOUSE OF LORDS.—20TH, 22ND AND 23RD MARCH, AND 21ST JUNE, 1923.

BRADBURY (H.M. INSPECTOR OF TAXES) v. THE ENGLISH SEWING COTTON COMPANY, LIMITED.[1]

Income Tax, Schedule D—Foreign possessions—Income Tax Act, 1842 (5 & 6 *Vict., c.* 35), *Section* 100, *Schedule D, Cases* I *and* V—*Finance Act*, 1914 (4 & 5 *Geo.* V, *c.* 10), *Section* 5.

An English company owned practically the whole of the Common Stock of an American company, which, for some years up to and including the year 1916–17, *was controlled in the United Kingdom, and was charged to Income Tax, as resident here, on the whole of its profits under Case* I *of Schedule D. The English company received the dividends on the American company's stock under deduction of Income Tax.*

Shortly before the 5*th April*, 1917, *the control and management of the American company were transferred to America with the result that from that date it ceased to be assessable under Case* I *of Schedule D, and the dividends on its stock were no longer paid under deduction of Income Tax.*

The English company, in addition to the dividends on the American company's stock, had income from other foreign possessions, and in ascertaining the English company's liability to assessment for the years 1917–18, 1918–19, *and* 1919–20, *under Case* V *of Schedule D (the liability being based each year upon the average amount for the three preceding years) it was sought to bring into account the dividends received from the American company in the years* 1914–15, 1915–16, *and* 1916–17 (i.e., *prior to the transfer of control abroad*).

Both before and since the transfer of control of the American company, the dividends payable to the English company have been remitted to them by cheque from America.

Held (*Lord Sumner dissenting*), *that the dividends which the English company had received prior to the* 5*th April*, 1917, *under deduction of Income Tax, in respect of its holding of Common Stock of the American company did not constitute income from foreign possessions within the meaning of Case* V *of Schedule D, and could not properly be taken into account in computing the company's liability to assessment under that Case.*

CASE

Stated under the Taxes Management Act, 1880, Section 59, and the Income Tax Act, 1918, Section 149, by the Commissioners for the Special Purposes of the Income Tax Acts, for the opinion of the King's Bench Division of the High Court of Justice.

[1] Reported (C.A.) [1922] 2 K.B. 369, and (H.L.) [1923] A.C. 774.

1. At a Meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 16th April, 1920, for the purpose of hearing Appeals, the English Sewing Cotton Company, Limited, hereinafter called the Respondents, appealed against assessments to Income Tax being additional first assessments of £250,748 for the year ending 5th April, 1918, and of £250,748 for the year ending 5th April, 1919, and an assessment of £251,677 for the year ending 5th April, 1920, made upon them by the Additional Commissioners of Income Tax for the Division of Manchester under the provisions of Case V of Schedule D of the Income Tax Acts.

2. The Respondents are a Company incorporated and carrying on business in the United Kingdom, and they have for several years past been duly assessed to Income Tax by separate assessments under Case I of Schedule D on the profits and gains of their trade, under Case IV of Schedule D on income from foreign securities, under Case V of Schedule D on income from foreign possessions, and latterly under Case III of Schedule D on untaxed interest respectively. They have also for several years up to and including the year ended 5th April, 1920, been in receipt of dividends upon shares held by them in other companies from which Income Tax has been deducted. Among the dividends thus received by the Respondents and taxed by deduction up to and including the year ending 5th April, 1917, there were included dividends on the Common Stock of the American Thread Company, the whole of which was up to the month of February, 1917, held by the Respondents or by trustees on their behalf.

3. The American Thread Company is, and at all material times has been, a Company incorporated and registered in the State of New Jersey, United States of America. Its position in relation to Income Tax was considered in the case of the American Thread Company *v.* Joyce, 6 Tax Cases, 1 and 163, in which it was held that, the District Commissioners of Taxes having found that the control of the management of the affairs of the Company rested with and was constantly exercised by the Directors resident in England, and there being evidence to support that finding, the American Thread Company must be regarded as resident and carrying on business in the United Kingdom and liable to assessment on the profits of its trade under Case I of Schedule D. It was assessed under Case I accordingly up to and including the year ending 5th April, 1917.

4. Shortly before the 5th April, 1917, the control and management of the affairs of the American Thread Company was transferred to America. The Respondents continued at all material times to hold nearly the whole of the Common Stock of that Company, but small portions of this Common Stock are now held by Directors resident in the United States of America in their own right absolutely, and the control and management of the affairs of the American Thread Company is now and has at all times since 5th April, 1917, been exercised in the United States of America by those Directors. It is admitted that for the year ending 5th April, 1918, and subsequent years, the American Thread Company is not liable to assessment on the profits of its trade

under Case I of Schedule D, and that the Respondents are directly assessable under Case V of Schedule D,and in accordance with the Rules thereof as amended by Section 5 of the Finance Act, 1914, in respect of income arising from stocks, shares or rents in any place out of the United Kingdom including the dividends on their holding of Common Stock of the American Thread Company, but only in the manner required by Case V and subject to the Rules thereof.

5. The Respondents received in the United Kingdom from foreign possessions, exclusive of their holding of Common Stock of the American Thread Company :—

				£
In the year ending 31st March,			1915 ...	6,124
,,	,,	,,	1916 ...	18,350
,,	,,	,,	1917 ...	5,445
,,	,,	,,	1918 ...	11,239

and they were assessed in respect of these foreign possessions under Case V of Schedule D :—

For the year ending 5th April, 1918, in the sum of £12,000, subsequently amended by consent to £9,973, being the average of the income arising in the three years ending 31st March, 1917 :

And for the year ending 5th April, 1919, in the sum of £12,000, subsequently amended by consent to £11,678, being the average of the income arising in the three years ending 31st March, 1918. A statement is annexed hereto as part of the Case marked E.S.C.(1) showing the details of the income from foreign possessions brought in to assessment for Case V by the Respondents for the years 1915–16 to 1918–19 inclusive. The notice of the said assessment for the year 1918–19, and a certified extract from the Inspector's records as to all the assessments in respect of the Respondents' foreign possessions for the years 1917–18 and 1918–19 are attached to and form part of this Case.(1)

6. From dividends on the Common Stock of the American Thread Company the Respondents received in the United Kingdom :—

(*a*) Prior to the date when the control of the business of the American Thread Company was removed to America :—

In the year ending—

March, 1915—£111,600 gross before deduction of Income Tax.

March, 1916—£200,880 gross before deduction of Income Tax.

March, 1917—£185,925 gross before deduction of Income Tax.

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(1) Omitted from the present print.

(*b*) After the date when the said control was removed to America :
In the year ending—
March, 1918—£250,749 gross without deduction of Income Tax.
March, 1919—£252,606 gross without deduction of Income Tax.

Both before and after the date when the control of the business of the American Thread Company was removed to America the amount of the dividends received in the United Kingdom by the Respondents has been remitted to them by cheque from America.

7. For the years since the decision in American Thread *v.* Joyce up to and including the year ended 5th April, 1917, no question arose in regard to the assessment to Income Tax of these dividends as the dividends were paid out of profits charged to Income Tax in the hands of the American Thread Company, tax was deducted from the dividends, and the Respondents' liability in respect of them for the respective years in which they were received was thus fully satisfied. For the three years ending 5th April, 1918, 1919 and 1920 respectively, for which the American Thread Company was no longer assessable on its profits under Case I of Schedule D, separate assessments, being the assessments under appeal, were made upon the Respondents under Case V of Schedule D, in respect of the dividends on their holding of Common Stock of the American Thread Company alone and independently of the assessments on their income from the foreign possessions referred to in paragraph 5 of this Case. The notices of these assessments are attached to and form part of this Case.(1)

8. The basis on which the assessments under appeal were made was that applicable according to the provisions of Case I of Schedule D, where a trade has been set up and commenced within the year of assessment or within the period of three years upon the average of which the liability would normally be computed; and the assessment for the year ending 5th April, 1918, was based upon the amount of the dividends received in that year, the assessment for the year ending 5th April, 1919, upon the amount of the dividends received in the year ending 5th April, 1918, and the assessment for the year ending 5th April, 1920, upon the average of the dividends received in the two years ending 5th April, 1919. At the hearing of the Appeal the Crown did not seek to support the assessments on this basis, but advanced the contentions mentioned in paragraph 10 of this Case.

9. It was contended on behalf of the Respondents—

(*a*) that the basis upon which they were assessable under Case V of Schedule D was the average of their income from foreign possessions for the three years preceding the year of assessment ;

(*b*) that the dividends on their holding of Common Stock of the American Thread Company were not income from a foreign possession for the period prior to 5th April, 1917, when the

(1) Omitted from the present print.

business of the American Thread Company was controlled in the United Kingdom and that Company was consequently assessed under Case I of Schedule D on all the profits of its trade as a Company resident and carrying on business in the United Kingdom ;

(*c*) that no part of the dividends on the Respondents' holding of Common Stock of the American Thread Company arising prior to 5th April, 1917, ought to be taken into account in computing their liability under Case V of Schedule D for the three years ending 5th April, 1920 ; and

(*d*) that their liability under Case V of Schedule D for the year ending 5th April, 1918, was satisfied by the assessment originally made for that year in the sum of £9,973 computed on the average of their income from foreign possessions (exclusive of dividends on the Common Stock of the American Thread Company) for the three years ending 5th April, 1917, and that in computing their liability under Case V of Schedule D for the two years ending respectively 5th April, 1919, and 5th April, 1920, the dividends on their holding of Common Stock of the American Thread Company arising subsequently to 5th April, 1917, should be aggregated with their income from other foreign possessions for the three years preceding the respective years of assessment, and the average of such aggregate amounts should be taken without any addition on account of dividends on the Common Stock of the American Thread Company arising prior to 5th April, 1917.

10. It was contended on behalf of the Crown—

(*a*) that the American Thread Company was a foreign Company, incorporated and at all material times resident in the United States of America notwithstanding that until 1917 it has been controlled and in that sense also resident in the United Kingdom ;

(*b*) that the dividends received by the Respondents from the American Thread Company upon their holding of Common Stock in that Company were at all material times both before and after the transfer of the control of the American Thread Company to America income from a foreign possession, and as such legally assessable under Case V of Schedule D in the hands of the Respondents, although up to 5th April, 1917, they had not actually been so assessed as such upon the principle recognised in Gilbertson *v.* Fergusson (1881) 7 Q.B.D. 562 ; 1 Tax Cases 501, for the reason that they were wholly paid out of profits already taxed under Case I of Schedule D ;

(*c*) that in computing the Respondents' liability under Case V of Schedule D, for the three years ending 5th April, 1920, the whole of the dividends received by them on their holding of

Common Stock of the American Thread Company in the period of three years preceding the respective years of assessment ought to be taken into account without reference to the removal of the seat of control of the said Company in 1917 ; and

(*d*) that the Respondents were assessable under Case V of Schedule D for each of the three years in question upon the average of the total income received by them in the United Kingdom from foreign possessions, including dividends on Common Stock of the American Thread Company, for the three years preceding each of such years.

11. We, the Commissioners who heard the appeal, having considered the facts and arguments submitted to us, gave our decision as follows :—

" We are of opinion that dividends on shares in a company which, though incorporated in a foreign country, is resident and carries on business in the United Kingdom, and is assessed on the whole of its profits under Case I of Schedule D are not income from a foreign possession within Case V, and that the dividends declared by the American Thread Company and received by the English Sewing Cotton Company, Limited, subject to deduction of tax in the years 1914-15, 1915-16, and 1916-17 when the American Thread Company was controlled in the United Kingdom, cannot for the purposes of Case V assessments on the English Sewing Cotton Company, Limited, for subsequent years be added to the income from foreign possessions originally brought into the average for assessment under Case V. We shall accordingly reduce the Case V assessments to the average of the income from foreign possessions exclusive of the dividends of the American Thread Company prior to 5th April, 1917, but inclusive of the dividends of that Company payable after that date."

