HIGH COURT OF JUSTICE—5TH, 6TH, 9TH, 10TH AND 20TH JULY, 1951

COURT OF APPEAL—23RD, 24TH, 25TH, 28TH, 29TH AND 30TH JANUARY AND 22ND FEBRUARY, 1952

HOUSE OF LORDS—5TH, 9TH, 10TH, 11TH AND 12TH FEBRUARY AND 9TH MARCH, 1953

(1) Union Corporation, Ltd.

v.

Commissioners of Inland Revenue

(2) Johannesburg Consolidated Investment Co., Ltd.

v.

Commissioners of Inland Revenue

(3) Trinidad Leaseholds, Ltd.

v.

Commissioners of Inland Revenue[1]

Profits Tax—Companies registered or operating abroad but also resident in the United Kingdom—Whether "ordinarily resident outside the United Kingdom"—Finance Act, 1947 (10 & 11 *Geo.* VI, *c.* 35), *Section* 39 (1).

The Appellant Companies in the first two cases were incorporated, and had their registered offices, in South Africa. In each case the Company's activities were carried on partly in South Africa and partly in London; a majority of each Company's staff and a number of directors holding powers of attorney empowering them, in wide terms, to manage and conduct the Company's business in South Africa, resided in South Africa. The supremacy in matters of policy was vested in the board of directors, which sat in London.

In the third case the Company was incorporated in England and carried on extensive business operations in Trinidad (through a manager there). All the directors resided in England and all formal board meetings took place there. The executive directors and other officials, however, paid frequent visits to Trinidad during which important decisions were taken by those directors.

(1) Reported 95 S.J. 484; [1951] 2 T.L.R. 582; 96 S.J. 150; [1952] 1 T.L.R. 651; [1952] 1 All E.R. 646; 97 S.J. 206; [1953] 2 W.L.R. 615; [1953] 1 All E.R. 729.

On appeal against certain assessments to Profits Tax, while the Companies all admitted that they were ordinarily resident in the United Kingdom and subject to the tax, they all contended that they were also "ordinarily resident outside the United Kingdom" and that accordingly under Section 39 (1), *Finance Act,* 1947, *their profits were not subject to the higher rate of tax. It was contended on behalf of the Crown that the expression in Section* 39 (1) *"ordinarily resident outside the United Kingdom" means "not ordinarily resident in the United Kingdom"; alternatively, that a trading company can be resident only where its central management and control abides, that it cannot be resident in two places unless its central management and control is divided and that since in each case central management and control was exercised in London each Company was not "ordinarily resident outside the United Kingdom".*

The Special Commissioners held that if ordinary residence outside the United Kingdom, concurrent with ordinary residence in the United Kingdom, were established it would entitle the Company to the benefit of Section 39 (1), *but that, on the facts, each Company was ordinarily resident only in the United Kingdom.*

Held, *that the words "ordinarily resident outside the United Kingdom" in Section* 39 (1) *mean "not ordinarily resident in the United Kingdom", and that therefore the Companies were not entitled to the relief in the rate of tax afforded by Section* 39 (1).

(*In view of their decision on this question the House of Lords found it unnecessary to consider the further decision in the Court of Appeal that all three Companies were ordinarily resident outside the United Kingdom, as well as ordinarily resident in the United Kingdom.*)

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(1) *Union Corporation, Ltd.* v. *Commissioners of Inland Revenue*

CASE

Stated under the Finance Act, 1937, Section 24 (2) and Fifth Schedule, Part II, Paragraph 4, 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 High Court of Justice.

1. At meetings of the Commissioners for the Special Purposes of the Income Tax Acts held on 23rd and 24th February, 1950, Union Corporation, Ltd., hereinafter called "the Corporation", appealed against assessments to the Profits Tax made on the Corporation for the two chargeable accounting periods of twelve months ended respectively 31st December, 1947, and 31st December, 1948.

2. The said assessments were made in estimated amounts, the profits being charged as to part at 25 per cent. and part at 10 per cent., representing the rates applicable for the two periods in question to profits so far as distributed, and to undistributed profits respectively. The figures of the assessments are as follows:—

Accounting period	*Amount of profits assessed*	*Net amount of profits chargeable*	*Rate at which charged*	*Profits Tax payable*
	£	£	per cent.	£
1.1.47 to 31.12.47	1,000,000	890,000	25	233,500
		110,000	10	
1.1.48 to 31.12.48	1,000,000	900,000	25	235,000
		100,000	10	

3. The Corporation is a company incorporated under the laws of the Union of South Africa, having been incorporated on 29th December, 1897, in the former South African Republic (now the Transvaal Province), under the name of "A. Goerz & Co., Ltd." for the purpose of acquiring the business and interests in various mining and other companies and properties in South Africa of A. Georz & Co. The name of the Corporation was changed to Union Corporation, Ltd., on 21st September, 1918.

4. It is admitted for the Corporation that it is within the charge of the Profits Tax by reference to Section 19 (2) of the Finance Act, 1937, as amended by Section 31 (1) of the Finance Act, 1947.

The said Section 19 (2) is as follows:

> "Subject as hereafter provided, the trades and businesses to which this section applies are all trades or businesses of any description carried on in the United Kingdom, or carried on, whether personally or through an agent, by persons ordinarily resident in the United Kingdom."

Section 31 (1) of the Finance Act, 1947, has the effect of limiting the charge to trades or businesses carried on by bodies corporate or bodies unincorporate, so far as they are not partnerships or executors.

5. It is contended for the Corporation that, while ordinarily resident in the United Kingdom, it is also—on the facts, and for the reasons, hereinafter appearing—"ordinarily resident outside the United Kingdom" in terms of Section 39 (1) of the Finance Act, 1947, and that consequently any Profits Tax payable by it must be computed exclusively at the lower rate applicable to undistributed profits. Such lower rate for the two years under appeal is 10 per cent., as shown in paragraph 2 above.

The terms of Section 39 (1) and (2) of the Finance Act, 1947, are as follows—

> "39.—(1) Where the person carrying on a trade or business is ordinarily resident outside the United Kingdom throughout a chargeable accounting period, the profits tax payable by that person shall be ascertained as if no net relevant distributions to proprietors had been made in the case of that person for that period.
>
> (2) Where a trade or business is carried on by a body corporate and, throughout a chargeable accounting period, both the following conditions are fulfilled, that is to say—
>
> (*a*) that that body corporate is ordinarily resident in the United Kingdom; and
>
> (*b*) that another body corporate which is not ordinarily resident in the United Kingdom controls, directly or indirectly, not less than one half of the voting power in the first-mentioned body corporate,
>
> distributions to that other body corporate shall be left out of account in determining, in relation to the first-mentioned body corporate, the net relevant distributions to proprietors for that period."

Sub-section (3) of the Section, in making provision for a matter not arising in the present appeal, refers to the case where a person's franked investment income includes

> "income received from a body corporate ordinarily resident outside the United Kingdom to which subsection (1) or subsection (2) of this section applies."

6. The sole issue for our determination was whether the Corporation, while ordinarily resident in the United Kingdom, is also ordinarily resident outside the United Kingdom, that is to say, in South Africa, since there is no suggestion that it could be resident or ordinarily resident in any country other than England or South Africa or both.

7. In 1904, when, as indicated in paragraph 3 above, the Corporation was known as "A. Goerz & Co., Ltd.", the question arose of its residence for Income Tax purposes. The Corporation was held in *Goerz* v. *Bell*, [1904] 2 K.B. 136, to be resident in the United Kingdom, Channell, J., remarking, at page 146, that

> "it is possible—though I do not decide the question one way or the other—that the company may have two residences."

8. The objects for which the Corporation was formed were to adopt and carry into effect an agreement, dated 7th December, 1897, between A. Goerz & Co., the Deutsche Bank and Henry Charles Hull (acting as trustee for the Corporation), and to carry on the business of a merchant, dealer in shares, stocks and other securities, financial and general agent, miner and mining in all branches and generally to carry on and undertake any business, transaction or operation commonly carried on by capitalists, promoters, financiers, contractors for public and other works, or agents; and the other objects set out in the Corporation's memorandum of association.

9. On 21st July, 1917, new articles of association were adopted by the Corporation under the procedure of the Companies Act, 1909 (Transvaal), and these are the articles now in force. A copy of the Corporation's memorandum and articles of association, including special resolutions in force, is attached, marked "A", and forms part of this Case.(1)

10. Clause 2 of the memorandum of association provides:

> "The Registered Office of the Company shall be situate at Johannesburg in the Transvaal".

This provision is in accordance with the requirements of South African law. Section 57 of the Companies Act, 1926 (South Africa) provides:

> "Every company shall have a registered office in the Union to which all communications and notices may be addressed, and at which all process may be served."

Section 25 provides for the keeping at the registered office of a register of the company's members.

11. Articles 68 to 93 of the Corporation's articles of association deal with general meetings, and with proceedings thereat. Article 68, in conformity with Section 59 of the aforesaid Companies Act, 1926, provides for general meetings once at least in every year

> "at such time and place as may be prescribed by the Company in General Meeting, or, if no time or place is so prescribed, at such time and place as may be determined by the Directors."

Article 74 indicates the business to be transacted at an ordinary meeting. Article 76 provides:

> "The Chairman of the Directors shall be entitled to take the chair at every General Meeting; or if there be no Chairman . . . the Directors present or in default the Members present shall choose another Director as Chairman; and if no Director be present, or if all the Directors present decline to take the chair, then the Members personally present shall choose one of their own number to be Chairman."

12. Articles 94 to 116 deal with directors, alternate directors and managing directors. Article 94 provides:

> "Unless otherwise determined by a General Meeting, the number of the Directors shall not be less than three nor more than nine, and they may reside in South Africa, Europe or elsewhere."

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(1) Not included in the present print.

Article 96 provides for a director's resignation on notice in writing to the Company "at its Registered Office or London Office" and article 105 for the eligiblity for election of a person, not being a retiring director on notice in writing of his candidature "left at the Registered Office or London Office."

Article 110 provides that each director may appoint "a person to act as alternate Director in his place", and:

> "Such alternate Director shall be entitled to act at all Meetings and in all proceedings in which and on all occasions when the Director who appointed him shall not act himself . . ."

Under article 111

> "Every person acting as an alternate Director shall be an officer of the Company, and shall alone be responsible to the Company for his own acts and defaults, and he shall not be deemed to be the agent of or for the Director appointing him."

Articles 113 to 116 provide for the appointment, remuneration, powers and duties of one or more managing directors.

13. Articles 117 to 125 deal with proceedings of directors. Under article 117

> "The Directors may meet together for the dispatch of business at such place as they shall by resolution appoint, may adjourn and otherwise regulate their Meetings as they think fit, and may determine the quorum necessary for the transaction of business, and until otherwise determined two shall be a quorum."

Under article 122

> "The Directors may from time to time appoint Committees consisting of one or more members of their body as they think fit, and may delegate any of their powers to such Committees and from time to time revoke the same and discharge any such Committee wholly or in part."

14. Articles 126 and 127 deal with powers of directors, and articles 128 to 132 with local and foreign management. Under article 128

> "The Directors may from time to time provide for the management and transaction of the affairs of this Company in this Province or in any foreign country in such manner as they think fit."

Under article 129 the directors

> "may establish any Local Board or Agency or Committee (in these presents collectively referred to as 'Local Committee') for managing any of the affairs of the Company, or may appoint any persons or firms to be members of such Local Committee, and may fix their remuneration"

—provision being made for the delegation of powers, etc., vested in the directors. Under article 130 each local committee-man is given power to appoint an alternate committee-man. Article 131 deals with the appointment of attorneys of the Company and is as follows:—

> "The Directors may at any time and from time to time by Power of Attorney appoint any person or persons to be the attorney or attorneys of the Company for such purposes and with such powers, authorities and discretions (not exceeding those vested in or exerciseable by the Directors under these presents) and for such period and subject to such conditions as the Directors may from time to time think fit, and any such appointment may (if the Directors think fit) be made in favour of the members or any of the members of any Local Committee established as aforesaid, or in favour of any company, or of the members, directors, nominees, or managers of any company or firm, or otherwise in favour of any fluctuating body of persons, whether nominated directly or indirectly by the Directors, and any such Power of Attorney may contain such provisions for the protection or convenience of persons dealing with such attorneys as the Directors may think fit."

Under article 132

"Any such delegates or attorneys as aforesaid may be authorised by the Directors to sub-delegate all or any of the powers, authorities and discretions for the time being vested in them."

15. Articles 134 and 135 deal respectively with a register of members, to be kept "at the office of the Company", and with branch registers of members.

Article 136 provides for a common seal:

"The Common Seal of the Company shall not be affixed to any instrument except by the authority of a Resolution of the Board of Directors or of a Committee of Directors, and in the presence of a Director and of the Secretary or such other person as the Directors may appoint for that purpose, and two Directors and the Secretary or such other person as aforesaid shall sign every instrument to which the Seal of the Company is so affixed. Every instrument to which the Seal of the Company is so affixed and which is so signed shall be binding on the Company."

16. Article 151 provides:

"The Directors shall cause true accounts to be kept of the sums of money received and expended by the Company, and the matters in respect of which such receipt and expenditure takes place, and of the assets, credits and liabilities of the Company. Such of the books of account as shall be in South Africa shall be kept at the Office of the Company, or at such place or places as the Board may think fit. All other books of account shall be kept at such offices and places, either in South Africa, Europe or elsewhere, as the Board may from time to time determine."

17. On 17th November, 1948, the Corporation's nominal capital was increased to £1,250,000, divided into 2,000,000 shares of 12*s*. 6*d*. each; and at 31st December, 1948, the amount of issued capital was £1,017,500, in 1,628,000 shares. The aforesaid increase (and the previous increase) were made under the procedure of the Companies Acts of South Africa, and notices of the increases of capital were given to the Registrar of Companies, Pretoria. The Corporation's issued capital is now £1,162,500 in 1,860,000 shares, a further 232,000 shares of 12*s*. 6*d*. each having been issued on 13th May, 1949.

18. The directors of the Corporation are the Rt. Hon. Brendan Bracken (chairman), P. M. Anderson (deputy chairman and managing director), C. B. Anderson, A. Chester Beatty, Eric Fraenkel, Sir Charles Hambro, K.B.E., M.C., the Rt. Hon. Lord Harlech, K.G., P.C., G.C.M.G., the Rt. Hon. Lord Leathers, P.C., C.H., LL.D., Cyrus T. Pott, T. P. Stratten, and Clive E. Temperley, O.B.E., M.C.

19. There are three alternate directors appointed under article 110 (paragraph 12 above), namely, A. Chester Beatty, Junr., M. W. Richards and J. S. Walker.

20. The directors who reside in the United Kingdom are the Rt. Hon. Brendan Bracken, A. Chester Beatty, Eric Fraenkel, Sir Charles Hambro, Lord Harlech, Lord Leathers, C. T. Pott and C. E. Temperley. The directors who reside in South Africa are P. M. Anderson, C. B. Anderson and T. P. Stratten. One of the alternate directors resides in the United Kingdom, namely, A. Chester Beatty, Junr., and the remaining alternate directors, namely, M. W. Richards and J. S. Walker, reside in South Africa.

21. Changes among the directors have to be notified to the Registrar of Companies, Pretoria, in pursuance of Section 70 (4) of the Companies Act, 1926 (South Africa), as amended, and to the Registrar of Companies, London, pursuant to Section 409 of the Companies Act, 1948.

22. The registered office of the Corporation is Union Corporation Building, 74–78, Marshall Street, Johannesburg, which the Corporation rents from one of its wholly-owned subsidiary companies. The Corporation has a London Office at 95, Gresham Street, London, E.C.2.

23. The secretary of the Corporation is resident in Johannesburg, and performs his duties at the Corporation's registered office. In London there is another secretary, who is described as " the London secretary " ; but they are not joint secretaries. The secretary and the London secretary maintain close contact by correspondence.

24. Under the powers of article 122 (paragraph 13 above) the directors passed a resolution on 16th October, 1946, appointing an executive committee to conduct the day to day business of the Corporation in London. The minute of the Resolution is as follows:—

> " Mr. P. M. Anderson submitted proposals for the day to day management of the Corporation's business in London and, after discussion, it was Resolved:—
>
> 1. That an Executive Committee be and is hereby appointed to conduct the day to day business of the Corporation in London, such Committee to consist of such Directors, Managers and other officials of the Corporation as the Board of Directors may from time to time appoint for that purpose, the first members to be the Attorneys hereinafter appointed in the General Power of Attorney, and the Rt. Hon. Brendan Bracken, M.P., to act as Chairman of the Committee.
>
> 2. That the Rt. Hon. Brendan Bracken, M.P., and Mr. P. M. Anderson, each acting alone, be nominated as Attorney or Attorneys of the Corporation, to do, execute or perform all or any of the acts specified in the Special Power of Attorney, a draft of which was submitted and initialled by the Deputy Chairman.
>
> 3. That the Rt. Hon. Brendan Bracken, M.P., and Mr. P. M. Anderson, each acting alone, or alternatively Mr. C. E. Temperley acting alone, or alternatively Mr. E. Fraenkel acting alone, or alternatively Mr. S. T. Amner, Mr. C. D. Pott, Mr. A. V. Conrad and Mr. W. Randerson, or any two of them acting jointly, be nominated as Attorney or Attorneys of the Corporation to do, execute and perform all or any of the acts specified in the General Power of Attorney, a draft of which was submitted and initialled by the Deputy Chairman."

The Executive Committee so appointed does not operate to any great extent as such committee, because its members hold individual powers of attorney (paragraphs 26 and 27 below) and commonly act as attorneys.

25. The following is a copy of a minute of a resolution relating to the conduct of business in South Africa passed by the directors at a meeting of the board held in London on 19th December, 1945:

> " A letter was submitted from Mr. P. M. Anderson requesting the authorisation of two new Powers of Attorney in substitution for those executed on 10th September, 1943, owing to changes in personnel in Johannesburg. The proposal was approved and it was resolved that any two Directors be appointed a Committee to prepare in consultation with our Solicitors and deal with the necessary Powers of Attorney of the Corporation in Johannesburg as follows: Mr. Peter Maltitz Anderson to have the right to sign alone (as at present) or Messrs. Colin Bruce Anderson, Mervyn Whitmore Richards, Thomas Price Stratten or John Strand Walker, or any two of them, to sign jointly, or any one of the above C. B. Anderson, M. W. Richards, T. P. Stratten and J. S. Walker to sign jointly with either Edward James Read or Arnold Tracy Milne.
>
> It was further Resolved that such Committee be authorised to sign and seal the documents, when completed, in the presence of a Notary."

26. Copies of powers of attorney granted by the Corporation in pursuance of the above resolution are annexed and form part of this Case(1), those marked "B" and "C" relating to South Africa, and those marked "D" and "E" to London. These powers of attorney are in very wide terms.

27. The following is a copy of a letter addressed by the Chairman, the Rt. Hon. Brendan Bracken, to all the Attorneys other than himself and Mr. P. M. Anderson:—

"Princes House,
95, Gresham Street,
London, E.C.2.

30th October, 1946.

Messrs. C. E. Temperley, E. Fraenkel, S. Amner,
C. D. Pott, A. V. Conrad and W. Randerson,
Princes House,
95, Gresham Street, E.C.2.

DEAR SIRS,

The General Power of Attorney executed by the Board of the Corporation on 28th October, 1946, appoints you, acting alone or jointly as the case may be, to be Attorney or Attorneys of the Corporation to do, execute and perform a wide variety of acts, matters and things as therein specified.

In view of the very wide powers and authorities which are contained in the Power of Attorney, the Board desires me to instruct you that you should not use your powers to enter into any commitment on behalf of the Corporation which involves the Corporation in any liability, absolute or contingent, of any great magnitude. The Board does not wish to define specifically the words "of any great magnitude" and is quite willing to leave their interpretation to your good sense, bearing in mind the usual practice of the Corporation in the conduct of its business. If any such case should arise in the absence of both Mr. Anderson and myself, you should, before signature, obtain the approval of the Board of Directors or in the case of urgency where the Board cannot be consulted then of one of the Directors of the Corporation not connected with the Management.

Moreover the Board desires that those Attorneys who are authorised by the Power of Attorney to act jointly should only act when all the Attorneys who are authorised to act alone are not available.

Will you please acknowledge receipt of these instructions.

Yours faithfully,
(Sgd.) Brendan Bracken,
Chairman."

28. The activities of the Corporation are carried on partly in South Africa and partly in London.

In Johannesburg the main activities comprise:—

(*a*) Acquiring properties or options for properties with potential mineral wealth with a view to their exploitation.

(*b*) Providing from the Corporation's own resources, with or without associates, the necessary funds to test such properties or options, and to carry their development to a stage where the public subscription of further funds is justified.

The general practice of the Corporation is to acquire an option on every property which it considers to be worth working, and as a rule, instead of continuing to hold the options in its own name, to form a new company—or nowadays to expand an existing company, originally so formed—under the management of the Corporation to work and prove the property. Such new companies are always incorporated in South Africa.

(1) Not included in the present print.

(*c*) As the next stage, where the public subscription of further funds is justified, making all arrangements necessary to be made in South Africa for the further finance of the venture by public issues of shares and debentures of companies formed to take over the properties or options, and guaranteeing such issues.

(*d*) Maintaining a service of engineers and technical consultants to advise in the acquiring of such properties or options, and to supply technical services to established companies.

These individuals include geologists, geophysicists, metallurgists, mining engineers, mechanical and electrical engineers. They are employed by the Corporation itself in South Africa, and their services are lent to the companies formed by the Corporation as above. The payment for their services is usually covered by the general management fee which the Corporation charges against the several companies. In some isolated cases the individuals are definitely seconded for service with a particular company, their salaries being then paid by that company.

(*e*) Maintaining an organization to provide secretarial and management facilities for companies associated with the Corporation, and in most cases managing those companies, and nominating directors to their boards.

(*f*) Participating in the actual management of the affairs of such companies and nominating directors to their boards.

(*g*) Dealing in shares and securities of such companies and of other companies of all kinds on the Johannesburg Stock Exchange.

(*h*) Accepting the funds of the various companies associated with the Corporation on deposit, lending such funds, and investing them in suitable securities.

(*i*) Examining and participating in ventures managed by other similar companies.

These activities are concerned with ventures situated on the African continent.

29. In London the main activities of the Corporation comprise:—

(*a*) Making arrangements for finance to be found in London for the companies referred to in paragraph 28 (*c*) above the underwriting issues, introducing shares on the Stock Exchange, London, and by offers for sale.

(*b*) Accepting money on deposit, and lending money on the London money market.

(*c*) Dealing in shares and securities on the Stock Exchange, London, and participating in the underwriting of London issues.

(*d*) Providing secretarial services and London secretaries for the companies associated with the Corporation, and in a few cases managing those companies and nominating directors to their boards.

30. The board of Directors of the Corporation sits in London, meetings being held once a month. The register of directors under Section 70 of the Companies Act, 1926 (South Africa), is kept in Johannesburg. The minute book of board meetings is kept in London, and certified transcripts are sent to Johannesburg.

31. An executive committee (paragraph 24 above) exists for conducting the day-to-day business of the Corporation in London.

32. At 31st December, 1948, the Corporation had eleven subsidiary companies, but five more such companies were incorporated in 1949, so that the Corporation now has sixteen subsidiary companies within Section 229 of the Companies Act, 1926 (South Africa). Thirteen are incorporated in South Africa, two in England, and one in Mexico. The thirteen South African subsidiaries are managed from Johannesburg, and the others from London. The Corporation also acts in secretarial and technical capacities for eleven other companies which are not subsidiaries within that section. Nine of these companies are incorporated in South Africa, and two in England. The nine South African companies are managed from Johannesburg; one of the English companies is managed from London; and the other English company is not managed by the Corporation, which merely acts as secretary.

33. All general meetings of the Corporation (paragraph 11 above) are held in Johannesburg, where the annual accounts and the directors' reports are presented to the shareholders. The minute book of general meetings is kept in Johannesburg, and certified transcripts are sent to London.

34. Accounts (paragraph 16 above) are made up and audited in Johannesburg and London, and a combined balance sheet and profit and loss account is compiled in London. The accounts are made up in South African currency, United Kingdom currency being taken at par. Two banking accounts of the Corporation are kept, one in Johannesburg and one in London.

35. The common seal of the Corporation (paragraph 15 above), which is authorised by Section 18 (3) of the Companies Act, 1926 (South Africa), is kept in Johannesburg. An official seal, which is authorised by Section 75 of that Act, is kept in London.

36. Dividends are declared by the directors in London pursuant to article 137 of the Corporation's articles of association, and are advertised simultaneously in London and Johannesburg. Dividends for shareholders resident in Kenya, Uganda and the Belgian Congo, and in all territory southwards thereof (and in Mauritius and the Seychelles Islands), are paid from Johannesburg. All other shareholders receive their dividends from London.

37. The register of members of the Corporation is kept in Johannesburg, and a duplicate is maintained in London in order to facilitate payment of dividends. The two registers are kept up to date by inter-office communications. Share transfers are registered in Johannesburg or in London according to where the instrument of transfer is lodged. The directors have appointed two share transfer committees under article 122. One committee is in Johannesburg and the other in London, and each committee considers whether instruments of transfer lodged in Johannesburg and London respectively shall be registered. Share certificates are issued in Johannesburg or in London according to where the instrument of transfer is lodged. By Section 89 of the Companies Act, 1926 (South Africa), as amended, the Corporation is bound to have a share certificate ready for delivery within two months after the instrument of transfer is lodged, unless the conditions of issue of the shares otherwise provide.

38. The staff employed by the Corporation number approximately 83 in London and 203 in Johannesburg. The service contracts between the Corporation and the staff in Johannesburg are entered into in Johannesburg.

39. A document containing a copy of the directors' report, the balance sheet and the profit and loss account for 1947, as submitted to the shareholders, together with the consulting engineer's report, is annexed, marked

" F ", and forms part of this Case(1). A copy of the similar documents for 1948 is also annexed, marked " G "(1).

40. The first page of each of these documents sets out the names of the directors and the alternate directors, of the general staff at London and Johannesburg severally, and of the engineering staff at Johannesburg. It also sets out of the names of the bankers successively in Johannesburg, London, Paris and New York, of the auditors in Johannesburg and London, and of the solicitors in Johannesburg and London, and the addresses of the offices in Johannesburg and London.

On the second page the notice convening the ordinary general meeting in Johannesburg is signed by the secretary at Johannesburg and the London secretary at London.

