HIGH COURT OF JUSTICE (CHANCERY DIVISION)—15TH, 16TH, 17TH AND 22ND JULY, 1958

COURT OF APPEAL—20TH, 21ST AND 22ND JANUARY, AND 12TH FEBRUARY, 1959

HOUSE OF LORDS—2ND, 3RD AND 30TH NOVEMBER, 1959

Bullock (H.M. Inspector of Taxes)

v.

The Unit Construction Co., Ltd.[1]

Income Tax, Schedule D—Deductions—Payments to associated companies in respect of losses—Whether associated companies resident in United Kingdom—Finance Act, 1953 (1 & 2 *Eliz.* II, *c.* 34), *Section* 20.

Income Tax—Companies—Residence.

Three companies, wholly owned by B Ltd., a company resident in the United Kingdom, were formed in East Africa with the intention that they should be solely resident there. Each subsidiary company had its registered office in East Africa and carried on its business there. The articles of association of each subsidiary provided for the management and control of its business to be placed in the hands of its directors, whose meetings might be held anywhere outside the United Kingdom. In fact, directors of the subsidiaries were elected to and, when the occasion arose, removed from office on the instructions of the parent company. None of the directors was a director of the parent company.

In view of the lack of success of the African subsidiaries, the parent company decided in 1950 *to take over their management and control. There was at no time any formal agreement to this effect with the African subsidiaries, but the decision was communicated to the company's senior representative in East Africa, who was the chairman of the board of each of them, and was accepted by him. From then on, all decisions on matters of major importance and many on minor matters were made by the parent company. The East African directors never met as boards, and did not all have access to all the documents and information concerning their companies. Decisions were, however, taken locally on the day-to-day running of their companies' trading activities, within the general policy directions of the parent company.*

In 1952 *and* 1953, *the Respondent Company, which was resident in the United Kingdom and was another wholly-owned subsidiary of B Ltd., made certain payments to the three African subsidiaries. On appeal to the Special Commissioners against assessments to Income Tax under Schedule D for the years* 1953–54 *and* 1954–55, *the Company claimed that each of the*

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[1] Reported (Ch.D.) [1959] Ch. 147; [1958] 3 W.L.R. 504; 102 S.J. 654; [1958] 3 All E.R. 186; 226 L.T.Jo. 99; (C.A.) [1959] Ch. 315; [1959] 2 W.L.R. 437; 103 S.J. 238; [1959] 1 All E.R. 591; 227 L.T.Jo. 161; (H.L.) [1960] A.C. 351; [1959] 3 W.L.R. 1022; 103 S.J. 1027; [1959] 3 All E.R. 831; 228 L.T.Jo. 318.

African subsidiaries was resident in the United Kingdom at the material time within the meaning of Section 20 (9) *of the Finance Act,* 1953 (*which relates to payments between associated companies in respect of losses*). *It was common ground that if they were so resident the Company was entitled by virtue of that Section to deduct the payments in computing its profits. The Commissioners found that the controlling power and authority, which according to the constitution of each of the African subsidiaries was vested in its board of directors, was actually exercised to a very substantial degree by the board of the parent company, and held that the three companies were resident in the United Kingdom at the material time.*

Held, *that there was evidence justifying the Commissioners' conclusion.*

CASE

Stated under the Income Tax Act, 1952, Section 64, 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 15th, 17th, 18th and 24th May, 1956, the Unit Construction Co., Ltd. (hereinafter called "Unit") appealed against assessments to Income Tax made upon it under Case I of Schedule D for the year 1953–54 in the sum of £110,000 less £36,388 capital allowances and for the year 1954–55 in the sum of £200,000 less £50,000 capital allowances.

2. (1) The appeal concerned the following payments made by Unit, which Unit claimed to deduct in computing its profits for the purposes of the assessments under appeal:

£15,000 paid to Booth & Co. (Africa), Ltd., in 1952.

£8,000 paid to Booth & Co. (Africa), Ltd., in 1953.

£29,000 paid to Booth & Co., Ltd., in 1952.

£27,500 paid to Booth & Co., Ltd., in 1953.

£33,000 paid to Bulleys Tanneries, Ltd., in 1952.

£11,500 paid to Bulleys Tanneries, Ltd., in 1953.

(2) The sole question in dispute was whether Booth & Co. (Africa), Ltd., Booth & Co., Ltd., and Bulleys Tanneries, Ltd., were, in 1952 and 1953, companies resident in the United Kingdom within the meaning of Section 20 (9) of the Finance Act, 1953. It was common ground that if they were so resident then the payments in question were subvention payments which Unit was entitled to deduct in computing its profits, by virtue of the said Section 20.

3. (1) The following documents are annexed hereto, marked as indicated, and form part of this Case[1]:

Memorandum of association of Alfred Booth & Co., Ltd. (marked "A").

Extracts from the board minutes of Alfred Booth & Co., Ltd. (marked "B").

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[1] Not included in the present print.

Extracts from the minutes of meetings of the executive directors of Alfred Booth & Co., Ltd. (marked "C").

Printed memoranda and articles of association of Booth & Co. (Africa), Ltd., Booth & Co., Ltd., and Bulleys Tanneries, Ltd. (marked "D", "E" and "F" respectively).

Letter dated 17th October, 1950, from Hollander Hyams, Ltd., to Alfred Booth & Co., Ltd. (marked "G").

Document entitled "East African Financial Statements as at 27th December, 1952" (marked "H").

Document entitled "Bulleys Trading Company Financial Return for the eleven months ended 30th November, 1952" (marked "I").

Document entitled "Extract from File No. 45 for 1953" (marked "J").

Document entitled "Extract from File No. 11 for 1952" (marked "K").

(2) The following additional documents were produced to us; they are not annexed hereto but are available for the use of the Court if required:

Accounts of Unit as at 31st December, 1953, and 1954.