In accordance with this decision we discharged the assessment of £250,748 for the year ending 5th April, 1918, reduced the assessment of £250,748 for the year ending 5th April, 1919, to the sum of £83,583, and reduced the assessment of £251,677 for the year ending 5th April, 1920, to the sum of £167,785.

12. The Appellant immediately upon the determination of the appeal declared to us his dissatisfaction therewith as being erroneous in point of law, and in due course required us to state a Case for the opinion of the High Court pursuant to the Taxes Management Act, 1880, Section 59, and the Income Tax Act, 1918, Section 149, which Case we have stated and do sign accordingly.

13. The sole question for the decision of the High Court is whether the dividends received by the Respondents upon their holding of Common Stock in the American Thread Company during the years ended 5th April, 1915, 5th April, 1916, and 5th April, 1917, can under the circumstances of the present case be taken into account in computing the liability of the Respondents to assessment under Schedule D, Case V,

of the Income Tax Acts for the years ended 5th April, 1918, 5th April, 1919, and 5th April, 1920.

P. WILLIAMSON,
W. J. BRAITHWAITE,
Commissioners for the Special Purposes of the Income Tax Acts.

York House,
23, Kingsway,
London, W.C. 2.
30*th April*, 1921.

The case was heard before Mr. Justice Sankey on the 22nd and and 23rd November, 1921, when the Attorney-General (Sir Gordon Hewart, K.C., M.P.) and Mr. R. P. Hills appeared as Counsel for the Appellant and Sir John Simon, K.C., and Mr. A. M. Latter appeared for the Respondents.

On the latter day, Mr. Justice Sankey delivered judgment against the Crown, with costs, holding that the determination of the Special Commissioners was one of fact and that, as the evidence before them was sufficient to support their conclusions and they had not misdirected themselves in law, the Court was not entitled to question their determination.

JUDGMENT.

Sankey, J.—In this case the Inspector of Taxes is the Appellant and the English Sewing Cotton Company, Limited, are the Respondents. "The Respondents are a Company incorporated and carrying on business in the United Kingdom, and they have for several years past been duly assessed to Income Tax by separate assessments under Case I of Schedule D on the profits and gains of their trade, under Case IV of Schedule D on income from foreign securities, under Case V of Schedule D on income from foreign possessions, and latterly under Case III of Schedule D on untaxed interest respectively. They have also for several years up to and including the year ended 5th April, 1920, been in receipt of dividends upon shares held by them in other companies from which Income Tax has been deducted. Among the dividends thus received by the Respondents and taxed by deduction up to and including the year ending the 5th April, 1917, there were included dividends on the Common Stock of the American Thread Company, the whole of which was up to the month of February, 1917, held by the Respondents or by trustees on their behalf. The American Thread Company is, and at all material times to this present case has been, a Company incorporated and registered in the State of New Jersey, United States of America."

The position of that Company in relation to Income Tax has been litigated in these Courts and the decision with regard to it will be found in two parts of the Sixth Volume of Tax Cases, the first part being a

decision of the Court of Appeal which is reported at page 1, and the second part being a decision of the House of Lords which affirmed the Court of Appeal and which will be found reported at page 163.

The decision on page 1 is, as it appears to me, correctly set out in the head note of the *American Thread Company* v. *Joyce*, which reads as follows :—" A Company incorporated and registered in the United " States owns cotton mills in the United States for the manufacture of " cotton thread, none of which is sold in the United Kingdom. The " Company was promoted by the English Sewing Cotton Company, " Limited "—that is the case we are now dealing with—" which is " registered and carries on business in the United Kingdom and which " owns directly or through trustees the whole of the American Com- " pany's Common Stock."

I think there is a little difference in the present case, that it owns nearly or practically all the Common Stock, but it is quite an immaterial difference.

" The by-laws of the American Company "—that is the American Thread Company—" provide *inter alia* that there shall be seven direc- " tors of whom three shall reside in the United States, and that there " shall be an executive committee of three directors resident in America " to direct the current business of the Company; that the regular " meetings of the Board shall be held in America and extraordinary " meetings in Great Britain at the office of the Company there. Certain " powers, viz., those of dealing with the purchase or lease of any business " or plant, the sale or lease of real estate, the borrowing of money, the " appointment of auditors, the selection of the executive committee of " directors, and the fixing of their remuneration, the filling of casual " vacancies among the directors, the making of agreements for periods " exceeding one year, and the appointment of higher officials, were " reserved to the Board of Directors convened in extraordinary meetings " (*i.e.*, in the United Kingdom). In practice the Board also, at these " extraordinary meetings, decide upon the dividend to be declared on " the Company's Common Stock, and exercise supervision over the " Company's accounts, and over the processes of manufacture in use " in the Company's works in America."

It was held by the Court of Appeal : " That, the District Commis- " sioners of Taxes having found that the control of the management of " the affairs of the Company rested with and was constantly exercised " by the directors resident in England in extraordinary session, this " finding could only be impugned on the ground that there was not any " evidence to justify the Commissioners in arriving at this conclusion ; " and as the Court was satisfied that there was such evidence, the Com- " pany must be regarded as resident in the United Kingdom, and liable " to assessment under the First Case of Schedule D."

The Court of Appeal having so held and found, the case proceeded to the House of Lords, where the judgments were of a somewhat short character. They said it was not for them to enter into the question of how on the materials which came before the Inland Revenue Commissioners they would have dealt with the question of fact. The Lord

Chancellor says: "The Taxes Management Act of 1880"—that is the Act which gives the right to state a case for an appeal—"precludes us "from looking at the finding of the Commissioners except in so far as it "is necessary to see whether there was any evidence which could have "supported it." They, therefore, upheld the decision of the Court of Appeal and affirmed it.

That decision of the House of Lords was given in the year 1913.

Now matters apparently remained in that state for some short time, that is to say, there was the Respondent Company which was wholly English, and there was the American Thread Company which was incorporated and registered in the State of New Jersey in the United States of America. But it was held by the House of Lords, as I have stated, that the American Company, although incorporated and registered in the State of New Jersey, must be regarded as resident and carrying on business in the United Kingdom and liable to assessment under Case I of Schedule D.

Now it was assessed under Case I up to and including the 5th April, 1917, but shortly before that date an entire change took place in the affairs and method of business of the American Thread Company and the control and management of those affairs were transferred to America.

Now, although the control and management of the affairs of the American Company were transferred to America the Respondent Company continued at all material times to hold nearly the whole of the Common Stock of that Company, and now the management and affairs of the American Company are exercised in the United States of America by the Directors. It was admitted that for the year ending the 5th April, 1918, and in subsequent years, the American Thread Company was not liable to assessment on the profits of its trade under Case I of Schedule D—that is because of the change of method of which I have already spoken—and that the Respondents were directly responsible under Case V of Schedule D, and in accordance with the Rules of that Case as amended by Section 5 of the Finance Act, 1914, in respect of income arising from stocks, shares or rents in any place out of the United Kingdom including the dividends on their holding of Common Stock of the American Thread Company, but only in the manner required by Case V and subject to the Rules thereof.

Now it appears that the Respondent Company received from foreign possessions certain sums of money. The sums of money which they received from foreign possessions other than the holding of this Common Stock in the American Thread Company are set out in paragraph 5 of the Case, and I do not think it is very important to notice them; and the dividends which the Respondent Company received from the Common Stock of the American Company are set out in paragraph 6 of the Case.

Now for the purposes of clearness and for the purposes of making the point to emerge, the Case finds what the dividends were before the control was removed to America shortly before the 5th April, 1917, and what the dividends were after the Thread Company control and management were transferred to America.

It appears that in the year ending March, 1915, the dividends were £111,000 odd gross before deduction of Income Tax, and in the year ending March, 1916, £200,000 odd, and in the year ending March, 1917, £185,000 odd.

After the date when the control was removed to America in the year ending March, 1918, the dividends were £250,000 odd gross and in 1919 £252,000 odd gross. It is found that "Both before and after the date "when the control of the business of the American Thread Company "was removed to America the amount of the dividends received in the "United Kingdom by the Respondents has been remitted to them by "cheque from America."

In order to put it quite clearly, it will be observed that the dividends before the control was removed to America and the dividends after the control was removed to America are stated, and the question which fell for determination was this: What was the basis under Case V of Schedule D upon which the income was to be calculated?

"It was contended on behalf of the Respondents—(*a*) that the basis "upon which they were assessable under Case V of Schedule D was the "average of their income from foreign possessions for the three years "preceding the year of assessment; (*b*) that the dividends on their "holding of Common Stock of the American Thread Company were not "income from a foreign possession for the period prior to the 5th April, "1917, when the business of the American Thread Company was con-"trolled in the United Kingdom and that Company was consequently "assessed under Case I of Schedule D on all the profits of its trade as "a Company resident and carrying on business in the United Kingdom; "(*c*) that no part of the dividends "—this is the important thing—"on "the Respondents' holding of Common Stock of the American Thread "Company arising prior to 5th April, 1917, ought to be taken into "account in computing their liability under Case V of Schedule D for the "three years ending 5th April, 1920,"—in other words, they said:— "You must not and cannot take into account the dividends received "before the American Company was removed to America."

"It was contended on behalf of the Crown—(*a*) that the American "Thread Company was a foreign Company, incorporated and at all "material times resident in the United States of America notwith-"standing that until 1917 it has been controlled and in that sense also "resident in the United Kingdom."

Now, which of those two contentions is the correct one? The Commissioners have held in favour of the contention of the Respondents, the Company, and they have said that you cannot take into account the dividends received during the three years prior to the control of the American Company being removed from this country to the United States.

Mr. Hills, on behalf of the Appellant, the Inspector of Taxes, has stated a number of sections of the Act of Parliament and a number of cases in support of his view. He was naturally somewhat oppressed by

the finding of the Court in the *American Thread Company's* case (1), and what in effect he says is this : " Although it is perfectly true that " a Company registered abroad may be resident here, a person may be " resident in two places for Income Tax purposes." He relies for that proposition upon *Lloyd* v. *Sulley*, 1884, which is reported in 2 Tax Cases, page 37, and *Cooper* v. *Cadwalader* which is in 5 Tax Cases, page 101, which say that an individual may have two residences.

Sir John Simon, who argued the case on behalf of the Respondent, at first said that although those cases clearly laid down that an individual could have two residences for the purposes of the Income Tax Acts, he did not think that it applied to a company. In the course of his argument he referred to the remarks of Baron Huddleston in the case of the *Cesena Sulphur Company* v. *Nicholson* (2), which is reported in the 1st Exchequer Division. The remarks in question are on page 453, the case itself beginning at page 428.

The learned Baron says (3) : " In the present argument the Attorney-" General advanced a proposition to which I cannot assent. He sug-" gested that the registration of a company was conclusive of its " residence, that if a company was registered in England it must be held " to reside in England. I think the answer which was given during " the argument is a good one. It is this :—Registration, like the birth " of an individual, is a fact which must be taken into consideration in " determining the question of residence. It may be a strong circum-" stance, but it is only a circumstance. It would be idle to say that " in the case of an individual the birth was conclusive of the residence."