Pages 5 to 8 of the 1947 document show, under the heading " Gold Interests ", the operating results of various mines in South Africa owned by companies which the Corporation controls or manages. Pages 8 to 9 show, under the heading " Other Interests ", information relating to other companies in which the Corporation is interested, such companies operating in various other territories besides South Africa.

Pages 10 to 16 are occupied by a comprehensive technical report by the Corporation's consulting engineer, Mr. S. R. Brown, whose name appears first in the list of the engineering staff on the first page of the report. Page 13 gives a table of statistics of results obtained by the gold mines of the Corporation's group, which indicate the magnitude of the Corporation's operations abroad in relation to the companies which it manages. The figures include, *inter alia*, tonnage working profits and numbers of Europeans and natives employed.

41. The balance sheets and profit and loss accounts of the Corporation for 1947 and 1948 appear on the last two pages of the respective documents. The first item on the assets side of the balance sheet, " Share and Debenture Holdings, other than in Subsidiary Companies, £3,640,702 " includes holdings in all the companies in the Corporation's group, all of these being public companies. The second item " Shareholdings in Subsidiary Companies (at or under cost), £153,108 " relates to the subsidiaries mentioned in paragraph 32 above, in which the Corporation has more than a 50 per cent. interest.

42. Accounts were specially prepared for the purpose of the Corporation's appeal, allocating as far as possible the revenue and expenditure between (*a*) the Union of South Africa and (*b*) other countries (called " Non-Union ") including the United Kingdom. Copies of these accounts for 1947 and 1948 are annexed, marked " H " and " I " respectively, and form part of this Case(1).

The items of expenditure in the 1947 account show that £251,352 was spent in the Union and £115,981 elsewhere. The figure for Union salaries, £117,275, includes the remuneration of the directors resident in South Africa, who are whole-time employees. The item " Directors' Fees £18,189 ", which appears lower down in the account under the head, Non-Union, represents the remuneration paid to the London directors.

On the revenue side the " Realised profit on Shareholdings ", i.e., from purchase and sale of shares, shows £43,030 as Union and £728,902 as Non-Union, the bulk of the sales being on the London market. " Dividends and Interest Received " appear as £569,855 Union, and £277,239 Non-Union ;

(1) Not included in the present print.

interest on Government Securities, etc., as £210 Union and £48,752 Non-Union. Among "Other Income" appear "Administration Fees", i.e., fees for the management of companies, £109,260 Union and £32,575 Non-Union, and "Directors Fees" received from other companies are shown at £35,189 Union and £8,504 Non-Union. The "Total Income" figures are £671,503 Union and £1,067,949 Non-Union, £622,120 of the latter figure representing the realised profit on sales of shares less depreciation.

43. The Corporation, which for many years has been assessed to United Kingdom Income Tax in respect of the whole of its profits under Case I of Schedule D, is assessed to Income Tax in South Africa on profits made in the Union.

44. The Double Taxation Relief (Taxes on Income) (South Africa) Order, 1947, gives effect to an agreement set out in the schedule thereto. A copy of the said Order (Statutory Rules and Orders 1947, No. 315) is annexed, marked "J", and forms part of this Case(1).

On 13th January, 1947, the Corporation's Johannesburg office applied to the Commissioner of Inland Revenue in Capetown for exemption on behalf of the Corporation's shareholders from the South African non-resident shareholders' tax. In relation to the correspondence which followed (paragraph 44 below) particular reference may be made to articles II (1) (*f*) and VI (1) of the agreement set out in the Schedule to the Order. Article II (1) (*f*) is as follows:—

> "The terms 'resident of the United Kingdom' and 'resident of the Union' mean respectively any person who is resident in the United Kingdom for the purposes of United Kingdom tax and not ordinarily resident in the Union for the purposes of Union tax and any person who is ordinarily resident in the Union for the purposes of Union Tax and not resident in the United Kingdom for the purposes of United Kingdom tax; and a company shall be regarded as resident in the United Kingdom if its business is managed and controlled in the United Kingdom and as ordinarily resident in the Union if its business is managed and controlled in the Union."

Article VI (1) provides:

> "There shall be exempt from the Union non-resident shareholders' tax . . . . (*b*) any dividend paid by a company which is a resident of the United Kingdom."

45. A copy is annexed, marked "K" and forming part of this Case(1), of correspondence beginning with the Corporation's letter of 13th January, 1947, above referred to, applying for exemption from the non-resident shareholders' tax. The Commissioner of Inland Revenue, Capetown, replied on 25th February, 1947, that on the facts before him he was satisfied that the business of the Corporation was managed and controlled in the Union and that consequently dividends distributed by the Corporation would not be exempt in terms of Article VI (1) (*b*) of the agreement.

Letters followed between the Corporation's accountants in London, Messrs. Thomson McLintock & Co., and H.M. Inspector of Taxes, City 4th District. A letter of 15th August, 1947, from the accountants enclosed a letter of 13th August from the London office of the Corporation, providing a statement in answer to questions raised by the Inspector concerning the conduct of the Corporation's business. The statement is in accord with facts already set out at greater length in this Case, and with oral evidence appearing in paragraph 46 below.

On 16th September, 1947, the Inspector wrote that it was understood that the Union Commissioner of Inland Revenue was now taking "a different view in this type of case", and on 8th March, 1948, the accountants

(1) Not included in the present print.

wrote, enclosing a copy of a letter of 2nd March addressed to the Corporation's Johannesburg office by the Department of Inland Revenue, Pretoria, from which it would be noted that

> " the Commissioner has now decided to regard the Corporation as resident in the United Kingdom for the purpose of the double taxation relief arrangements and accordingly that Non-Resident Shareholders' tax will no longer be imposed on dividends of the Corporation."

46. Evidence, which we accepted, was given before us by Colonel Temperley, a full-time executive director of the Corporation in London. The witness stated that in the past the Corporation had itself done some mining and exploratory work. At present it engaged in prospecting, but not in actually winning the mineral to sell. Recently the Corporation had had no technical staff in London at all. It sent out technical experts from Johannesburg to examine suitable country, and on their reports secured options on land. When the question arose of expanding a company by further subscriptions of capital (paragraph 28 (*b*) above), it was a matter of policy which the executive directors holding powers of attorney in London and Johannesburg would decide. In the ordinary course the accomplished fact was put before the board, the principal attorneys having made up their minds on their own responsibility. If they had some business which was not usual for the Corporation—e.g., involving heavy risks not ordinarily undertaken—the opinion of the other directors would be sought, and the witness did not think it would be mentioned at the board table. The attorneys carried on the business in accordance with the policy of the Board, in the sense of the tradition and practice established by the Corporation.

In forming new companies the Corporation had in most cases retained certain rights, including the right to subscribe for any further money required by the company when it expanded. The Corporation exercised that right. A substantial holding (not amounting to 50 per cent.) was retained in such companies, which yielded the heavy dividends shown in the accounts. There were also extensive dealings, varying from time to time, in the shares of such companies and in other shares; and extensive transactions were carried out in order to keep the market steady. In Stock Exchange dealings there was a general policy liaison between London and Johannesburg, operations taking place at both centres and cables being sent from one to the other. The realisation of a policy to liquidate holdings in certain companies to a certain extent depended entirely on market conditions. The great bulk of the share operations took place in London; and the operations were, in nearly every instance, the result of a policy agreed upon by cables and letters between the executive directors in Johannesburg and London. In the witness's experience there had never been a clash which required to be resolved, but if the London and Johannesburg executive directors really could not agree, the matter would have to go to the board, who must have the last word. South African executive directors came to this country from time to time and attended board meetings.

Day-to-day business in London as in Johannesburg, was of such a nature that it could not wait for the monthly board meetings, and in both places it was transacted by the executive directors, who reported to the board, the latter only having to make a decision on something going wrong or something exceptionally difficult occurring.

Service contracts of the South African staff were entered into in South Africa, only new appointments of higher staff above a certain level of salary being referred to the board.

47. Evidence, which we accepted, was also given before us by Mr. T. Sharpe, chief accountant on the London staff of the Corporation, with regard to the Corporation's position in relation to South African taxation.

The witness explained that the Corporation was assessed every year to the Union normal tax, but no tax, as a rule, had been actually payable. For 1946-47, however, there was an assessment of £18,000, and normal tax was actually paid in 1935 and 1936, and in respect of 1945-46. It was usually the case either that there was a loss on the year for South African tax purposes or that there was a loss brought forward from the preceding year sufficient to wipe out any profit. The lowness of any profit was primarily due to the fact that, since there was no tax on dividends in South Africa, the whole of the Corporation's dividend income was excluded from South African profits for tax purposes, whereas the whole of the Corporation's expenses were allowed. The Corporation was not looked upon as resident outside the Union for the purpose of the non-resident shareholders' tax on dividend income: the relief which had been sought and granted from non-resident shareholders' tax was relief for the shareholders, who alone had suffered that tax.

When the Corporation made any profit for the purpose of the normal tax, it consisted of share-dealing profits in the Union, management fees, directors' fees, interest, construction fees and other items after deduction of expenses.

48. It was contended on behalf of the Corporation that:—

(1) in law a company can be resident and ordinarily resident in more than one country;

(2) the true test of the residence or ordinary residence of a company is where it keeps house and does business;

(3) one place where it keeps house and does business is the place where the central management and control abides;

(4) the place where the central management and control abides is, however, not necessarily the sole place where a company keeps house and does business;

(5) the volume of business done in another place may be such, taken in conjunction with registration and other factors in that place, as to constitute, as in the present instance, a second place where the company keeps house and does business, and is therefore resident and ordinarily resident;

(6) if, in such other place, the company incorporated there does no more than comply with the statutory requirements of the local company law, it is open to appeal commissioners, but not obligatory upon them, to decide that the company is not resident or ordinarily resident in that place;

(7) on the evidence in the present case the great volume of business done in South Africa by the Corporation, taken in conjunction with, *inter alia*, its registration in that country, and its control by South African law and the size of its organization there leads to the conclusion that the Corporation, in addition to being ordinarily resident in the United Kingdom, is ordinarily resident in South Africa, that is to say, is "ordinarily resident outside the United Kingdom" in terms of Section 39 (1) of the Finance Act, 1947.

49. It was contended on behalf of the Respondents that, having regard to all the authorities:—

(1) a trading company can be "resident" and "ordinarily resident" only where the central management and control abides:

(2) a company can only be resident and ordinarily resident in two places if its central management and control is divided ;

(3) the case does not present those features which would, on the authorities, justify a finding that the central control and management of the Corporation is divided ;

(4) on the facts and evidence of the present case, the central management and control of the Corporation is not divided, but is in the United Kingdom alone ;

(5) consequently, however substantial are the activities of the Corporation in South Africa, the Corporation is ordinarily resident in the United Kingdom alone, and is not "ordinarily resident outside the United Kingdom" in terms of Section 39 (1) of the Finance Act, 1947.

50. Apart from the contentions aforesaid, based on the facts of the present case in the light of the various authorities, it was also contended for the Respondents that the expression in Section 39 (1) of the Finance Act, 1947, " a person ordinarily resident outside the United Kingdom " means, in the context, a person not ordinarily resident in the United Kingdom. This contention was resisted on behalf of the Corporation.

51. Reference was made to the following cases, *inter alia :*

Calcutta Jute Mills Co., Ltd. v. *Nicholson,* 1 T.C. 83 ;
Cesena Sulphur Co., Ltd. v. *Nicholson,* 1 T.C. 88 ;
San Paulo (Brazilian) Railway Co. v. *Carter,* 3 T.C. 344 and 407 ;
Goerz v. *Bell,* [1904] 2 K.B. 136 ;
De Beers Consolidated Mines, Ltd. v. *Howe,* 5 T.C. 198 ;
Egyptian Hotels, Ltd. v. *Mitchell,* 6 T.C. 152 and 542 ;
American Thread Co. v. *Joyce,* 6 T.C. 163 ;
New Zealand Shipping Co., Ltd. v. *Thew,* 8 T.C. 208 ;
Swedish Central Railway Co., Ltd. v. *Thompson,* 9 T.C. 342 ;
Todd v. *Egyptian Delta Land & Investment Co., Ltd.,* 14 T.C. 119 ;
Koitaki Para Rubber Estates, Ltd. v. *Federal Commissioner of Taxation,* 64 C.L.R. 15.

52. We, the Commissioners who heard the appeal, having taken time to consider, gave our decision as follows:—

1. The Appellant Company is admitted to be ordinarily resident in the United Kingdom. It is contended, however, that it is also " ordinarily resident outside the United Kingdom " in terms of Section 39 (1) of the Finance Act, 1947, with the consequent benefit for purposes of the Profits Tax.

2. We are of opinion that there is nothing in the terms of Section 39 as a whole, or in the terms as to residence or ordinary residence to be found in the wide context of the taxing Acts, which can justify reading the expression " ordinarily resident outside the United Kingdom " as equivalent to " not ordinarily resident in the United Kingdom ", so as to debar the Appellant Company *in limine* from advancing the above-stated claim. The claim has therefore to be considered on the facts of the case and in the light of the numerous authorities.

3. The central control and management of the Company is in the United Kingdom. It is registered in South Africa and, as the evidence

before us amply attests, its operations in that country are of great importance and extent, both in themselves and in relation to those in the United Kingdom.

4. The Company was originally entitled " Goerz and Co." In *Goerz* v. *Bell*, [1904] 2 K.B. 136, it was held to be resident in the United Kingdom on the ground that " the head office and the directing power " were in this country (at page 150). At the same time Channell, J., remarked, in the course of his judgment (at page 146), " it is possible—though I do not decide the question one way or the other—that the company may have two residences ".

5. No case before that of the *Swedish Railway*, which was heard in 1925 (9 T.C. 342), expressly desided that a company could have two places of residence. In that case reference was made to the remark of Channell, J., in the *Goerz* case quoted above by the Master of the Rolls (at page 357), by Warrington, L.J. (at page 362), and by Lord Cave (at page 373).

6. In the line of earlier authorities beginning with the *Calcutta Jute*(1) and *Cesena*(2) cases, which were heard in 1876, and particularly in the House of Lords' judgment in 1906 in the *De Beers* case, 5 T.C. 198, great emphasis was laid on control and management as determining a company's residence, on whatever scale it might operate elsewhere. It appears to us that the weight of authority in the Courts had not envisaged that, in any case where actual control was found to be in one country, the company might be held to have a second place of residence in another.

7. We may now consider Lord Cave's judgment in the *Swedish Railway* case(3), where the company, although controlled from Sweden, was held to be resident in the United Kingdom. Reliance is placed on this case by the Appellant Company.

8. We are of opinion that the terms of Lord Cave's reference, 9 T.C., at page 374, to the *Egyptian Hotels* case(4), followed by those of his conclusion with regard to the *Swedish Railway* (at pages 375-6), make it impossible to say that, in the case of the latter, he based his judgment on a view that there was divided control.

9. Lord Cave observes that the decision in the *Egyptian Hotels* case(4) " appears to be inconsistent with any other view " than that a Company which, on the *De Beers* principle, is resident in the place where it is controlled, may yet have another residence.

" It is noticeable ",

he says at page 374,

> " that the facts, as found by the Commissioners and interpreted in the Court of Appeal and in this House, were sufficient according to the principle of the *De Beers* case to establish residence in Egypt, so that, if a company can have but one residence, namely, the place where its control and management abides, it must have been held that the company being resident in Egypt was not resident here, and accordingly was not taxable at all ; but no such suggestion was made either by counsel or by any member of the tribunals by which the decision was given and upheld. This being so, while the case does not expressly decide that a company may have two residences for Income Tax purposes, the decision appears to be inconsistent with any other view."

(1) 1 T.C. 83. (2) 1 T.C. 88. (3) 9 T.C. 342, at p. 371. (4) 6 T.C. 542.

10. In the *Swedish Railway* case(1), the Company was admitted to be controlled and managed from Sweden, but here the admission was expressly confirmed by the Special Commissioners, and yet the company was found to have another residence in England. The Commissioners stated that they were " satisfied that the real control and management " were in Sweden, but nevertheless, placing reliance on the *Egyptian Hotels* case(2), they held that the Company was a person residing in the United Kingdom. Lord Cave directs himself to the findings of the Commissioners as follows(3):—

> " In the present case it was found by the Commissioners that, while the business of the Company was controlled and managed from the head office at Stockholm, so that the Company would in the contemplation of English law have a residence in Sweden, the Company was resident in the United Kingdom for the purposes of the Income Tax Acts; and it was hardly disputed that, assuming that a company can have two residences "—

which Lord Cave had held to be the case—

> " there was sufficient material upon which that finding could be based. I am not at present prepared to say that registration in the United Kingdom would itself be sufficient proof of residence here; that point does not arise in this case, and I express no opinion upon it. But, however that may be, I am satisfied that the fact of registration together with the other circumstances which were found by the Commissioners to exist, were sufficient to enable them to arrive at their finding."

11. In the light of the passages above referred to, we think that the earlier passage on pages 372-3, where Lord Cave considers the rule laid down by Lord Loreburn in the *De Beers* case(4), can only be understood in one way.

> " The effect of this decision ",

says Lord Cave(5),

> " is that, when the central management and control of a company abides in a particular place, the company is held for the purposes of Income Tax to have a residence in that place; but it does not follow that it cannot have a residence elsewhere, ... The central management and control of a company may be divided, and it may 'keep house and do business' in more than one place; and if so, it may have more than one residence ".

It appears to us that, in the context of the whole judgment, this passage must undoubtedly be taken as recognising that, although central management and control determines one residence, there may be grounds for finding that the company has a residence in another place either (1) where the central management and control is not wholly in the said particular place, but is divided or (2) where the central management and control is undivided, but the company also " keeps house and does business " elsewhere.

12. We may perhaps note, in passing, a special feature in the *Egyptian Hotels* case, 6 T.C. 152 and 542. In that case, where residence in the United Kingdom was admitted for the purpose of Case V liability, a legal right of control in certain matters, although never in fact exercised, remained with the London directors. The remarks of Lord Parker of Waddington at the middle of page 550 suggest to us that, had that right been exercised, so as to " interfere with the Company's business in Egypt ", a case of divided control might have been established.

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(1) 9 T.C. 342. (2) 6 T.C. 542. (3) 9 T.C., at p. 375.
(4) 5 T.C. 198. (5) 9 T.C., at p. 372.

13. It is necessary, next, to consider Lord Sumner's judgment in the *Egyptian Delta* case, 14 T.C. 119, and, in the first place, his references to the *Swedish Railway* case(1), in the decision of which he had concurred. He says, at page 144:

> "Before your Lordships Sir Douglas Hogg presented the case in rather a different form, [1925] A.C. at pages 498-499, 'unless it is established that central control is the sole and exclusive test of residence . . . the finding of the Commissioners disposes of the case . . . If necessary, it is submitted a company has a residence where its registered office is, though it may also have a residence where its central control abides'. It is, I think, plain that your Lordships' House affirmed the judgment of the Court of Appeal on the first of these two grounds only, for the Lord Chancellor says at page 501: 'An individual may clearly have more than one residence . . . and in principle there appears to be no reason why a company should not be in the same position. The central management and control of a company may be divided, and it may "keep house and do business" in more than one place; and if so, it may have more than one "residence".' This was said with reference to the fact that there was evidence on which the Commissioners could act of business done in England sufficient in importance and in amount to give a residence on that ground".

We understood this passage to mean that the House of Lords affirmed the Court of Appeal on the ground that central control was not established as the sole and exclusive test of residence, so that, although the Swedish company was controlled from Sweden, the business done by it in England was sufficient on all the facts of that case to justify the Commissioners in finding that it also had a residence in England.

14. On the other hand Lord Sumner had emphasised a few lines before (at page 143) that, on the facts of the *Swedish Railway* case(1), there was little to be done in the way of control. Of the business done in England, he says that

> "in the static condition of the company's affairs it was not much less important than the Swedish part. If new questions arose, the Swedish directors could settle them, but as things were little had to be done anywhere except 'administration', as is often the case with companies, and that was fairly divided between the two countries. I would particularly draw attention to the powerful judgments of my noble and learned friend Lord Atkinson and of Lord Justice Atkin as showing how strong are the grounds for saying that since the *De Beers* case(2) the test of taxable residence for any company has been settled to be the carrying on of business here and not the bare operation of the Companies (Consolidation) Act".

15. Thus Lord Sumner makes it clear that the small scope for control in the *Swedish Railway* case was one of the facts which justified the decision that the company, although resident in Sweden, where it was controlled, was also resident in England. Control by the governing body may "often" be limited in scope and, while enough to establish one place of residence, not exclude the possibility of finding that there is another place of residence, if business "sufficient in importance and in amount" is done in another country.

The difficulty is to decide whether such cases are indicated as the only exceptions—apart from cases of "divided control"—to a general rule that a company controlled in a particular place is resident there and nowhere else.

16. It appears to us that the reason why Lord Sumner, after dealing with the facts of the *Swedish Railway* case, immediately proceeds to commend the two dissenting judgments, is that he is passing to the quite distinct issue raised by the *Egyptian Delta* case(3), corresponding to the second ground put forward by Sir Douglas Hogg in the *Swedish Railway*

(1) 9 T.C. 342. (2) 5 T.C. 198. (3) 14 T.C. 119.

case (see paragraph 13 above). He is concerned to overthrow, once and for all, the conception that registration can prevail by itself, or along with formal statutory Acts, as a test of residence. This was an old conception which had survived even after the *De Beers* case(1). In the *Swedish Railway* case(2) Warrington, L.J., was prepared to hold that it was right, and Lord Cave himself reserved judgment on the matter. In the *Egyptian Delta* case(3) the conception was expressly adopted by the lower courts. On the other hand the two dissenting judgments in the *Swedish Railway* case had forcibly rejected it.

Lord Sumner decides that, whenever the choice is between registration (together with formal statutory acts) in one country, and central management and control in another, control must—in view of all the authorities, culminating with the *De Beers* case—be conclusive as establishing the company's residence, and single residence.

17. Thus the importance of control is emphasized throughout as against registration, which (although registration is a factor to be taken into account) it completely over-rides. Nevertheless, after careful consideration, we incline to the view that Lord Sumner's judgment has a wider significance. We have noted his remarks as to the small scope for control in the *Swedish Railway* case (paragraph 14 above). With that case in his mind, he gives unqualified approval to the very strong pronouncements of earlier authorities in the sense that a company resides where its control and management is found. We find it difficult to resist the view that, had he regarded those authorities as not excluding a second place of residence in cases (unlike the *Swedish Railway* case) of active and effective control, he would have given a clear indication to that effect.

18. Moreover the dissenting judgments of Atkin, L.J., and of Lord Atkinson in the *Swedish Railway* case were emphatic in their conclusion that the weight of authority over many years had decided that control and management not only over-rode registration, but also established the residence of a company for tax purposes to the exclusion of any second residence. Here again we find it difficult to resist the view that, if Lord Sumner had differed from the wider conclusion of those " powerful judgments " in their application to cases of active and effective control, he would have made it clear that he did so.

19. From Lord Sumner's judgment(4) as a whole, and in view especially of the terms in which he refers (1) to Lord Halsbury's expression of opinion in the *American Thread* case(5) (at top of page 151)—(2) to Lord Sterndale's comment, in the *New Zealand Shipping* case(6), on the rule laid down in *De Beers* (at foot of page 151 and top of page 152)—and (3) to " the general agreement of the most valuable text-books" (pages 152-4), we think it the natural inference (although no single statement appears to be conclusive to such an effect) that as regards an active company where control is effective, his Lordship regarded the possibility of a second residence as excluded, whatever operational activities may exist in a country other than that in which the control is exercised.

20. On hearing the arguments addressed to us, we have been impressed by the difficulty of the question. But after considering all the authorities we have come to the conclusion that a company can have

(1) 5 T.C. 198. (2) 9 T.C. 342. (3) 14 T.C. 119.
(4) 14 T.C., at p. 139. (5) 6 T.C. 163. (6) 8 T.C. 208.

only one residence for tax purposes, namely, the place of its central control and management, except in any case where the facts may justify a finding that control is not centred in one country, but is divided, or in a case such as that of the Swedish Railway Company, where the control amounts to so little that the company can be said to "keep house and do business" not only in the place of control but also in another place, if business is done there "sufficient in importance and amount".

21. The facts of the Appellant Company's case do not bring it within either of these exceptions, and we therefore hold that it is not "ordinarily resident outside the United Kingdom." The appeal fails, and we leave the figures to be agreed.

53. The Appellant Corporation, immediately after the determination of the appeal, declared to us its dissatisfaction therewith as being erroneous in point of law and in due course required us to state a Case for the opinion of the High Court pursuant to the Finance Act, 1937, Section 24 (2), and Paragraph 4, Part II of the Fifth Schedule, and Income Tax Act, 1918, Section 149, which Case we have stated and do sign accordingly.

(The figures following upon our decision have not been agreed; but on the request of the Company, and with the concurrence of the Crown, we have, in order to obviate undue delay, stated the foregoing Case on the question of principle.)

54. The questions for the opinion of the Court are whether we were right in holding:—

(1) that the expression "ordinarily resident outside the United Kingdom" in Section 39 (1) of the Finance Act, 1947, is not equivalent in its context to the expression "not ordinarily resident in the United Kingdom"; but

(2) that on the facts of this case, and in the light of all the authorities, as the Corporation is admittedly "ordinarily resident" in the United Kingdom it cannot also be "ordinarily resident" in some other place outside the United Kingdom in terms of the said Section.

G. R. Hamilton,
B. Todd-Jones,
} Commissioners for the Special Purposes of the Income Tax Acts.

Turnstile House,
94-99, High Holborn,
London, W.C.1.
11th December, 1950.

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(2) *Johannesburg Consolidated Investment Co., Ltd.*

v.

Commissioners of Inland Revenue

CASE

Stated under the Finance Act, 1937, Section 24 (2) and Fifth Schedule, Part II, Paragraph 4, 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 High Court of Justice.

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 16th March, 1950, Johannesburg Consolidated Investment Co., Ltd., hereinafter called "the Company", appealed against assessments to the Profits Tax made on the Company for the two chargeable accounting periods of 12 months ended respectively 30th June, 1947, and 30th June, 1948.

2. The said assessments were made in estimated amounts, the figures being as follows:—

Accounting period	*Amount of profits assessed*	*Net amount of profits chargeable*	*Rate at which charged*	*Profits Tax payable*
	£	£ s. d.	per cent.	£ s. d.
1.7.46 to 30.6.47	336,667	(½) 168,333 10 0	5	8,416 13 6
		(½) 168,333 10 0	25	42,083 7 6
				50,500 1 0
				£
1.7.47 to 30.6.48	1,000,000	1,000,000	25	250,000
		Non distribution relief on 733,333	15	110,000
				140,000

The computation for the first period was made in accordance with the transitional provisions of Section 47 (2) of the Finance Act, 1947, which relate to a period falling partly before and partly after the end of the calendar year 1946. The rate of 5 per cent. is that which was in force prior to the Finance Act, 1947.