Document entitled "Notes on Bulleys Tanneries, Ltd.".

Folders of correspondence between London and Nairobi during 1952 and 1953.

Minute books of Booth & Co. (Africa), Ltd., Booth & Co., Ltd., and Bulleys Tanneries, Ltd.

Original memorandum of association of Alfred Booth & Co., Ltd.

Accounts of Booth & Co. (Africa), Ltd., Booth & Co., Ltd., and Bulleys Tanneries, Ltd., for 1952 and 1953.

We also heard evidence from Mr. J. W. Booth and Mr. P. Meinertzhagen.

(3) The facts found by us are set out in the following paragraphs of this Case.

4. Unit is a wholly-owned subsidiary of Alfred Booth & Co., Ltd. Booth & Co. (Africa), Ltd., Booth & Co., Ltd., and Bulleys Tanneries, Ltd. (which, when it is necessary to refer to them together, are hereinafter called "the African subsidiaries") are also wholly-owned subsidiaries of Alfred Booth & Co., Ltd.

It was admitted on behalf of Unit that the African subsidiaries were at all material times resident in East Africa.

Alfred Booth & Co., Ltd., is a company incorporated and resident in England, and is the parent of a group of ten or more companies trading in many parts of the world. It was incorporated in 1914 to carry on banking, merchanting and manufacturing businesses of all descriptions, and it did carry on a number of businesses in different parts of the world, including in particular building contracting and businesses connected with the leather industry, all of which it had, by August, 1949, transferred to subsidiary companies incorporated for the purpose. In August, 1949, it adopted a new memorandum of association (exhibit A), with the objects of an investment trust company, with power to carry on the business of banking.

The board of directors of Alfred Booth & Co., Ltd., met regularly in London, and exhibit B contains extracts from the minutes of its meetings concerning the affairs of the African subsidiaries. In addition to the board

meetings, a committee of executive directors held weekly meetings in London, at which matters relating to the affairs of various subsidiary companies were considered from time to time, extracts from the minutes of which (so far as concerns the African subsidiaries) are in exhibit C.

The chairman of the board of directors and of the executive committee was Mr. J. W. Booth; he had been a director since 1935, but for some years prior to May, 1950, had no managerial duties; in May, 1950, he became a managing director (with special responsibility on the board and on the executive committee for the African subsidiaries); in July, 1952, he became chairman, and at the same time the special responsibility for the African subsidiaries was divided as under:

Mr. J. W. Booth was responsible for their general trading and mining interests.

Mr. E. Booth (another of the directors of Alfred Booth & Co., Ltd.) was responsible for their building interests.

Mr. E. W. Espenhahn (another of the directors of Alfred Booth & Co., Ltd.) was responsible for their hide and skin and tanning interests.

5. (1) The African subsidiaries, which were incorporated in 1948 and 1949 with the objects set out in their respective memoranda of association (exhibits D, E and F) carried on the following businesses:

(*a*) Booth and Co. (Africa), Ltd.

Building contracting in East Africa. A mining venture in Uganda. A forwarding agency at Mombasa, which acted principally as agent for the African subsidiaries themselves. A merchanting business, carried on as a separate department under the name of Bulley's Trading Co.; this dealt chiefly in prefabricated buildings exported from England by Booth & Co. (England), Ltd. (another subsidiary of Alfred Booth & Co., Ltd.) and extended to other articles such as paints, imported by Booth & Co. (Africa), Ltd., into East Africa from England.

(*b*) Booth & Co., Ltd.

The business consisted in the earning of commissions by purchasing hides and in the purchase and sale of skins, and was conducted through a number of posts set up in East Africa. In the case of hides, the company acted as agents for Hollander Hyams, Ltd. (a company which had no connection with the Alfred Booth & Co., Ltd., group of companies). This part of the business was governed by an agreement dated 17th October, 1950 (exhibit G), which is referred to more specifically in paragraph 6 (4) below. This agreement allowed Booth & Co., Ltd., to supply a limited number of hides to Bulleys Tanneries, Ltd., and other tanneries within the Alfred Booth & Co., Ltd., group of companies. In the case of skins the company acted as principals.

(*c*) Bulleys Tanneries, Ltd.

Manufacturing in Kenya leather for sale locally, and manufacturing or part-manufacturing leather for export to England, where the product was sold on behalf of Bulleys Tanneries, Ltd., by Booth & Co. (England), Ltd.

(2) Each of the African subsidiaries is incorporated in Kenya under the Kenya Companies Ordinance and has its registered office in Nairobi. The articles of association of each of them contains provisions placing the

management and control of its business in the hands of its directors and providing that directors' meetings may be held anywhere outside the United Kingdom. It was the intention of the directors of Alfred Booth & Co., Ltd. (which intention they thought they had carried out) in forming the African subsidiaries that those companies should be solely resident in Africa in order that their profits could be used for development in Africa without becoming liable to United Kingdom taxation and also in order to forestall any question which might arise in connection with any future nationalisation, particularly of the building industry. It turned out, owing to disturbances in Kenya and other difficulties, that they incurred losses (except for the department known as Bulleys Trading Co., which made profits) and this was a source of great anxiety to Alfred Booth & Co., Ltd., which had sunk considerable sums of money in them, as it reflected on the financial position of the Alfred Booth group of companies as a whole. Mr. J. W. Booth, who was brought into the detailed control of the African subsidiaries on his appointment as a managing director of Alfred Booth & Co., Ltd., in 1950, considered that the situation of the African subsidiaries was becoming so serious that it was unwise to allow them to be managed in Africa any longer, and that their management must be taken over by the directors of Alfred Booth & Co., Ltd., in London. He considerd that his principal job was to manage them. The board of directors of Alfred Booth & Co., Ltd., after discussions, decided that as a result of the lack of success of the African subsidiaries they were forced to take over management and control, in order to save their company's investment; at the same time it was their policy to dispose of all or any of the African subsidiaries' undertakings if the opportunity should arise. There was at no time any formal agreement with the African subsidiaries that the directors of Alfred Booth & Co., Ltd., should manage them; the intention of the said directors to do so was communicated to Mr. P. Meinertzhagen (the chairman of the board of directors of each of the African subsidiaries) and accepted by him. As a result, from 1950 onwards the directors of Alfred Booth & Co., Ltd., in London, began to intervene in the affairs of the African subsidiaries in the manner hereinafter set forth; they were aware that their action in so doing might affect the question of the residence of the African subsidiaries and their liability to United Kingdom taxation. The following table indicates the extent of the financial stake of Alfred Booth & Co., Ltd., in the African subsidiaries on the 31st December, 1952:

	Booth & Co. (Africa), Ltd.	Booth & Co., Ltd.	Bulleys Tanneries, Ltd.
	£	£	£
Shareholding	50,000	50,000	125,000
Loans	105,000	120,000	12,500
Current account	26,464	—	—
Guaranteed bank overdraft ...	138,624	126,291	58,803
Accumulated losses	96,831	73,940	76,870

(3) The chairman of the directors of each of the African subsidiaries was at all times Mr. P. Meinertzhagen. He had been, prior to 1948, an employee of Alfred Booth & Co., Ltd., in England, and went to Africa to form and supervise the African subsidiaries. He was not at any material time a director of Alfred Booth & Co., Ltd., he had no contract of service with any company in the group, and his remuneration took the form of a

salary paid to him by Booth & Co., Ltd. (the other two African subsidiaries refunding Booth & Co., Ltd., part of it). He is described in the correspondence shown to us, and in staff lists, as "Alfred Booth & Co., Ltd.'s senior representative in East Africa".

(4) The other directors of the African subsidiaries, who varied from time to time, were all persons employed by and holding contracts of service with the companies of which they became directors. Only one of them was a director of more than one of the African subsidiaries; this was Mr. Trembath, who left in 1952, and was occasionally described or referred to as "Number 2" to Mr. Meinertzhagen. These directors were all elected to the boards of the African subsidiaries on the instructions of the parent company, Alfred Booth & Co., Ltd., and their contracts of service were made in London by Alfred Booth & Co., Ltd., as agent for the African subsidiary concerned. None of these directors was at any time a director of Alfred Booth & Co., Ltd. When occasion arose, as it did arise more than once, for removing one of them from office, the decision was taken in London by the directors of Alfred Booth & Co., Ltd., to determine his contract of service and remove him, and instructions to that effect were issued by Alfred Booth & Co., Ltd., to Mr. Meinertzhagen. When any question arose, as it did arise, of compensating a director or member of the staff of an African subsidiary for removal or dismissal, it was dealt with by the directors of Alfred Booth & Co., Ltd.; for this purpose they used Mr. Meinertzhagen as an intermediary, or as happened on one occasion, one of their number flew to East Africa to negotiate terms. The directors of the African subsidiaries did not all have access to all the documents of, or information concerning, the companies of which they were directors.

(5) We saw the minute books of the directors' meetings of each of the African subsidiaries. These record, in the main, only formal business (such as particulars of annual general meetings, appointments and retirements of directors, secretaries and accountants, resolutions concerning the operation of banking accounts or the affixing of the companies' seals to documents and the acquisition or transfer of mineral claims or other property) at meetings held on irregular dates; in a few instances they record more important business, but in each such instance a decision had in fact been taken by the directors of Alfred Booth & Co., Ltd., in London and the record in the minute book of the African subsidiary merely formally records its implementation. Mr. Meinertzhagen is recorded as present at each such meeting, with one or two other directors. In many cases, however, the directors recorded as being present had not actually met at all and might not have known that any meeting was supposed to be taking place, as directors as a rule were not notified of any meetings. Where, however, a director of Alfred Booth & Co., Ltd., is recorded as having been in attendance at a meeting, a meeting with such director did take place. All these minutes purporting to record meetings prior to 1952 were written up in 1952, to comply with law, on the instructions of the directors of Alfred Booth & Co., Ltd. They were written up from records that had been typed and kept loose in a book by previous company secretaries. In most cases, where the minute book records a meeting and business transacted thereat, the business recorded was in fact transacted by Mr. Meinertzhagen (in all matters of any importance, on the instructions of Alfred Booth & Co., Ltd.) and the minute was written afterwards. In no case did the directors of any of the African subsidiaries sit round a table as a board, and they never either took any decision as a board, met as a board, or were summoned to meet as a board.

(6) At all material times the boards of directors of the African subsidiaries did not and for all practical purposes could not manage and control the businesses of their respective companies. If they had tried to manage and control their companies' businesses (otherwise than in accordance with instructions from the directors of Alfred Booth & Co., Ltd.), Alfred Booth & Co., Ltd., would have removed them from office.

(7) At all material times the whole of the trading policy of the African subsidiaries was dictated by the board of directors of Alfred Booth & Co., Ltd., and was implemented by Mr. Meinertzhagen as their senior representative and chairman of the African subsidiaries. Mr. Meinertzhagen was, however, consulted on occasions before a decision was taken, and from time to time he made submissions to the parent board on behalf of the African subsidiaries which were taken into account in determining future policy. He made two visits to London in 1952 and 1953, having been summoned to attend discussions with the directors of Alfred Booth & Co., Ltd., on various aspects of the affairs of the African subsidiaries. There were also occasions when a visiting director of the parent company consulted the local directors on the spot before deciding what he wanted to do.