In his reply, Mr. Hills referred to a passage in the speech of Lord Loreburn in the case of *De Beers Consolidated Mines, Limited*, v. *Howe*, 1906 Appeal Cases, page 455, at page 458 where the Lord Chancellor says (4) ; " Mr. Cohen propounded a test which had the merit of sim-" plicity and certitude. He maintained that a Company resides where " it is registered, and nowhere else. If that be so, the Appellant Com-" pany must succeeed, for it is registered in South Africa. I cannot " adopt Mr. Cohen's contention. In applying the conception of " residence to a Company, we ought, I think, to proceed as nearly as we " can upon the analogy of an individual. A company cannot eat or " sleep, but it can keep house and do business. We ought therefore to " see where it really keeps house and does business. An individual " may be of foreign nationality and yet reside in the United Kingdom. " So may a company. Otherwise it might have its chief seat of manage-" ment and its centre of trading in England under the protection of " English law, and yet escape the appropriate taxation by the simple " expedient of being registered abroad and distributing its dividends " abroad."

Now, if I had to decide this point, I think I should come to the conclusion that the point taken by Sir John Simon that a company is in this respect different from an individual cannot be maintained. I do not see that there is anything to prevent a company on the analogy, as Lord Loreburn says of an individual, having a double residence.

(1) 6 T.C. 1 and 163. (2) 1 T.C. 88 and 102. (3) 1 T.C. 104. (4) 5 T.C. 212.

I am aware of what Lord Justice Buckley said in the *American Thread Company* v. *Joyce* in the first report of that case (1) at page 31 : " There " is a place of residence for the purpose of Income Tax, and according to " the decision in the *De Beers* Case (2), if, to use the language of the " findings of the Commissioners, the head and seat and directing power " of the affairs of the Company are in the United Kingdom, from whence " the chief operations of the Company, both in the United Kingdom and " elsewhere, are controlled, managed and directed, then it is plain, upon " authority, that it is residing in that place."

It is not for me to anticipate the decision of other Courts or of my successors, but it may well be that a company meets at some period in one country and at other periods in another country, and it may be amenable to the laws of both countries under these circumstances.

But, in the view I take of this case, it is not necessary for me to decide that point, though I confess that as at present advised I think Mr. Hills is probably right upon it. But it seems to me that the decision in the present case can be given on much narrower grounds. As I have already stated from the judgment of the House of Lords in the *American Thread* Case (3), the decision of the Commissioners upon a point of fact cannot be challenged as long as they have not either (1) misdirected themselves in law, or (2) acted in the absence of any evidence. If they have gone wrong in law or if they have found a fact without any evidence to support it, then I think this Court can interfere. But in the view I take of this case I think I have to see whether they have either gone wrong in law or found facts which there was no evidence to support.

What they found is this, in paragraph 11 of the Case : " We are of " opinion that dividends on shares in a company which, though incor- " porated in a foreign country is resident and carries on business in the " United Kingdom, and is assessed on the whole of its profits under " Case I of Schedule D are not income from a foreign possession within " Case V, and that the dividends declared by the American Thread " Company and received by the English Sewing Cotton Company, " Limited, subject to deduction of tax in the years 1914–15, 1915–16, " and 1916–17, when the American Thread Company was controlled in " the United Kingdom, cannot for the purposes of Case V assessments " on the English Sewing Cotton Company, Limited, for subsequent " years be added to the income from foreign possessions originally " brought in to the average for assessment under Case V. We shall " accordingly reduce the Case V assessments "—there were dividends on foreign shares other than those of the alleged foreign possession of the American Thread Company, and they say :—" We shall accordingly " reduce the Case V assessments to the average of the income from " foreign possessions exclusive of the dividends of the American Thread " Company prior to 5th April, 1917, but inclusive of the dividends of " that Company payable after that date."

I think that what they are finding there is this, that up to the date to which I have already referred—that is a date shortly before the 5th April, 1917, when the control and management of the affairs of the

(1) 6 T.C. at p. 31. (2) 5 T.C. 198. (3) 6 T.C. 163.

Thread Company were transferred to America—this Company, the American Thread Company, was resident and carrying on business in the United Kingdom, and that therefore, as they say, the dividends of such a Company are not income from a foreign possession. They do not find at all that the American Company was a foreign possession during that time ; in fact, they find just the other way.

Mr. Hills' case depends upon his first contention as set out in paragraph 10 (*a*), " That the American Thread Company was a foreign " Company, incorporated and at all material times resident in the " United States of America notwithstanding that until 1917 it has been " controlled and in that sense also resident in the United Kingdom."

Now, as I understand it, the Commissioners have found that not to be the fact. I think it might have been open—I do not express an opinion upon it—but I think it might have been open—to them to find a dual residence, as in the case of *Lloyd* v. *Sulley* (1) and *Cooper* v. *Cadwalader* (2) ; but I think the answer to Mr. Hills' contention is this, that, although that was a finding which they might have come to, they did not. And I think that their finding is a finding of fact and that there was ample evidence upon which they could come to that finding.

It will be remembered that in the *San Paulo* case (3), which is reported in 1896 Appeal Cases at page 31, it was said by Lord Watson on page 40 : " When it has been ascertained that a person interested " in the profits of a trade has his residence in the United Kingdom, in " such sense as to bring him within the incidence of the Income Tax " Acts, the only question remaining for determination is whether the " measure of his liability is to be found in the First or in the Fifth Case " of Schedule D. In the one case he is liable to pay duty in respect of " the net profits accruing to him from such trade ; in the other in " respect of only such part of these profits as shall have been actually " received by him in this country."

Whether Sir John Simon is right in saying that the present point was such an obvious one that it must have been considered and rejected by the very distinguished expert in these matters that Lord Watson was, I have no means of judging. I do not think it affected the determination in that case ; in fact, I am sure that it did not.

Giving the best consideration that I can to the present circumstances, I think it was a question of fact for the Commissioners and I cannot see that they misdirected themselves in law. There was ample evidence upon which they could have come to the conclusion of fact that they did in fact arrive at, and I am of opinion that their decision as set out in paragraph 11 of the Case, which I need not read again, is correct.

When I come to paragraph 13, which says : " The sole question for " the decision of the High Court is whether the dividends received by " the Respondents upon their holding of Common Stock in the American " Thread Company during the years ended 5th April, 1915, 5th April, " 1916, and 5th April, 1917, can under the circumstances of the present " case be taken into account in computing the liability of the Respon-

(1) 2 T.C. 37. (2) 5 T.C. 101. (3) San Paulo (Brazilian) Railway Co., Ltd. v. Carter, 3 T.C. at p. 411.

"dents to assessment under Schedule D, Case V, of the Income Tax "Acts for the years ended 5th April, 1918, 5th April, 1919, and 5th "April, 1920", I answer it in the same way that the Commissioners have answered it.

That being so, this appeal must be dismissed and the assessment confirmed.

Mr. Latter.—The appeal will be dismissed with costs, my Lord?

Sankey, J.—Yes.

Notice of appeal having been given against the decision in the King's Bench Division, the case was heard by the Court of Appeal (Sterndale, *M.R.*, and Scrutton and Younger, *L.JJ.*) on the 27th and 28th April, 1922, when judgment was reserved. The Solicitor-General (Sir Leslie Scott, K.C., M.P.) and Mr. R. P. Hills appeared as Counsel for the Appellant, and Sir John Simon, K.C., and Mr. A. M. Latter, K.C., appeared for the Respondents.

Judgment was delivered on the 30th May, 1922, against the Crown, with costs, their Lordships holding (Scrutton, *L.J.*, dissenting) that the dividends which the Respondent Company had received prior to the 5th April, 1917, under deduction of Income Tax, in respect of its holding of Common Stock of the American Thread Company did not constitute income from foreign possessions within the meaning of Case V of Schedule D, and could not properly be taken into account in computing the Respondent Company's liability to assessment under that Case.

JUDGMENT.

The Master of the Rolls.—The question in this case is as to the proper method of assessing the Respondents for Income Tax under Schedule D. It arises in these circumstances. The Respondents are a company registered and carrying on business in England. They hold practically all the shares in a company called the American Thread Company registered in New Jersey and carrying on business in America. In 1915–16–17 the American Company was managed and controlled from England in a manner which, according to the decisions, made it taxable as resident in England. It was accordingly so taxed upon its profits in the ordinary way, and was treated for taxation purposes as an English company. The Respondents, as shareholders, bore their share of taxation by the deduction by the American Company from their dividends of a proportionate part of the tax. There was considerable argument before us as to whether in those circumstances the Respondents could have been taxed direct upon the dividends received by them as a profit received from foreign possessions, which a share in a foreign company certainly is. I do not think it necessary to decide this point. I will assume that they could, but it is clear that in that case the amount of taxation might have been

very different, for the American Company was taxed upon the whole of its profits conventionally ascertained, and it does not follow that the amount distributed in dividends in each of those taxable years amounted to the same sum. But whatever the right of the Crown in that respect there is no doubt that they chose the method of taxing the American Company as resident in England, and the deduction made from the Respondents' dividends was, therefore, a deduction made in respect of taxation upon English profits.

In 1917 the management and control of the American Company was transferred to America and the Company ceased to be taxable as resident in England. The Revenue authorities then, for the taxable year, assessed the Respondents upon the amount of their dividends from the American Company as profits received from a foreign possession, and in order to arrive at the amount of assessment they claimed to treat the amount of dividends in the years 1915–16–17 as also profits received from a foreign possession in order to ascertain the three years' average on which, if circumstances permit, the assessment is to be founded. They do not, however, claim to tax the Respondents on those dividends in those years, as tax has already been received upon them, but they claim that shares in the American Company did not cease during the years 1915–16–17 to be a foreign possession, and that, as dividends on them were received by the Respondents during these years, the Respondents have for three years before the year of assessment been in receipt of profits from this foreign possession. In other words, they claim to treat these dividends throughout all the years in which they have been received as profits of a foreign possession for every Revenue purpose, except that of taking from the Respondents a second tax in respect of them. I agree that the American Company is not transformed into an English company by the fact that circumstances have made it taxable in England upon its profits, nor are its shares in fact changed from a foreign possession into an English possession by such taxation, but I do not think this is conclusive of the question whether the Crown is now justified in making use of them in any way as foreign possessions for the purpose of increasing the charge upon the Respondents. I do not think they are. I have already pointed out that the amount of profit subject to taxation, by reason of the Crown electing to tax the American Company on its trading profits instead of the Respondents upon their profits from foreign possessions, is not the same, and, if there were a choice, I do not doubt that the Crown chose the more favourable alternative. As is pointed out by Lord Cave in *Commissioners of Inland Revenue* v. *Blott*, (1) ([1921] 2 A.C. 171), the burden of the taxation upon a company taxed like the American Company falls upon the shareholders in that company, and, therefore, I think the Crown during the years 1915–16–17 treated the dividends received by the Respondents as profits, not from a foreign possession, but from a British business, *i.e.*, income from a British, not from a foreign, source. Having done so, I think they are bound to be consistent, and cannot afterwards, for any Income Tax

(1) 8 T.C. 101.

purposes, treat them as income from a foreign source so as to impose a greater burden on the Respondents, and I think it is no answer to say that they are only departing from the way in which they have elected to treat the dividends for the purpose of calculation and increase of assessment and not for the purpose of imposing a second tax. I think the appeal should be dismissed with costs.