As regards the second period the rates of 25 per cent. and 15 per cent. represent those generally applicable to profits for the said period, and to relief on undistributed profits respectively.

3. The Company is a company incorporated under the law of the Union of South Africa, having been incorporated on 28th September, 1889, in the former South African Republic (now the Transvaal Province) under the Limited Liability Law (No. 5 of 1874).

4. It is admitted for the Company that it is within the charge of the Profits Tax by reference to Section 19 (2) of the Finance Act, 1937, as amended by Section 31 (1) of the Finance Act, 1947.

The said Section 19 (2) is as follows:

> "Subject as hereafter provided, the trades and businesses to which this section applies are all trades or businesses of any description carried on in the United Kingdom, or carried on, whether personally or through an agent, by persons ordinarily resident in the United Kingdom."

Section 31 (1) of the Finance Act, 1947, has the effect of limiting the charge to trades or businesses carried on by bodies corporate or bodies unincorporate, so far as they are not partners or executors.

5. It is contended for the Company that, while ordinarily resident in the United Kingdom, it is also—on the facts, and for the reasons, hereinafter appearing—"ordinarily resident outside the United Kingdom" in terms of Section 39 (1) of the Finance Act, 1947, and that consequently any Profits Tax payable by it must be computed exclusively at the lower rate applicable to undistributed profits.

The terms of Section 39 (1) and (2) of the Finance Act, 1947, are as follow:

> "39.—(1) Where the person carrying on a trade or business is ordinarily resident outside the United Kingdom throughout a chargeable accounting period, the profits tax payable by that person shall be ascertained as if no net relevant distributions to proprietors had been made in the case of that person for that period.

(2) Where a trade or business is carried on by a body corporate and, throughout a chargeable accounting period, both the following conditions are fulfilled, that is to say—

(*a*) that that body corporate is ordinarily resident in the United Kingdom; and

(*b*) that another body corporate which is not ordinarily resident in the United Kingdom controls, directly or indirectly, not less than one-half of the voting power in the first-mentioned body corporate,

distributions to that other body corporate shall be left out of account in determining, in relation to the first-mentioned body corporate, the net relevant distributions to proprietors for that period."

Sub-section (3) of the Section, in making provision for a matter not arising in the present appeal, refers to the case where a person's franked investment income includes

"income received from a body corporate ordinarily resident outside the United Kingdom to which subsection (1) or subsection (2) of this section applies."

6. The sole issue for our determination was whether the Company, while ordinarily resident in the United Kingdom, is also ordinarily resident outside the United Kingdom, that is to say, in South Africa.

7. By resolutions passed by the shareholders of the Company at special general meetings on 26th November and 19th December, 1935, new articles of association were adopted by the Company under the procedure of the Companies Act, 1926 (South Africa), and these are the articles now in force. The said new articles were registered by the Registrar of Companies, Pretoria, in accordance with Section 17 of the Companies Act, 1926 (South Africa).

8. A copy of the Company's memorandum and articles of association is annexed, marked "A", and forms part of this Case[1]. The objects of the Company are to acquire land, quarries, mines, mining or other claims, rights and privileges, diamonds, gold and other minerals and precious stones, in Africa or elsewhere, to acquire, undertake and manage the property and business of any company or person with objects similar to those of the Company; to acquire, hold and deal in shares, stocks and other property; to carry on any business, undertaking and transaction or operation commonly carried on or undertaken by minters, capitalists, promoters, financiers, concessionaries, contractors for public works, merchants and other businesses; and the other objects set out in the Company's memorandum of association.

9. The authorised capital of the Company during the two years ending 30th June, 1948, was £4,345,000, divided into 4,345,000 shares of £1 each, of which 3,950,000 were then, and are now, issued and fully paid up. The authorised capital is now £7,000,000.

10. Article 94 of the articles of association provides:

"The number of Directors shall be not less than eight nor more than fifteen",

and Article 95 that three of the directors, as named, shall be permanent directors. At 30th June, 1946, there were eleven directors; at 30th June, 1947, nine; and at 30th June, 1948, ten, which is also the present number.

11. By Article 125 each director has power, subject to the approval of the board, to appoint a person to act as alternate director in his place, the alternate director being entitled to act on all occasions when the director who appointed him does not act himself. There are two such alternate directors.

(1) Not included in the present print.

12. Article 113 provides:

> "The Board may meet for the despatch of business, adjourn and otherwise regulate their meetings as they think fit, and may determine the quorum necessary for the transaction of business. Until otherwise determined two Directors shall form a quorum. A Director may at any time, and the Secretary upon the request of a Director shall, convene a meeting of the Directors. All meetings of the Board shall, unless the Board otherwise directs, be held in London. A Director who is not within the United Kingdom shall not be entitled to notice of any such meeting."

Under Article 117

> "A resolution in writing signed by all the Directors who may at the time be present in the United Kingdom, being not less than are sufficient to form a quorum, shall be as valid and effectual as if it had been passed at a meeting of the Board duly called and constituted; provided that where a Director is not so present but has an Alternate who is so present, then such resolution must also be signed by such Alternate."

13. Five of the directors reside and perform their duties as directors in London, and five in South Africa. One of the alternate directors, who is one of the Company's consulting engineers, resides in England, being an alternate for an English resident director, and the other alternate director resides in South Africa, being an alternate for a South African resident director. The board of directors meets in London, and no direction to the contrary, under Article 113, was in force during the periods relating to this appeal, nor has any such direction been in force in the period since 30th June, 1948. The quorum of directors is two, no contrary determination under Article 113 having been in existence in any such period. The minute book of directors' meetings, under Section 66 of the Companies Act, 1926 (South Africa), is kept in London, and copies of minutes are sent to Johannesburg.

14. Article 103 provides:

> "The Company shall keep at the Office a register containing the names, addresses and occupations of its Directors or Managers and shall send to the Registrar of Companies a copy of such Register, and shall from time to time notify to him any change that takes place in such Directors or Managers."

15. Written notices of changes among the directors are given to the Registrar of Companies at Pretoria, in accordance with Section 70 (4) of the Companies Act, 1926 (South Africa), as amended, and to the Registrar of Companies in England in accordance with Section 409 of the Companies Act, 1948. The register of directors is kept at the Company's registered office in Johannesburg, as is required by Section 70 (3) of the Companies Act, 1926 (South Africa), as amended.

16. The registered office of the Company is at Consolidated Building, Fox Street, Johannesburg, the said premises being owned by the Company, and the Company has a London office at 6, Lothbury, E.C.2. By Section 57 of the Companies Act, 1926 (South Africa), it is obligatory that the registered office of the Company should be in the Union of South Africa.

17. The secretary of the Company performs his duties in London. There is also a secretary in South Africa, and his name is entered in the register which has to be kept by the Company pursuant to Section 70 of the Companies Act, 1926 (South Africa), as amended. The general manager of the Company's business resides in South Africa. His responsibility extends to the Company's South African affairs only, and for this reason he is described in the directors' reports and in other documents as "general manager in South Africa." The general manager is also a director. There are two consulting engineers of the Company, one of whom resides in Johannesburg and the other in London.

18. Articles 128–130 relate to the South African Committee, and are in the following terms:

"South African Committee.

128. Without prejudice to the general powers conferred by these presents, it is hereby expressly declared that the Directors shall be entrusted with the power to appoint and at their discretion to remove or suspend a South African or other Local Committee, to fix and vary their remuneration, and also to keep the Register of the Company in Johannesburg or elsewhere and to close the same at discretion, and to appoint and remove agents to represent the Company for the issue, sub-division and transmission of shares subject to the provision of these presents, and for such other purposes as the Directors may (subject to these Articles) determine: and to give the members of any such Committee or any such Agents the power to appoint alternate Committee-men or substituted agents and such alternates and substitutes to remove, others to appoint, or themselves again to act, as also to grant to such Committee-men or agents power to appoint other persons as co-Committee-men or joint agents. Any Director may act on the Local Committee whenever in South Africa and may take part in the proceedings of such Committee and have the same rights and privileges as any member of the Committee permanently resident in South Africa.

129. The Board may at any time and from time to time by Power of Attorney appoint any person or persons to be the Attorney or Attorneys of the Company for such purposes and with such powers, authorities, and discretions (not exceeding those vested in or exercisable by the Board under these presents) and for such period and subject to such conditions as the Board may from time to time think fit, and any such appointment may if the Board think fit be made in favour of the Members, or any of the members of any Local Committee established as aforesaid, or in favour of any company, or of the members, directors, nominees or managers of any company or firm, or otherwise in favour of any fluctuating body of persons, whether nominated directly or indirectly by the Board, and any such Power of Attorney may contain such provisions for the protection or convenience of persons dealing with such Attorneys as the Board may think fit.

130. Any such delegates or Attorneys as aforesaid may be authorised by the Board to sub-delegate all or any of the powers, authorities and discretions for the time being vested in them."

19. Pursuant to Article 128 the directors have appointed a committee of directors for managing the affairs of the Company in South Africa. Under Article 129 the Company gave to the South African committee a power of attorney empowering the committee in wide terms to manage and conduct the business and affairs of the Company in South Africa. The committee consists of the directors, or their alternate directors, who are permanently resident in South Africa and any other director of the Company who may for the time being be in South Africa.

20. A copy of the aforesaid power of attorney, dated 9th January, 1936, is annexed, marked "B", and forms part of this Case[1]. In 1938, a supplementary power of attorney was granted in favour of the committee, with authority to appoint alternate committee-men; but no point arises on this document, and no copy thereof is annexed.

21. The said power of attorney was sent to South Africa with a letter of the same date, 9th January, 1936, containing the board's instructions as to the manner in which the power was to be exercised. The letter was in the following terms:—

"9th January, 1936.

Dear Sirs,

The Power of Attorney to the South African Committee in the form prepared by Messrs. Webber Wentzel Solomon & Friel has been sealed by the Board here and is sent herewith.

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[1] Not included in the present print.

The Board, while recognising that in certain respects this document confers very wide powers and discretions on the South African Committee, have not altered the form of the document as drafted, preferring, as between the Board and the Committee, to limit the exercise of those powers by the instructions herein contained rather than impose limitations which might in practice hamper the Committee in dealing with third parties.

I am to refer in particular to Clauses 3, 9, 10, 11 and 13 of the Deed, and to ask you to accept this as your instructions that before exercising any of the powers conferred by those Clauses with reference to sales or dealings in shares belonging to the Company, the making and realisation of investments and other securities, the acquisition or sale of stands or mining rights or leases or the pledging of the Company's credit in any way, the Committee should refer wherever possible to the Board here and take their instructions on any transaction proposed, and generally to do so before entering into any important engagement. The Board feel no doubt that this course would in any case be adopted, as following the practice so long carried out by the Johannesburg Board; but have thought it right to put the position which they expect the Committee to occupy beyond doubt, having regard to the alteration of the Management by the adoption of the new Regulations and the wide discretion given by the Power of Attorney.

The above limitations do not, of course, apply to the sale of stands on the Company's Estates which are being developed for building purposes nor to the granting of loans on Mortgage in connection with such sales or varying the terms of such loans where necessary.

Finally, in connection with the power conferred by Clause 8 of issuing share warrants to bearer, the practice which has obtained hitherto that all share warrants are issued from the London Office only is to be adhered to, and applications received by the Committee for the issue of such warrants will be forwarded to London. Consequently, unless and until the Board otherwise direct, no share warrants will be issued on your side.

I should be glad if you would acknowledge this letter of instructions so that there is a record on this side of the position.

Yours faithfully,
J. B. Joel,
Chairman.

To the Members of the South African Committee of the Johannesburg Consolidated Investment Co., Ltd."

22. The activities of the Company fall into two categories, namely, those carried on in Johannesburg and those carried on in London. In Johannesburg the main activities are:—

(*a*) acquiring properties or options for properties with potential mineral wealth with a view to their exploitation;

(*b*) providing from the Company's own resources with or without associates the necessary funds to test such properties or options and to carry their development to a stage where the public subscription of further funds is in the Company's opinion justified;

(*c*) at this stage making all necessary arrangements required in South Africa for the further finance of the venture by public issues of securities of companies formed to take over the properties or options and guaranteeing such issues;

(*d*) dealing in shares and securities of such companies and of other companies of all kinds on the Johannesburg Stock Exchange;

(*e*) the management of five gold-mining companies (producers), the management of one gold-mining company (exploratory), and the management of two gold-mining companies (developing); a management fee is taken in each case, as also in (*f*) and (*g*) following;

(*f*) the management of the liquidation of two gold-mining companies. (This has already taken four years);

(*g*) the management of four coal and four other mineral companies and one technical engineering company ;

(*h*) the buying of stores and materials for the development of the businesses of these seventeen companies, and the financing of capital expenditure by them ; a commission is charged on the purchases ;

(*i*) the maintenance of a staff of inspectors for the purposes of a system of internal audit for seventeen of the companies ;

(*j*) the maintenance of departments of geology, metallurgy, survey, mechanical engineering, electrical engineering, drawing and law for the purposes of conducting investigations into new projects, the designing of plant and the acquiring of new areas for prospecting and development ;

(*k*) the provision of secretarial and accountancy services for the Company in Johannesburg and for the seventeen other companies: these services include the payment and welfare of the Johannesburg office staff and the management of a pension fund ;

(*l*) the establishment, management and sale of townships on the company's land, and all accountancy, legal and secretarial work in connection therewith.

Each of the departments set out in (*j*) above has a separate head of department. The departments provide technical services of the nature indicated by their titles for the mine-owning companies included under (*e*) to (*g*), and these services are all covered by the management fee taken. The managed companies are not wholly owned by the Company, and only six of them—all among those under (*g*)—are subsidiary companies.

23. The activities of the Company carried on in London include the general supervising of the whole business of the Company, and controlling the day-to-day business on matters referred back from Johannesburg to London. The extent to which such reference to London is required is fairly indicated by the letter from the board to the members of the South African committee set out in paragraph 21 above.

Additional main activities in London are:

(*a*) the management of the Company's investments ;

(*b*) the greater part of the share transfer work of the Company and of thirteen other companies in the group ;

(*c*) the accountancy work in connection with (*a*) and (*b*) above, and the aggregation of the Johannesburg and London accounts for the purpose of compiling a consolidated balance sheet and profit and loss account ;

(*d*) the payment and recording of the coupons of four companies in the group, and of two other companies which are in liquidation ;

(*e*) the management of the London office pension fund.

24. Under Article 68 of the articles of association it is provided:

> "A General Meeting shall be held once at least in every calendar year, and not more than fifteen months after the holding of the last preceding General Meeting at such place and at such time as the Board may from time to time determine."

All general meetings are held in Johannesburg, where the annual accounts and the directors' reports are presented to the members. The minute book of general meetings, under Section 66 of the Companies Act, 1926 (South Africa), is kept in Johannesburg, and copies of the minutes are sent to London.

25. Article 63 places a limit on the borrowing powers of the board without the sanction of a general meeting.

26. As regards accounts, Article 141 provides:

> "The Board shall cause true accounts to be kept of the sums of money received and expended by the Company, and the matters in respect of which such receipts and expenditure take place, and of the assets, credits and liabilities of the Company. The books of account shall be kept at the office of the Company or at such other place or places as the Board think fit."

Accounts are in fact made up and audited in Johannesburg and London, and a consolidated balance sheet and profit and loss account is compiled in London. The accounts are drawn up in South African currency, United Kingdom currency being taken at par. Profit and loss accounts for the periods relevant to this appeal are referred to in paragraphs 33 and 34 below.

27. Dividends are declared in London, and are announced simultaneously in London and Johannesburg. Shareholders whose addresses are in Africa south of the Equator receive their dividends from Johannesburg. All other shareholders receive their dividends from London.

28. The common seal of the Company, which is authorised by Section 18 (3) of the Companies Act, 1926 (South Africa), and for which provision is made in Article 131, is kept in Johannesburg, and an official seal, authorised by Section 75 of that Act, is kept in London.

29. The register of members is kept at the Company's registered office in Johannesburg, as is required by Section 25 of the Companies Act, 1926 (South Africa), and a duplicate is maintained in London, and changes are notified from the one office to the other. Transfers of shares are registered in Johannesburg or London according to where the instrument of transfer is lodged. Share certificates are issued from Johannesburg or London, and the place of issue is also determined by the place where the instrument of transfer is lodged. In pursuance of Article 118 (which follows the common form of delegation to a committee subordinate to the board) the board, by a resolution passed on 9th January, 1936, constituted any two directors in the United Kingdom to be a transfer committee for the purpose of considering transfers of shares. There is also a transfer committee in Johannesburg.

30. The staff employed in London and Johannesburg, excluding executive directors, numbers approximately 51 in London and 237 in Johannesburg, and is divided among the various departments as follows:—

	London	*Johannesburg*
Secretarial (for the Company) ...	9	16
Transfer	33	37
Accountancy (for the Company) ...	6	9
Buying	—	17
Consulting Engineers	3	112
Secretarial (for the group) ...	—	19
Accountancy (for the group) ...	—	11
Inspectors	—	16

Service agreements for the South African staff are made in South Africa.

31. Both the Johannesburg and London offices do a certain amount of business in lending money to associated companies, but the greater part of this is done in Johannesburg.

32. The receipts for the various services performed by the Company from its Johannesburg and London offices respectively, for the year ended 30th June, 1948, as shown below, indicate the relative sizes of the two offices. The London figures have been grouped together, as there are no separate departments in London, as there are in Johannesburg.

	London £	*Johannesburg* £
Buying		33,191
Consulting Engineers		132,928
Inspectors	30,793	17,350
Secretarial and Accountancy (for the group)		30,493
Transfer	3,354	27,981
	£34,147	£241,943

These sums were almost entirely received from other companies in the group.

33. A copy of the printed directors' report and accounts for the year ended 30th June, 1947, as submitted in Johannesburg to the shareholders, is annexed, marked " C ", and forms part of this Case(1). A copy of a similar document for the year ended the 30th June, 1948, is also annexed, marked " D "(1).

34. Profit and loss accounts were specially prepared for the purpose of the Company's appeal, allocating the revenue and expenditure for each of the said two years between London and Johannesburg. Copies of these accounts, marked " E " and " F ", are annexed and form part of this Case(1).

The items of expenditure on operation account are grouped on the left hand side of each account under the first two headings, " Directors' Fees, Salaries, etc." and " Establishment Charges." These total £56,327 for London and £168,364 for Johannesburg in the June, 1947, account, the corresponding figures in the June, 1948, account being £55,609 and £197,693. The comprehensive totals on the left hand side are loaded for London by the charge of all depreciation on stocks and shares held by the Company, and by the very large provision for United Kingdom taxation.

The items of revenue on the right hand side show, *inter alia*, " Dividends Received & Declared "—£189,040 for London as compared with £358,073 for Johannesburg in the June, 1947, account, and £359,778 for London as compared with £401,091 for Johannesburg in the June, 1948, account; and " Profit on Stocks & Shares Realised "—£688,654 for London as compared with £804,829 for Johannesburg in the June, 1947, account, and £712,559 for London as compared with £213,229 for Johannesburg in the June, 1948, account.

Under the head " Gross Profit from all other sources " are grouped fees and other receipts for the management activities of the Company. These total only £42,571 and £38,447 in the two accounts for London, as compared with £304,432 and £338,782 for Johannesburg.

35. The group of mining companies in South Africa managed by the Company employed, as at 30th June, 1948, a total of 5,942 Europeans and 47,768 natives.

(1) Not included in the present print.

36. For many years the Company has been regarded for Income Tax purposes as resident in the United Kingdom, and has been assessed under Case I of Schedule D in respect of the whole of its profits. The Company is assessed to income tax in South Africa on profits made in the Union.

37. Correspondence took place, commencing in December, 1946, between the Company's secretary in Johannesburg and the Commissioner for Inland Revenue, Pretoria, on the question whether the Company was "resident in the United Kingdom" or "resident in the Union" for purposes of the double taxation agreement between the United Kingdom and the Union.

The said agreement is scheduled to the Double Taxation Relief (Taxes on Income) (South Africa) Order, 1947 (No. 315), and it contains, in Article II (1) (*f*), the following definition:—

> "The terms 'resident of the United Kingdom' and 'resident of the Union' mean respectively any person who is resident in the United Kingdom for the purposes of United Kingdom tax and not ordinarily resident in the Union for the purposes of Union tax and any person who is ordinarily resident in the Union for the purposes of Union tax and not resident in the United Kingdom for the purposes of United Kingdom tax; and a company shall be regarded as resident in the United Kingdom if its business is managed and controlled in the United Kingdom and as ordinarily resident in the Union if its business is managed and controlled in the Union."

38. After inspection of the power of attorney given by the Company to the South African committee on 9th January, 1936 (a copy of which is annexe "B", forming part of this case(1)), and of the Board's letter of the same date in relation thereto (which is set out in paragraph 21 of this Case), the Commissioner for Inland Revenue, Pretoria, confirmed that for purposes of the aforesaid agreement the Company would be regarded as resident in the United Kingdom.

39. The question was also raised whether the Company would be regarded as liable for the Union undistributed profits tax. The Commissioner for Inland Revenue, Pretoria, confirmed that, since shareholders resident in the United Kingdom controlled more than 50 per cent. of the entire voting power of the Company, the Company was exempt from undistributed profits tax. The percentage of voting power controlled by shareholders resident in the United Kingdom was in fact slightly in excess of 80 per cent.

40. Evidence, which we accepted, was given before us by Mr. J. K. Cockburn Millar, a director of the Company in London since October, 1948. In the course of his evidence, which confirmed the facts presented to us and enabled us to amplify our statement of them in one or two particulars, the witness stated that the whole of the selling of stocks and shares held by the Company was controlled from London. Johannesburg might suggest such sales, but in every case Johannesburg obtains authority from London before carrying them out.

Evidence, which we accepted, was also given before us by Mr. Walter Blair, the Secretary of the Company. He said that the Company is assessed to normal tax in South Africa in respect of its management fees and similar receipts, and in respect of share-dealing profits in those cases (if any) where the transaction took place in South Africa, and was not authorised from London. Copies of the Company's returns for normal tax for the years ended 30th June, 1947, and 30th June, 1948, are annexed, marked "G" and "H" respectively, and form part of this Case(1). The sums of

(1) Not included in the present print.

£98,593 15*s.* 6*d.* and £110,787 7*s.*, shown in these respective returns under the heading " Directors and other Fees Received ", are the net receipts of this kind after charging salaries and other items borne by the Company.

41. It was contended on behalf of the Company that:—

(1) in law a company can be " resident " and " ordinarily resident " in more than one country ;

(2) the true test of the residence or ordinary residence of a company is where it keeps house and does business ;

(3) one place where it keeps house and does business is the place where the central management and control abides ;

(4) the place where the central management and control abides is, however, not necessarily the sole place where a company keeps house and does business ;

(5) the volume of business done in another place may be such, taken in conjunction with registration and other factors in that place, as to constitute, as in the present instance, a second place where the company keeps house and does business, and is therefore resident and ordinarily resident ;

(6) if, in such other place, the company incorporated there does no more than comply with the statutory requirements of the local company law, it is open to appeal commissioners, but not obligatory upon them, to decide that the company is not resident or ordinarily resident in that place ;

(7) on the evidence in the present case the great volume of business done in South Africa by the company, taken in conjunction with, *inter alia,* its registration in that country, and its control by South African law and the size of its organisation there, and with its ownership of the building which forms its office in Johannesburg, leads to the conclusion that the Company, in addition to being ordinarily resident in the United Kingdom, is ordinarily resident in South Africa, that is to say, is " ordinarily resident outside the United Kingdom " in terms of Section 39 (1) of the Finance Act, 1947.

42. It was contended on behalf of the Respondents that, having regard to all the authorities:—

(1) a trading company can be " resident " and " ordinarily resident " only where the central management and control abides ;

(2) a company can only be resident and ordinarily resident in two places if its central management and control is divided ;

(3) the case does not present those features which would, on the authorities, justify a finding that the central management and control of the Company is divided ;

(4) on the facts and evidence of the present case, the central management and control of the Company is not divided, but is in the United Kingdom alone ;

(5) consequently, however substantial are the activities of the Company in South Africa, the Company is ordinarily resident in the United Kingdom alone, and is not " ordinarily resident outside the United Kingdom " in terms of Section 39 (1) of the Finance Act, 1947.

43. Apart from the contentions aforesaid, based on the facts of the present case in the light of the various authorities, it was also contended for

the Respondents that the expression in Section 39 (1) of the Finance Act, 1947, " a person ordinarily resident outside the United Kingdom " means, in the context, a person not ordinarily resident in the United Kingdom. This contention was resisted on behalf of the Company.

44. Reference was made to the following cases, *inter alia*:

Calcutta Jute Mills Co., Ltd. v. *Nicholson*, 1 T.C. 83 ;

Cesena Sulphur Co., Ltd. v. *Nicholson*, 1 T.C. 88 ;

San Paulo (Brazilian) Railway Co., Ltd. v. *Carter*, 3 T.C. 344 and 407 ;

Goerz v. *Bell*, [1904] 2 K.B. 136 ;

De Beers Consolidated Mines Ltd. v. *Howe*, 5 T.C. 198 ;

Egyptian Hotels Ltd. v. *Mitchell*, 6 T.C. 152 and 542 ;

American Thread Co. v. *Joyce*, 6 T.C. 163 ;

New Zealand Shipping Co., Ltd. v. *Thew*, 8 T.C. 208 ;

Swedish Central Railway Co., Ltd. v. *Thompson*, 9 T.C. 342 ;

Todd v. *Egyptian Delta Land & Investment Co., Ltd.*, 14 T.C. 119 ;

Koitaki Para Rubber Estates Limited v. *Federal Commissioner of Taxation*, 64 C.L.R. 15.

45. We, the Commissioners who heard the appeal, having taken time to consider, gave our decision as follows:—

1. For many years the Appellant Company has been regarded for Income Tax purposes as resident in the United Kingdom, and has been assessed under Case I of Schedule D on the whole of its profits. It is not contested that the Company is ordinarily resident in the United Kingdom. It is contended, however, that it is also " ordinarily resident outside the United Kingdom " in terms of Section 39 (1) of the Finance Act, 1947, with the consequent benefit for purposes of the Profits Tax.