(8) Article 145 of the Kenya Companies Ordinance provides that every company shall keep at its registered office a register of its directors or managers, and provides for the case of registration of a corporation as a director or manager. Sub-paragraph (6) thereof provides that ". . . a person in accordance with whose directions or instructions the directors of a company are accustomed to act shall be deemed to be a director and officer of the company". At no time was the name of Alfred Booth & Co., Ltd., or of any director of that company included in the register of directors of any of the African subsidiaries.

6. (1) At all material times every aspect of the business carried on by the African subsidiaries was under scrutiny by the executive directors of Alfred Booth & Co., Ltd., at their weekly meetings in London. They were kept informed in three ways:

(*a*) by periodical statements they required from the African subsidiaries, such as weekly financial statements in the form of exhibit H; monthly trading statements in the form of exhibit I; periodical statements of which exhibits J & K are examples;

(*b*) by a regular interchange of letters which passed (for the most part) between Mr. J. W. Booth and Mr. Meinertzhagen. These were produced to us but are not exhibited; the files for 1952 and 1953 comprise 167 and 196 pages respectively;

(*c*) by visits to Africa by executive directors. Mr. J. W. Booth made two visits in 1952 and one in 1953; Mr. E. Booth made two in 1953, and Mr. E. W. Espenhahn made one in 1952 and one in 1953.

(2) Throughout 1952 and 1953 the directors of Alfred Booth & Co., Ltd., had constantly in mind the level on which the trading of the African subsidiaries should be carried on. At this time there were serious difficulties facing the East African hide and skin trade (which affected Booth & Co., Ltd.) and in the East African tanning industry (which affected Bulleys Tanneries, Ltd.). The directors of Alfred Booth & Co., Ltd., endeavoured to overcome these difficulties to some extent by economies and rearrangement of local branches and (as regards Bulleys Tanneries, Ltd.) by varying from time to time the level of production. In the case of Bulleys Trading Co., which presented excellent prospects for development, they took various

steps to prevent overstocking and overtrading; they also, in the interests of economy and efficiency, instructed Booth & Co., Ltd., to give facilities to Bulleys Trading Co. at Booth & Co. Ltd.'s hide-purchasing posts. The building activities of Booth & Co. (Africa), Ltd., were proving unprofitable and they made a number of policy decisions concerning the scale and place of future operations; they required that company to submit every contract above a certain value to them for approval. All of the decisions were taken against the background of the tight control which they kept of finance, both of bank borrowings and of inter-company financial arrangements in the light of the financial position of each of the African subsidiaries concerned and the overall financial position of the Alfred Booth group. They not only negotiated with the bankers overdraft limits for the African subsidiaries (which Alfred Booth & Co., Ltd., guaranteed), but they imposed limits on bank borrowings from time to time inside the limits arranged with the bankers. They also paid careful attention to the problem of the management of the various undertakings of the African subsidiaries. We found, in the way of a conclusion of fact from a great deal of detailed evidence before us, that their aim was to have a single efficient executive arm in East Africa capable of exercising day-to-day management of all the East African undertakings, which could be relied on to implement their own policy decisions without the necessity of frequent visits to Africa by themselves. In 1952 and 1953, the day-to-day management of the undertakings was broadly supervised by Mr. Meinertzhagen, who was responsible for local (East African) management within the instructions and limitations (financial and otherwise) imposed upon him by the directors of Alfred Booth & Co., Ltd.; the work involved imposed too great a burden on him in view of the particular difficulties existing at that time and the fact that the undertakings were spread between Kampala and Mombasa. In particular, they were anxious to have a reliable "number 2" to him who could act during his absence.

(3) The mining venture, which was in form one of the activities of Booth & Co. (Africa), Ltd., was in fact almost entirely managed from London. Mr. J. W. Booth authorised the purchase of a claim on a visit to Nairobi; after certain initial steps had been taken, it was financed entirely by Alfred Booth & Co., Ltd., without recourse to the African subsidiary's bankers; the decision to start mining was taken by the executive directors in London; they sent out an expert to advise and report on the mine, and they decided what the rate of production should be, how much labour should be employed and what vehicles should be used. The manager of the mine made reports from time to time direct to them, without going through the channel of Booth & Co. (Africa), Ltd.

(4) The agreement with Hollander Hyams, Ltd (exhibit G), under which Booth & Co., Ltd., disposed of most of its hides, was negotiated in London between Hollander Hyams, Ltd., and Alfred Booth & Co., Ltd., as agents for Booth & Co., Ltd. At different times proposals were made for varying the rates of commission payable to Booth & Co., Ltd., thereunder; these variations were negotiated and concluded by Alfred Booth & Co., Ltd., in London. In the day-to-day working of the agreement, Hollander Hyams, Ltd., normally dealt directly with Booth & Co., Ltd., but Hollander Hyams, Ltd., had no control over Booth & Co., Ltd.'s, purchasing organisation, which was controlled as regards policy matters—such as the number and situation of posts in East Africa—by the board of directors of Alfred Booth & Co., Ltd.

(5) In 1952 and 1953 it was part of the policy of the board of directors of Alfred Booth & Co., Ltd., to sell any of the assets or undertakings of the African subsidiaries if opportunity offered, and they supervised negotiations (mainly carried out on their instructions by Mr. Meinertzhagen in Africa) for selling the tannery and, on another occasion, the mine. These negotiations proved abortive.

(6) The decisions of the board of directors of Alfred Booth & Co., Ltd., and of their executive committee are recorded in the minutes of their meetings (exhibits B and C). In addition to decisions they took on matters of major importance, of which examples are set out in sub-paragraphs (2), (3), (4) and (5) above, they constantly made decisions on minor matters of which the following are examples :

Rates of commission to be charged by Booth & Co., Ltd., to Bulleys Trading Co. for facilities.

Authority on one occasion for Booth & Co., Ltd., to sell goatskins "short".