Scrutton, L. J.—The question in this appeal is as to the principle on which the English Sewing Cotton Company, whom I will call "the English Company", should be assessed to Income Tax under Schedule D. They have for some years held all or nearly all the shares in the American Thread Company, whom I will call "the "American Company". The American Company is incorporated and registered in the State of New Jersey, but up to the year ending 5th April, 1917, its control and management was found to be in England, and it was therefore directly assessed under Case I of Schedule D as a person resident and trading in England. It would be so assessed on the average of its trading profits in the three previous years. Being so assessed, it deducted English Income Tax from the dividends it paid its shareholders, which did not necessarily amount to the same figure as the average of conventional profit on which it paid Income Tax to the Crown. The English Company was assessed (1) on its own profits of trade, (2) on the three years' average of certain receipts from foreign possessions under Case V of Schedule D, and (3) discharged its liability, if any, for the dividends it received from its shares in the American Company by submitting to the deduction of English Income Tax thereon.

Early in 1917 the method of business of the American Company was changed, and the seat of control of its business was transferred to the United States. It therefore ceased to be directly assessable to English Income Tax as a person resident. But the English Company who received, or was entitled to receive, its dividends could be assessed on those dividends as on profits from "foreign possessions" under Case V of Schedule D under the authority of *Singer* v. *Williams* (1) ([1921] 1 A.C. 41). Income from foreign possessions is now assessed under Section 5 of the Finance Act, 1914, "in respect of income arising "from . . . shares . . . in any place out of the United "Kingdom", and such income was computed on a three years' average of the income from foreign possessions of the three previous years. It should be noticed that in *Singer* v. *Williams* the whole income from foreign possessions for the year 1914 was included in the computation of average to ascertain the taxable amount for the year 1917, whether received in the United Kingdom or not; although if not received in the United Kingdom it was not taxable in 1914. It was so included because the amount taxable as income from foreign possessions in 1917 was not the amount received but the whole amount; and therefore the average was taken of total income whether received or not.

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(1) 7 T.C. 419.

In this state of facts the difference of contention which arose was this. The English Company alleged that it was to be taxed for the year 1917–18 on its average income from foreign possessions for the three preceding years, and that its dividends in those years from the American Company were not foreign possessions, because the American Company was then an English resident, or, in the alternative, could not be treated as income from foreign possessions because the Crown had taxed them in the hands of the American Company as profits of British trade. The Crown at first alleged that under the First Rule of the First Case of Schedule D, if this income became income from a foreign possession for the first time in 1917, it was taxable on a one year's average. They abandoned this contention before the Commissioners on the ground that there were receipts from other foreign possessions in the preceding years, 1914, 1915 and 1916, so that a three years' average could be obtained. But they substituted the contention that the income from dividends of the American Company was, in 1914, 1915 and 1916, income from foreign possessions which should be included in the average to ascertain the taxable and conventional income for 1917 as representing the income from foreign possessions arising in that year.

These opposing contentions appear to me to raise two questions for decision:—(1) Were the dividends of the American Company before 1917 "foreign possessions"; and (2) if they were, does the fact that they were paid out of sums taxed under Case I—Income Tax thereon being deducted by the American Company from the dividends —prevent their being used as elements from which to obtain an average on which to base a conventional income from foreign possessions in a later year, in which there was no levy on this income under Case I?

Probably when the language "foreign possessions" was first used, companies were hardly thought of. But in 1914, when the Finance Act was passed, companies were well known, and the language then used is "income arising from . . . .stocks, shares or rents in any place out of the United Kingdom". There may be a doubt whether the construction is "income arising in any place out of the United "Kingdom", or "income arising from shares, &c., in any place out "of the United Kingdom". The latter appears to me to be the more natural collocation of the words. The phrase "shares in a place" is curious; but can, I think, only refer to shares in a company established according to the laws of a place. The dividends in this case are found to be paid by cheque remitted from America, where the American Company, registered there, had, at any rate, one place of residence. The fact that it had another place of residence in England, from which it controlled a trade in America, does not appear to me to prevent a share in the foreign company, established by the law of the United States, from being a "foreign possession". In *Norwich Union Fire Insurance Company* v. *Magee* (1), (73 Law Times, 733), where an English fire insurance company, also trading in the United States, received income from securities held in the United States as part of its trade, Mr. Justice Wright held that this income could be

(1) 3 T.C. 457.

taxed by the Crown at its option either as income from foreign securities under Case IV, or as profits of trade under Case I, but not under both. To treat it as taxable as profits of trade in one year does not seem to me to prevent the use of it, if it is in fact income from foreign securities or possessions, as an element from which to obtain a conventional average for the purpose of taxation in another year, if in fact it is not taxed twice. If this is so, what is the position of an English shareholder receiving a dividend from a company? If nothing more is known or proved, I do not see how he could escape assessment under Schedule D. He would be receiving profits or gains as of right from property, whether situate in the United Kingdom or elsewhere. His answer would be, if the facts were so, that he had paid tax on those gains by deduction, and could not be taxed again. In the case of dividends tax-free, the shareholder would have to return to Super-tax, not the amount he actually received, but a larger amount representing the addition of a supposed tax deducted, and return it as his income, not as the profits of the company. If for some reason—say, that the Crown did not know that the foreign company was resident in England—the shareholder alone was assessed, it appears to me he would have no answer to the assessment except by proving deduction of the tax. In my opinion it would be no answer for him to say simply "I have not paid tax and shall not; your only right is to assess the "company." The Crown would reply, "You are receiving as of right "income from property, and must pay tax on it, unless you can show "you have already paid by deduction or otherwise." I do not see any answer to this. If, then, the payments to the shareholder in 1914, 1915 and 1916 were in fact income from foreign possessions, though the shareholder did not pay on them as such, because he paid Income Tax on the same amount by deduction made by a person who was assessed on them as profits of trade, it seems to me they must be brought into average in 1917 to find the conventional income from foreign possessions for that year. The second point decided in *Singer* v. *Williams* (1) was that income from foreign possessions for 1914 was to be brought into average for 1917, though in 1914, not the whole income, but only the sums received in England from foreign possessions, was taxable. It is not being taxed a second time for 1914, but being used to obtain the taxable and conventional amount of income from foreign possessions for 1917. The three years' average of sums the shareholder is entitled to receive from foreign possessions, and does receive on his dividends, gives the same result, for the sums are the same.

For the reasons stated I am of opinion that the decision of the Special Commissioners was erroneous, and was an erroneous decision in law, namely, on the question whether certain admitted facts constituted foreign possessions in the true meaning of the Statute. I do not understand the view of the Judge below that the question was one of fact.

The appeal in my view should be allowed with costs here and

(1) 7 T.C. 419.

below, and the assessments remitted to the Commissioners for re-adjustment in accordance with this judgment.

Younger, L. J.—The sole question propounded here by the Commissioners for the decision of the Court, adopting their own words, is whether the dividends received by the Respondents, the English Company, upon their holding of Common Stock in the American Thread Company—the American Company—during the years ending on the 5th April in 1915, 1916 and 1917, can under the circumstances of the case be taken into account in computing the liability of the English Company to Income Tax under Schedule D, Case V, of the Income Tax Acts for the years ending on the 5th April in 1918, 1919 and 1920. And the decision of the Court upon the problem so stated depends entirely upon the question whether in the circumstances the dividends so received by the English Company can now, for the purpose of computing their liability to assessment to Income Tax for the three later years, be treated within the language of Case V as having been income received by them from foreign possessions. The position of the Crown which claims to treat that income as income so received by the English Company is, at the outset, beset with a difficulty from the consequences of which it never, in my view, if I may so far anticipate, succeeds in escaping, viz., that the income in question was neither in fact paid to the English Company as income from foreign possessions, nor was it taxed as such. This fact is, to my mind, of vital importance in relation to the present claim of the Crown. Had the Crown in these earlier years in fact refrained from taxing, as it did, the American Company itself—an essential, although not necessarily an effective condition precedent to its taxing the income received by the English Company from its shares in that Company as income from a foreign possession—that income of the English Company would almost certainly have been greater, possibly much greater in amount: it is well nigh impossible that, in each year, it could have been the same as the dividend actually received. Again, had the income been so taxed, the tax could only have been levied upon terms which the Crown has never essayed to comply with. The demand here again might in one year or in another have involved a larger or a lesser claim for duty than the sum in fact deducted in respect of duty from the income received; but it may safely be hazarded that the claim would not have been one for the same amount. The Crown, moreover, could in any case only have substantiated the demand by renouncing any claim to Income Tax which it in fact levied and received in each of the years in question in respect of the whole profits and gains of the American Company whether distributed amongst its stockholders or not.

All these considerations are ignored in the present claim of the Crown, even in its final form. Under no adjustments of any kind, whether in favour of the American Company or the English Company in respect of any of them, the Crown seeks now to treat the gross income in a different character altogether credited to the English Company in each of the earlier years, as being income from foreign possessions. I do not stop now to inquire whether the necessary

adjustments are now possible. It suffices to say that no offer is made to submit to them, and this omission on the part of the Crown is, as I see the case, of itself fatal to its contentions on this appeal.

I pause here to observe that it is in this connection, and, as I think it is, in this connection only, that the fact is of importance that during the years 1915 to 1917 the English Company held all the Common Stock of the American Company. That fact most materially increases the extra burden which would at once fall upon the English Company, if, without any adjustment, the present contention of the Crown were to be accepted. Apart from that, it is evident that the present claim of the Crown must have been equally valid if, every other fact in the case being the same, the Common Stock in the American Company held by the English Company had in these years been a mere fraction of the total issue, and if all the rest of that issue had during the same years been held by American citizens or other persons not resident in the United Kingdom.

Nor will it escape observation that the present claim of the Crown would have been no less well founded than it is, if, during the fiscal year of 1918—the first of the later years—the English Company had finally parted with all its stock and interest in the American Company. Any difficulties in the Crown's way would have been made more obvious and its case less arresting if either or both of these conditions had in fact been realised. But the difficulties of the Crown would not thereby have been increased. Unless the claim would have been good in these conditions, it cannot be good now.

I proceed to develop these statements and to justify, if I can, the correctness of those conclusions based upon them which I have already foreshadowed. The relevant facts are in no way open to dispute. The difficulties in the case are difficulties of law only.

In the fiscal years 1915 to 1917 the American Company was, as it is still, a company incorporated and registered in the State of New Jersey. It has never been registered in this country, but in these years, as is common ground, the control of the management of the affairs of the company rested with, and was constantly exercised by, the directors resident in England. In other words, the company was in these years resident and carrying on business in the United Kingdom within the meaning of the Income Tax Acts. Certain consequences at once flowed from that position so soon as it was established, and the burden of establishing it lay upon the Crown. (*Cesena* v. *Nicholson* [1], 1 Exchequer Division, 428.)

First of all, although for most purposes a foreign company domiciled abroad (see as to this, however, the speech of Lord Parker in the *Continental Tyre* [2] case in [1916] 2 A.C., at page 340) it was placed under the Income Tax Acts in the same position as it would have held had it been registered and incorporated in England. If it was to be taxed at all, then like an English company it had to be taxed to Income

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(1) Cesena Sulphur Co. v. Nicholson, 1 T.C. 88, 102.

(2) Daimler Company, Ltd., v. Continental Tyre and Rubber Co. (Great Britain), Ltd.

Tax under Case I of Schedule D. And it was so taxed accordingly up to and including the year ending the 5th April, 1917.

"The decision in *Colquhoun* v. *Brooks* (1)," says Lord Watson in *San Paulo Railway* v. *Carter* (2) ([1896] A.C. 31, 40), "directly affirms "the rule that every interest in the profits of trade belonging to a "person who is, within the meaning of the Acts, resident in the United "Kingdom, must be charged under the First Case of Schedule D if "the trade is carried on either wholly or partially within Great Britain "or Ireland." "The business of the San Paulo Company is not a "'foreign possession,'" says Lord Davey in the same case, "within "the meaning of the Fifth Case of Section 100, Schedule D, as inter-"preted in *Colquhoun* v. *Brooks*; and that being so, the case un-"doubtedly falls within the language of the First Case, and it follows "that the Company has been rightly charged upon the whole of its "profits and gains."