2. We are of opinion that there is nothing in the terms of Section 39 as a whole, or in the terms as to residence or ordinary residence to be found in the wide context of the taxing Acts, which can justify reading the expression " ordinarily resident outside the United Kingdom " as equivalent to " not ordinarily resident in the United Kingdom ", so as to debar the Appellant Company *in limine* from advancing the above-stated claim. The claim has therefore to be considered on the facts of the case and in the light of the numerous authorities.

3. The board of directors meets in London, and it is not contested that the central control and management of the Company is in the United Kingdom.

4. The Company is registered in South Africa, and the registered office, which is at Johannesburg, is owned by it. The evidence before us amply attests that its operations in South Africa are of great importance and extent, both in themselves and in relation to those in the United Kingdom.

5. No case before that of the *Swedish Railway*, which was heard in 1925 (9 T.C. 342) expressly decided that a company could have two places of residence. In *Goerz* v. *Bell*, [1904] 2 K.B. 136, Goerz and Co., a company with extensive operations in South Africa, was held to be resident in the United Kingdom on the ground that " the head office and

the directing power " were in this country (at page 150). At the same time Channell, J., remarked (at page 146),

> " it is possible—though I do not decide the question one way or the other that the company may have two residences."

In the *Swedish Railway* case(1) reference was made to this remark by the Master of the Rolls (at page 357), by Warrington, L.J. (at page 362), and by Lord Cave (at page 373). Reference was also made, *inter alia*, to the *Egyptian Hotels* case(2) (see paragraph 9 below).

6. In the line of earlier authorities beginning with the *Calcutta Jute*(3) and *Cesena* cases(4), which were heard in 1876, and particularly in the House of Lords judgment in 1906 in the *De Beers* case, 5 T.C. 198, great emphasis was laid on control and management as determining a company's residence, on whatever scale it might operate elsewhere. It appears to us that the weight of authority in the Courts had not envisaged that, in any case where actual control was found to be in one country, the company might be held to have a second place of residence in another.

7. We may now consider Lord Cave's judgment in the *Swedish Railway* case, where the company, although controlled from Sweden, was held to be resident in the United Kingdom. Reliance is placed on this case by the Appellant Company.

8. We are of opinion that the terms of Lord Cave's reference, 9 T.C., at page 374, to the *Egyptian Hotels* case, followed by those of his conclusion with regard to the *Swedish Railway* (at pages 375-6), make it impossible to say that, in the case of the latter, he based his judgment on a view that there was divided control.

9. Lord Cave observes that the decision in the *Egyptian Hotels* case " appears to be inconsistent with any other view " than that a Company which, on the *De Beers* principle, is resident in the place where it is controlled, may yet have another residence.

> " It is noticeable ",

he says at page 374,

> " that the facts, as found by the Commissioners and interpreted in the Court of Appeal and in this House, were sufficient according to the principle of the *De Beers* case to establish residence in Egypt, so that, if a company can have but one residence, namely, the place where its control and management abides, it must have been held that the Company being resident in Egypt was not resident here, and accordingly was not taxable at all; but no such suggestion was made either by counsel or by any member of the tribunals by which the decision was given and upheld. This being so, while the case does not expressly decide that a company may have two residences for Income Tax purposes, the decision appears to be inconsistent with any other view."

10. In the *Swedish Railway* case, the company was admitted to be controlled and managed from Sweden, but here the admission was expressly confirmed by the Special Commissioners, and yet the company was found to have another residence in England. The Commissioners stated that they were " satisfied that the real control and management " were in Sweden, but nevertheless, placing reliance on the *Egyptian Hotels* case, they held that the company was a person residing in the United Kingdom. Lord Cave directs himself to the findings of the Commissioners as follows:

> " In the present case it was found by the Commissioners that, while the business of the Company was controlled and managed from the head office at Stockholm, so that the Company would in the contemplation of

(1) 9 T.C. 342. (2) 6 T.C. 542. (3) 1 T.C 83. (4) 1 T.C. 88.

> English law have a residence in Sweden, the Company was resident in the United Kingdom for the purposes of the Income Tax acts; and it was hardly disputed that, assuming that a company can have two residences"

which Lord Cave had held to be the case

> "there was sufficient material upon which that finding could be based. I am not at present prepared to say that registration in the United Kingdom would itself be sufficient proof of residence here; that point does not arise in this case, and I express no opinion upon it. But, however that may be, I am satisfied that the fact of registration together with the other circumstances which were found by the Commissioners to exist, were sufficient to enable them to arrive at their finding."

11. In the light of the passages above referred to, we think that the earlier passage on pages 372–3, where Lord Cave considers the rule laid down by Lord Loreburn in the *De Beers* case(1), can only be understood in one way.

> "The effect of this decision",

says Lord Cave(2),

> "is that, when the central management and control of a company abides in a particular place, the Company is held for the purposes of Income Tax to have a residence in that place; but it does not follow that it cannot have a residence elsewhere. . . . The central management and control of a company may be divided, and it may 'keep house and do business' in more than one place; and if so, it may have more than one residence."

It appears to us that, in the context of the whole judgment, this passage must undoubtedly be taken as recognising that, although central management and control determines one residence, there may be grounds for finding that the company has a residence in another place either (1) where the central management and control is not wholly in the said particular place, but is divided, or (2) where the central management and control is undivided, but the company also "keeps house and does business" elsewhere.

12. We may perhaps note, in passing, a special feature in the *Egyptian Hotels* case, 6 T.C. 152 and 542. In that case, where residence in the United Kingdom was admitted for the purpose of Case V liability, a legal right of control in certain matters, although never in fact exercised, remained with the London directors. The remarks of Lord Parker of Waddington at the middle of page 550 suggest to us that, had that right been exercised, so as to "interfere with the Company's business in Egypt", a case of divided control might have been established.

13. It is necessary, next, to consider Lord Sumner's judgment in the *Egyptian Delta* case 14 T.C. 119, and, in the first place, his references to the *Swedish Railway* case(3), in the decision of which he had concurred. He says, at page 144:

> "Before your Lordships Sir Douglas Hogg presented the case in rather a different form, [1925] A.C., at pages 498–499, 'unless it is established that central control is the sole and exclusive test of residence . . . the finding of the Commissioners disposes of this case. . . . If necessary, it is submitted a company has a residence where its registered office is, though it may also have a residence where its central control abides.' It is, I think, plain that your Lordships' House affirmed the judgment of the Court of Appeal on the first of these two grounds only, for the Lord Chancellor says at page 501: 'An individual may clearly have more than one residence . . . and in principle there appears to be no reason why a company should not be in the same position. The central management and control of a company may be divided, and it may 'keep house and do business' in more than

(1) 5 T.C. 198. (2) 9 T.C., at p. 372. (3) 9 T.C. 342.

one place; and if so, it may have more than one 'residence'. This was said with reference to the fact that there was evidence on which the Commissioners could act of business done in England sufficient in importance and in amount to give a residence on that ground."

We understand this passage to mean that the House of Lords affirmed the Court of Appeal on the ground that central control was not established as the sole and exclusive test of residence, so that, although the Swedish Company was controlled from Sweden, the business done by it in England was sufficient on all the facts of that case to justify the Commissioners in finding that it also had a residence in England.

14. On the other hand Lord Sumner had emphasised a few lines before (at page 143) that, on the facts of the *Swedish Railway* case(1), there was little to be done in the way of control. Of the business done in England, he says that

> "in the static condition of the company's affairs it was not much less important than the Swedish part. If new questions arose the Swedish directors could settle them, but as things were little had to be done anywhere, except 'administration', as is often the case with companies, and that was fairly divided between the two countries. I would particularly draw attention to the powerful judgments of my noble and learned friend Lord Atkinson and of Lord Justice Atkin as showing how strong are the grounds for saying that since the *De Beers* case the test of taxable residence for any company has been settled to be the carrying on of business here and not the bare operation of the Companies (Consolidation) Act."

15. Thus Lord Sumner makes it clear that the small scope for control in the *Swedish Railway* case(1) was one of the facts which justified the decision that the company, although resident in Sweden, where it was controlled, was also resident in England. Control by the governing body may "often" be limited in scope and, while enough to establish one place of residence, not exclude the possibility of finding that there is another place of residence, if business "sufficient in importance and in amount" is done in another country.

The difficulty is to decide whether such cases are indicated as the only exceptions—apart from cases of "divided control"—to a general rule that a company controlled in a particular place is resident there and nowhere else.

16. It appears to us that the reason why Lord Sumner, after dealing with the facts of the *Swedish Railway* case, immediately proceeds to commend the two dissenting judgments, is that he is passing to the quite distinct issue raised by the *Egyptian Delta* case(2), corresponding to the second ground put forward by Sir Douglas Hogg in the *Swedish Railway* case(1) (see paragraph 13 above). He is concerned to overthrow, once and for all, the conception that registration can prevail by itself, or along with formal statutory acts, as a test of residence. This was an old conception which had survived even after the *De Beers* case(3). In the *Swedish Railway* case Warrington, L.J., was prepared to hold that it was right, and Lord Cave himself reserved judgment on the matter. In the *Egyptian Delta* case(2) the conception was expressly adopted by the lower Courts. On the other hand the two dissenting judgments in the *Swedish Railway* case had forcibly rejected it.

Lord Sumner decides that, whenever the choice is between registration (together with formal statutory acts), in one country, and central management and control in another, control must—in view of all the authorities, culminating with the *De Beers* case—be conclusive as establishing the company's residence, and single residence.

(1) 9 T.C. 342. (2) 14 T.C. 119. (3) 5 T.C. 198.

17. Thus the importance of control is emphasised throughout as against registration, which (although registration is a factor to be taken into account) it completely over-rides. Nevertheless, after careful consideration, we incline to the view that Lord Sumner's judgment has a wider significance. We have noted his remarks as to the small scope for control in the *Swedish Railway* case(1) (paragraph 14 above). With that case in his mind, he gives unqualified approval to the very strong pronouncements of earlier authorities in the sense that a company resides where its central control and management is found. We find it difficult to resist the view that, had he regarded those authorities as not excluding a second place of residence in cases (unlike the *Swedish Railway* case) of active and effective control, he would have given a clear indication to that effect.

18. Moreover the dissenting judgments of Atkin, L.J., and of Lord Atkinson in the *Swedish Railway* case were emphatic in their conclusion that the weight of authority over many years had decided that control and management not only over-rode registration, but also established the residence of a company for tax purposes to the exclusion of any second residence. Here again we find it difficult to resist the view that, if Lord Sumner had differed from the wider conclusion of those " powerful judgments " in their application to cases of active and effective control, he would have made it clear that he did so.

19. From Lord Sumner's judgment as a whole, and in view especially of the terms in which he refers (1) to Lord Halsbury's expression of opinion in the *American Thread* case(2) (at top of page 151)—(2) to Lord Sterndale's comment, in the *New Zealand Shipping* case(3), on the rule laid down in *De Beers*(4) (at foot of page 151 and top of page 152) —and (3) to " the general agreement of the most valuable text-books " (pages 152–4), we think it the natural inference (although no single statement appears to be conclusive to such an effect) that as regards an active company where control is effective, his Lordship regarded the possibility of a second residence as excluded, whatever operational activities may exist in a country other than that in which the control is exercised.

20. On hearing the arguments addressed to us, we have been impressed by the difficulty of the question. But after considering all the authorities we have come to the conclusion that a company can have only one residence for tax purposes, namely, the place of its central control and management, except in any case where the facts may justify a finding that control is not centred in one country, but is divided, or in a case such as that of the Swedish Railway company, where the control amounts to so little that the company can be said to " keep house and do business " not only in the place of control but also in another place, if business is done there " sufficient in importance and amount."

21. The facts of the Appellant Company's case do not bring it within either of these exceptions, and we therefore hold that it is not " ordinarily resident outside the United Kingdom." The appeal fails, and we leave the figures to be agreed.

(1) 9 T.C. 342 (2) 6 T.C. 163. (3) 8 T.C. 208. (4) 5 T.C. 198.

46. The Appellant Company immediately after the determination of the Appeal declared to us its dissatisfaction therewith as being erroneous in point of law, and in due course required us to state a Case for the opinion of the High Court pursuant to the Finance Act, 1937, Paragraph 4, Part II of the Fifth Schedule, and Income Tax Act, 1918, Section 149, which Case we have stated and do sign accordingly.

(The figures following upon our decision have not been agreed; but on the request of the Company, and with the concurrence of the Crown, we have, in order to obviate undue delay, stated the foregoing Case on the question of principle.)

47. The questions of law for the opinion of the Court are whether we were right in holding:—

(1) that the expression "ordinarily resident outside the United Kingdom" in Section 39 (1) of the Finance Act, 1947, is not equivalent in its context to the expression "not ordinarily resident in the United Kingdom"; but

(2) that on the facts of this Case, and in the light of all the authorities, as the Company is admittedly "ordinarily resident" in the United Kingdom, it cannot also be "ordinarily resident" in some other place outside the United Kingdom in terms of the said Section.

G. R. Hamilton,
B. Todd-Jones,
} Commissioners for the Special Purposes of the Income Tax Acts.

Turnstile House,
94–99, High Holborn,
London, W.C.1.
11th December, 1950.

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(3) *Trinidad Leaseholds, Ltd.* v. *Commissioners of Inland Revenue.*

CASE

Stated under the Finance Act, 1937, Section 24 (2) and Fifth Schedule, Part II, Paragraph 4, 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 High Court of Justice.

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1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 17th March, 1950, Trinidad Leaseholds, Ltd., hereinafter called "the Company", appealed against assessments to the Profits Tax made on the Company for the two chargeable accounting periods of 12 months ended respectively 30th June, 1947, and 30th June, 1948.

2. The said assessments were made in estimated amounts, the figures being as follows:—

Accounting period	*Amount of profits assessed*		*Rate at which charged*	*Profits Tax payable*
	£	£	per cent.	£
1.7.46 to 30.6.47	1,765,000	870,000	5	43,500
		259,000	25	64,750
		636,000	10	63,600
				171,850
1.7.47 to 30.6.48	3,000,000	475,000	25	118,000
		2,525,000	10	252,500
				371,250
	less Tax Credit			300,000
				71,250

The computation for the first period was made by reference to the transitional provisions of Section 47 (2) of the Finance Act, 1947, which relate to a period falling partly before and partly after the end of the calendar year 1946. The 5 per cent. rate is that which was in force prior to the Finance Act, 1947.

As regards the second period the rates of 25 per cent. and 10 per cent. represent those generally applicable for the said period to profits so far as distributed, and to undistributed profits respectively.

3. The Company was incorporated in England on 20th August, 1913.

4. It is not disputed by the Company that it is within the charge of the Profits Tax by reference to Section 19 (2) of the Finance Act, 1937, as amended by Section 31 (1) of the Finance Act, 1947.

The said Section 19 (2) is as follows:

> "Subject as hereafter provided, the trades and businesses to which this section applies are all trades or businesses of any description carried on in the United Kingdom, or carried on, whether personally or through an agent, by persons ordinarily resident in the United Kingdom."

Section 31 (1) of the Finance Act, 1947, has the effect of limiting the charge to trades or businesses carried on by bodies corporate or bodies unincorporate, so far as they are not partnerships or executors.

5. It is contended for the Company that, while ordinarily resident in the United Kingdom, it is also—on the facts, and for the reasons, hereinafter appearing—"ordinarily resident outside the United Kingdom" in terms of Section 39 (1) of the Finance Act, 1947, and that consequently any Profits Tax payable by it must be computed exclusively at the lower rate applicable to undistributed profits.

The terms of Section 39 (1) and (2) of the Finance Act, 1947, are as follows:

> "39.—(1) Where the person carrying on a trade or business is ordinarily resident outside the United Kingdom throughout a chargeable accounting period, the profits tax payable by that person shall be ascertained as if no net relevant distributions to proprietors had been made in the case of that person for that period.

(2) Where a trade or business is carried on by a body corporate and, throughout a chargeable accounting period, both the following conditions are fulfilled, that is to say—

(*a*) that that body corporate is ordinarily resident in the United Kingdom; and

(*b*) that another body corporate which is not ordinarily resident in the United Kingdom controls, directly or indirectly, not less than one half of the voting power in the first-mentioned body corporate,

distributions to that other body corporate shall be left out of account in determining, in relation to the first-mentioned body corporate, the net relevant distributions to proprietors for that period."

Sub-section (3) of the Section, in making provision for a matter not arising in the present appeal, refers to the case where a person's franked investment income includes

"income received from a body corporate ordinarily resident outside the United Kingdom to which subsection (1) or subsection (2) of this subsection applies."

6. The sole issue for our determination was whether the Company, while ordinarily resident in the United Kingdom, is also ordinarily resident outside the United Kingdom, that is to say, in Trinidad.

7. A copy of the memorandum and articles of association of the Company is annexed, marked "A", and forms part of this Case[1]. The first of the objects for which the Company was established is set out in its memorandum of association in the following terms:

"3 (A) To purchase, take on lease, or otherwise acquire freehold and other lands, mineral and other properties, and also grants, concessions, leases, claims, licenses, or authorities of and over lands, mineral properties, petroleum or oil-bearing lands in the island of Trinidad and elsewhere, or any rights connected with the getting or winning of any petroleum or other oil in the island of Trinidad, and particularly to acquire a Government Lease for mining for oil under certain Crown lands in the said island, and to sink wells, to make borings, and otherwise to search for and get petroleum and other mineral oils, and products thereof and with a view thereto, to enter into and carry into effect the following Agreements, viz. (1) between the Central Mining and Investment Corporation, Limited, of the one part and the Company of the other part, and (2) between the Crown Agents for the Colonies of the one part and the Company of the other part, in the terms of the drafts which have already been prepared, copies whereof have for the purpose of identification been subscribed by William Holmes, a Solicitor of the Supreme Court."

The Company carries on the business of winning, refining and dealing in petroleum and other mineral oils in Trinidad (where the Company is registered as having an established place of business within the colony pursuant to Section 298 of the Companies Ordinance, Ch. 31, No. 1) and also to a lesser extent in dealing in oils elsewhere, including Jamaica where the Company established a branch office.

8. The capital of the Company is £1,700,000 of which £1,639,452 was issued as fully paid up in 1947 and 1948.

9. Until 1939, the Company also carried on an extensive marketing business in the United Kingdom where it sold "Regent" petrol. During the 1939–45 war this business, in common with all oil distribution businesses in the United Kingdom, was taken over by the Petroleum Board, and was completely managed by the Board until 30th June, 1948. Until 30th June, 1948, supplies of oil required by the Petroleum Board were sold to it by the Company f.o.b. Trinidad.

10. From the outbreak of war up to 30th June, 1948, there was substantially no oil distributing activity by the Company in the United Kingdom

[1] Not included in the present print.

otherwise than in connection with the completion up to 1943 of a pre-existing contract with the Air Ministry and the transportation of materials by ocean tankers. The Company did, however, receive from the Petroleum Board depreciation, interest and commission. During that period the books kept by the Company in London in respect of the United Kingdom distribution were confined to pay rolls, shipping records and other records showing the Company's transactions with the Petroleum Board. From 12th March, 1947, the Company assigned all its United Kingdom marketing interests to its wholly-owned subsidiary, Regent Petroleum Co., Ltd., and on 30th June, 1948, the Company's ownership of the subsidiary was transferred to Regent Oil Company Ltd., which is owned 50 per cent. by the Company and 50 per cent. by California Texas Corporation.

11. The business carried on by the Company in Jamaica during the two years ended 30th June, 1948, was confined to the marketing of petroleum products within the island, but these operations were small compared with the volume of the operations carried out in Trinidad.

12. For taxation purposes the Company is treated as carrying on the additional trade of dealing in investments and shares in the United Kingdom, and appropriate figures in respect of that trade are incorporated in the computation of its assessments to tax.

13. During the two years ended 30th June, 1948, oil drilling and refining operations were carried out in Trinidad only.

14. At 30th June, 1946, the directors of the Company, including the chairman and managing director, were eight in number, at 30th June, 1947, six, and at 30th June, 1948, eight, all being resident in the United Kingdom. Frequent visits are, however, made by the chairman and other executive directors and officials of the Company to Trinidad ; and important decisions are taken by members of the board when there.

15. The directors hold their meetings in London and the secretary's office and the Company's seal are also in London.

16. General meetings of the Company are held and dividends declared in London.

17. The Company's books are kept and audited in Trinidad and London and also, during the period in question, in Jamaica. Those kept in Trinidad comprise the books of account necessary to record the producing, refining and distributing operations of the Company. Those in London comprise the books required by statutory authority and books of account dealing mainly with the Company's financial operations, as well as those appropriate for a head office.

18. The board and its executive directors in London are concerned with major questions of policy and principle, mainly arising from the Company's operations abroad.

Departmental officials in the United Kingdom act as liaison to the corresponding departments in Trinidad with the exception of the marketing and shipping managers, who are respectively concerned with the disposal and movement of oil.

19. No register of shareholders is kept in Trinidad, but any changes in directorate, etc., are filed in Trinidad as well as London.

20. Banking accounts are kept in Trinidad and London, and, during the material period, in Jamaica.

21. The approximate number of employees is as follows:—

(*a*) In the United Kingdom:—

Directors, 8.
Staff, 100.

(*b*) In Trinidad:—

Staff, 700.
Workmen, 5,500.

(*c*) In Jamaica:—

Staff and Workmen, 105.

22. The Company has a manager in Trinidad, who manages the business of the Company there, including the engagement and dismissal of employees.

23. The manager in Trinidad has a power of attorney from the Company, a copy of which is annexed, marked "B", and forms part of this Case[1]. The said power is drawn in wide terms which include, *inter alia*:—

(*a*) Generally to manage the undertakings and projects of the Company in Trinidad, to register lands, to do all acts necessary for the operation of the Company and to act as the Company's representative in Trinidad (clause 1).

(*b*) To engage, employ and discharge staff (clause 2).

(*c*) To prosecute actions on behalf of the Company (clauses 5–8).

(*d*) To operate banking accounts on behalf of the Company (clause 10).

(*e*) Generally to carry on all acts in or about the Company's premises as he may think proper (clause 19).

All the powers are "subject to such regulations, instructions and directions as from time to time may be prescribed by the Board of Directors of the Company."

24. The book value of property, plant, etc., owned by the Company at 30th June, 1947 and 1948, was as follows:—

Property	Year	Situated in U.K.	Situated in Trinidad	Situated in Jamaica	Situated elsewhere	Total
		£	£	£	£	£
Leasehold and Freehold oil and other rights lands and improvements.	1947	253	195,786	9,568	—	205,607
	1948	143	93,895	9,420	—	103,458
Buildings, Refineries, Reservoirs, Pipe Lines, Tanks, etc.	1947	3,888	771,838	7,849	—	783,575
	1948	3,042	647,715	13,268	—	664,025
Plant, Machinery and Vehicles.	1947	2,215	484,228	9,860	—	496,303
	1948	982	463,011	13,672	—	477,665
Tank Vessels	1947	—	18,791	141	142,063	160,995
	1948	—	5,505	—	65,954	71,459

25. Copies of the report of the directors and of the statement of accounts for the years ended 30th June, 1947, and 30th June, 1948, are annexed hereto, marked "C" and "D" respectively, and form part of this

(1) Not included in the present print.

Case(1). The photograph issued with the 1948 Accounts shows the Company's refineries and part of the Company's housing estate at Point-a-Pierre, Trinidad. Approximate details of certain of the Company's properties in Trinidad are:

320 bungalows for staff and seven hostels; two hospitals for staff and three dispensaries; 150 miles of roads; 120 miles of trunk pipelines; 122,000 acres of oil rights, which includes 7,800 acres of freehold oil and surface rights; 690 producing wells.

The first cost of the Company's fixed assets in Trinidad, included in the balance sheets at 30th June, 1947, and 30th June, 1948, was £6,252,000 and £6,368,000 respectively.

26. (*a*) For the year ended 30th June, 1947, the profits provisionally adjusted for Profits Tax purposes amounted to £1,705,411, of which profits not taxed in Trinidad amounted to £246,867 (14½ per cent.), leaving as profits taxed in Trinidad £1,458,544 (85½ per cent.).

(*b*) For the year ended 30th June, 1948, the profits provisionally adjusted for Profits Tax purposes amounted to £2,898,192, of which profits not taxed in Trinidad amounted to £110,469, leaving as profits taxed in Trinidad £2,787,723.

27. Evidence, which we accepted, was given before us by Mr. H. D. Acres, secretary of the Company from 1940 to 1948 and thereafter business manager.

The witness stated that the marketing manager and the shipping manager had always been stationed at the London office. Of the oil obtained in Trinidad before the war, the fuel oil was sold in Trinidad, and some also in Jamaica, where the Company had an installation: in the main, it went to ships for bunkering and as cargoes at Trinidad. The petrol was largely sold in this country. In terms of turnover the proportion of fuel oil sold in Trinidad to the more valuable products exported for sale was, roughly, about the same.

Even during the war it was necessary for the managing director to visit Trinidad. Since the war visits of executive directors had been more frequent, and amongst other such visits the managing director had been there in the latter part of 1947, in 1948 and twice in 1949 (once with the chairman). The assistant managing director was in Trinidad at that time. Important decisions were taken in the course of these visits, minutes being taken of the various meetings and conferences before the director or directors concerned left Trinidad, and being sent to London. In many aspects of the Company's business it was important to go into matters with the technical side of the management in Trinidad, particularly as regards drilling and oil production. The extent to which oil could be got, and the cost of getting it, had an important bearing on policy and led to its development and formulation. The conferences in Trinidad were not formal directors' meetings, and were not treated as such: the decisions were in many cases recorded and finalised in Trinidad, before being reported to London, but in some cases only after report—this depending on the nature and importance of the business. Any important matter would be reported to the board at its next meeting.