Closing of a branch of Booth & Co., Ltd., and reduction of staff.

Buying land at Kampala for a warehouse for Booth & Co., Ltd.

Sales arrangements in Africa of Bulleys Tanneries, Ltd.

Approach to the Colonial Development Corporation for backing for Bulleys Tanneries, Ltd.

Staff salaries and allocation of staff bonuses for Booth & Co. (Africa), Ltd.

Detailed arrangements for management of a new branch of Bulleys Trading Company at Kampala.

Provision of a new car for a manager of Booth & Co. (Africa), Ltd.

Negotiation with P.W.D. authorities at Kampala to alter the basis of payment for building works being carried out by Booth & Co. (Africa), Ltd.

Engagement, salaries and dismissal of European staff of the African subsidiaries.

Payment of expenses of evacuating families of staff of the African subsidiaries during disturbances in Kenya.

Appointment of auditors of the African subsidiaries ; on this occasion they overruled a request made by Mr. Meinertzhagen for a change of auditors.

(7) Throughout the material period the staff and officials of the African subsidiaries were making decisions concerning the day-to-day running of the trading activities of the African subsidiaries, within the general policy directions of Alfred Booth & Co., Ltd., of which the following are examples :

Booth & Co. (Africa), Ltd., was permitted to import such stocks of trading commodities as it required for the purposes of its business, subject to the specific financial limits laid down by the parent company. Booth & Co. (Africa), Ltd., took certain steps preparatory to opening up the Mombasa forwarding agency before obtaining the final approval of Alfred Booth & Co., Ltd., to the project of opening the agency.

Bulleys Tanneries, Ltd., was permitted to fix its own selling prices for leather products for the local market.

The African subsidiaries could also lend and borrow money to a limited extent among themselves to finance transactions.

With the exception, however, of Mr. P. Meinertzhagen (and, for a short time and to a limited degree, of Mr. Trembath), we did not find that the directors of the African subsidiaries had any greater authority in this connection, either as individuals or as boards, than other senior employees who were not directors; apart from the evidence furnished by the minute books (paragraph 5 (5) above) we had no evidence that such directors ever acted, or tried to act, as boards.

7. The United Kingdom subsidiaries of Alfred Booth & Co., Ltd., were managed by the parent company in the same way as the African subsidiaries. The company also has two subsidiaries in the United States of America which, however, are not subject to the same detailed control.

8. It was contended on behalf of Unit:

(1) that each of the African subsidiaries was resident in the United Kingdom at all material times, within the meaning of section 20 (9) of the Finance Act, 1953;

(2) that Unit was accordingly entitled to deduct the payments referred to in paragraph 2 hereof; and

(3) that the assessments be reduced accordingly.

9. It was contended on behalf of the Inspector of Taxes:

(1) that, as the African subsidiaries were admittedly resident in East Africa at all material times, they could not also at those times be resident in the United Kingdom;

(2) that in any event none of the African subsidiaries were resident in the United Kingdom at any material time; and

(3) that Unit was not entitled to the deductions claimed.

10. We, the Commissioners who heard the appeal, gave our decision as follows:

We think, in addressing our minds to the question whether the African subsidiaries were resident in the United Kingdom in the material period, that the first question we have to consider is what was the real situation regarding their management and control.

A number of (what have been described as) the acts of interference in their management by the directors of Alfred Booth & Co., Ltd., are equivocal, being equally well explained as acts of parental or group control, or as the taking over of the reins of management; others again are equivocal, being equally well explained as the financial control of a creditor, or as the taking over of the reins of management.

We have been taken through a great deal of written and oral evidence; we are not now going to review it in detail because we think that in deciding the issue before us we should try to stand back from the detail and make up our minds what is the picture which the whole of the evidence presents. We find that the position was at the material times that the boards of directors of the African subsidiaries (who are the people one would have expected to find exercising control and management) were standing aside in all matters of real importance and in many matters of

minor importance affecting the central management and control, and we find that the real control and management was being exercised by the board of directors of Alfred Booth & Co., Ltd., in London.

But it was contended on the part of the Crown that that finding would not be enough to conclude the question before us; it was said that there must be something more, that is, that before we could find that the African subsidiaries were resident in the United Kingdom, we must find control exercised here under the constitution of the company concerned, by those officers to whom such constitution gives it; in other words, the Crown contended that we must find some "formal" control and management here. We have considered this contention very carefully and have come to the conclusion that the authorities cited to us do not constrain us to accept it, nor do they point very strongly to the conclusion that it is right. On the contrary, we notice that Lord Loreburn, L.C., in his judgment in *De Beers Consolidated Mines, Ltd.* v. *Howe*, 5 T.C. 198, at pages 212–213, directs attention to

> "where the central management and control actually abides",

and we think it would be consistent with Lord Loreburn's reasoning to stress the word "actually". In the course of the arguments before us, both sides relied on the remarks of Lord Evershed, M.R., in *Union Corporation, Ltd.* v. *Commissioners of Inland Revenue*, 34 T.C. 207, and in particular on his reference, at page 271, to

> "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 the appeal before us, we find the controlling power and authority, which according to the constitution of each of the African subsidiaries is vested in its board of directors, is actually exercised, to a very substantial degree, by the board of Alfred Booth & Co., Ltd., in London. We hold, on our understanding of the authorities, that once we have found that as a fact, it is not necessary to go further and enquire whether such power and authority is exercised under the constitution of the company concerned by the officers to whom such constitution gives it.

For these reasons we find, and so far as it is a matter of law we hold, that each of the African subsidiaries was resident in the United Kingdom in 1952 and 1953. We do not think that we are precluded from coming to this conclusion by reason of the admitted fact that the African subsidiaries were at the material times resident in East Africa, having regard to the judgment of Lord Evershed, M.R., in *Union Corporation, Ltd.* v. *Commissioners of Inland Revenue*, 34 T.C. 207.