The result, therefore, was that during the period in question it was not open to the Crown to tax the American Company otherwise than under Case I, nor was its business a foreign possession within the meaning of the Fifth Case. It appears also from the decision in the *San Paulo* case and from the facts as stated here that there were, during the years in question, no profits of the American Company which could alternatively have been taxed under the Fifth Case, as was suggested as possible, but only so suggested by Mr. Justice Wright in the case of the *Norwich Union Company* v. *Magee* (3) (73 Law Times, 733). And it seems to my mind to follow as a necessary consequence that the shares or stock of that company could not, at least, during the same period and while it was taxed and charged under the First Case, be, in an Income Tax sense, a foreign possession either.

Now during that period dividends upon its Common Stock were declared and paid by the American Company. On these dividends, under Section 54 of the Act of 1842, Income Tax was deducted by the American Company at its source. These dividends under that deduction were paid to the English Company and they, with the deducted Income Tax, are the dividends with reference to which the present contention of the Crown is made.

There may, prior to *Blott's* (4) case, have been some question as to the character in which these deductions of Income Tax were made by the American Company. There is now no question upon that head. "Plainly," says Lord Cave in [1921] 2 A.C., at page 201 (5), "a company paying Income Tax on its profits does not pay it as agent "for its shareholders. It pays it as a taxpayer, and if no dividend "is declared the shareholders have no direct concern in the payment. "If a dividend is declared, the company is entitled to deduct from "such dividend a proportionate part of the amount of the tax pre-"viously paid by the company, and in that case the payment by the

(1) 2 T.C. 490.
(2) San Paulo (Brazilian) Railway Co., Ltd., *v.* Carter, 3 T.C. 407.
(3) 3 T.C. 457.
(4) Commissioners of Inland Revenue *v.* Blott, 8 T.C. 101.
(5) 8 T.C. at 136.

"company operates in relief of the shareholder. But no agency, "properly so-called, is involved." The same subject is dealt with, and in terms, for present purposes more directly in point, by Mr. Justice Rowlatt in his judgment in the same case. In [1920] 1 K.B., at page 120, that learned judge says (1) :—"The dividends or drawings "of the corporators, shareholders, partners, joint tenants, and the "like, were not again taxable as a new subject matter. Corporators "or shareholders bore their share of the tax (*i.e.*, a share of the collec- "tive tax, not an individual tax) from their dividends under the express "authority of Section 54." The result so far seems to me clearly to be first, that the dividends in question were not, during the years under review, received from a foreign possession, and secondly, that they were not taxed as such. The tax deducted was the English Company's share in the year of deduction of the collective tax to which in the same year the American Company had been assessed to Income Tax.

It is now convenient shortly to indicate what would have happened in these years if the Crown, being entitled so to do—I am expressing now no opinion upon the question whether it was so entitled—had sought to assess the English Company to Income Tax upon these dividends as being part of its income from a foreign possession: First, the Crown must have levied no Income Tax upon the American Company in respect of that year. I cannot doubt that in each, or at all events in some of the years in question and of the three previous years, profits of the American Company, more or less large in amount, were either carried forward or were placed to reserve. All Income Tax in respect of these must have been forgone. Secondly, the English Company held all the American Company's Common Stock. The relief of the American Company from Income Tax in respect of undistributed profit would have released for payment to the English Company in respect of dividend additional sums, more or less large. Thirdly, the assessment to Income Tax of the English Company would in each year have been arrived at on a principle quite different from that under which the deductions were in fact made. The Company would in each year have been assessed on the average of its receipts from foreign possessions in the three preceding years, the assessment resulting, I cannot doubt, in a sum which would have held little relation to the deduction for Income Tax actually made in each year.

It is in these circumstances that the Crown now, for the first time, seeks to treat these dividends so received by the English Company as being, for the purpose of computation of current Income Tax, income from a foreign possession. In my opinion they were nothing of the sort. I do not advert to the question whether by an alternative method of procedure they could have been so treated and so assessed by the Crown. It is, for the purpose of the present case, as I see it, unnecessary to express any opinion upon that question. It is enough to say that the Crown has not attempted to adopt that alternative, attended as it would have been with many disadvantages to itself. And, speaking for myself, I have been unable to discover

(1) 8 T.C. at 111.

in the case of *Singer* v. *Williams* (1) ([1921] 1 A.C. 41), in either of its branches, any support for the present contention of the Crown. That case was concerned with the operation of Section 5 of the Finance Act, 1914. The effect of that Section as explained by Lord Cave in the case cited so far as foreign shares were concerned—these alone here concern us—was to abrogate the rule that the income from them to be taxable must be received in the United Kingdom, but was to leave untouched the statutory rules as to the method of assessing the income accruing from them ; and particularly the rule that the income from foreign shares was, as an income from foreign possessions, to be computed on a three-year average.

Now the Section became operative in the financial year current at the passing of the Act—1914. If it was to have, and the Act said it was to have, immediate effect, then as the income was still to be computed on a three years' average, the income in the current year had to be computed on the average of the preceding three years, whether received in the United Kingdom or not. Had this not been so, the Act would in this respect have effected no change in 1914, and no complete change till 1917. In *Singer* v. *Williams* (1) it was contended that this was the effect of Section 5 (*b*) of the Act. The House rejected that contention. It held that the Section did not touch averaging. Lord Cave's view was that it had been inserted to prevent a double charge of duty. If that be so, it is, I think, difficult to see how that case helps the Crown here. The income there in question had always been income from a foreign possession ; it had always been taxed as such, and on a three-year average. The increase in the income brought into account in 1914 and subsequent years for the purpose of averaging was made necessary to give effect to the change in the law made in 1914, and effective for that and the subsequent years. If the increased charge had fallen on the foreign income received in the current year there could have been no question as to the effect of the Act. Equally there was no question when the income received in the three previous years was looked at only in order to ascertain the notional foreign income of 1914 on which the additional tax was to be levied. In the present case, however, the income now in question was, as I have shown, neither received nor taxed as from a foreign possession ; and there is here no statute which either involves or requires that it shall now be treated in that way for any purposes, however limited. These dividends were, as received, in no sense dividends from a foreign possession and, *rebus sic stantibus*—it is unnecessary that I should go further—the Crown is not, I think, entitled to demand that they shall be now so regarded.

In my judgment this appeal should be dismissed.

Sir John Simon.—Then, my Lord, the appeal will be dismissed with costs ?

The Master of the Rolls.—Yes.

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(1) 7 T.C. 419.

Notice of appeal having been given against the decision in the Court of Appeal, the case was heard in the House of Lords before Viscount Cave (Lord Chancellor), and Lords Shaw of Dunfermline, Sumner, Wrenbury and Phillimore, on the 20th, 22nd and 23rd March, 1923, when judgment was reserved.

The Attorney-General (Sir Douglas Hogg, K.C., M.P.), Sir Leslie Scott, K.C., and Mr. R. P. Hills appeared as Counsel for the Appellant, and Sir John Simon, K.C., Mr. A. M. Latter, K.C., and Mr. Cyril L. King appeared for the Respondents.

On the 21st June, 1923, judgment was given against the Crown with costs (Lord Sumner dissenting), confirming the decision of the Court below.

JUDGMENT.

The Lord Chancellor (read by *Lord Shaw of Dunfermline*).—My Lords, this appeal from the Court of Appeal in England raises the question whether certain dividends received by the Respondent Company (the English Sewing Cotton Company, Limited) on stock in an American company (called the American Thread Company) in the tax years 1914–15, 1915–16 and 1916–17, can be brought into average in computing the liability of the Respondent Company to be taxed on their income from foreign possessions in respect of the succeeding tax years 1917–18, 1918–19 and 1919–20.

The Respondent Company, a company registered and carrying on business in the United Kingdom, was during the above-mentioned years the holder (by itself or its nominees) of the whole of the Common Stock of the American Thread Company. That Company was incorporated and registered in New Jersey, and its purchases and sales of cotton and thread were made in the United States or elsewhere abroad. But in the year 1903 the by-laws of the American Company were altered so as to provide that while the current business of the Company was to be carried on by an Executive Committee of Directors sitting in New York, the decisions of the Board of Directors on questions such as the purchase or leasing of any business or plant, the sale or lease of the Company's real estate, the borrowing of money, the selection of the Executive Committee, the making of agreements which were to bind the Company for more than a year, and the appointment of the principal officers, were to be dealt with exclusively by extraordinary meetings of the Board to be held in Great Britain. This change was doubtless made at the instance of the Respondent Company, as the holder of the Common Stock of the American Company, in order that all important questions of policy might be settled in England, where four of the seven directors of the American Company (who were also directors of the Respondent Company) resided, and under the eye of the Respondent

Company; and this in fact happened, the extraordinary meetings of the Board being held by permission of the Respondent Company at the Respondent Company's offices in Manchester, and being regularly attended by an assistant secretary who also resided in the United Kingdom.

Under these conditions the Commissioners of Inland Revenue assessed the American Company to Income Tax under Case I of Schedule D of the Income Tax Acts in respect of the tax years 1914–15, 1915–16 and 1916–17 (which I will call the first three years) on the whole of the annual profits and gains arising from its trade wherever carried on, the assessment being made on the ground that, having regard to the facts above recited, the American Company had become for all Income Tax purposes a person resident in the United Kingdom. The American Company appealed against this assessment to the Commissioners for the General Purposes of the Income Tax Acts for the Division of Manchester; but those Commissioners, after hearing the parties, dismissed the appeal and, at the request of the American Company, stated a Case for the opinion of the High Court. The material findings of the last-mentioned Commissioners were stated in the Case as follows: "The Commissioners have heard counsel on behalf "of the Appellant Company and the Inspector of Taxes for the Inland "Revenue, and, having taken into consideration the documents and "the evidence of witnesses adduced before them, came to the con- "clusion that the control of the management of the affairs of the "Appellant Company was intended to rest and did rest with the "directors of the Appellant Company resident in England in extra- "ordinary session who constituted a majority of the Board and who "are also directors of the English Sewing Cotton Company, Limited, "which owns the entire common stock or ordinary shares of the "Appellant Company, and further that such control was constantly "exercised at meetings of the Board of the Appellant Company in "extraordinary session held in England. The Commissioners deter- "mined that the Appellant Company is a person residing in the United "Kingdom and is liable as such to be assessed under Section 2 of the "Income Tax Act, 1853, Schedule D, paragraph 1, sub-section 1, on the "whole of the annual profits and gains arising or accruing from its "trade whether the same was carried on in the United Kingdom or "elsewhere and accordingly confirmed the assessment." The arguments on the Case so stated were heard by Mr. Justice Hamilton, who held that there was evidence on which the Commissioners could come to the above conclusion, and accordingly affirmed their decision; and appeals against this judgment, first to the Court of Appeal and then to the House of Lords, were dismissed. The case is reported (*The American Thread Company* v. *Joyce*, 1913, 6 Tax Cases, pages 1 and 163).

During the period of three years above mentioned the dividends on the Common Stock of the American Company, though apparently settled by the directors in England, were declared in the United States and were remitted by cheque from the United States to the Respondent

Company, the Income Tax levied on the American Company in England being deducted.