28. It was contended on behalf of the Company:

(1) that the issue in the present case must be decided on the authority of the English cases, the relevant cases being those two in which

(1) Not included in the present print.

alone the question of dual residence was necessarily involved, viz. *Swedish Central Railway Co., Ltd.* v. *Thompson*, 9 T.C. 342, and *Todd* v. *Egyptian Delta Land & Investment Co., Ltd.*, 14 T.C. 119 ;

(2) that, while control and management has been held to be a test of residence of a company, it has never in any Court in this country been held to be the only test ;

(3) that in the judgments of the House of Lords in the *Swedish Railway* case there is nothing to support the contention that the decision depended as a matter of law on the fact that the railway company was not very active ;

(4) that in the *Swedish Railway* case the Special Commissioners found that the control and management was in Sweden, and that this finding, which negatived any division of control, was never challenged ;

(5) that the judgment of Lord Cave in the said case proceeded, both by implication and in express terms, on the view that in the case of a company controlled in one place, there may be facts to justify a finding that it is resident also in another ;

(6) that nothing to a contrary effect is to be found in the judgments of the House of Lords in the *Egyptian Delta* case, Lord Sumner stating that it was a matter of degree on the facts ;

(7) that, while the Company in the present case was incorporated in England, Lord Sumner's judgment in the *Egyptian Delta* case[1] establishes that the place of incorporation is, by itself, of very little importance ;

(8) that, if it is necessary to determine the question whether the control and management in the present case is or is not divided, the powers exercised in Trinidad under the power of attorney, and the decisions taken by members of the board when visiting Trinidad, are sufficient to justify a finding that the control is not wholly in the United Kingdom but is partly in Trinidad ;

(9) that, in any event, the extremely extensive commercial activities of the Company in Trinidad provide abundant evidence to support and justify a finding that the Company is resident, and ordinarily resident, in Trinidad, that is to say, is " ordinarily resident outside the United Kingdom " within the meaning of Section 39 (1) of the Finance Act, 1947 ;

(10) that the Company is ordinarily resident in Trinidad and is therefore ordinarily resident outside the United Kingdom within the meaning of the said Section 39 (1).

29. It was contended on behalf of the Crown that, having regard to the whole line of the authorities :—

(1) a trading company can be " resident " and " ordinarily resident " only where the central management and control abides ;

(2) a company can only be resident and ordinarily resident in two places if its central management and control is divided ;

(3) the present case does not present those features which would, on the authorities, justify a finding that the central control and management was divided ;

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(1) 14 T.C. 119.

(4) on the facts and evidence of the present case, the central management and control of the Company is not divided, but is in the United Kingdom alone, where, moreover, the Company was incorporated ;

(5) consequently, however substantial are the activities of the Company in Trinidad, the Company is ordinary resident in the United Kingdom alone, and is not " ordinarily resident outside the United Kingdom " within the meaning of Section 39 (1) of the Finance Act, 1947.

30. Apart from the contentions aforesaid, based on the facts of the present case in the light of the various authorities, it was also contended for the Crown that the expression in Section 39 (1) of the Finance Act, 1947, " a person ordinarily resident outside the United Kingdom " means, in the context, a person not ordinarily resident in the United Kingdom. This contention was resisted on behalf of the Company.

31. Reference was made to the following cases, *inter alia*:—

Calcutta Jute Mills Co., Ltd. v. *Nicholson,* 1 T.C. 83 ;

Cesena Sulphur Co., Ltd. v. *Nicholson,* 1 T.C. 88 ;

San Paulo (Brazilian) Railway Co., Ltd. v. *Carter,* 3 T.C. 344 and 407 ;

De Beers Consolidated Mines, Ltd. v. *Howe,* 5 T.C. 198 ;

Egyptian Hotels, Ltd. v. *Mitchell,* 6 T.C. 153 and 542 ;

American Thread, Co. v. *Joyce,* 6 T.C. 163 ;

Swedish Central Railway Co., Ltd. v. *Thompson,* 9 T.C. 342 ;

Todd v. *Egyptian Delta Land & Investment Co., Ltd.,* 14 T.C. 119 ;

Koitaki Para Rubber Estates, Ltd. v. *Federal Commissioners of Taxation,* 64 C.L.R. 15.

32. We, the Commissioners who heard the appeal, having taken time to consider, gave our decision as follows:—

1. The Appellant Company is admitted to be ordinarily resident in the United Kingdom. It is contended, however, that it is also " ordinarily resident outside the United Kingdom " in terms of Section 39 (1) of the Finance Act, 1947, with the consequent benefit for purposes of the Profits Tax.

2. We are of opinion that there is nothing in the terms of Section 39 as a whole, or in the terms as to residence or ordinary residence to be found in the wide context of the taxing Acts, which can justify reading the expression " ordinarily resident outside the United Kingdom " as equivalent to " not ordinarily resident in the United Kingdom ", so as to debar the Appellant Company *in limine* from advancing the above-stated claim. The claim has therefore to be considered on the facts of the case and in the light of the numerous authorities.

3. The Company was incorporated in England, and has its registered office here. The management of the Company's business is vested in the directors, who hold their meetings in London.

4. The Company owns valuable property in Trinidad, and the great body of its operations is carried on there. Our attention has been called to the terms of a power of attorney, under which extensive powers are delegated to the manager in Trinidad.

5. It is contended for the Company that, regard being had to the said power of attorney and to decisions taken by executive directors when visiting Trinidad, its control and management is not wholly in the United

Kingdom but is divided, part of the control being in Trinidad. This contention, however, was not pressed upon us, and we are quite unable to accept it (see paragraph 21 of this decision).

The main contention for the Company is founded on its extensive business activities in Trinidad. It is urged that these can, and should, be regarded as constituting a second place of residence, even on the footing that control and management abides wholly in the United Kingdom.

6. No case before that of the *Swedish Railway*, which was heard in 1925 (9 T.C. 342) expressly decided that a company could have two places of residence.

In the line of earlier authorities beginning with the *Calcutta Jute*(1) and *Casena* cases(2), which were heard in 1876, and particularly in the House of Lords judgment in 1906 in the *De Beers* case, 5 T.C. 198, great emphasis was laid on control and management as determining a company's residence, on whatever scale it might operate elsewhere. It appears to us that the weight of authority in the Courts had not envisaged that, in any case where actual control was found to be in one country, the company might be held to have a second place of residence in another. Such a possibility was, however, recognised by Channell, J., in *Goerz* v. *Bell*, [1904] 2 K.B. 136, at page 146.

7. We may now consider Lord Cave's judgment in the *Swedish Railway* case, where the company, although controlled from Sweden, was held to be resident in the United Kingdom. Reliance is placed on this case by the Appellant Company.

8. We are of opinion that the terms of Lord Cave's reference, 9 T.C., at page 374, to the *Egyptian Hotels* case(3), followed by those of his conclusion with regard to the *Swedish Railway* (at pages 375–6), make it impossible to say that, in the case of the latter, he based his judgment on a view that there was divided control.

9. Lord Cave observes that the decision in the *Egyptian Hotels* case "appears to be inconsistent with any other view" than that a company which, on the *De Beers* principle, is resident in the place where it is controlled, may yet have another residence.

"It is noticeable",

he says at page 374,

> "that the facts, as found by the Commissioners and interpreted in the Court of Appeal and in this House, were sufficient according to the principle of the *De Beers* case to establish residence in Egypt, so that, if a company can have but one residence, namely, the place where its control and management abides, it must have been held that the Company being resident in Egypt was not resident here, and accordingly was not taxable at all; but no such suggestion was made either by counsel or by any member of by the tribunals by which the decision was given and upheld. This being so, while the case does not expressly decide that a company may have two residences for Income Tax purposes, the decision appears to be inconsistent with any other view."

10. In the *Swedish Railway* case, the Company was admitted to be controlled and managed from Sweden, but here the admission was expressly confirmed by the Special Commissioners, and yet the Company was found to have another residence in England. The Commissioners stated that they were "satisfied that the real control and management" were in Sweden, but nevertheless, placing reliance on the *Egyptian Hotels* case, they held that the Company was a person residing in the United

(1) 1 T.C. 83. (2) 1 T.C. 88. (3) 6 T.C. 542.

Kingdom. Lord Cave directs himself to the findings of the Commissioners as follows(1):

> "In the present case it was found by the Commissioners that, while the business of the Company was controlled and managed from the head office at Stockholm, so that the Company would in the contemplation of English law have a residence in Sweden, the Company was resident in the United Kingdom for the purposes of the Income Tax Acts; and it was hardly disputed that, assuming that a company can have two residences"—

which Lord Cave had held to be the case—

> "there was sufficient material upon which that finding could be based. I am not at present prepared to say that registration in the United Kingdom would itself be sufficient proof of residence here; that point does not arise in this case, and I express no opinion upon it. But, however that may be, I am satisfied that the fact of registration together with the other circumstances which were found by the Commissioners to exist, were sufficient to enable them to arrive at their finding."

11. In the light of the passages above referred to, we think that the earlier passage on pages 372–3, where Lord Cave considers the rule laid down by Lord Loreburn in the *De Beers* case(2), can only be understood in one way.

> "The effect of this decision",

says Lord Cave,

> "is that, when the central management and control of a company abides in a particular place, the Company is held for the purposes of Income Tax to have a residence in that place; but it does not follow that it cannot have a residence elsewhere. . . . The central management and control of a company may be divided, and it may 'keep house and do business' in more than one place; and if so, it may have more than one residence".

It appears to us that, in the context of the whole judgment, this passage must undoubtedly be taken as recognising that, although central management and control determines one residence, there may be grounds for finding that the company has a residence in another place *either* (1) where the central management and control is not wholly in the said particular place, but is divided, or (2) where the central management and control is undivided, but the company also "keeps house and does business" elsewhere.

12. We may perhaps note, in passing, a special feature in the *Egyptian Hotels* case, 6 T.C. 152 and 542. In that case where residence in the United Kingdom was admitted for the purpose of Case V liability, a legal right of control in certain matters, although never in fact exercised, remained with the London directors. The remarks of Lord Parker of Waddington at the middle of page 550 suggest to use that, had that right been exercised, so as to "interfere with the Company's business in Egypt", a case of divided control might have been established.

13. It is necessary, next, to consider Lord Sumner's judgment in the *Egyptian Delta* case, 14 T.C. 119, and, in the first place, his references to the *Swedish Railway* case(3), in the decision of which he had concurred. He says, at page 144:

> "Before your Lordships Sir Douglas Hogg presented the case in rather a different form, [1925] A.C., at pages 498–499, 'unless it is established that central control is the sole and exclusive test of residence . . . the finding of the Commissioners disposes of the case. . . . If necessary, it is submitted a company has a residence where its registered office is, though it may also have a residence where its central control abides'.

(1) 9 T.C., at p. 375. (2) 5 T.C. 198. (3) 9 T.C. 342.

> It is, I think, plain that your Lordships' House affirmed the judgment of the Court of Appeal on the first of these two grounds only, for the Lord Chancellor says at page 501: 'An individual may clearly have more than one residence . . . and in principle there appears to be no reason why a company should not be in the same position. The central management and control of a company may be divided, and it may "keep house and do business" in more than one place; and if so, it may have more than one "residence".' This was said with reference to the fact that there was evidence on which the Commissioners could act of business done in England sufficient in importance and in amount to give a residence on that ground."

We understand this passage to mean that the House of Lords affirmed the Court of Appeal on the ground that central control was not established as the sole and exclusive test of residence, so that, although the Swedish Company was controlled from Sweden, the business done by it in England was sufficient on all the facts of that case to justify the Commissioners in finding that it also had a residence in England.

14. On the other hand Lord Sumner had emphasised a few lines before (at page 143) that, on the facts of the *Swedish Railway* case(1), there was little to be done in the way of control. On the business done in England, he says that

> "in the static condition of the company's affairs it was not much less important than the Swedish part. If new questions arose, the Swedish directors could settle them, but as things were little had to be done anywhere except 'administration', as is often the case with companies, and that was fairly divided between the two countries. I would particularly draw attention to the powerful judgments of my noble and learned friend Lord Atkinson and of Lord Justice Atkin as showing how strong are the grounds for saying that since the *De Beers* case(2) the test of taxable residence for any company has been settled to be the carrying on of business here and not the bare operation of the Companies (Consolidation) Act."

15. Thus Lord Sumner makes it clear that the small scope for control in the *Swedish Railway* case was one of the facts which justified the decision that the company, although resident in Sweden, where it was controlled, was also resident in England. Control by the governing body may "often" be limited in scope and, while enough to establish one place of residence, not exclude the possibility of finding that there is another place of residence, if business "sufficient in importance and in amount" is done in another country.

The difficulty is to decide whether such cases are indicated as the only exceptions—apart from cases of "divided control"—to a general rule that a company controlled in a particular place is resident there and nowhere else.

16. It appears to us that the reason why Lord Sumner, after dealing with the facts of the *Swedish Railway* case, immediately proceeds to commend the two dissenting judgments, is that he is passing to the quite distinct issue raised by the *Egyptian Delta* case(3), corresponding to the second ground put forward by Sir Douglas Hogg in the *Swedish Railway* case (see paragraph 13 above). He is concerned to overthrow, once and for all, the conception that registration can prevail by itself, or along with formal statutory acts, as a test of residence. This was an old conception which had survived even after the *De Beers* case. In the *Swedish Railway* case Warrington, L.J., was prepared to hold that it was right, and Lord Cave himself reserved judgment on the matter. In the *Egyptian Delta* case the conception was expressly adopted by the lower courts. On the other hand the two dissenting judgments in the *Swedish Railway* case had forcibly rejected it.

(1) 9 T.C. 342. (2) 5 T.C. 198. (3) 14 T.C. 119.

Lord Sumner decides that, whenever the choice is between registration (together with formal statutory acts), in one country, and central management and control in another, control must—in view of all the authorities, culminating with the *De Beers* case(1)—be conclusive as establishing the company's residence, and single residence.

17. Thus the importance of control is emphasised throughout as against registration, which (although registration is a factor to be taken into account) it completely over-rides. Nevertheless, after careful consideration, we incline to the view that Lord Sumner's judgment has a wider significance. We have noted his remarks as to the small scope for control in the *Swedish Railway* case(2) (paragraph 14 above). With that case in his mind, he gives unqualified approval to the very strong pronouncements of earlier authorities in the sense that a company resides where its central control and management is found. We find it difficult to resist the view that, had he regarded those authorities as not excluding a second place of residence in cases (unlike the *Swedish Railway* case) of active and effective control, he would have given a clear indication to that effect.

18. Moreover the dissenting judgments of Atkin, L.J., and of Lord Atkinson in the *Swedish Railway* case were emphatic in their conclusion that the weight of authority over many years had decided that control and management not only over-rode registration, but also established the residence of a company for tax purposes to the exclusion of any second residence. Here again we find it difficult to resist the view that, if Lord Sumner had differed from the wider conclusion of those "powerful judgments" in their application to cases of active and effective control, he would have made it clear that he did so.

19. From Lord Sumner's judgment(3) as a whole, and in view especially of the terms in which he refers (1) to Lord Halsbury's expression of opinion in the *American Thread* case(4) (at top of page 151)—(2) to Lord Sterndale's comment, in the *New Zealand Shipping* case(5), on the rule laid down in *De Beers* (at foot of page 151 and top of page 152)—and (3) to "the general agreement of the most valuable text-books" (pages 152–4), we think it the natural inference (although no single statement appears to be conclusive to such an effect) that as regard an active company where control is effective, his Lordship regarded the possibility of a second residence as excluded, whatever operational activities may exist in a country other than that in which the control is exercised.

20. On hearing the arguments addressed to us, we have been impressed by the difficulty of the question. But after considering all the authorities we have come to the conclusion that a company can have only one residence for tax purposes, namely, the place of its central control and management, *except* in any case where the facts may justify a finding that control is not centred in one country, but is divided, or in a case such as that of the Swedish Railway Company, where the control amounts to so little that the company can be said to "keep house and do business" not only in the place of control but also in another place, if business is done there "sufficient in importance and amount".

21. As regard the first of those exceptions we find and hold that the Appellant Company has its whole control and management in the United Kingdom. We are fortified in this conclusion by, *inter alia*,

(1) 5 T.C. 198. (2) 9 T.C. 342. (3) 14 T.C., at p. 139.
(4) 6 T.C. 163. (5) 8 T.C. 208.

passages in the judgment of Chief Baron Kelly in the *Calcutta Jute* case, 1 T.C. 83, at pages 93–4, and in that of Lord Watson in the *San Paulo* case, 3 T.C. 407, at page 412.

As regards the second exception stated above, it is clear that the facts of the Appellant Company's case do not fall within it.

22. We therefore hold that the Company is not " ordinarily resident outside the United Kingdom ". The appeal fails, and we leave the figures to be agreed.

The figures subsequently being agreed we adjusted the Profits Tax assessments as follows:—

Accounting period	*Amount of profits assessed* £	£	*Rate at which charged* per cent.	*Profits Tax payable* £ s. d.
1.7.46 to 30.6.47	1,674,008	837,000	5	41,850 0 0
		178,043	25	44,510 15 0
		658,965	10	65,896 10 0
				152,257 5 0
		Less: Tax Credit		91,597 13 0
				60,659 12 0
1.7.47 to 30.6.48	2,857,938	473,883	25	118,470 15 0
		2,384,055	10	238,405 10 0
				356,876 5 0
		Less: Tax Credit		343,676 4 0
				13,200 1 0

33. The Appellant Company immediately after the determination of the appeal declared to us its dissatisfaction therewith as being erroneous in point of law, and in due course required us to state a Case for the opinion of the High Court pursuant to the Finance Act, 1937, Paragraph 4, Part II of the Fifth Schedule, and Income Tax Act, 1918, Section 149, which Case we have stated and do sign accordingly.

34. The questions of law for the opinion of the Court are whether we were right in holding:—

(1) that the expression " ordinarily resident outside the United Kingdom " in Section 39 (1) of the Finance Act, 1947, is not equivalent in its context to the expression " not ordinarily resident in the United Kingdom " ; but

(2) that on the facts of this case, and in the light of the authorities, the Company cannot in law be resident or ordinarily resident in more countries than one and therefore (being admittedly ordinarily resident in the United Kingdom) is not " ordinarily resident outside the United Kingdom " within the meaning of the said Section.

G. R. Hamilton,
B. Todd-Jones,
Commissioners for the Special Purposes of the Income Tax Acts.

Turnstile House,
94–99, High Holborn,
London, W.C.1.
11th December, 1950.

The cases came before Harman, J., in the High Court on 5th, 6th, 9th and 10th July, 1951, when judgment was reserved. On 20th July, 1951, judgment was given in favour of the Crown, with costs, in all three cases.

Mr. J. Millard Tucker, K.C., and Mr. N. E. Mustoe appeared as Counsel for Union Corporation, Ltd., and Johannesburg Consolidated Investment, Co., Ltd., Mr. Frederick Grant, K.C., and Mr. F. N. Bucher, for Trinidad Leaseholds, Ltd., and Mr. F. Heyworth Talbot, K.C., and Mr. Reginald P. Hills for the Crown.

Harman, J.—These three Stated Cases raise in effect the same point, namely, whether the Appellant Companies are " persons ordinarily resident outside the United Kingdom " within the meaning of these words in Section 39 of the Finance Act, 1947, so as to be entitled to the relief in the rate of Profits Tax afforded by that Section. The Commissioners have found in each case that the Company in question is not so resident. Each of the Appellants admits that it is a person ordinarily resident within the United Kingdom so as to be liable to the tax, but argues that it has a second residence and that being also resident outside the United Kingdom it is entitled to the benefit of the Section. Two points are thus raised ; namely, first, whether on that admission the Appellants are excluded from the benefit of the Section upon the footing that Sub-section (1) of Section 39 applies only to persons having no residence within the United Kingdom ; and secondly, whether if this be not so (as the Commissioners held) the facts judged in the light afforded by the authorities justify the conclusion that the Appellants have a second residence outside the jurisdiction. On this point the Commissioners have found against the Appellants, holding that for fiscal purposes a corporate body can have no second residence except in circumstances which admittedly do not here prevail.

The first question is one of construction on which there was apparently little argument before the Commissioners, but the point was undoubtedly taken and is mentioned in the Cases and must logically take precedence over the second, which was elaborately argued before the Commissioners and before me.

This tax was originally called the National Defence Contribution and was imposed at a flat rate by Section 19 of the Finance Act, 1937, which is in these terms:

> " National Defence Contribution. 19.—(1) There shall be charged, on the profits arising in each chargeable accounting period falling within the five years beginning on the first day of April, nineteen hundred and thirty-seven, from any trade or business to which this section applies, a tax (to be called the ' national defence contribution ') of an amount equal to five per cent. of those profits in a case where the trade or business is carried on by a body corporate and four per cent. of those profits in any other case. (2) Subject as hereafter provided, the trades and businesses to which this section applies are all trades or businesses of any description carried on in the United Kingdom, or carried on, whether personally or through an agent, by persons ordinarily resident in the United Kingdom."

Section 20 of the same Act in effect applies the principles of Income Tax as computed under Schedule D to the computation of profits. The tax was by the Finance Act, 1946, renamed Profits Tax. Section 31 of the Finance Act, 1947, in effect exempts individuals from the tax.

(Harman, J.)

Section 30 of the same Act introduced a differentiation in rates in respect of undistributed profits, and the critical Section 39 applies that benefit in favour of certain persons and corporations. Sub-section (1) reads thus:

> "Where the person carrying on a trade or business is ordinarily resident outside the United Kingdom throughout a chargeable accounting period, the profits tax payable by that person shall be ascertained as if no net relevant distributions to proprietors had been made in the case of that person for that period."

Thus far I should assume that the relief applied only to persons resident exclusively abroad, for to say that a person resides out of the jurisdiction suggests, in my judgment, that he does not reside within it, as the Appellants admittedly do. I may here say that it was agreed before me that for present purposes the word "ordinarily" adds nothing to the word "resident".

I was often reminded during the hearing that the word "resides" as applied to a corporate body imports on its face an artificial notion, for a juridical person has not in any ordinary sense a residence. The phrase however has long been current; and it is not now in dispute, though it was for long a matter of controversy, that a corporation has for fiscal purposes a residence and may for the same purposes have a plurality of residences. Nevertheless I remain of the opinion that to describe a person, whether real or juridical, as resident outside an area implies *prima facie* non-residence within it. It remains true that the Sub-section does not say "and not within" or "only" so as to remove all possibility of misunderstanding.

Sub-section (2) reads as follows:

> "Where a trade or business is carried on by a body corporate and, throughout a chargeable accounting period, both the following conditions are fulfilled, that is to say—(*a*) that that body corporate is ordinarily resident in the United Kingdom; and (*b*) that another body corporate which is not ordinarily resident in the United Kingdom controls, directly or indirectly, not less than one half of the voting power in the first-mentioned body corporate, distributions to that other body corporate shall be left out of account in determining, in relation to the first-mentioned body corporate, the net relevant distributions to proprietors for that period";

and the reader is at once struck by the difference in language. The words are not "resident outside" but "not resident in" the United Kingdom, and quite naturally the Appellants argue that, there being no obvious reason for the change except that a different meaning is intended, I must apply ordinary canons of the construction of instruments and interpret the words in Sub-section (1) in a sense different to Sub-section (2), and that the only way to do this is to construe the former as including residence both within and without the area and not in what I have described as the natural sense. It cannot be denied that this argument is a forcible one. It is however to be observed that "not resident in" in (2) (*b*) is used as the opposite to "resident in" in (2) (*a*), and that the latter must mean "resident in and nowhere else", so that "resident outside" in Sub-section (1) should be opposite to that, namely, resident outside and nowhere else.

The Section must moreover be read as a whole, and I look on to Sub-section (3) which begins as follows:

> "Where the franked investment income of a person includes income received from a body corporate ordinarily resident outside the United Kingdom to which subsection (1) or subsection (2) of this section applies, the preceding provisions of this Part of this Act relating to the determination of the net relevant distributions for any period . . ."

and so on; I need read no further.

Now in my judgment the obvious inference from these words is that the framers of the Section supposed that the body corporate referred to as

resident outside the area was one to which Sub-sections (1) and (2) applied indifferently: in other words, that to the draftsman "resident outside" and "not resident in" were synonyms. The Section is framed so as to give relief under its first two Sub-sections, first, to a person carrying on a trade who is resident outside the United Kingdom and, secondly, to a body corporate itself resident in the jurisdiction but having half or more of its voting power controlled by a corporation not resident in the United Kingdom. The intention seems to be to give relief to persons abroad and to corporations which, though not themselves abroad, are controlled from abroad. Now under Sub-section (2) there can be no doubt that the controlling corporation must have no residence here, and it seems to me anomalous if under Sub-section (1) a person is to get a like advantage though it has a residence here. I am satisfied that the Section can be made to give an intelligible result if the wider construction of Sub-section (1) be adopted, but it seems to me in the circumstances to give a strained construction to the Section when read as a whole.

The point was also taken that in the taxing Acts the dichotomy has always been between persons residing in the United Kingdom and persons residing outside it, and that it has not hitherto been necessary to put upon the Commissioners the onus of deciding not this question, but a different one, namely, where outside the United Kingdom the person resides. This might obviously raise difficult questions, in that a person might in the English view be resident in a country where according to the law of that country it was regarded as not resident. This seems to me to be a factor to take into account in construing the Section.

It was also pointed out that in Rule 12 (1) of the Rules applicable to Cases I and II of Schedule D (the principles of which apply) the phrase "persons resident outside the United Kingdom" must necessarily connote persons so residing to the exclusion of a residence inside the United Kingdom. I add that in Rule 12 (2) the expression is changed to "a person resident abroad". I do not give very much weight to this consideration of the language of a different Act, but as that Act is dealing with a kindred subject-matter it would not be right to ignore it.

On the whole therefore I arrive at the conclusion that, unfortunate as is the change in language in the body of this Section, I must conclude that the words "resident outside the United Kingdom" in Section 39 (1) are synonymous with the words "not ordinarily resident in the United Kingdom" within Sub-section (2), and that the operation of Sub-section (1) is therefore confined to persons not resident here. If this be so the Section has no application to the Appellants and the decision of the Commissioners is right, though not on the grounds on which they arrived at it.

This makes it strictly unnecessary to deal with the second point but it would perhaps be disrespectful to the arguments upon it, which extended over several days, if I did not briefly express a view upon it. As I have said, the Commissioners came to the conclusion that these Companies were not resident outside the United Kingdom as a matter of law and not as a matter of fact. The Commissioners reached this conclusion after a most painstaking and exhaustive review of the authorities for which I am much indebted to them, and with the greater part of which I entirely agree. In fact I only part company with them at paragraph 15 where they start to comment on and draw inferences from the views expressed by Lord Sumner in the *Delta*

(Harman, J.)

case(1). In the circumstances I do not propose to tread once again what Lord Sumner so aptly described as the weary road of the Tax Cases.