We left the amounts of the assessments under appeal to be agreed.

11. Agreement of the figures having been reported to us, on 29th May, 1957, we determined the appeals by reducing the assessment for 1953–54 to £46,546 (less £37,110 capital allowances) and reducing the 1954–55 assessment to £163,477 (less £54,712 capital allowances).

12. The Inspector of Taxes immediately after our determination of the appeal having expressed to us his dissatisfaction therewith as being erroneous in point of law in due course required us to state a Case for the opinion of the High Court, which Case we have stated and do sign accordingly.

13. The points of law for the opinion of the Court are:

(1) whether there was evidence upon which we could arrive at the findings of fact in paragraph 10 hereof; and

(2) whether our conclusions in paragraph 10 hereof are wrong in law.

R. A. Furtado
F. Gilbert
} Commissioners for the Special Purposes of the Income Tax Acts.

Turnstile House,
94–99, High Holborn,
London, W.C.1.

1st April, 1958.

The case came before Wynn-Parry, J., in the Chancery Division on 15th, 16th and 17th July, 1958, when judgment was reserved. On 22nd July, 1958, judgment was given in favour of the Crown, with costs.

Mr. Roy Borneman, Q.C., and Mr. Alan Orr appeared as Counsel for the Crown, and Mr. F. Heyworth Talbot, Q.C., and Mr. J. Creese for the Company.

Wynn-Parry, J.—In paragraph 2 (2) of the Case the Special Commissioners rightly pose the question as follows:

> "The sole question in dispute was whether Booth & Co. (Africa), Ltd., Booth & Co., Ltd., and Bulleys Tanneries, Ltd., were, in 1952 and 1953, companies resident in the United Kingdom within the meaning of Section 20 (9) of the Finance Act, 1953."

In paragraph 4 of the Case the Special Commissioners say:

> "It was admitted on behalf of Unit that the African subsidiaries were at all material times resident in East Africa."

Mr. Heyworth Talbot, on behalf of Unit, submitted that I should give no colour to that admission, because it could not be said with precision what were the grounds on which it was made or how far it was intended to go. I cannot accept this submission. A study of the Case convinces me that the admission was not only proper, but inevitable. In my view, if it had been contended that the African subsidiaries were not resident in East Africa, the Special Commissioners would have been bound to find that they were resident in East Africa for taxation purposes. Not only were all those companies registered in East Africa, but they carried on business there; the members of the respective boards were resident there; and the articles of association provided in each case that the board meetings and general meetings of the company concerned could be held anywhere except in the United Kingdom. In short, every necessary step was taken to ensure that, having regard to the state of the authorities, if the residence of the African subsidiaries should become a material matter for consideration, the inevitable conclusion would be that they were each resident in East Africa.

The next, and indeed the main, submission put forward by Mr. Heyworth Talbot was that, as the Special Commissioners held, the African subsidiaries were also resident in the United Kingdom over the material period.

(Wynn-Parry, J.)

As will be seen from the careful and exhaustive statement of the evidence on behalf of the Respondents, which the Special Commissioners accepted, the board of directors of Alfred Booth & Co., Ltd., (the parent company), in effect told the boards of the African subsidiaries what to do, and those boards accepted the instructions and acted accordingly. In those circumstances, it is argued that the reality of the matter is that the real business of these companies is carried on in the United Kingdom as being the country where the central management and control abide. It is accepted by Mr. Talbot that this argument involves going further than any authority to be found in the books.

I do not intend to multiply reference to authority, but I would say this. Speaking broadly, prior to *Swedish Central Railway Co., Ltd.* v. *Thompson,* 9 T.C. 342, the Courts were concerned with cases in which the dispute was as to which one of two or more alleged places was to be regarded as the place where the company concerned was to be regarded as resident. No question of dual residence arose. It is against that background that the cases prior to the *Swedish Railway* case have to be considered.

In *De Beers Consolidated Mines, Ltd.* v. *Howe,* 5 T.C. 198, Lord Loreburn, L.C., said, at pages 212–3:

> "Mr. Cohen propounded a test which had the merits of simplicity and certitude. He maintained that a Company resides where it is registered and nowhere else. If that be so, the Appellant Company must succeed, for it is registered in South Africa. I cannot adopt Mr. Cohen's contention. In applying the conception of residence to a Company, we ought, I think, to proceed as nearly as we can upon the analogy of an individual. A Company cannot eat or sleep, but it can keep house and do business. We ought, therefore, to see where it really keeps house and does business. An individual may be of foreign nationality, and yet reside in the United Kingdom. So may a Company. Otherwise, it might have its chief seat of management and its centre of trading in England, under the protection of English law, and yet escape the appropriate taxation by the simple expedient of being registered abroad and distributing its dividends abroad. The decision of Chief Baron Kelly and Baron Huddleston, in the *Calcutta Jute Mills* v. *Nicholson*[1] and the *Cesena Sulphur Company* v. *Nicholson*[2], 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 on where the central management and control actually abides."

I desire to lay emphasis on the reasoning of Lord Loreburn which led him to state the rule as he did in the passage which I have quoted. It is, I think, to be found in the words:

> "Otherwise, it might have its chief seat of management and its centre of trading in England, under the protection of English law, and yet escape the appropriate taxation by the simple expedient of being registered abroad and distributing its dividends abroad."

When Lord Loreburn says "its chief seat of management", he must mean "the company's chief seat of management", and not the seat of management of any other company: in other words, "the chief seat of management as set up within the constitution of the company". If that be the true implication to be drawn from Lord Loreburn's words, then the case of *De Beers Consolidated Mines, Ltd.* v. *Howe,* does not help Mr. Talbot.