After, and probably by reason of, this decision, the American Company again altered its by-laws so as to put an end to its "residence" in the United Kingdom, and to transfer the whole control and management of its business to the United States. This transfer was completed shortly before the 5th of April, 1917; and, accordingly, as from the end of the tax year 1916–17, the Crown was no longer in a position to assess the American Company to Income Tax, and could only assess the Respondent Company under Case V of Schedule D in respect of its dividends on the Common Stock in the American Company, as being income from foreign possessions. In making this assessment for each of the tax years 1917–18, 1918–19 and 1919–20 (which I will call the second three years) the Commissioners of Inland Revenue claimed to bring into computation for the three years' average to be struck under Case V (in addition to the income of certain other foreign possessions, which need not be further mentioned) the dividends received by the Respondent Company on the Common Stock of the American Company during the first three years. In other words, they claimed that in assessing the Respondents to tax on their receipts from foreign possessions for the tax year 1917–18, they were entitled to take into account the dividends received in England during the first three years, plus the tax deducted from those dividends, and to strike an average accordingly; and so as to each of the two following tax years. This claim was resisted by the Respondents, who contended that the American Company having during the first three years been resident in England, the dividends on its stock were not income from foreign possessions at all, and accordingly could not be brought into the computation for the purpose of the three years' average. It is this dispute which falls to be decided upon the present appeal; and its importance to the parties may be gathered from the fact that the dividends so received amounted in the year 1914–15 to £111,600, in the year 1915–16 to £200,880, and in the year 1916–17 to £185,925 (gross before deduction of tax).

The dispute having been referred to the Commissioners for the Special Purposes of the Income Tax, those Commissioners, after hearing the parties, gave their decision in favour of the Respondents and reduced the assessments accordingly, but, on the application of the Crown, stated a Case for the opinion of the High Court. In this Case the Commissioners referred to and in effect adopted the findings in the case of the *American Thread Company* v. *Joyce* (1) (to which I have accordingly freely referred in the above statement) and stated their conclusions as follows: "We are of opinion that dividends on shares in "a company which, though incorporated in a foreign country, is resident "and carries on business in the United Kingdom, and is assessed on the "whole of its profits under Case I of Schedule D, are not income from "a foreign possession within Case V, and that the dividends declared

(1) 6 T.C. 1 and 163.

"by the American Thread Company and received by the English "Sewing Cotton Company, Limited, subject to deduction of tax, in "the years 1914–15, 1915–16 and 1916–17 when the American Thread "Company was controlled in the United Kingdom, cannot for the "purposes of Case V assessments on the English Sewing Cotton Com- "pany, Limited, for subsequent years be added to the income from "foreign possessions originally brought into the average for assess- "ment under Case V. We shall accordingly reduce the Case V assess- "ments to the average of the income from foreign possessions exclusive "of the dividends of the American Thread Company prior to 5th April, "1917, but inclusive of the dividends of that Company payable after "that date." Upon the argument of the Case Stated before Mr. Justice Sankey, that learned Judge held that the question was a question of fact for the Commissioners, and that there was ample evidence upon which they could have come to their conclusions, and held also that they had not erred in law; and he accordingly dismissed the appeal of the Commissioners of Inland Revenue. On an appeal by the Crown to the Court of Appeal, that Court, by a majority consisting of the Master of the Rolls and Lord Justice Younger, Lord Justice Scrutton dissenting, affirmed the decision of Mr. Justice Sankey. Hence the present appeal.

My Lords, I think it important to point out that there is here no question of a claim to double taxation. The Respondents' dividends for the first three years have already paid tax by deduction, and could not now be taxed again; nor does the Appellant allege that they could. His claim is, not to tax those dividends over again, but to tax the Respondents' income from foreign possessions for the second three years, and for that purpose, and for that purpose only, to take account of the dividends received in the first three years, and to compute the tax for the later years upon the average so obtained. As was pointed out in *Singer* v. *Williams* (1) ([1921]A.C. 41), the fact that the income of a previous year is not taxable, does not prevent it from being brought into computation for the purpose of assessing the tax payable in a later year, and so being treated as a measure, though not as a ground, of taxation. If the dividends for the first three years were in truth income from foreign possessions, the Crown is entitled (I think) to bring them into the computation; and, as the case presents itself to me, the real question to be determined is whether they were in fact such income.

Then, were the dividends received in the first three years income from foreign possessions, or (in other words) was the Common Stock during the first three years a foreign possession of the Respondents? This appears to me to be a question of some difficulty. On the one hand, the stock was stock in a company incorporated according to the law of New Jersey, and having its registered office there, and so American by birth and status. But, on the other hand, it was decided in *Joyce's* case(2), and must be taken to be the fact, that this American

(1) 7 T.C. 419. (2) The American Thread Company v. Joyce, 6 T.C. 1 and 163.

Company was, during the three years in question, resident in England, where (to use the language of Lord Loreburn in *De Beers Consolidated Mines* v. *Howe* (1) ([1906]A.C. 455)) the seat and directing power of the affairs of the Company were located, and its chief operations both in the United Kingdom and elsewhere were controlled, managed and directed. And the question, therefore, arises whether the locality of the shares or stock of a company is to be determined by its place of incorporation and registration or by its place of residence and trading. After some doubt, I have come to the conclusion that the latter is the true view. "Shares in a company," said Sir James Hannen in *re Ewing* ([1881] 6 P.D. at page 23), "are locally situate where the head "office is"; and I think this means that they are locally situate where the company's principal place of business is to be found. A share or a parcel of stock is an incorporeal thing, carrying the right to a share in the profits of a company; and where the company is, there the share is also, and there is the source of any dividend paid upon it. It was decided in *Joyce's* case(2) that during the first three years the American Company was here for all the purposes of Income Tax; and the Company being here I find it impossible to hold that its stock was abroad. In any case I am unable to understand how the Crown, having in 1913 successfully maintained that the American Company was then resident and trading in England, can now be heard to say that the profits of that trading when divided among the stockholders were income from foreign possessions. The fact that the dividends were declared in America and remitted by American cheque cannot, in my opinion, displace the inference to be drawn from the fact that the Company resided and traded in England. The result may be unfortunate for the Crown, which will lose duty on some part of the later dividends; but the Crown succeeded in 1913 in establishing that for Income Tax purposes the American Company was here, and must accept the consequences of its victory.

If this be the right view, then there is an end of this appeal, and it is unnecessary to deal with the further difficulty to which Lord Justice Younger referred, viz., that the dividends received by the Appellants in the first three years did not represent the full divisible income of the American Company, but only that income diminished by the tax levied upon it. It is enough to say that on the contention which is at the root of the Appellant's case, viz., that the dividends received in the first three years were income received from foreign possessions, the Appellant fails, and accordingly that, in my opinion, this appeal should be dismissed with costs.

Lord Shaw of Dunfermline.—My Lords, the position of the American Thread Company in reference to Income Tax in the United Kingdom was settled in the case of that Company v. *Joyce* (6 Tax Cases, 1 and 163). With reference to the taxing years 1914–15, 1915–16 and 1916–17 that decision, of course, clearly applies. It was to the effect

(1) 5 T.C. 198.
(2) The American Thread Company v. Joyce, 6 T.C. 1 and 163.

that this House confirmed the finding in fact that the control and management of the affairs of the Company resided with and was exercised by directors resident in England; the American Thread Company accordingly must, for the purposes of Income Tax, be regarded as resident and carrying on business in the United Kingdom, and as consequently liable to assessment on the profits of its trade under Case I of Schedule D.

The first and very simple proposition which I make on this judgment is that, re-affirming various decisions, it settles, in the case of this Thread Company, and settles in the negative, the proposition that a company necessarily resides where it is registered. And the second proposition is that residence is the true test for the purpose of enabling the officers of Revenue to determine under which category or rule in Schedule D the assessment of Income Tax is to be laid on.

In *De Beers Consolidated Mines* v. *Howe*(1), 1906 Appeal Cases, page 458, the proposition was put forward that a company resides where it is registered and nowhere else. The House of Lords declined to adopt any such view. Lord Loreburn (Lord Chancellor) observed that it was "maintained that a company resides where it is registered "and nowhere else. If that be so, the Appellant Company must "succeed, for it is registered in South Africa. I cannot adopt Mr. "Cohen's contention. In applying the construction of residence to a "company we ought, I think, to proceed as nearly as we can upon the "analogy of the individual." His observations go on to distinguish —as my noble and learned friend Lord Wrenbury in a judgment which I have had the advantage of perusing, and which is now about to be read, also distinguished—between nationality and residence.

As applied to a company, all the considerations affecting control, management, &c., of its affairs, supply the test and equivalent of residence, and that test has been definitely applied in this country to the American Thread Company. In my opinion accordingly it is settled beyond recall that during the years to which I have referred, the profits of the Company were profits assessable as profits on a trading company residing in England.

I hold, my Lords, that by its nature this involves a direct negative to the proposition that for the purpose of taxation for revenue in this country under the Income Tax Acts the Company or the shares therein can be treated as foreign possessions.

In my humble opinion the Rules under Schedule D of the Income Tax Act were rules made to apply so as to disintegrate into categories the cases of liability to taxation in the Schedule. The separate Cases mean the separate instances to which, in fact, this Schedule with its taxation will apply. According to the view which I have formed it is accordingly impossible to permit overlapping in these Cases, because overlapping is the very opposite of that disintegration which was the object of the division into Cases. Accordingly when the profits from a trading concern are taxed on the footing that it is an English trading concern then, *ex necessitate*, this involves that the taxing authority is committed to that situation, and is, for all purposes of the Income

(1) 5 T.C. 198.

Tax Acts, precluded from placing or reckoning the income so treated under any other category. That fact, accepted or decided, concerning the profits or profit of what is settled to be an English trading company, is a negation of the conception that they can for the same years, and in respect of the same profits, be reckoned as a foreign possession.

These things seem so clear that it would be unnecessary to refer to them, but for the statement in the Case that it was contended on behalf of the Crown "that the dividends received by the Respondents from "the American Thread Company upon their holding of Common "Stock in that Company were at all material times, both before and "after the transfer of the control of the American Thread Company to "America, income from a foreign possession". In my opinion, for the reason I have given, this contention is altogether unsound.

When the taxing year April 1917–1918 was reached, the American Thread Company, which as an English company under the decision referred to had, during the three preceding years, paid its dividends to the Respondents, became an American company by the shifting of the locus of its management and control. In doing so it placed the Income Tax authorities in the position that it could no longer be looked upon as an English company. A change had occurred; its English residence was lost, and it was therefore a foreign possession out of which the English Thread Company, the Respondents, drew its dividends. The case accordingly was simply one in which the facts were subsumed under Case V, the foreign possession Case, instead of under Case I, the English trading Case. Up to that date the American Company had been English, after that it was foreign; and the contention of the Crown is that in the reckoning of income from foreign possessions, the taxpayer is bound to bring into calculation for the purpose of a three years' average applicable to foreign possessions those very years with regard to which it has been judicially determined that the American Thread Company was not a foreign possession.

My Lords, there are several answers to this, one of which is obvious enough to the effect that the actual taxpayer in the three years 1914–1917 was the American Thread Company, on account of its residence. That taxpayer was enabled under the Statute to be recouped by deducting from the dividends paid to the English Sewing Cotton Company the proportionate amounts appertaining to their dividends. But after the transfer to America, the American Thread Company drops out; the actual taxpayer thenceforward is the English Sewing Cotton Company, and the English Sewing Cotton Company was not a taxpayer in those previous years. Consequently the identity of the Respondents who are to pay on their foreign possessions subsequent to 1917 is not an identity with any taxpayer who paid on foreign possessions prior to that date. For the English Sewing Cotton Company to include in their foreign possessions the shares in the American Thread Company which they owned in the three years for which the American Company, as English taxpayers have already been taxed—and to make a return which would state that during the three years 1914–1917 it, the English Thread Company, had been obtaining income from the American Thread Company as a foreign possession—this, in view of the decision

in *Joyce* (1) would have been to make a false return. The duties and obligations in regard to the three years of average which I have cited had been completely discharged by recouping the American Thread Company, as an English trading company, the tax imposed upon the profits of that concern. When that was done, and the change of residence occurred, the correct category under Schedule D had been reached, and, as I have indicated, when that has been done it appears to me to exclude all other categories.