The paragraphs with which I disagree begin at the end of paragraph 15 and include paragraphs 17 to 20. I do not follow the inference which the Commissioners draw from the *Delta* case, namely that except in a case like the *Swedish Railway* case(2), where control was not active, Lord Sumner would have held that nothing but control of a company in a country would confer on it a residence there. What he was concerned to deny was that mere incorporation and things done to satisfy the legislation in the country of incorporation were of themselves sufficient to confer residence. In the *Delta* case nothing else was done in England, and yet the Court of Appeal held that the company was resident here. That notion has been killed by Lord Sumner's speech in the House of Lords in the *Delta* case but it is essential to remember that he concurred in the decision in the *Swedish Railway* case, and that was a clear decision that a residence may be acquired or retained even where the control is not situate. The fact that control in that case did not amount to very much no doubt made it easier to conclude that there was a dual residence, but was not otherwise crucial. Lord Sumner went so far as to say that the things done here were almost as important as those done in Sweden, but they were not acts involving control which admittedly remained and could only be exercised there.

Lord Cave's speech in the *Swedish Railway* case, quoted at paragraph 9 of the Commissioners' reasons, categorically finds that a company can have two residences even where control is not divided, and cites the *Egyptian Hotel* case(3) in support of this view. He further expresses the view that the fact of registration *coupled with other acts* found by the Commissioners justified their view, which he upheld.

I agree also with the interpretation by the Commissioners in the present case (see paragraph 11) of Lord Cave's speech as meaning that even though control be in one country and undivided the company may by "keeping house" elsewhere acquire a residence there. In this view Lord Sumner concurred. There is no indication to my mind in the *Delta* case that he resiled from this view. This appears from the citations in paragraph 13 where he expressly approves the view that evidence of business done in England of sufficient importance and amount would justify a finding of residence there in the absence of control. I therefore do not accept the Crown's submission that Lord Cave's reference to "keep house and do business" is merely exegetical or another way of saying "where the control abides".

If this be right so far, there remains the question what degree of activity in a country other than that where control abides will confer residence there. Clearly the mere carrying on of a branch will not suffice. For this the old case of the *Ottoman Bank*(4) is authority. It seems to me arguable that no degree of trading activity alone will be enough if the trade be directed from the country where the control abides. There are however administrative as well as commercial activities incident to the life of a company, and it was argued before me that in these the key is to be found. For instance the general meetings of both the South African Companies are held in Johannesburg and the Companies' accounts are audited and published there in South African currency. It seems however to be essential that both features of the phrase "keeps house and does business" must be present. Keeping house will thus refer to administrative management, and doing business to trading activities. Where both are found the conditions are satisfied.

(1) 14 T.C. 119, at p. 144. (2) 9 T.C. 342. (3) 6 T.C. 152 and 542.
(4) (1874), 10 Ex. 20.

(Harman, J.)

On this view the question is one of fact for the Commissioners. The facts in the two South African cases before me bear a great similarity to each other but are not identical. Those in the Trinidad case differ widely from both. The Commissioners in the view they took of the law did not weigh these factors: they contented themselves with finding that control in all three cases was in England and not divided, and those findings on their view of the law were sufficient to decide the cases.

It was not seriously disputed before me that if the Commissioners had not felt themselves excluded by the rule which they (in my judgment mistakenly) propounded they could have taken only one view of the facts in the two South African cases. If ever companies could satisfy the test of doing business and keeping house in South Africa these Companies did, as is amply shown by the facts recited in the relevant Cases. I should therefore have felt at liberty in these two cases to conclude that these Companies in the eye of the English law are resident outside, as well as inside, the United Kingdom. The case of the Trinidad Company is very different. No doubt the trading operations all take place outside the United Kingdom, but there appears to be active control by the board here and there was no evidence of administrative acts outside England. On the facts before me I should not have considered this case by any means clear and should have referred it back to the Commissioners for further consideration unshackled by the supposed rule which on the former hearing precluded them from weighing the factors for and against a second residence.

Having regard to my decision on the construction point I dismiss all three appeals.

Mr. Hills.—My Lord, the appeals will be dismissed with costs?

Harman, J.—Yes, Mr. Hills.

Mr. Hills.—If your Lordship pleases.

The Companies having appealed against this decision, the cases came before the Court of Appeal (Sir Raymond Evershed, M.R., and Jenkins and Hodson, L.JJ.) on 23rd, 24th, 25th, 28th, 29th and 30th January, 1952, when judgment was reserved. On 22nd February, 1952, judgment was given unanimously in favour of the Crown, with three-quarters of the costs in each case.

Mr. J. Millard Tucker, Q.C., and Mr. N. E. Mustoe appeared as Counsel for Union Corporation, Ltd., and Johannesburg Consolidated Investment Co., Ltd., Mr. Frederick Grant, Q.C., and Mr. F. N. Bucher for Trinidad Leaseholds, Ltd., and Mr. F. Heyworth Talbot, Q.C., and Mr. Reginald P. Hills for the Crown.

Sir Raymond Evershed, M.R.—The judgment I am about to read is the judgment of the Court.

These are three appeals brought respectively by Union Corporation, Ltd., Johannesburg Consolidated Investment Co., Ltd., and Trinidad Leaseholds, Ltd., from three Orders made by Harman, J., on 20th July, 1951, dismissing their respective appeals from decisions of the Special Commissioners concerning the computation of their liabilities to Profits Tax.

(Sir Raymond Evershed, M.R.)

Each of the three Appellant Companies admittedly is and has at all material times been resident in the United Kingdom ; but each of them also claims that it is and has at all material times been concurrently resident in a place outside the United Kingdom, namely in South Africa as regards Union Corporation, Ltd., and Johannesburg Consolidated Investment Co., Ltd., and in Trinidad as regards Trinidad Leaseholds, Ltd.

Each of the three appeals raises the same two questions: (i) whether on the assumption that a company is shown to have been ordinarily resident in a place outside the United Kingdom throughout a given chargeable accounting period it is, upon the true construction of Section 39 (1) of the Finance Act, 1947, entitled to the benefit of that provision in the computation of its liability to Profits Tax, as having been " ordinarily resident outside the United Kingdom throughout " the relevant chargeable accounting period within the meaning of Section 39 (1), notwithstanding that it was admittedly also ordinarily resident in the United Kingdom throughout the same period ; and (ii) if the answer to the first question is in the affirmative whether, having regard to the circumstances in which, according to the authorities, dual residence can as a matter of law properly be inferred, the company is on the facts of the case shown to have been throughout the relevant period ordinarily resident in the place outside the United Kingdom claimed as its second or concurrent place of residence.

The effect of the Special Commissioners' decision in each of the three cases was: (i), as regards the first question, that residence in a place outside the United Kingdom throughout a given chargeable accounting period would, if established, entitle the company to the benefit of Section 39 (1), notwithstanding the admitted fact of concurrent residence in the United Kingdom throughout the same period ; but, (ii), as regards the second question, that the test of dual residence in their view deducible from the authorities precluded them as a matter of law from holding that the Company was on the facts of the case shown to have been ordinarily resident outside the United Kingdom as claimed, concurrently with its admitted residence in the United Kingdom. The claims of the three Appellant Companies to the benefit of Section 39 (1) of the Finance Act, 1947, accordingly failed before the Special Commissioners.

The learned Judge (who took the convenient course, also adopted in this Court, of hearing the three cases together and combining them in a single judgment) differed from the Special Commissioners on both questions, but nevertheless arrived at the same result; for he held (in effect): (i), as regards the first question, that upon its true construction Section 39 (1) did not apply to a company ordinarily resident in a place outside the United Kingdom throughout a given chargeable accounting period if it was also ordinarily resident in the United Kingdom during the same period ; or, in other words, that the condition of residence outside the United Kingdom required by Section 39 (1) postulated absence of residence in the United Kingdom and accordingly was not satisfied in a case of dual residence by proof of residence in a place outside the United Kingdom concurrently with residence in the United Kingdom ; and (ii), as regards the second question (on which he thought it right to express his view, although his decision on the first question concluded the appeals against all three Companies and made it strictly unnecessary for him to do so), that the Special Commissioners had misapprehended the effect of the authorities as regards the circumstances in which dual residence can as a matter of law properly be inferred, and that, judged by the true test deducible from the authorities when properly understood, the facts as found by the Special Commissioners

in the cases of Union Corporation, Ltd., and Johannesburg Consolidated Investment Co., Ltd., sufficed to establish the dual residence in South Africa as well as in the United Kingdom claimed by them respectively, but that as regards Trinidad Leaseholds, Ltd., the facts so far found were not sufficient to warrant the same course and he would, had he reached a different conclusion on the first question, have thought it necessary to remit the Case to the Special Commissioners for further consideration.

We are now invited to reverse the learned Judge's decision on the first question, and to adopt his views on the second. On the part of Trinidad Leaseholds, Ltd., we are asked to go further and to hold its claim to dual residence established on the facts as already found, dispensing with the remission to the Special Commissioners which the learned Judge would have thought it necessary to direct.

It is unnecessary for the purposes of the present appeals to discuss in any detail the intricacies of the Profits Tax legislation.

The tax was first imposed by the Finance Act, 1937, under the name of National Defence Contribution as a tax at a uniform rate on profits, whether distributed or not, Sub-sections (1) and (2) of the charging Section (Section 19 of the 1937 Act) being in these terms. Sub-section (1):

> "There shall be charged, on the profits arising in each chargeable accounting period falling within the years of charge to the national defence contribution . . ."

—I have there inserted the result of an amendment in 1942—

> "from any trade or business to which this section applies, a tax to be called the 'national defence contribution'".

Sub-section (2):

> "Subject as hereafter provided, the trades and businesses to which this section applies are all trades or businesses of any description carried on in the United Kingdom, or carried on, whether personally or through an agent, by persons ordinarily resident in the United Kingdom."

The tax, originally introduced for a period of five years, was continued indefinitely by Section 36 of the Finance Act, 1942. Its name was changed to Profits Tax by Section 44 of the Finance Act, 1946. A radical alteration in the character of the tax was made by the Finance Act, 1947, which introduced an entirely new feature in the shape of discrimination between distributed and undistributed profits. By Section 30 (1), as amended by the Finance (No. 2) Act of the same year, the rate of Profits Tax was increased to 25 per cent. By Section 30 (2), as similarly amended, relief was granted at the rate of 15 per cent. on the amount of any excess of profits chargeable to tax for any chargeable accounting period over the amount of profits distributed for that period. Conversely, by Section 30 (3), as similarly amended, an additional charge at the rate of 15 per cent. was made on the amount of any excess of profits distributed for any chargeable accounting period over the profits chargeable to tax for that period.

The broad effect of the provisions thus briefly summarised was therefore to charge Profits Tax at the rate of 25 per cent. on distributed, and 10 per cent. on undistributed, profits; and these were the rates in force during the periods relevant to the present appeals. By Section 31 of the Finance Act, 1947, trades or businesses carried on by individuals, partnerships of individuals and persons acting as personal representatives were exempted from the tax, and its scope (save in certain special cases probably rare in practice) was thus in effect limited to trades or business carried

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on by corporate bodies. The Act also contains elaborate provisions, which need not for the present purpose be considered in detail but to which some further reference is made hereafter, for exempting from further liability to tax profits received by way of distribution by one Profits Tax paying concern from another (termed in the Act "franked investment income") and for excluding the appropriate proportion of any franked investment income in computing the amount of any taxable distribution made out of the profits which include franked investment income.

Reference should now be made to Section 39 of the Finance Act, 1947, and as the first question in these appeals turns upon the true construction of Sub-section (1) of this Section, while its remaining provisions have been relied on in argument as aiding one way or the other in the solution of that problem, it had better be read in full. Sub-section (1):

> "Where the person carrying on a trade or business is ordinarily resident outside the United Kingdom throughout a chargeable accounting period, the profits tax payable by that person shall be ascertained as if no net relevant distributions to proprietors had been made in the case of that person for that period."

Sub-section (2):

> "Where a trade or business is carried on by a body corporate and, throughout a chargeable accounting period, both the following conditions are fulfilled, that is to say—(*a*) that that body corporate is ordinarily resident in the United Kingdom; and (*b*) that another body corporate which is not ordinarily resident in the United Kingdom controls, directly or indirectly, not less than one half of the voting power in the first-mentioned body corporate, distributions to that other body corporate shall be left out of account in determining, in relation to the first-mentioned body corporate, the net relevant distributions to proprietors for that period."

Sub-section (3):

> "Where the franked investment income of a person includes income received from a body corporate ordinarily resident outside the United Kingdom to which sub-section (1) or sub-section (2) of this section applies, the preceding provisions of this Part of this Act relating to the determination of the net relevant distributions for any period by reference to the gross relevant distributions therefor shall have effect subject to the following modification, that is to say, that any reference therein to the profits for the period (not being a reference to profits computed without abatement and including franked investment income) shall be construed as a reference to the first mentioned profits increased by the said income received from the said body corporate."

The first question to be determined depends on the construction of the word "outside" in Section 39, Sub-section (1). The Appellants contend that the word has a wide meaning which does not exclude other residence inside the United Kingdom, whereas the Respondents contend for a narrower construction, making residence outside the United Kingdom exclusive of residence inside the United Kingdom. It was conceded that for present purposes the word "ordinarily" adds nothing to the word "resident".

Having regard to the language chosen by Parliament in Section 39 the question is not an easy one, but apart from a special context we think that the word "outside" has naturally an exclusive meaning and in its ordinary application has a negative import as opposed to the positive import which the word "inside" possesses. When, however, it is attached to such a word as "residence" and when it is remembered that a person may be resident in two places at the same time, the purely negative import of the word "outside" is not so obvious. Nevertheless, we agree with Harman, J., in thinking that the exclusive is still the *prima facie* meaning of the word. To speak of residence inside the United Kingdom is to make a positive

assertion of fact: to speak of residence outside the United Kingdom is merely to contradict the fact of residence inside the United Kingdom without any positive assertion of any other particular residence.

The research of Counsel was directed to finding examples of the use of similar words in a taxing statute when it could be said with certainty that the word "outside" had been used in the exclusive or purely negative sense. No satisfactory illustration was given except one taken from Rule 12 (1) of the Rules applicable to Cases I and II of Schedule D. Here it is conceded that the phrase "persons resident outside the United Kingdom" must necessarily connote the exclusion of persons residing inside the United Kingdom. When we come to the particular context here involved the question of construction is rendered difficult by the change of language in Section 39 (2) (*b*), where the words used are not "ordinarily resident outside the United Kingdom" but "not ordinarily resident in the United Kingdom".

The Appellents contend, first, that the change of language must be regarded as deliberate and shows that, whereas the words used in Sub-section (2) (*b*) are plainly exclusive, the words used in Sub-section (1) are not exclusive of residence inside the United Kingdom. In the alternative they argue that the problem goes beyond the sphere of difficult construction and becomes one of ambiguity. They rely on the judgment of Baron Pollock in *Clifford* v. *Commissioners of Inland Revenue*, [1896] 2 Q.B. 187, at page 193, approving a passage in the First Edition of Maxwell on Statutes which reads as follows:

> "Statutes which impose pecuniary burdens are subject to the rule of strict construction. It is a well settled rule of law that all charges upon the subject must be imposed by clear and unambiguous language, because in some degree they operate as penalties. The subject is not to be taxed unless the language by which the tax is imposed is perfectly clear and free from doubt."

The Appellants then contend that the ambiguity must be resolved in favour of the taxpayer. At to this we have, after the exhaustive argument addressed to the Court on behalf of all parties concerned, arrived at the conclusion that there is no ambiguity in the sense contended for and that the difficulty is one of construction which can and should be overcome. And, in any case, the Section is primarily a relieving Section and not a taxing Section.

We return to the first point. Change of language in itself is not a necessary support for an argument that meaning is changed—see *Congreve*, 30 T.C. 163, at page 204. Lord Simonds in discussing in that case the use of the words "by means of" and "by virtue or in consequence of" in Section 18 of the Finance Act, 1936, both phrases being in close proximity to one another, refused to draw a fine distinction and concluded that the difference of language was there sufficiently explained by the wish of the draftsmen not to use the same expression twice.

We admit that if the Respondents are right the change in terminology is open to criticism as a matter of drafting, but we think it is easy to see (upon the Respondents' view) how it may have come about. The Act reads in Section 39 (2)(*a*)

> "that that body corporate is ordinarily resident in the United Kingdom",

and then continues in Section 39 (2) (*b*)

> "that another body corporate which is not ordinarily resident in the United Kingdom"

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etc. In drafting (*a*) and (*b*) together it seems natural enough to add the word " not " before the words " ordinarily resident " rather than to look back to see what form of words was used in Section 39 (1) to describe the same thing.

We are not, then, persuaded that the change of language in Section 39 (2) displaces what we regard as the *prima facie* meaning of the words " resident outside the United Kingdom " in Section 39 (1). On the other hand, we think that assistance can be gained from a consideration of the language of Section 39 (3).

The first two Appellants contended that

> " a body corporate ordinarily resident outside the United Kingdom to which . . . subsection (2) of this section applies "

refers to the body corporate in Sub-section (2) (*b*). That contention is accepted by the Respondents, and *prima facie* it supports their submission that the word " outside " in the second line of Sub-section (3) is synonymous with the words " not ordinarily resident in " in Sub-section (2) (*b*). The Respondents thus endeavour in part to meet the contention based on change of language. Mr. Tucker on behalf of the first two Appellants retorts that this reference carries the matter no further since reference to Sub-section (2) (*b*) in Sub-section (3) may be to a limited class of corporations already included in the wider language of the latter Sub-section.

Sub-section (3) is concerned with what is called " franked investment income ". This phrase is defined in Sub-paragraph (1A) of Paragraph 7 of the Fourth Schedule to the Finance Act, 1937, as amended by Section 32 of the Finance Act, 1947, and, without attempting a complete or precise exposition, the purpose and effect of these provisions are to avoid double payment of the tax (at the full rate) when and to the extent that the profits of one body corporate (liable to the tax) consist of " investment income " directly or indirectly received from another body corporate which has, in respect of that income, already become liable to tax at the full rate. Both Sub-section (1) and Sub-section (2) of Section 39 of the 1947 Act make provision for reducing the rate of tax in certain cases—Sub-section (1) in the case of all the taxable profits of a body corporate " ordinarily resident outside the United Kingdom ", and Sub-section (2) in the case of a body corporate " ordinarily resident inside the United Kingdom " which is controlled as to not less than half its voting power by a body corporate not ordinarily resident inside the United Kingdom, to the extent of the profits distributed to the latter body. It is reasonably clear then, in our view, that what Sub-section (3) is designed to do is to provide that where income or profits, in respect of which the rate of tax has been reduced by virtue of Sub-sections (1) or (2), would in the hands of another body corporate be entitled to be treated as " franked investment income " under the earlier provisions of the Act, then that other body corporate is, *quoad* such income or profits, disentitled to the relief it would otherwise obtain. As regards the reference to Sub-section (1) no difficulty seems to arise. The phrase " to which subsection (1) . . . applies " is in all respects appropriate. As regards Sub-section (2), however, the language used is much less clear and on any view the drafting must be regarded as somewhat inelegant. For Sub-section (2) is dealing with the case of a body corporate ordinarily resident inside the United Kingdom—albeit having the characteristic that not less than 50 per cent. of its voting power is controlled by a body corporate not ordinarily so resident. The Appellants are then confronted with a dilemma. If the word " applies " in Sub-section (3) has, *quoad* Sub-section (2), its ordinary significance, then the only body corporate to which

Sub-section (2) " applies " is one ordinarily resident not outside but inside the United Kingdom. To avoid this difficulty the word " applies " must be read as " refers ". This is the horn of the dilemma preferred by Mr. Tucker, and although, as we have already said, it is no doubt possible as a matter of language to regard Sub-section (3) as intending, by its reference to Sub-section (2), to identify a sub-class (as it were) of bodies corporate ordinarily resident outside the United Kingdom, namely, those that are not also ordinarily resident inside the United Kingdom, it is a singularly oblique method of achieving that end, to say the least; and if the word " applies " must for this purpose be read as equivalent to " refers " then the far more natural sense of the language, in our judgment, is that " ordinarily resident outside the United Kingdom " and " not ordinarily resident inside the United Kingdom " are treated as synonymous.

Mr. Grant so far recoiled from this result that he grasped the first horn of the dilemma. He insisted that the word " applies " must, *quoad* Sub-section (2), be correctly used and read. But this conclusion is, we think, even less happy for him than was the alternative preference for Mr. Tucker; for, as we have already observed, Sub-section (2) applies not to a body corporate ordinarily resident outside the United Kingdom but to a body corporate ordinarily resident inside the United Kingdom. To make sense, therefore, of the provision at all, Sub-section (3) on Mr. Grant's argument must be treated, *quoad* Sub-section (2), as intended, by an even greater obliquity than demanded by the alternative construction, to be referring to a body corporate ordinarily resident inside the United Kingdom which is also ordinarily resident outside it: and (by what must be admitted to be a queer caprice) to be taking away the benefit introduced by Section 32 of the Act of 1947 from a person who has received as " franked investment income " income received from *that* body corporate and not income received from the body corporate referred to in Sub-section (2) (*b*). Notwithstanding that, relief in regard to the rate of tax has been given by Sub-section (2) to distributions to the latter body corporate and not to the former.

In our judgment the complexities and anomalies which either of the Appellants' arguments require are such as to make it impossible to attach significance to the change in expression from " ordinarily resident outside " on the one hand to " not ordinarily resident inside " on the other. In other words, the inelegance of language and the mental contortions which are otherwise forced upon the reader point strongly, in our judgment, to the solution that the two expressions are and were intended to be synonymous.

We think, therefore, on the whole that the argument of the Respondents has persuasive force and that the natural reference to Sub-section (2) in Sub-section (3) is to the body corporate not ordinarily resident in the United Kingdom mentioned in Sub-section (2) (*b*), so that " ordinarily resident outside " in Sub-section (3) is synonymous with " not ordinarily resident in " in Sub-section (2) (*b*).

We think, however, that support for the Respondents' contention (apart from the *prima facie* meaning of the word " outside ") is also to be found in the structure of the legislation by which the Profits Tax is imposed. The normal dichotomy in the taxing Acts is between persons residing in, and persons residing out of, the United Kingdom. We use the word " normal " to show that we have not overlooked the fact (pointed out by

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Mr. Grant) that the 1947 Act introduced a new conception, namely differential rates of Profits Tax according to whether profits were distributed or not and that the distinction is not one wholly between resident and non-resident since under Section 39 (2) relief is given to a person who is resident in this country.

The distinction does, however, appear in Section 19 of the Finance Act of 1937 which first imposed the National Defence Contribution. The Appellants were made subject to the tax by the Act of 1937, and if it had been intended by Section 39 (1) of the Act of 1947 to give persons resident not only inside but also at the same time outside the United Kingdom relief already given by the same Section to persons residing exclusively outside the United Kingdom the Legislature would, in our opinion, have said so in terms.

In our judgment the words of Section 39 (1) construed in their natural meaning in their context, and against the background of the taxing Acts generally, can only properly be construed in the sense contended for by the Respondents, so that the Appellants, being resident inside, cannot claim the benefit conferred by the Section on persons resident outside the United Kingdom.

Before leaving this part of the case it is desirable that we should refer to one sentence used by Harman, J., which has been the subject of criticism in this Court. He said[1]:

> "It is however to be observed that 'not resident in' in (2) (*b*) is used as the opposite to 'resident in' in (2) (*a*) and that the latter must mean 'resident in and nowhere else'".

We are unable to assent to this statement since once it is conceded that a company may be resident in two places, the positive finding that a company is resident in the United Kingdom does not, according to the natural sense of the words, exclude a finding that the same company is also resident outside the United Kingdom. In so far, therefore, as the learned Judge found support for the construction he placed upon the language of Section 39 (1) in the language of Sub-sections (2) (*a*) and (2) (*b*), we should not follow him.

Having regard to the conclusion at which we have arrived upon the first question it becomes, in strictness, unnecessary for us to express our view upon the second. But it has been most fully and elaborately argued before us; and we have been informed by learned Counsel that those who are engaged in the practice and administration of Income Tax law have now for more than 20 years been vexed by the problem, and have awaited an opportunity for its determination by the Court. Both the Special Commissioners and Harman, J., have given their opinions upon it, and the present case may well be considered by the House of Lords. In the circumstances we have thought it right to state our own conclusions.

The short question at issue may conveniently be posed at this stage in reference to one of the three Appellants—say, Union Corporation, Ltd. —and so posed it may indeed seem at first sight simple enough. This large corporation, incorporated according to the laws of the Union of South Africa, having its registered office in Johannesburg in that country, has an issued share capital of more than £1,000,000, and controls the activities of 16 subsidiary companies, 13 of them incorporated in South Africa and managed by the Appellant Company from Johannesburg, two of them incorporated in England, and the last in Mexico which, like the

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[1] *See* page 256 *ante*.

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English companies, is managed from London. In addition the Appellant Company "acts in secretarial and technical capacities" for a number of other companies, most of them incorporated in South Africa, in which country the Appellant's services are performed. More than two-thirds of the Appellant's staff is in South Africa. A minority of the board of directors resides in South Africa. Meetings of the board, or of committees of the board, take place in South Africa, but on matters of policy or otherwise generally affecting the Company's affairs the supremacy rests with the board in London. It follows that the real and ultimate control over the Appellant Company's activities is to be found in London where the majority of the directors reside and act; and of the large revenue which the Appellant Company enjoys more than one-half (as appears from the Case Stated) may fairly be taken to be earned in England or outside the Union.

We have given but a brief summary of the functions and activities of Union Corporation, Ltd. They are fully analysed in the Case Stated, but the summary is sufficient for our present purpose. Where, on these facts, is Union Corporation, Ltd., "ordinarily resident"? Or, since it is conceded on both sides that in the present case the adverb is without significance, where is it "resident"? We have put the question deliberately in that form since it is also conceded, and must in any event since the *Swedish Central Railway* case, 9 T.C. 342, be taken as established, that an incorporated company may for Income Tax purposes have more than one residence. But though we think the question is properly put as we have posed it, the circumstances have presented it to us in slightly different form. The Appellant Company being admittedly resident in England, is it resident also in South Africa? For residence in England has throughout been conceded on the Appellant Company's behalf, and having regard to the existence and exercise of final and effective control by the directors in London, to the presence or "abiding" in London (to anticipate the formula recurring time and again in the many cases cited) of "central control and management"—we deliberately omit the definite article as tending to beg the question—the Appellant Company's advisers could do no other.

The words "residing" and "residence", whether applicable to a natural or an artificial person, are nowhere defined in any of the relevant Income Tax or Finance Acts. There is no indication in such legislation that the significance of the words is to be determined by reference to any particular facts or circumstances. So far as the words apply to a natural person, it is established that they are to be construed according to their natural and ordinary import—see *per* Viscount Sumner in the *Egyptian Delta* case, 14 T.C. 119, at page 152, citing *Lysaght's* case, 13 T.C. 511.