To my mind, however, the matter does not rest on mere implication. There are two authorities, both Court of Appeal decisions, which I regard as negativing the proposition which Mr. Talbot puts forward and as support-

(1) 1 T.C. 83. (2) 1 T.C. 88.

ing the view that, in order that a company resident abroad can claim the benefit of residence in this country, it must be shown that the acts relied on as constituting such residence were done within its constitution. If they were not so done, they are not the acts of the company, and are not to be taken into consideration.

The first of the two authorities is *Stanley* v. *Gramophone and Typewriter, Ltd.*, 5 T.C. 358. In that case the company held all the shares in a German subsidiary. The German subsidiary was not shown to be a mere simulacrum of the English company, the mere existence of a power of ultimate control not being held sufficient to lead to such a conclusion. In the course of his judgment Sir Herbert Cozens-Hardy, M.R., said, at pages 374–5 :

> "The German Company was established in Germany in 1900 in accordance with German law. It was undoubtedly a Company with several shareholders who brought in considerable capital. One of those shareholders was an English Company whose undertaking was subsequently acquired by the present English Company. At some date which is not stated, the English Company acquired all the shares of the German Company, and I assume in favour of the Crown that this event had happened before the material dates. The fact that an individual by himself or his nominees holds practically all the shares in a Company may give him the control of the Company in the sense that it may enable him, by exercising his voting powers, to turn out the Directors and to enforce his own views as to policy, but it does not in any way diminish the rights or powers of the Directors, or make the property or assets of the Company his as distinct from the Corporation's. Nor does it make any difference if he acquire not practically the whole, but absolutely the whole of the shares. The business of the Company does not thereby become his business. He is still entitled to receive dividends on his shares, but no more. I do not doubt that a person in that position may cause such an arrangement to be entered into between himself and the Company as will suffice to constitute the Company his agent for the purpose of carrying on the business, and thereupon the business will become for all taxing purposes his business. Whether that consequence follows is in each case a matter of fact. In the present case I am unable to discover anything, in addition to the holding of the shares, which in any way supports this conclusion. The German Company was not at first, and there is no evidence that it has ever become, a sham company or a mere cloak for the English Company. It has its Board of Management and its Board of Supervision as required by the German law. Its accounts are made out in accordance with German law. On the other hand, the English Company has its Board of Directors, some of whom are on the German Board. It has a proper account and balance sheet in which its interest in the German Company is described accurately as so many shares in the German Company, and the gross profits of the German Company are in no way brought into the Profit and Loss Account of the English Company. Against this the only thing to be said is that the Chairman of the English Company made a foolish speech in which he treated the gross profits of the German Company as profits of the English Company; but the dividend declared by the English Company did not proceed upon this footing. In my opinion it would be wrong to attribute to the loose and inaccurate language of the Chairman a force sufficient to override the formal acts of both the English Company and the German Company and all the other circumstances of the Case."

Buckley, L.J., in a well-known passage, at pages 381–2, said :

> "Further, it is urged that the English Company as owning all the shares can control the German Company, in the sense that the German Company must do all that the English Company directs. In my opinion this again is a misapprehension. This Court decided not long since in the *Automatic Filter Syndicate* v. *Cuninghame* (1906, 2 Chancery, page 34) that even a resolution of a numerical majority at a General Meeting of the Company cannot impose

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> its will upon the Directors when the articles have confided to them the control of the Company's affairs. The Directors are not servants to obey directions given by the shareholders as individuals; they are not agents appointed by and bound to serve the shareholders as their principals. They are persons who may, by the regulations, be entrusted with the control of the business, and if so entrusted they can be dispossessed from that control only by the statutory majority which can alter the articles. Directors are not, I think, bound to comply with the directions even of all the corporators acting as individuals. Of course the corporators have it in their power by proper resolutions, which would generally be special resolutions, to remove directors who do not act as they desire, but this in no way answers the question here to be considered which is, whether the corporators are engaged in carrying on the business of the Corporation. In my opinion they are not. To say that they are involves a complete confusion of ideas. The enquiry may be put in another form by asking who would be liable upon the contracts of the German Company? Obviously the German Company, and not those who are the holders of its shares."

The second authority is *Union Corporation, Ltd.* v. *Commissioners of Inland Revenue,* 34 T.C. 207. In this case Sir Raymond Evershed, M.R., gave the judgment of the Court and, after an exhaustive review of the authorities, laid down a test for ascertaining whether or not it could be postulated of a company that it was resident in more than one place. It is true that, strictly speaking, his judgment on this point was *obiter,* but, given as it was after so much careful consideration, I should feel myself bound to accept it, apart from the circumstance that, if I may say so with respect, I wholly agree with it. I need cite only one passage, at page 271:

> "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."

In my view this passage is conclusive of the question before me. In the first place, the words of the Master of the Rolls,

> "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",

indicate to my mind that he was contemplating only an exercise of authority which could properly be exercised within the framework of the constitution of the company concerned. This conclusion is, I think, inevitable when one considers the phrase used by Dixon, J., "the superior or directing authority".

In that context " authority " must have a narrower meaning than " power ". It must connote something which has been regularly established and, because of that regular establishment, is entitled and able to exercise direction. To my mind, the board of the parent company cannot fall within the phrase " superior or directing authority ". As such it has no authority over the boards of the African subsidiaries. True, those boards may accept the instructions of the board of the parent company ; but they are not bound to do so. It may be that they do accept instructions, because failure to do so would result in dismissal, but acceptance in fact of such instructions does not mean that the board of the parent company have authority to give the instructions. As I have said, they have no such authority. It must follow, to my mind, that in applying the test adumbrated by the Master of the Rolls no weight or attention can be given to the activities of the board of the parent company in relation to Unit and the African subsidiaries for the purpose of considering whether or not any of them are resident in the United Kingdom. In the result it cannot be said that any part of the superior and directing authority of these companies can be said to exist in the place claimed as a residence, namely, the United Kingdom. Further, even if " authority " could be regarded as being synonymous with " power ", the word " power " in the context would have to be read as " power regularly exercised ".