If it did not so exclude all other categories, it would, I fear, follow that it would be logically possible, even during the three years while a taxpayer was paying under one category, to compel him also to pay taxation under another category, and that is clearly contrary to law. It appears to me to be as contrary to law in principle to compel him to go through the confusing process of treating profits which have been already defined and taxed under one category as to be taken into account for the purpose of averaging under another category. I see no justification for opening the past which has definitely fixed the Case and its nature under which the profits have been classed, or to do so either for the purpose of doubling taxation completely, or doubling taxation partially, or doubling taxation *ad interim*.

I am of opinion that the Courts below have reached the correct conclusion.

Lord Sumner.—My Lords, it seems not to be disputed that, after the control of the American Thread Company's business was removed from the United Kingdom, dividends on its Common Stock distributed to the Respondents, when assessable, fall under the Fifth Case of Schedule D. The admission involves the further result that the stock held by them is part of their foreign possessions. Apart, however, from admissions, I think this must be so. The American Thread Company has now nothing English about it except the fact, that practically all its stock is owned in England, which is not in itself of great significance in such a connection as this. Its property, its operations and its management are all in the United States. What else can its Common Stock now be to English holders except foreign possessions, unless indeed the place where the share certificates are kept is to be of moment. The quality of being foreign, in respect of a " possession ", must be relative to the taxpayer who possesses and to the time at which he is assessed. It is not requisite to say that the Company is now necessarily or actually situated in New Jersey, where it is incorporated. Within the United States its local situation may be a question of degree and doubly, therefore, a question of fact. Its situation may change from time to time, but at any rate the situation of an English holding of its stock is, for present purposes, abroad. Further, the words of the Schedule and Cases themselves invest shares with the capacity of being " foreign", that is of having locality, and that locality cannot simply be the locality of the shareholder, since he always is, *ex hypothesi*, in the United Kingdom and so is being assessed here. I

(1) The American Thread Company *v.* Joyce, 6 T.C. 1 and 163.

think that, primâ facie, the locality of the shares must be the locality of the company whose share capital is constituted by the shares into which it is divided, and that locality is abroad.

As to the duty to be charged the Statute is imperative. The duty has to be charged, at the appropriate rate of tax, upon a sum, and that sum has to be computed for the purpose of being charged. The Act says that the sum shall be "not less than the full amount of the actual "sums annually received in Great Britain". That will be the result of the computation. As to the method of it, the Act proceeds "com- "puting the same on an average of the three preceding years, as directed "in the first case", that is to say, "upon a fair and just average of "three years", ending on a day in the year immediately preceding the year of assessment, which is fixed by the customary date for making up the accounts of the trade, the profits of which are being charged. The reference from Case V to Case I seems to show that Case V was originally framed, so far as trading foreign possessions are concerned, mainly with reference to trades carried on abroad by the taxpayer who is charged at home, and not to a case like the present, where the taxpayer is not the trader, but only the holder of stock in a foreign incorporated company, trading abroad. Accordingly, the two provisos in Case I seem to be wholly inapplicable to Case V under such circumstances, and the date on which the period of three years is to end becomes an arbitrary one, unless the trade and the profits of the American Thread Company are regarded as the Respondent's trade and profits, which in law they are not. This much, however, is clear that, when the Respondents are charged under Case V, they are charged on a sum which, on the one hand, must be deemed to be the sum actually received in Great Britain in the year of charge, since the words of the Case direct the duty to be computed on a sum not less than the sum so actually received, and, on the other, will only be the same as that actually received in the year of charge, notionally or by accident, for it is the result of a computation from sums arising or received in other years. The basis of the computation appears to be that something is to be measured not by actually measuring it, but by measuring something else more or less like it; in other words, the sums arising or received in previous years are only factors in a computation, while the sum taxed, as the result of that computation, is a sum which was not taxed in previous years, since it did not then exist.

As the Respondents in the year of charge (by which I mean the first year of charge after the change in the place of management of the American Thread Company) did actually receive in Great Britain, by remittances from abroad, sums in respect of a foreign possession, namely, their holding of the Common Stock of the American Thread Company, and as those sums could be reached by the Inland Revenue in no other way than by the application of Case V, it seems to follow that the amount was rightly computed by striking an average of the dividends for the three preceding years distributed by the American Thread Company, in respect of the same foreign possessions, remitted from the same quarter, and resulting from the same distribution to its stockholders.

My Lords, I accept it as a principle, now well recognised, that the various taxing Acts with which we are concerned nowhere authorise the Crown to take Income Tax twice over in respect of the same source for the same period of time, and that this can only be done, if at all, under statutory authority. Though the Acts nowhere say so, this principle has long been assumed. Whether the contention may ever be raised that the Crown is not bound by mere conventions of fair play current from time to time, hitherto, at any rate, the binding force of this principle has not been questioned.

The Respondents' argument, as I apprehend it, is rested primarily upon this ground. It is said that, if duty in respect of the dividends for the year of charge is charged upon the Respondents on a computation of the average of their dividends in the three preceding years, the Crown will be taxing the same thing, namely, the dividends in those three years, twice over, for they were only paid to the Respondents out of profits which had already been taxed in the hands of the American Thread Company, and the Respondents in turn suffered a proportionate deduction in respect of that tax. Thus the dividends will be taxed over again, if they are brought into computation to ascertain the amount of duty to be paid in the year of charge. The argument that the Crown, having chosen to tax the profits of the American Thread Company for the three previous years, is bound by its election and must act consistently throughout, is, I think, only an additional mode of stating the same point. The case is one neither of option nor of estoppel in the true sense of the words. The Crown does not make an arbitrary election between taxing A and taxing B. It follows the Act, and having done so is not estopped thereby from doing something else which it is authorised to do. If it follows the Act again in another case when it arises it acts within the law.

The Respondents, however, urge as the only way of introducing consistency into the whole proceedings, that the dividends which they received in the three previous years were not really sums received in respect of foreign possessions, but were sums distributed to its stockholders by a company which was, "for Income Tax purposes", an English Company, and was assessed accordingly. From this they say that it follows that, even if the dividends received in the three previous years are introduced for purposes of computation only, and are not sought to be made the subject of charge in any true sense during the year of charge, still, as a "fair and just" average, or any average at all, of the three preceding years involves an average only of things which are comparable, as being identical in character, no average can be struck of dividends received in respect of a foreign possession and of dividends received from what, at any rate "for Income Tax purposes", was an English trading company. Such is the argument. The question must be whether a company, which is in fact foreign and whose stock is prima facie foreign, becomes the contrary either by reason of the language of the Income Tax Acts or by reason of the course taken on behalf of the Crown in administering them.

In substance, my Lords, the Income Tax Acts are confined to what is their proper business, namely, the provision of authority under which

specified taxation is to be raised from specified classes of taxpayers upon specified subjects of charge. For the rest, the Acts take the general law as they find it. An American company for general purposes is an American company for Income Tax purposes, but there are circumstances under which an American company can be assessed to Income Tax here. In its appeal to your Lordships' House the American Thread Company was not held to be an English company "for Income "Tax purposes". What was held was that, if it resided in England and thence directed and controlled a business here and abroad, the Income Tax Acts made it liable to be assessed for Income Tax here on the whole of its profits, wherever made. If being assessed to British Income Tax makes an income a British income, then the American Thread Company earned a British income, but it was a foreign company all the same, and, as its Common Stock did not belong to it but to the stockholders, there was no sense in which that Stock was anything but a foreign possession to those to whom it belonged. An attempt was made at the Bar to explain a foreign possession as being that kind of source of income which, being abroad, was beyond the reach of the English tax-gatherer's arm, so that he had to levy on the recipient of its fruits in England, but I think this contention fails for the simple reason that the words are "foreign possessions", not "foreign sources". It seems to me to follow that the Respondents' shares in the American Thread Company have been foreign possessions all along, and are so still, and that an average of the dividends actually received from them is a fair and just one, since they are all comparable and of the same character; that the reason why, in the earlier years, the Respondents were not chargeable in respect of them simply was, that they were annual payments arising out of the property of another person, for which such other person ought to be, and was, charged by virtue of the Act of 1842, and not because the shares were not foreign possessions of the Respondents, or because the other person, the American Thread Company, was for Income Tax or any other purposes, an English company. The Master of the Rolls says, in the course of his judgment, "I agree "that the American Company is not transformed into an English "company by the fact that circumstances have made it taxable in "England . . . ., nor are its shares changed from a foreign possession into "an English possession by such taxation". So far I concur. Where I venture to differ from him is in thinking that the Crown really is "justified in making use of them as foreign possessions" now, because such action is not inconsistent in itself nor contrary to the language of the legislation. The question for us is not whether what has been done is extortionate but whether it is illegal.

Furthermore, I think there is here no question of taxing the same thing twice over. What was taxed in the three preceding years was the profit made by the American Thread Company. That did not belong to the Respondents nor was tax paid upon it by or for the Respondents. It belonged to the American Thread Company, who paid tax on it for themselves. Apart from any peculiar provisions in their Articles of Association, the American Thread Company might or might not have paid dividends in those years, as they chose; they might or might not

have paid their dividends out of reserves, and not merely out of the profits of the year; they might or might not have deducted tax against their stockholders on the dividends paid. In fact, again subject to any special provisions in their Articles, the Respondents, by exercising their voting power in time, could have prevented any deduction being made at all, and if they themselves suffered tax by deduction, it was because they did not choose to prevent it. The Acts have regard to the economic identity of annual payments arising out of profits, which are a taxable source, to the extent of taxing the payer without requiring the payee to include them in his return, but this is under the express provisions of the legislation. Beyond that, effect must be given to the legal position, namely, that in the three preceding years the Respondents' dividends were not taxed. The words of Case V must be read accordingly, and the result is that there has not been in this case any taxing a second time. A similar answer applies to the argument that, for the three preceding years, what the Crown seeks to bring into the computation is the gross dividend, though all that the Respondents actually received was the residue after deduction of the proportionate amount of tax. The object of the computation is to arrive at a notional sum, which will be taken to be the full amount of the actual sum on which tax is to be levied for the year of charge; that is to say, the object is to get at a gross dividend, which has not yet been reduced by taxation, and so can be charged presently. Obviously the comparable sums here, for the purpose of a fair and just average, are also the gross dividends before any deduction for tax has been made.

My Lords, in arriving at a conclusion, which is the contrary of that arrived at by the Commissioners, by the learned Trial Judge, by the majority of the Court of Appeal, and above all by your Lordships, I am very sensible of my own unwisdom, but I should allow the appeal.

Lord Wrenbury.—My Lords, in the case of a foreigner found in this country, residence, not nationality, is the test of the incidence of liability to Income Tax. Bearing this in mind I find no great difficulty in forming a judgment upon this case.

For convenience I will call the financial years 1914–15, 1915–16 and 1916–17 the first three years. The American Thread Company is a company incorporated in America, which, during the first three years, so conducted its business and so controlled its affairs that, for the purposes of the Income Tax Acts, it resided in the United Kingdom and was assessable in this country to Income Tax on all its profits. This was decided in 1913 in *American Thread Company* v. *Joyce* (6 Tax Cases, 1, 163), a decision of this House. It resulted that for the first three years the American Company was liable to be assessed and it was assessed and paid Income Tax upon all its profits, and none the less because the profits were made in America. The Company was resident here and was taxable here in respect of all its profit wherever made. Lord Loreburn, in his judgment in *De Beers* v. *Howe* [1] (1906, Appeal Cases, 455–458), points out that for purposes of Income Tax the company resides where its real business is carried on, and that is where the central management and control actually abides.