On the other hand, it is obvious that a body corporate, a *persona ficta*, cannot appropriately be said to "reside" at all in the same and ordinary sense as an individual: physical presence and its normal manifestations, *e.g.* of eating and sleeping, are absent in the former case. The relevant legislation has, however, over a long period applied the test of "residence" indifferently to natural and artificial persons. The sense of the words must, therefore, as respects a body corporate, be derived, as Lord Loreburn observed in his much quoted opinion in the *de Beers* case(1), from analogy. But the analogy involves no mere technicality, no great

(1) 5 T.C. 198, at pp. 212–3.

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mystery or mental strain; it leaves, we should have thought, room for common sense. Still the words remain, "residing" and "resident". There is, as we have said, no substitution in the statutes in the case of a body corporate of a new and elaborate formula, the precise terminology of which requires to be construed by the Court.

If, then, this were the whole matter we should for our part have been much inclined to say, upon the facts as we have summarised them, and regarding the Appellant Company's activities and functions as best we could by sensible analogy to those of an individual trader, that if Union Corporation, Ltd., resided in the United Kingdom it resided also in the Union of South Africa, since there are ample manifestations of its presence in both places and it truly does business in both countries, or at least we should have been inclined to hold that the question was one of fact to be conclusively determined in a broad man-of-the-world sense by the Special Commissioners. Unfortunately so simple an approach and so easy a solution are not possible. And the Special Commissioners attempted no such matter-of-fact determination but concluded, after a most careful summary of the numerous authorities, that in the circumstances of the present case the (admittedly correct) concession of a London residence negatived as a matter of law the existence of a residence elsewhere.

During the thirty years between 1875 and 1905, the span covered at its extreme by the decision of the Exchequer Chamber in the *Ottoman Bank* case (*The Attorney-General* v. *Alexander* (1874), 10 Ex. 20) and the decision of the House of Lords in the *De Beers* case (*De Beers Consolidated Mines, Ltd.* v. *Howe*, 5 T.C. 198), the Courts undoubtedly worked out and enunciated a rule or principle for determining where for purposes arising under Schedule D of the Income Tax Acts a limited company resided. The rule found classical expression in Lord Loreburn's words, already quoted, in the *De Beers* case—"where the central control and management abides". Thereafter, and before the *Swedish Central Railway* case(1), this enunciation was thrice affirmed in the House of Lords in *American Thread Co.* v. *Joyce*, 6 T.C. 163, in *New Zealand Shipping Co., Ltd.* v. *Thew*, 8 T.C. 208, and in *Bradbury* v. *English Sewing Cotton Co., Ltd.*, 8 T.C. 481. And it must now be taken also, since the case of *Egyptian Delta Land & Investment Co., Ltd.* v. *Todd*, 14 T.C. 119, as clear that the rule or principle was and is equally applicable to companies incorporated in the United Kingdom and to companies incorporated outside the United Kingdom—see page 150 of the report of that case. But nowhere in any of the authorities from the *Ottoman Bank* case until the *Swedish Central Railway* case(1) was it decided—nor was it material to decide—whether the test, if satisfied as regards one country, was exclusive of residence in another. There are many judicial *dicta* favouring the possibility of dual residence—for example, Chief Baron Kelly in the case of *Cesena Sulphur Co., Ltd.* v. *Nicholson*(2) (1876), 1 Ex. D. 429, at page 445; Channell, J., in *Goerz* v. *Bell*, [1904] 2 K.B. 136, at page 146; Phillimore, J., in the *De Beers* case, [1905] 2 K.B. 612, at page 632; Buckley, L.J., in *American Thread Co.* v. *Joyce* in 6 T.C. at page 31, and elsewhere. But the truth was that at the time of the *De Beers* case

> "... and for twenty years afterwards it was assumed that a limited liability company could not have two residences, for Income Tax purposes; either it resided abroad or it did not"—

per Viscount Sumner in the *Egyptian Delta* case at page 149 of 14 T.C. We are, therefore, disposed for ourselves to think (with all respect to certain language of Viscount Cave in the *Swedish Central Railway* case) that if

(1) 9 T.C. 342. (2) 1 T.C. 88, at p. 95.

Lord Loreburn and the other noble Lords who participated in the *De Beers* decision(1) had been asked if the test there formulated was exclusive in its effect, they would have answered affirmatively because the possibility of dual residence by a limited liability company for tax purposes was not then in contemplation. But whether our surmise be right or wrong, it is beyond doubt that none of the cases referred to ever so decided.

So the question arose for the first time in the *Swedish Central Railway* case(2), and in that case—equally beyond doubt—the House of Lords answered the question affirmatively and decided that a limited company, which was admitted to reside in Sweden (where its board of directors in fact met to conduct the company's business) could still have, and did have, at the same time an English residence also for Income Tax purposes. But it is, we think, impossible to avoid the conclusion that the opinions in that case, upon the face of them, went further than merely to assert the validity of the proposition that a limited liability company might contemporaneously reside in more than one country and that there was evidence sufficient to justify the finding by the Special Commissioners that the Swedish Central Railway Company resided in the United Kingdom as well as in Sweden, but lend strong support to the view that, even where the "central control and management" were concentrated exclusively in one country, still concurrent residence in another country might exist, based on not much more than the facts of incorporation and registration in that other country together with such further activities as were necessary to maintain the registration in accordance with the local law. It will be necessary for us hereafter to state more fully the facts in the *Swedish Central Railway* case and to refer to certain language used by Lord Cave on which the Appellants have particularly relied. But it is pertinent at this place to state first that both Atkin, L.J., and Lord Atkinson dissented from the conclusion of the majority in the Court of Appeal and the House of Lords respectively and maintained that the rule enunciated in the *De Beers* case was exclusive in its effect; and, second, that Lord Sumner, though expressing no reasons of his own, assented to the conclusion proposed by Lord Cave. If, therefore, upon the facts of the present case having been presented to us for our opinion before the *Swedish Central Railway* case, we should have felt bound by the authority of the *De Beers* case—contrary to our own inclination as above intimated—to answer the question posed adversely to the Appellant's arguments, after the decision of the *Swedish Central Railway* case we should have felt no less bound to express the opposite conclusion.

Then, four years later, the *Egyptian Delta* case(3) came before the House of Lords. In that case, as in the *Swedish Central Railway* case, residence in a country outside the United Kingdom was admitted: but it was contended that, although beyond a peradventure the central control and management abided wholly in Egypt, the mere fact of incorporation and registration in the United Kingdom, together with the performance there of such other formal or administrative functions as were essential by the law of England to maintain such registration, sufficed to give to the company English residence also.

Harman, J., was of opinion that the House in the *Egyptian Delta* case did not resile in any respect from the opinions it had expressed in the *Swedish Central Railway* case, and so far as concerns the matters

(1) 5 T.C. 198. (2) 9 T.C. 342. (3) 14 T.C. 119.

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strictly decided in the latter case no doubt the House did not do so and could not have done so. But we have found it impossible to avoid the conclusion that Lord Sumner in the course of his long analysis of the previous decisions, and particularly of the decision in the *Swedish Central Railway* case(1) itself, did at least substantially qualify, and intend to qualify, some of the *dicta* in the last-mentioned case, and the inferences to which, unqualified, they must inevitably have led. In support of this view we refer particularly to the attention directed by Lord Sumner to the dissenting judgments of Lord Atkinson and Atkin, L.J., in the *Swedish Central Railway* case and to the emphasis placed by Lord Sumner, Lord Buckmaster and Lord Warrington of Clyffe upon the language of Rule 7 of All Schedules Rules to the Income Tax Act, which had not been previously noticed.

The question presented to the House of Lords for decision in the *Egyptian Delta* case(2) was of a limited character—whether the company being admittedly resident in Egypt could in the circumstances already mentioned properly be held also to have an English residence. But as it had been with Viscount Cave in the *Swedish Central Railway* case, so the speech of Viscount Sumner was not confined to giving a negative answer to the question posed. He trod again " the weary road of the Tax Cases "(3) and elaborately analysed previous decisions, and particularly the *Swedish Central Railway* case. As a consequence, upon certain passages of his speech. the Crown have relied with no less zeal than have the Appellants upon their chosen sections of the speech in the *Swedish Central Railway* case. The result has been that the language of both these speeches and of Lord Loreburn's speech in the *De Beers* case(4) has at times been subjected to a closeness of scrutiny more appropriate to the examination of the words of a Statute in course of interpretation by the Court. This process has, we think, run the risk of doing less than justice to the speeches in question, which were intended only to express the speakers' reasons for the conclusions at which they arrived in the particular circumstances before them.

What, however, is the result? The view of the Special Commissioners was that in the case of a limited company engaged in active business operations (like each of the Appellant Companies but unlike the Swedish Central Railway Company) residence in more than one country could only be found if the supreme command, as it were, over the Company's affairs, " *the* central control and management ", was in truth divided so as to be equally, or substantially equally, present in both countries: as if, in Union Corporation, Ltd.'s case, the board of directors in England and South Africa were equally, or substantially equally, balanced, and board meetings in each country possessed and exercised a like authority ; or as if a company's single board of directors divided its presence, energies and functions correspondingly between two countries.

We agree with Harman, J., in rejecting this view. It is clear that mere registration and mere performance of those acts which the English law relating to limited companies (and corresponding laws in other countries) require to be done to maintain registration do not constitute such activities as are by analogy equivalent to the activities which, in the case of a natural person, establish residence. It is, we think, no less clear that the mere presence in a country of physical assets belonging to a company and the conduct of substantial productive or other business operations on the company's behalf by its managing or other servants will not suffice if the control of all those operations and of the general affairs of the company is elsewhere: for otherwise it would follow (and Mr. Grant's argument

(1) 9 T.C. 342. (2) 14 T.C. 119. (3) *Ibid.*, at p. 144. (4) 5 T.C. 198.

seemed indeed at times to go so far) that a company would reside in every country where substantial business activities were being in fact conducted on its behalf. The company may be properly found to reside in a country where it " really does business ", that is to say, where the controlling power and authority which, according to the ordinary constitution of a limited liability company, is vested in its board of directors, and the exercise of that power and authority, is to some substantial degree to be found. In our judgment, the formula " where the central power and authority abides " does not demand that the Court should look, and look only, to the place where is found the final and supreme authority.

We have upon this difficult question derived great assistance from the judgment of Sir Owen Dixon in the Australian case of *Koitaki Para Rubber Estates, Ltd.* v. *Federal Commissioner of Taxation,* 64 C.L.R. 15 and 241, where the same problem was fully considered by that learned Judge and by the full High Court of Australia. We cite one paragraph from Dixon, J.'s judgment:

> " The better opinion, however, appears to be that a finding that a company is a resident of more than one country ought not to be made unless the control of the general affairs of the company is not centred in one country but is divided or distributed among two or more countries. The matter must always be one of degree and residence may be constituted by a combination of various factors, but one factor to be looked for is the existence in the place claimed as a residence of some part of the superior or directing authority by means of which the affairs of the company are controlled."

We accept and respectfully adopt that passage as accurately stating the solution of the problem. The question in any particular case, whether or not the test is satisfied, whether such part of the " superior and directing authority " of a limited liability company is found in any country as will justify the conclusion that the company is really doing business there and is, accordingly, there resident, is one of degree and therefore one of fact upon which, if there be evidence to support it, the conclusion of the Special Commissioners will be final.

Of the cases decided before the *Swedish Central Railway* case(1) we do not find it necessary to refer to any but the *De Beers* case (*De Beers Consolidated Mines, Ltd.* v. *Howe,* 5 T.C. 198) to which we have already many times referred. The de Beers Company, like Union Corporation, Ltd., had been incorporated in South Africa where a substantial mining business was conducted in its name. But, as in the case of Union Corporation, Ltd., the majority of its directors resided in England, where the superior and directing authority over the company's affairs was undoubtedly exercised. The question—and the only question—involved in the case was whether in the circumstances the company resided in England for Income Tax purposes. The relevant part of Lord Loreburn's judgment must be quoted in full(2):

> " 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 . . . The decision of Chief Baron Kelly and Baron Huddleston, in the *Calcutta Jute Mills* v. *Nicholson*(3) and the *Cesena Sulphur Company* v. *Nicholson*(4), now thirty years ago, involved the principle that a Company resides, for purposes of Income Tax, where its real business is carried on. Those decisions have been acted upon ever since. I regard that as the true rule ; and the real business is carried

(1) 9 T.C. 342. (2) 5 T.C. at pp. 212–3. (3) 1 T.C. 83. (4) 1 T.C. 88.

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> on where the central management and control actually abides. It remains to be considered whether the present case falls within that rule. This is a pure question of fact, to be determined, not according to the construction of this or that regulation or byelaw, but upon a scrutiny of the course of business and trading."

In that passage Lord Loreburn was, in our judgment, answering two distinct questions—first, what were the activities or functions of a body corporate, an artificial person, which by analogy corresponded to those human functions or activities which in the case of a natural person might constitute "residence"?: and second, what (for the purpose of providing the answer to the question raised in the case before him) extent or degree of those activities or functions on the part of an artificial person would suffice to establish "residence"? To the first question Lord Loreburn's answer was—"keeping house and doing business": not, be it observed, doing business alone, for otherwise, as we have already stated, a limited company might be said to reside in every country where any substantial business was being done in its name, though it remained, in Dixon, J.'s phrase, a mere "absentee owner". To the second question Lord Loreburn's answer was—where those activities are "really" performed, where the company "really keeps house and does business". And the significance of the essential adverb is supplied by the later paraphrase "the real business is carried on where the central management and control actually abides." The form of the language was determined by reference to the particular question which the House was called upon to determine and by the circumstance that the possibility of dual residence was then neither contemplated nor relevant. In such a context the test formulated amounts, in our judgment, to no more and no less than the test stated by Dixon, J., in the Australian case.

In the *Swedish Central Railway* case (*Swedish Central Railway Co., Ltd.* v. *Thompson*, 9 T.C. 342) the facts were that the railway undertaking owned by the Company had at the material date been leased to another company in Sweden so that its business activities were for practical purposes limited to the receipt of the contractual rentals. All meetings of directors as well as of shareholders were held in Sweden but there was a secretary in London, a banking account in London and the company's seal was kept in London, where all transfers of shares were made or registered. It was conceded that the company was resident in Sweden but the question was whether (as the Crown alleged) the company was also resident for the purposes of Schedule D in the United Kingdom. According to the judgment in the *Egyptian Delta* case of Lord Sumner, who was, as we have noted, a member of the House which heard the appeal in the *Swedish Central Railway* case the character of the activities performed in Sweden and England respectively were never discussed at the Bar (see 14 T.C., at page 143).

> "In the static condition of the company's affairs",

he said,

> "[the business done in England] was not much less important than the Swedish part . . . as things were little had to be done anywhere except 'administration', as is often the case with companies, and that was fairly divided between the two countries."

Nevertheless Viscount Cave, L.C., and the majority of the House proceeded to determine the case on the basis that the central control and management of the company's affairs was to be found, and found (as we think) exclusively, in Sweden. That fact did not however (they held) negative concurrent

residence in England, nor did it invalidate the finding of the Special Commissioners that the company also resided in England. At page 372 of the report Lord Cave said:

> "The effect of this decision is that, when the central management and control of a company abides in a particular place, the company is held for purposes of Income Tax to have a residence in that place; but it does not follow that it cannot have a residence elsewhere. An individual may clearly have more than one residence (see *Cooper* v. *Cadwalader*, (1904) 5 T.C. 101); and in principle there appears to be no reason why a company should not be in the same position. The central management and control of a company may be divided, and it may 'keep house and do business' in more than one place; and if so, it may have more than one residence."

The passage upon which the Appellants most strenuously relied is that which occurs later at page 375:

> "In the present case it was found by the Commissioners that, while the business of the Company was controlled and managed from the head office at Stockholm, so that the Company would in the contemplation of English law have a residence in Sweden, the Company was resident in the United Kingdom for the purposes of the Income Tax Acts; and it was hardly disputed that, assuming that a company can have two residences, there was sufficient material upon which that finding could be based. I am not at present prepared to say that registration in the United Kingdom would itself be sufficient proof of residence here; that point does not arise in this case, and I express no opinion upon it. But, however that may be, I am satisfied that the fact of registration together with the other circumstances which were found by the Commissioners to exist, were sufficient to enable them to arrive at their finding."

In the *Egyptian Delta* case (*Todd* v. *The Egyptian Delta Land & Investment Co., Ltd.*, 14 T.C. 119) the facts were similar to those in the preceding case save that (1) the business of the company was not "static" but consisted of active trading operations in Egypt and (2) the residual activities of the company in England were confined to such purely "administrative" functions only as were necessary to comply with the requirements, in order to sustain the company's continued registration in England, of the Companies (Consolidation) Act, 1908. The Crown contended—relying particularly upon the *Swedish Central Railway* decision[1]—that the company was, as a matter of law, resident in England as well as in Egypt for Income Tax purposes, and so the Revenue Judge and the Court of Appeal had both determined. Lord Sumner and the other noble Lords who were then associated with him (Lord Atkinson, Lord Buckmaster and Lord Warrington of Clyffe) decisively rejected that proposition. We have already cited certain comments by Lord Sumner on the *Swedish Central Railway* case, but the whole passage at page 143 of the report should be quoted:

> "All that was decided in the *Swedish Central Railway* case was that the company could have two residences, one in England as well as one in Sweden. Your Lordships were not asked to decide more. It is true that by admission the controlling power over the business was in Sweden, but other business was done in London the character and importance of which, though set out in the Case, was not discussed at the Bar. It was a matter of degree on the facts and your Lordships cannot be deemed to have come to some unexpressed conclusion on that ground merely because you did not for yourselves declare either that there was no evidence of business carried on in England or that there was no need to discuss the carrying on of business because the effect of registration was conclusive. Nor is it decisive of the point to say now that the business done in England was only administrative. It was in fact a good deal more, and in the static condition of the company's affairs it was not much less important than the Swedish part. If new questions arose the Swedish directors could settle them, but as things were little had to be done

(1) 9 T.C. 342.

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> anywhere except 'administration', as is often the case with companies, and that was fairly divided between the two countries. I would particularly draw attention to the powerful judgments of my noble and learned friend Lord Atkinson and of Lord Justice Atkin as showing how strong are the grounds for saying that since the *De Beers* case(1) the test of taxable residence for any company has been settled to be the carrying on of business here and not the bare operation of the Companies (Consolidation) Act."

Having so restricted the effect and significance of the *Swedish Central Railway Company* decision(2) the noble Lord then proceeded to his review of the authorities up to and beyond the *De Beers* decision. To do justice to its sense and its reasoning, the whole speech must be read. In our judgment it involved, essentially, an unhesitating affirmation of the validity and authority of the test expounded by Lord Loreburn in the *De Beers* case.

"Then",

he said at page 147,

> "in 1906 the *De Beers* case . . . was decided in terms which in my opinion render it conclusive of the present issue."

Again at page 150,

> "I submit that, even technically, the *De Beers* case is a binding authority to-day."

In our judgment, therefore, Lord Loreburn's test emerges supreme and authoritative, subject only to the rider or corollary that since a limited liability company can contemporaneously have more than one residence (a thing not contemplated by Lord Loreburn) his analogy to a natural person demands that central management and control may be divided and that such division, being a matter of fact and degree in each case, is not denied by the circumstances that the supreme command, the power of final arbitrament, may be found to be, or to be predominantly, in one place. The *Swedish Central Railway* case emerges as a decision justified by its peculiar facts and an authority consequently limited; but at least it renders it no longer possible to satisfy the test of residence by reference only to the country where final control abides or to assert that when for that reason residence in one country is conceded residence elsewhere cannot co-exist.

There remains the Australian case to which we have already alluded—*Koitaki Para Rubber Estates, Ltd.* v. *Federal Commissioner of Taxation*(3). In that case, Australian residence being admitted, it was claimed that the company resided also in Papua. But in that country, though substantial productive business was conducted by the company, that is, by the company's servants in the company's name, there existed no part of the company's "superior or directing authority".

"From the point of view of that territory [*i.e.*, Papua],"

said Dixon, J.,

> "[the company] is simply an absentee owner of a rubber estate managed by an attorney under power in its name. . . . It may be conceded . . . that in respect of the conduct of the plantations a full measure of responsibility is placed in the attorney or manager. But his responsibility, however full, is confined to what may broadly be described as the production and shipment of rubber and does not extend to the control of the general or corporate affairs of the company, to matters of policy or of finance. All control seems to me to be centred in Sydney"

see 64 C.L.R. at page 18. It was held accordingly that the company had failed to establish residence in Papua, and we respectfully agree with that decision.

We have already expressed our concurrence with the conclusion of Dixon, J., and with his formulation of the proper test, and we are content

(1) 5 T.C. 198. (2) 9 T.C. 342. (3) 64 C.L.R. 15 & 241.

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to adopt the whole of his judgment and reasoning with one slight exception. At page 21 of 64 C.L.R., where the learned Judge has discussed the *Swedish Central Railway* case(1) and refers to the conclusion that the Swedish Central Railway Company was resident in Sweden and in England, he is reported as saying:

> "But Viscount Cave, L.C. clearly stated that the reason was that there was a division between the two countries of the 'central management and control'."

With all respect, we have difficulty in accepting this view. Although we think that the explanation of the case by Lord Sumner in the *Egyptian Delta* case(2) produces, in effect, that result, nevertheless the passage which we have cited above from Lord Cave's speech seems to us to show that, in his opinion, residence in England could be supported though the "central control and management" was concentrated in Sweden. That view was not, however, essential to the decision, as Lord Sumner interpreted it. This small matter cannot be said to affect Dixon, J.'s decision or the reasoning on which it was based, and that decision was affirmed by the full High Court. Sir George Rich, in his short judgment, was content to accept the judgment of Dixon, J.

> "In Papua",

he said,

> "the company's operations fall into an auxiliary or subordinate position of a purely local as opposed to a central nature."

The judgment of Williams, J., as we read it, might be said to revert to a more strict interpretation of the original formulation of principle in the *De Beers* case(3). But any divergence between him and Dixon, J., in this respect was immaterial for the purpose of answering the particular question there before the Court. At pages 250-251 Williams, J., observed,

> "In order that a company may acquire a residence in two countries for the purposes of income tax . . . the central management and control must be divided between such countries so as to 'abide' in them both. The company through the central control is then metaphorically speaking bodily present and residing by analogy in both countries."

We do not, in the circumstances, read that passage as meaning that such dual residence can only be established where the final or supreme authority is found to be divided.

We have, therefore, reached upon this matter the same view as that entertained by Harman, J. In such a matter as this the precise formulation of the test must be a difficult matter. According to him, it is

> "essential that both features of the phrase 'keeps house and does business' must be present. Keeping house will thus refer to administrative management and doing business to trading activities. Where both are found the conditions are satisfied"(4).

For our part we feel some doubt whether it is right to treat the phrase "keeping house" as referring only to administrative management: but we think that the sense of the learned Judge's test is the same as that which we have attempted to formulate and the same as that stated by Dixon, J.—in other words, that there must, in order to constitute residence, be not only some substantial business operations in any given country but also present some part of the superior and directing authority. We prefer, accordingly, to state the matter as we have done, but we agree with Harman, J., that the question of the extent of the superior or directing authority required (as well as of the business operations being performed) is one of fact to be determined by the Special Commissioners.

(1) 9 T.C. 342. (2) 14 T.C. 119. (3) 5 T.C. 198. (4) *See* page 258 *ante*.

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It only remains accordingly to apply the test, as we have stated it, to the three Appellant Companies. As we earlier observed, the Special Commissioners treated themselves as bound in law to reject the Appellant Companies' claims for dual residence, and therefore expressed no conclusion of fact on the matter of degree. They did, however, in the Stated Cases, fully record their findings in regard to the relevant circumstances affecting each of the three Appellant Companies. It seems, therefore, proper that the Court should now express its own view of the result.

As regards Union Corporation, Ltd., the facts which we have earlier summarised seem to us clearly to justify the conclusion, if our test is correctly formulated, that the Company has a residence in South Africa as well as in England. It was conceded before us that the position of Johannesburg Consolidated Investment Co., Ltd., is in all material respects the same as that of Union Corporation, Ltd., and a similar result follows accordingly. We agree, therefore, with Harman, J., as regards both these Companies.

The case of Trinidad Leaseholds, Ltd., presents greater difficulty, and Harman, J., was of opinion that this case should be referred back to the Special Commissioners for their opinion. On the whole, however, it seems in the circumstances right for this Court to express its conclusion. The findings of the Special Commissioners cover in great detail the nature of the various operations and activities performed by or on behalf of this Company in England and elsewhere, and it does not seem to us that any further investigation could usefully be undertaken. The Company was incorporated in England and all its eight directors now reside in England, where all formal board meetings take place, as well as the general meetings of the Company, and where the secretary resides. The main business of the Company is that of winning, refining and dealing in petroleum and other mineral oils in Trinidad, and there is no doubt that in that island it possesses property of great extent and value. The issued capital, very largely represented by these assets in Trinidad, is no less than £1,639,432. Its very considerable operations in Trinidad are in charge of a manager who, under a power of attorney from the board of directors, has the widest powers and responsibility. Still, if the matter rested there, the case would seem to us in principle to be the same as the Australian case. The Appellant Company would be an "absentee owner" and there could not be found in Trinidad any part of the superior and directing authority. But, although the supreme control is undoubtedly exercised at the meetings of the Company's directors in England, it is clear that in practice the chairman, managing director, and other directors pay frequent visits to Trinidad for the purpose of exercising their supervision and a large measure of control over the policy and general affairs of the Company. In the words of the Stated Case, paragraph 14:

> "Frequent visits are made by the chairman and other executive directors and officials of the Company to Trinidad; and important decisions are taken by members of the Board when there."

Reference is also made to the evidence of the secretary of the Company, which the Special Commissioners accepted and which was to a like effect. Thus:

> "Important decisions were taken in the course of these visits [to Trinidad], minutes being taken of the various meetings and conferences before the director or directors concerned left Trinidad, and being sent to London. In many aspects of the Company's business it was important to go into matters with the technical side of the management in Trinidad, particularly as regards drilling and oil production."

On these facts it seems to us that there is sufficient to justify the conclusion that Trinidad Leaseholds, Ltd., is resident in Trinidad as well as in London.

Upon this part of the case, therefore, we are of opinion that each of the three Appellant Companies is able to make good its claim to residence outside the United Kingdom as well as within the United Kingdom. But their success in this matter avails them nothing, having regard to our view upon the first question raised in the appeals, which must be dismissed accordingly.

Mr. F. Heyworth Talbot.—With costs in each case?

Sir Raymond Evershed, M.R.—That is for what you ask?

Mr. Heyworth Talbot.—If your Lordship pleases.

Sir Raymond Evershed, M.R.—I wondered about costs. Of course there were two distinct issues raised, and it might be said that a certain amount of time, if my recollection goes back so far, was taken up with your argument on the second part of the case.

Mr. Heyworth Talbot.—The second issue was raised by the other side against us.

Sir Raymond Evershed, M.R.—They have won it.

Mr. Heyworth Talbot.—We might have abandoned the contest and offered no evidence.

Sir Raymond Evershed, M.R.—What happened below? Did Harman, J., dismiss the appeals with costs?

Mr. Heyworth Talbot.—Yes.

Sir Raymond Evershed, M.R.—What is said on the other side?

Mr. N. E. Mustoe.—I would submit the broad position is that a very considerable part, if not the larger part, of the time was spent in this appeal upon the residence question.

Sir Raymond Evershed, M.R.—The essential battle was won, and your appeals are being dismissed.

Mr. Mustoe.—I appreciate that. I was going to put it in this way. The raising of the residence question was agreed by my learned friend, and it was said (I think on both sides) that it was very desirable to have that question decided ; and in that way a very considerable portion of time was devoted to a question in which the Revenue are at least as much interested as the two Appellants.

Hodson, L.J.—You chose to make it part of your argument on appeal, to deal with the second question.

Mr. Mustoe.—That is so, but on the other hand the Revenue also wanted the residence question decided. No insistence was placed upon the Court deciding the Section 39 point first, and then, if the Court was adverse to us on that question, leaving the residence question alone. That was never suggested. The suggestion was rather the other way.

Sir Raymond Evershed, M.R.—It could not be. To consider the whole case you obviously had to argue both points, and if we had decided the other way, favourable to you, the Crown might have said " Now we want the other case decided ". That was the position before the Commissioners. It had to be argued.

Mr. Mustoe.—It had to be argued. I suppose it would have been open to the Court to decide the Section 39 point—

Sir Raymond Evershed, M.R.—Perhaps I ought not to say this, but I understand that some substantial allowance in your tax returns will be made in respect of the costs of the appeals. That will mean the Revenue pay in effect some part of them.

Mr. Mustoe.—With great respect—

Sir Raymond Evershed, M.R.—Is that not right?

Mr. Mustoe.—No.

Mr. Heyworth Talbot.—I hope your Lordship will not be construed as giving judgment upon that point.

Mr. Mustoe.—Not in opposition to the House of Lords. That point has been decided.

Sir Raymond Evershed, M.R.—Perhaps I ought not to have mentioned it.

Mr. Mustoe.—We cannot even fall back upon that grain of comfort.

Sir Raymond Evershed, M.R.—The point is whether it would be right and just in a case of this kind, where another point has been fully argued and you have prevailed upon it. You might say the Crown have got a judgment against them on it. They were not bound to contest it. Do you support Mr. Mustoe?

Mr. F. N. Bucher.—Yes. I say on behalf of Trinidad Leaseholds—

Sir Raymond Evershed, M.R.—You have done slightly better than even you did before Harman, J.

Mr. Bucher.—Yes. We were bound to come before the Court, having regard to how the Special Commissioners dealt with the residence point—

Sir Raymond Evershed, M.R.—Having regard to the wording of the notice of appeal it was advisable. You are Appellants.

Mr. Bucher.—Yes, but your Lordship has my submission. The Special Commissioners decided the residence point in a way adversely to us, in a way which has not commended itself, if I may say so, either to the learned Judge in the Court below or to your Lordships. Upon that we have succeeded. We were bound to come to the Court in order to succeed upon that point.

Mr. Heyworth Talbot.—May I just add this by way of answer? Of course there have been two points discussed, but those are nothing more than alternative contentions directed to what is the same issue.

Sir Raymond Evershead, M.R.—That is true, I think. This is a very substantial case. There were two quite distinct and very substantial points, and we have stated, I hope correctly, in our judgment that it rather was the wish of both sides that this Court should express its views in any circumstances upon the residence point.

Mr. Heyworth Talbot.—Indeed.

Sir Raymond Evershed, M.R.—Is it not fair that there should be some remission of the costs having regard to the fact that that was argued fully with the intention of getting a separate decision in any event?

Mr. Heyworth Talbot.—Would your Lordship allow me to take instructions for one moment?

(Counsel conferred with his clients.)

As a matter of principle we feel that we ought to make and press the submission that, having succeeded upon the whole case, because we have succeeded on the whole case, we are entitled to our costs, but in the particular circumstances of this case we should prefer to submit entirely to your Lordships' discretion.

Jenkins, L.J.—It is a very unusual case.

Sir Raymond Evershed, M.R.—It is a very unusual case. If we should say that some fraction ought to be remitted it is right to make it quite clear that that in no way reflects upon the propriety of anything the Crown has done in the case. It is not to be regarded as depriving them of something as a result of some act of which we disapprove, simply that it is an exceptional case where we were invited in any circumstances to express a view upon a very difficult and wholly separate point. It may be, therefore, not unjust to allow some fraction of the full costs. That is how it strikes us.

Mr. Heyworth Talbot.—If your Lordship pleases. I would not wish to say any more.

Sir Raymond Evershed, M.R.—We are disposed to say that in the circumstances the appeals should be dismissed, and the Crown should recover three-quarters of their costs of the appeals.

Mr. Heyworth Talbot.—If your Lordship pleases.

Mr. Mustoe.—On behalf of the first two Appellants I desire to apply for leave to appeal to the House of Lords.

Sir Raymond Evershed, M.R.—Does the third Appellant desire also to appeal?

Mr. Bucher.—Yes.

Sir Raymond Evershed, M.R.—Have you anything to say on that?

Mr. Heyworth Talbot.—I could not resist that in the circumstances of the case.

Sir Raymond Evershed, M.R.—I do not think we can say anything either. We must give you leave.

The Companies having appealed against this decision, the case came before the House of Lords (Lords Normand, Oaksey, Morton of Henryton, Reid and Cohen) on 5th, 9th, 10th, 11th and 12th February, 1953, when judgment was reserved. On 9th March, 1953, judgment was given in all three cases unanimously in favour of the Crown, with costs.

Mr. J. Millard Tucker, Q.C., Mr. N. E. Mustoe, Q.C., and Mr. R. R. D. Phillips appeared as Counsel for Union Corporation, Ltd., and Johannesburg Consolidated Investment Co., Ltd., Mr. Frederick Grant, Q.C., Mr. F. N. Bucher and Mr. Philip Shelbourne for Trinidad Leaseholds, Ltd., and the Attorney-General (Sir Lionel Heald, Q.C.), Mr. F. Heyworth Talbot, Q.C., and Sir Reginald Hills for the Crown.

Lord Normand.—My Lords, I fully agree with the opinion which my noble and learned friend, Lord Cohen, is about to deliver and have nothing to add.

Lord Oaksey.—My Lords, I, too, agree with the opinion which my noble and learned friend, Lord Cohen, is about to deliver.

Lord Morton of Henryton.—My Lords, I also agree with the opinion which my noble and learned friend, Lord Cohen, is about to deliver.

Lord Reid.—My Lords, I also agree with that opinion.

Lord Cohen.—My Lords, these are three appeals brought respectively by Union Corporation, Ltd., Johannesburg Consolidated Investment Co., Ltd., and Trinidad Leaseholds, Ltd., from three Orders of the Court of Appeal made on 22nd February, 1952, affirming three Orders of Harman, J., made on 20th July, 1951, whereby he dismissed the respective appeals of the three Appellant Companies from decisions of the Special Commissioners concerning the computation of their respective liabilities to Profits Tax.

Each of the three appeals raises the same two questions: (i) whether, on the assumption that a company is shown to have been ordinarily resident in a place outside the United Kingdom throughout a given chargeable accounting period, it is, upon the true construction of Section 39 (1) of the Finance Act, 1947, entitled to the benefit of that provision in the computation of its liability to Profits Tax, as having been "ordinarily resident outside the United Kingdom throughout" the relevant chargeable accounting period within the meaning of Section 39 (1), notwithstanding that it was admittedly also ordinarily resident in the United Kingdom throughout the same period; and (ii) if the answer to the first question is in the affirmative whether, having regard to the circumstances in which, according to the authorities, dual residence can, as a matter of law, properly be inferred, the company is on the facts of the case shown to have been throughout the relevant period ordinarily resident in the place outside the United Kingdom claimed as its second or concurrent place of residence.

The effect of the Special Commissioners' decision in each of the three cases was: (i) as regards the first question, that residence in a place outside the United Kingdom throughout a given chargeable accounting period would, if established, entitle the company to the benefit of Section 39 (1), notwithstanding the admitted fact of concurrent residence in the United Kingdom throughout the same period; but (ii) as regards the second question, that the test of dual residence in their view deducible from the authorities precluded them as a matter of law from holding that the company was on the facts of the case shown to have been ordinarily resident outside the United Kingdom as claimed, concurrently with its admitted residence in the United Kingdom. The claims of the three Appellant Companies to the benefit of Section 39 (1) of the Finance Act, 1947, accordingly failed before the Special Commissioners.

The learned Judge (who took the convenient course also adopted in the Court of Appeal of hearing the three cases together and combining them in a single judgment) differed from the Special Commissioners on both questions, but nevertheless arrived at the same result; for he held (in effect): (i) as regards the first question, that upon its true construction Section 39 (1) did not apply to a company ordinarily resident in a place outside the United Kingdom throughout a given chargeable accounting period if it was also ordinarily resident in the United Kingdom during the same period; and (ii) as regards the second question, that the Special Commissioners had misapprehended the effect of the authorities as regards the circumstances in which dual residence can, as a matter of law, properly be inferred; and that, judged by the true test deducible from the authorities when properly understood, the facts as found by the Special Commissioners in the cases of Union Corporation, Ltd., and Johannesburg Consolidated Investment Co., Ltd., sufficed to establish the dual residence in South Africa as well as in the United Kingdom claimed by them respectively, but that as regards Trinidad Leaseholds, Ltd., the facts so far found were

not sufficient to warrant the same course and, had he reached a different conclusion on the first question, he would have thought it necessary to remit the Case to the Special Commissioners for further consideration.

The Court of Appeal agreed with the conclusion of Harman, J., on the first point, though not with all his reasoning; on the second point also they agreed with his view of the law but saw no reason on the facts to distinguish the case of Trinidad Leaseholds, Ltd., from that of the other two companies.

Before I consider the *ratio decidendi* in the Courts below it will be convenient to refer briefly to so much of the legislation dealing with Profits Tax as is relevant to the questions your Lordships have to decide.

Profits Tax was first introduced under the style "National Defence Contribution" by Section 19 of the Finance Act, 1937, and was charged on all the profits of each chargeable accounting period arising from any trade or business irrespective of whether the profits were distributed or were retained in the business. It was levied on individuals and partnerships as well as on bodies corporate. Section 19 (2) provided as follows:

> "Subject as hereafter provided, the trades and businesses to which this section applies are all trades or businesses of any description carried on in the United Kingdom, or carried on, whether personally or through an agent, by persons ordinarily resident in the United Kingdom".

By Section 20 (1) it was provided that the profits arising from a trade or business were to be computed on Income Tax principles as adapted in accordance with the provisions of the Fourth Schedule to the Act.

The tax, originally introduced for a period of five years, was continued indefinitely by Section 36 of the Finance Act, 1942. Its name was changed to Profits Tax by Section 44 of the Finance Act, 1946. A radical alteration in the character of the tax was made by the Finance Act, 1947, which introduced an entirely new feature in the shape of discrimination between distributed and undistributed profits. By Section 30 (1), as amended by the Finance (No. 2) Act of the same year, the rate of Profits Tax was increased to 25 per cent. By Section 30 (2), as similarly amended, relief was granted at the rate of 15 per cent. on the amount of any excess of profits chargeable to tax for any chargeable accounting period over the amount of profits distributed for that period (in the Section called "net relevant distributions"). Conversely, by Section 30 (3), as similarly amended, an additional charge at the rate of 15 per cent. was made on the amount of any excess of profits distributed for any chargeable accounting period over the profits chargeable to tax for that period.

The broad effect of the provisions thus briefly summarised was therefore to charge Profits Tax at the rate of 25 per cent. on distributed, and £10 per cent. on undistributed, profits; and these were the rates in force during the periods relevant to the present appeals. By Section 31 of the Finance Act, 1947, trades or businesses carried on by individuals, partnerships of individuals and persons acting as personal representatives were exempted from the tax, and its scope (save in certain special cases probably rare in practice) was thus in effect limited to trades or businesses carried on by corporate bodies. The Act also contains elaborate provisions, which need not for the present purpose be considered in detail but to which some further reference is made hereafter, for exempting from further liability to tax profits received by way of distribution by one Profits Tax paying concern from another (termed in the Act "franked investment

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income "), and for excluding the appropriate proportion of any franked investment income in computing the amount of any taxable distribution made out of profits which include franked investment income.

I turn now to Section 39 of the Finance Act, 1947, upon the true construction of Sub-section (1) of which the first question before your Lordships' House turns. Sub-sections (1) and (2) are in the following terms:

> " (1) Where the person carrying on a trade or business is ordinarily resident outside the United Kingdom throughout a chargeable accounting period, the profits tax payable by that person shall be ascertained as if no net relevant distributions to proprietors had been made in the case of that person for that period.
>
> (2) Where a trade or business is carried on by a body corporate and, throughout a chargeable accounting period, both the following conditions are fulfilled, that is to say—
>
> (*a*) that that body corporate is ordinarily resident in the United Kingdom; and
>
> (*b*) that another body corporate which is not ordinarily resident in the United Kingdom controls, directly or indirectly, not less than one half of the voting power in the first-mentioned body corporate,
>
> distributions to that other body corporate shall be left out of account in determining, in relation to the first-mentioned body corporate, the net relevant distributions to proprietors for that period."

It will be observed that Sub-section (1) granted relief to a foreign body corporate carrying on a trade or business in the United Kingdom in its own name, while Sub-section (2) in effect granted relief to a foreign company carrying on business in the United Kingdom through a subsidiary company. It is, however, also to be noticed that if the subsidiary company was not a 100 per cent. subsidiary company the relief granted would enure to the benefit also of the other shareholders in the subsidiary company.

Sub-section (3) is a charging and not an exempting provision and its purpose appears to be to levy a distribution charge on profits which have obtained relief under Sub-section (1) or Sub-section (2) but ultimately find their way into the coffers of a body corporate resident in the United Kingdom. The Sub-section provides as follows:

> " Where the franked investment income of a person includes income received from a body corporate ordinarily resident outside the United Kingdom to which subsection (1) or subsection (2) of this section applies, the preceding provisions of this Part of this Act relating to the determination of the net relevant distributions for any period by reference to the gross relevant distributions therefor shall have effect subject to the following modification, that is to say, that any reference therein to the profits for the period (not being a reference to profits computed without abatement and including franked investment income) shall be construed as a reference to the first mentioned profits increased by the said income received from the said body corporate."

With these provisions in mind I return to the judgments of Harman, J., and of the Master of the Rolls, who delivered the judgment of the Court of Appeal, and I shall confine myself for the time being to the question of the true construction of Section 39 (1).

Harman, J., based his decision mainly on three points:

(1) He considered that to describe a person, whether real or juridical, as resident outside an area implies, *prima facie,* non-residence within it.

(2) He considered that in Sub-section (2) the contrast between the expressions " resident in " in (*a*) and " not resident in " in (*b*) necessarily involved that " resident in " in (*a*) meant " resident in and nowhere else ", and from this he arrived at the conclusion that " resident outside " in Sub-section (1) should be opposite to that, namely, resident outside and nowhere else.

(3) He considered that the introductory words of Sub-section (3):

> "Where the franked investment income of a person includes income received from a body corporate ordinarily resident outside the United Kingdom to which subsection (1) or subsection (2) of this section applies"

gave rise to the obvious inference that the body corporate referred to as resident outside the area was one to which Sub-sections (1) and (2) applied indifferently: in other words, that to the draftsman "resident outside" and "not resident in" were synonymous.

The Master of the Rolls agreed with Harman, J., as to the *prima facie* meaning of the phrase "resident outside". He rejected, and I think rightly rejected, the second point on which Harman, J., relied, since, as the Master of the Rolls pointed out(1), once it is conceded that a company may be resident in two places the positive finding that a company is resident in the United Kingdom does not necessarily exclude a finding that the same company is also resident outside the United Kingdom. The Master of the Rolls agreed, however, with Harman, J., in the inference that he drew from Sub-section (3).

He ended his judgment on this question by saying(2):

> "We think, however, that support for the Respondents' contention (apart from the *prima facie* meaning of the word 'outside') is also to be found in the structure of the legislation by which the Profits Tax is imposed. The normal dichotomy in the taxing Acts is between persons residing in, and persons residing out of, the United Kingdom. We use the word 'normal' to show that we have not overlooked the fact (pointed out by Mr. Grant) that the 1947 Act introduced a new conception, namely, differential rates of Profits Tax according to whether profits were distributed or not and that the distinction is not one wholly between resident and non-resident, since under Section 39 (2) relief is given to a person who is resident in this country.
>
> The distinction does, however, appear in Section 19 of the Finance Act of 1937 which first imposed the National Defence Contribution. The Appellants were made subject to the tax by the Act of 1937, and if it had been intended by Section 39 (1) of the Act of 1947 to give persons resident not only inside but also at the same time outside the United Kingdom relief already given by the same Section to persons residing exclusively outside the United Kingdom the Legislature would, in our opinion, have said so in terms.
>
> In our judgment the words of Section 39 (1), construed in their natural meaning in their context and against the background of the taxing Acts generally, can only properly be construed in the sense contended for by the Respondents, so that the Appellants, being resident inside, cannot claim the benefit conferred by the Section on persons resident outside the United Kingdom."

Before your Lordships, Mr. Tucker, for the first two Appellant Companies, relied on the same arguments which he addressed to the Court of Appeal. They may be summarised as follows:

(1) Once it is admitted that for the purposes of the Profits Tax Acts a company may reside both outside and in the United Kingdom, the expression "ordinarily resident outside the United Kingdom" does not exclude the possibility of the same body corporate residing in the United Kingdom. This construction is reinforced by the fact that it is common ground that the expression "a body corporate ordinarily resident in the United Kingdom" in Sub-section (2) (*a*) would cover a body corporate which was also resident outside the United Kingdom.

(2) The change of language from "ordinarily resident outside" in Sub-section (1) to "not ordinarily resident in" in Sub-section (2) (*b*) connotes a change of meaning.

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(1) *See* page 266 *ante*. (2) *See* page 265 *ante*.

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(3) He agreed with the Attorney-General that the expression in Sub-section (3) " a body corporate ordinarily resident outside the United Kingdom to which . . . subsection (2) applies " refers to the " body corporate which is not ordinarily resident in the United Kingdom " mentioned in Sub-section (2) (*b*) and not to the " body corporate . . . ordinarily resident in the United Kingdom " referred to in Sub-section (2) (*a*). He differed, however, from the Attorney-General by insisting that Sub-section (3) was neutral in its effect when construing Sub-section (1).

He concluded by submitting that : (1) the primary rule of construction is that words must be given their natural meaning in the absence of some context forcing your Lordships to place some other meaning upon them ; (2) the possibility of dual residence being admitted, the natural meaning of the words " a person . . . ordinarily resident outside the United Kingdom " is inclusive of a person answering the description but also ordinarily resident in the United Kingdom ; (3) as his clients were companies within that category they were entitled to the relief given by Sub-section (1).

I am unable to accept this argument. It seems to me that the expression your Lordships have to construe is capable of bearing either the inclusive or the exclusive meaning. I agree with the Master of the Rolls that your Lordships must construe the Section in the light of the provisions of Part III of the Finance Act, 1937, with which it has, under Section 74 of the Finance Act, 1947, to be read, and also against the background of the taxing Acts generally. That background is, I think, correctly stated in the passage from the judgment of the Master of the Rolls which I have already read. I appreciate that the change in language to which Mr. Tucker referred is *prima facie* against the construction to which reference to the background of the Acts would lead me, but I agree with the explanation of that change of language offered by the Master of the Rolls when he says[1]:

> " We admit that if the Respondents are right the change in terminology is open to criticism as a matter of drafting, but we think it is easy to see (upon the Respondents' view) how it may have come about. The Act reads in Section 39 (2) (*a*) ' that that body corporate is ordinarily resident in the United Kingdom ', and then continues in Section 39 (2) (*b*) ' that another body corporate which is not ordinarily resident in the United Kingdom ' etc. In drafting (*a*) and (*b*) together it seems natural enough to add the word ' not ' before the words ' ordinarily resident ' rather than to look back to see what form of words was used in Section 39 (1) to describe the same thing."

Looking at the matter as a whole I should be inclined, quite apart from Sub-section (3), to the opinion expressed by the Court of Appeal that the words of Section 39 (1), construed in their natural meaning in their context and against the background of the taxing Acts generally, should be construed in the sense contended for by the Respondents. I would add that any doubt I might otherwise have felt is removed by Sub-section (3) if that Sub-section is to be construed in the sense for which the Attorney-General and Mr. Talbot contend and which Mr. Tucker accepts. Once it is admitted that the expression in Sub-section (3) " body corporate ordinarily resident outside the United Kingdom to which . . . subsection (2) applies " refers to the body corporate mentioned in Sub-section (2) (*b*), it seems to me a necessary inference that the expression " body corporate ordinarily resident outside the United Kingdom " and " body corporate not ordinarily resident in the United Kingdom " are being used by the draftsman as interchangeable terms. The latter phrase is plainly exclusive of a body corporate also resident in the United Kingdom, and it follows that the exclusive meaning must be attributed to the former.

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(1) *See* page 263 *ante*.

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Mr. Grant, however, for Trinidad Leaseholds, Ltd., while adopting the rest of Mr. Tucker's argument, differs from him as to Sub-section (3) and contends that the expression "body corporate ordinarily resident outside the United Kingdom to which . . . subsection (2) applies" is a reference to the "body corporate ordinarily resident in the United Kingdom" mentioned in Sub-section (2) (*a*). He founds his argument on the contention, which I think is not disputed, that if the Attorney-General is right, the word "applies" cannot be read in its normal sense and must be construed as "refers". He points out that, if his construction be accepted, the word "applies" can be given its natural meaning, and he says that as the possibility of dual residence is admitted, the company ordinarily resident in the United Kingdom referred to in Sub-section (2) (*a*) may often be also a company ordinarily resident outside the United Kingdom. This is no doubt true, but the wording of Sub-section (3) is extremely inept if the intention was to refer to the body corporate mentioned in paragraph (*a*) of Sub-section (2), and the contention of the Attorney-General that in relation to Sub-section (2) the word "applies" in Sub-section (3) means "refers" seems to me to involve far less a distortion of the language of the Section.

It must also be observed that, if Mr. Grant and Mr. Tucker are right, a company might answer the description of a body corporate ordinarily resident outside the United Kingdom in Sub-section (1) and also be a company ordinarily resident in the United Kingdom not less than half of the voting power in which was held by a company not ordinarily resident in the United Kingdom within Sub-section (2). There could, therefore, plainly be an overlap between Sub-sections (1) and (2). The existence of such an overlap is not an inevitable bar to the acceptance of their argument since, as Mr. Tucker points out, there are instances under the Income Tax Acts where a taxpayer can be taxed under one or other of the taxing provisions at the option of the Crown, but, none the less, if I were left in doubt as between two constructions and there were no other factors to consider, I should prefer the construction which avoided the overlap.

Bearing all these considerations in mind, I have come to the conclusion that the Court of Appeal were right when they said that the words of Section 39 (1), construed in their natural meaning and against the background of the taxing Acts generally, can only be construed in the sense contended for by the Respondents, so that the Appellants, being resident inside, cannot claim the benefit conferred by the Section on persons resident outside the United Kingdom. In arriving at this conclusion I have not overlooked Mr. Tucker's contention that on this basis logically the "body corporate ordinarily resident in the United Kingdom" referred to in Sub-section (2) (*a*) should not include a body corporate ordinarily resident outside the United Kingdom, whereas the Respondents accept that it does include such a body corporate. Since the construction of Sub-section (2) is not now directly in point and may arise before us in another case, I prefer to say no more than that I do not think this contention can affect your Lordships' decision in view of the other matters to which I have referred.

Mr. Tucker submitted that in case of doubt the statute should be strictly construed against the Crown, and he relied on the following cases, *Stockton & Darlington Railway Co.* v. *Barrett*, 11 Cl. & Fin. 590, *Warrington* v. *Furbor*, 8 East 242, and *Armytage* v. *Wilkinson*, 3 A.C. 355. I observe

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that in the last-mentioned case Sir James Colville, delivering the judgment of the Board, said at page 370:

> "It is only, however, in the event of there being a real difficulty in ascertaining the meaning of a particular enactment that the question of strictness or of liberality of construction need arise."

In the case before your Lordships I find it unnecessary to consider whether the principle on which Mr. Tucker relies applies to such a case as the present or whether, where the question is whether a taxpayer brings himself within the category of persons entitled to total or partial exemption from duty, it may not be right to apply the ordinary principle that the onus of proving an allegation rests on the person making it.

Both Harman, J., and the Court of Appeal dealt at length with the question whether each of the three Appellant Companies was in fact resident outside as well as inside the United Kingdom, no doubt in order that your Lordships might have the assistance of their opinion on that question in case your Lordships differed from them on the first question. In view of the fact that your Lordships are affirming the decision of the Court of Appeal on the first question, I do not find it necessary to consider the second question.

For the reasons I have stated I would dismiss the appeal with costs.

Questions put:

Union Corporation, Ltd.

v.

Commissioners of Inland Revenue

That the Order appealed from be reversed.

The Not Contents have it.

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

The Contents have it.

Johannesburg Consolidated Investment Co., Ltd.

v.

Commissioners of Inland Revenue

That the Order appealed from be reversed.

The Not Contents have it.

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

The Contents have it.

Trinidad Leaseholds, Ltd.

v.

Commissioners of Inland Revenue

That the Order appealed from be reversed.

The Not Contents have it.

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

The Contents have it.

[Solicitors—Herbert Smith & Co. (for Union Corporation, Ltd.); Holmes, Son & Pott (for Johannesburg Consolidated Investment Co., Ltd., and Trinidad Leaseholds, Ltd.): Solicitor of Inland Revenue.]

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