[1] 5 T.C. 198.

In truth the place of registration is no more than one circumstance to be borne in mind. In result it is in many respects comparable with the nationality of a natural person. For purposes of Income Tax, nationality, if the person taxed is resident here, is irrelevant. An American citizen resident in this country is taxable upon the whole profits of his business although carried on in America. The same is true of an American corporation.

The proposition may be illustrated by the converse case of the corporation which, although registered in the United Kingdom, yet carries on its business wholly abroad. That was the case in *Egyptian Hotels Company* v. *Mitchell* (1) ([1914] 3 K.B. 118, [1915] A.C. 1022). The fact that it was registered here did not prevail over the fact that it was resident elsewhere in the sense that its whole business was carried on and controlled elsewhere. It was held that it was taxable accordingly, that is to say, in respect only of profits remitted to this country.

The English Sewing Cotton Company during the first three years held, and they subsequently continued to hold, all, or nearly all, the ordinary shares in the American Company. They were entitled to receive, and did receive, dividends in respect of them. The fund available for their payment was not the profits of the American Company, but the differential sum remaining after deduction from those profits of the Income Tax which the American Company was liable to pay and had paid. And the person to make payment to them was the American Company. The case was one within Section 52 of the Income Tax Act, 1842. The English Company as a holder of shares in the American Company was a person to whom an annual payment was made out of property of the American Company in respect of which the American Company was chargeable to Income Tax under the Act. The English Company could not, during the first three years, be assessed, and was not assessed, in respect of the dividends thus received. The American Company was the person, and the only person who could be assessed in respect of the profits of the business of the American Company. The corporator bore his share of the tax by the deduction of the appropriate share of the collective tax paid by the corporation from his dividend (*Inland Revenue* v. *Blott* (2), [1920] 1 K.B. 114, 130, 131).

Shortly before the beginning of the fourth year the control of the American Company's trade was removed to the United States. That Company ceased to be resident in this country and was no longer assessable in respect of its profits. As from the date when the American Company ceased to reside in this country the interest of the English Company in the American Company was such that the dividends they received from their shares in the American Company were profits from a foreign possession. As to this there is no dispute. The Crown, however, contends that in the fourth year the English Company was assessable under the Fifth Case of Schedule D upon the average of the first three years of the dividends they received in those years, because (it is argued) the shares of the American Company were during the first three years a "foreign possession" of the English Company. The

(1) 6 T.C. 152 and 542. (2) 8 T.C. 101.

English Company had other foreign possessions in respect of which it is not disputed that they were assessable under the Fifth Case. The Crown contends that in their statement of average income from foreign possessions they were bound to include a three years' average of the dividends received in the first three years upon the shares in the American Thread Company. The question is whether in the first three years the English Company's holding of shares in the American Company was a foreign possession.

The English Companies Acts contain provisions under which a company limited by shares is to have "a capital divided into shares". The American law, I believe, is similar. A share is, therefore, a fractional part of the capital. It confers upon the holder a certain right to a proportionate part of the assets of the corporation, whether by way of dividend or of distribution of assets in winding-up. It forms, however, a separate right of property. The capital is the property of the corporation. The share, although it is a fraction of the capital, is the property of the corporator. The aggregate of all the fractions if collected in two or three hands does not constitute the corporators the owners of the capital—that remains the property of the corporation. But, nevertheless, the share is a property in a fractional part of the capital. The Crown has argued that the share is necessarily a possession in the place where the corporation is incorporated. For the purposes of the Income Tax Acts and in a case where the foreign corporation is resident here, the proposition is, I think, unsound. For all purposes of the Income Tax Acts the company when resident here is not foreign. It is taxable by reason of residence and for that purpose and all purposes of liability to Income Tax the company and its capital and the members' interest in the capital is not foreign when the company is resident here. It is not possible that for determining the liability of the corporation to Income Tax it is here and for determining that of its members it shall be at the same moment foreign. The share is a right of property in a fraction of property of which the company resident here is the owner.

Further, during the first three years, the English Company had not a possession in any part of the profits of the American Company in America. The possession of the English Company was of shares which (if a dividend was declared) entitled them to receive from a company resident here a dividend whose source was the differential sum remaining in the hands of the company resident here after that company resident here had paid Income Tax upon all its profits. The source was not in America, but here. The English Company could not, during the first three years, have been assessed upon their shares as a foreign possession, and in the fourth year they cannot be assessed upon an average of the first three years on the footing that during that three years the shares were a foreign possession.

To ascertain whether a possession is a foreign possession or not I must look to see what is the "source of income" from which the profits of the possession arise. It is a "source of income" which the Act contemplates in all the Schedules. Section 52 of the Act of 1842 speaks of "the sources chargeable under this Act" and "the sources contained in the several schedules". A profit arising from a foreign possession—a possession out of Great Britain—must be a profit coming

from a source out of Great Britain. During the first three years the American Company received profits arising from a source out of Great Britain, and being resident here it was liable to pay, and did pay, tax upon them, although they came from such a source. But the English Company did not receive profits from a source out of Great Britain. By virtue of action taken by a person resident here (viz., by a declaration of dividend made by a corporation resident here) the English Company became entitled to receive money from the company resident here. The source, so far as the English Company was concerned, was the company resident here, and none the less if the dividends were remitted by cheque from America.

The Appellant referred to the words "shares of any foreign com-" pany", which are found in the Income Tax Acts, *e.g.*, in Section 10 of the Income Tax Act, 1853, and Section 36 of the Revenue (No. 2) Act, 1861, and sought to use them as an indication that a share in a company incorporated abroad is necessarily a foreign possession. My Lords, the Acts contain no definition in that sense, and the words, I think, indicate nothing of the kind. If a company is foreign by incorporation and foreign by residence, no doubt shares in the company are foreign possessions (*Gramophone Company* v. *Stanley* (1) [1908] 2 K.B. 23, 89; *Singer* v. *Williams* (2), [1921] 1 A.C. 41). But for the purposes of the Income Tax Acts, having regard to the provisions which render a person resident here taxable in respect of all his foreign profits, the company ceases to be a foreign company so soon as by residence it becomes amenable to all the provisions of the Acts. It cannot be foreign for one purpose of the Acts and not for another. For this reason I am of opinion, as I said at the outset, that the whole of this case is covered by the consideration that residence, not nationality, is the test relevant to liability to Income Tax.

My Lords, in my opinion the appeal fails, and must be dismissed with costs.

Lord Phillimore.—My Lords, I have read and I agree with the opinions of the Lord Chancellor, Lord Shaw and Lord Wrenbury; but I wish to add a few words.

This case seems to depend upon the following considerations. A joint stock company is under the Income Tax Act, 1842, treated as a person and is directed to make a return of its profits or gains according to Schedule D upon a conventional figure, arrived at by taking an average of the three preceding years, and is liable to be assessed and taxed thereupon.

If the principle of its being a distinct person, distinct from its shareholders or the aggregate of its shareholders, had been carried to a logical conclusion, there would have been no reason why each shareholder should not, in his turn, have to return as part of his profits or gains under Schedule D the money received by him in dividends.

Their taxation would seem to be logical, but it would be destructive of joint stock company enterprise, so the Act of 1842 has apparently proceeded on the idea that for revenue purposes a joint stock company

(1) 5 T.C. 358. (2) 7 T.C. 419.

should be treated as a large partnership, so that the payment of Income Tax by a company would discharge the quasi-partners. The reason for their discharge may be the avoidance of double taxation, or to speak accurately, the avoidance of increased taxation. But the law is not founded upon the introduction of some equitable principle as modifying the Statute; it is founded upon the provisions of the Statute itself; and the Statute carries the analogy of a partnership further, for it contemplates a company declaring a dividend on the gross gains, and then on the face of the dividend warrant making a proportionate deduction in respect of the duty, so that the shareholder whose total income is so small that he is exempt from Income Tax or pays at a lower rate, can get the Income Tax which has been deducted on the dividend warrant returned to him.

This is the state of the law with regard to companies known as such to the legislature. But the British taxpayer may be receiving annual sums from foreign possessions and thus become liable to be assessed and taxed on a three-yearly average computed in the same way as already mentioned, according to the Fifth Case of Schedule D. And it matters not what the foreign possession is, whether it is land or goods or shares in a foreign company. The periodic sums which are so remitted to him must be entered by him in his return and are liable to assessment and taxation, not because they are dividends on shares in foreign companies, but simply because they are remittances from foreign sources.

The officers of the Crown do not know and do not care what is the character of the sources from which the money comes. It may be a company, it may be a firm, it may be the taxpayer himself trading under an alias. It may call itself a company and not be one, or be a company and not so call itself. These questions are only important if it be desired to use the machinery of the Income Tax Act, 1853, Section 10. Otherwise it is enough that the taxpayer is in receipt of income "arising from securities, stocks, shares, or rents in any place out of "the United Kingdom" (Finance Act, 1914, Section 5) or "sums "annually received from foreign possessions" as the description in the Fifth Case under the Income Tax Act, 1842, runs.

But if the company removes to Great Britain and acquires what I may call a taxable seat here, it becomes taxable as a company to which Section 40 of the Income Tax Act, 1842, applies; and, as in ordinary cases of a taxed company, the shareholder is taken to have paid the tax upon his dividends through the company and is not assessed or taxed upon them. This fact is conceded, if the reason be disputed.

If the company again remove itself abroad so that it ceases to pay Income Tax as a company, the shareholder has as before to pay the tax upon the dividends which he receives as upon sums received from foreign possessions, because there is no longer a company that has paid Income Tax for him.

To make the point simple, let it be supposed (though it was not so in the present case) that the taxpayer had no other source of revenue which could be brought under Schedule D. Then during the years in which the company has a taxable seat in Great Britain the shareholder

if served with a notice under Schedule D would make a "nil" return; and he would continue to make a "nil" return till he had received a dividend from the company remitted to him after the company had removed its taxable seat from Great Britain.

It seems to be suggested for the Crown that a company may be a foreign company in suspense and the dividends declared by it may be treated as sums received from foreign possessions held in suspense, so that when the company goes back abroad the right to treat it as having been all along a foreign company and its dividends all along as sums received from foreign possessions revives. I doubt if this idea would ever have been entertained if the company had been originally English and there had been no question of its going back to a foreign country.

Be this as it may, I find no warrant in law for such a conception. A company either comes under Section 40 of the Act of 1842, or it does not. If it does not, it is not taxable; but in that event those who receive dividends from it will be taxable in respect of their dividends. If it does come under Section 40, its shareholders are not taxable for their dividends. This is so, not because of any implied rule of law against double taxation, a rule for which it would be difficult to find support in the books, but because dividends on shares in a taxed company do not come under Schedule D.

It is sought, nevertheless, to bring these dividends under the head of "sums received from foreign possessions" though only for the limited purpose of making an average in subsequent years. If they were such sums, they were taxable at the time. Nothing happened in the year 1917 to change the character of a dividend received in 1914. If in 1917 it was a sum received from a foreign possession, so it was in 1914. If it was such a sum in 1914, it ought to have been taxed then and there.

But everyone agrees that this would have been absurd.

Wherefore I would dismiss this appeal.

Questions put:

That the Order appealed from be reversed.

The Not Contents have it.

That the Order appealed from be affirmed and this Appeal dismissed with costs.

The Contents have it.