If I have, as I hope is the case, rightly understood the test propounded by the Master of the Rolls, then there is furnished for the guidance of those interested in these matters a test clearly defined in its scope (and founded, if I may say so, on principles of common sense), with the result that certainty is achieved, the only possible difficulty (though hard to foresee) being in its application in a given case. If, on the other hand, Mr. Talbot's proposition were to be accepted, certainty goes, and the Court would have to take into consideration, as material statements for the purpose of answering such a question as is posed here, acts (in this case the acts of the board of the parent company) which, on the reasoning in the *Gramophone* case[1], must be regarded as irregular interference by a parent company in the affairs of a subsidiary.

In the result, in my view the appeal succeeds and must be allowed with costs.

Mr. Roy Borneman.—Would your Lordship also think it right to remit the case to the Commissioners for the assessment to be adjusted in accordance with your Lordship's finding?

Wynn-Parry, J.—Yes. I think that will have to be done.

Mr. Borneman.—If your Lordship pleases.

The Company having appealed against the above decision, the case came before the Court of Appeal (Jenkins, Romer and Pearce, L.JJ.) on 20th, 21st and 22nd January, 1959, when judgment was reserved. On 12th February, 1959, judgment was given unanimously in favour of the Crown, with costs.

Mr. F. Heyworth Talbot, Q.C., and Mr. J. Creese appeared as Counsel for the Company, and Mr. Roy Borneman, Q.C., Mr. Alan Orr and Mr. J. R. Phillips for the Crown.

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(1) 5 T.C. 358.

Jenkins, L.J.—The judgment which is about to be read by Romer, L.J., is the judgment of the Court in this case.

Romer, L.J.—The question on this appeal is whether three wholly-owned subsidiary companies of Alfred Booth & Co., Ltd., namely Booth & Co. (Africa), Ltd., Booth & Co., Ltd., and Bulleys Tanneries, Ltd. (hereinafter collectively referred to as " the subsidiaries "), were in 1952 and 1953 resident in the United Kingdom for the purposes of Section 20 of the Finance Act, 1953. The Special Commissioners held that they were, but their decision was reversed by Wynn-Parry, J., on the ground that it was wrong in law. The Unit Construction Co., Ltd., who are concerned to uphold the decision of the Special Commissioners, have appealed to this Court against the learned Judge's order.

It was admitted on behalf of the Unit Construction Co., Ltd., before the Commissioners that the subsidiaries were at all material times resident in East Africa. We think it is quite clear that this admission was rightly made, and as every possible step was taken when the subsidiaries were incorporated in 1948 and 1949 to ensure beyond possibility of doubt that their residence should be regarded as being in East Africa, and as their articles of association were never altered, it would have been virtually impossible for the Unit Company to have contended to the contrary. As the learned Judge observed in his judgment(1) :

> " Not only were all those companies registered in East Africa, but they carried on business there ; the members of the respective boards were resident there ; and the articles of association provided in each case that the board meetings and general meetings of the company concerned could be held anywhere except in the United Kingdom."

The fact that in 1952 and 1953 the subsidiaries were resident in East Africa is naturally somewhat embarrassing to the contention that in those years they were resident in the United Kingdom. It is not however in any way destructive of that contention, because ever since the decision of the House of Lords in *Swedish Central Railway Co., Ltd.* v. *Thompson,* 9 T.C. 342, it has been well established that for Income Tax purposes a company can simultaneously have two " residences " in different countries. The view of the Special Commissioners that during the relevant period the subsidiaries could properly be regarded as resident in the United Kingdom as well as in East Africa was based upon their finding that each of these companies was controlled and managed by the parent company, Alfred Booth & Co., Ltd., which is incorporated and resident in England.

" We find ",

the Commissioners say in the Stated Case,

> " that the position was at the material times that the boards of directors of the African subsidiaries (who are the people one would have expected to find exercising control and management) were standing aside in all matters of real importance and in many matters of minor importance affecting the central management and control, and we find that the real control and management was being exercised by the board of directors of Alfred Booth & Co., Ltd., in London. . . . we find the controlling power and authority, which according to the constitution of each of the African subsidiaries is vested in its board of directors, is actually exercised, to a very substantial degree, by the board of Alfred Booth & Co., Ltd., in London."

The reasons for these findings and the facts on which they are based are stated with great care and clarity in the Case, and there is no doubt but that the findings are fully warranted. The only question before the learned Judge,

(1) *See* page 723 *ante.*

as it is before us, was whether those findings justified the Commissioners' conclusion in law that the subsidiaries had a residence in the United Kingdom.

Having found as a fact that the controlling power and authority over the subsidiaries was actually exercised by the parent company in London, the Commissioners held, on their understanding of the authorities, that

> "it is not necessary to go further and enquire whether such power and authority is exercised under the constitution of the company concerned by the officers to whom such constitution gives it."

It is upon that issue of law that the learned Judge differed from the Special Commissioners, and it is that issue which has been brought to this Court for decision. The question, in its briefest form, may be illustrated and posed as follows: Company A, resident in one country, is *de facto*, but not *de jure*, managed and controlled by company B, which is resident in another. Is a dual residence to be attributed to company A by reason of this *de facto* management and control? The Special Commissioners in effect answered this question in the affirmative. The learned Judge came to a different conclusion, and he expressed it in a judgment with which we so wholly agree that we would be content to adopt it as our own, both in its reasoning and in its language. Out of deference, however, to the arguments which were addressed to us by Mr. Heyworth Talbot and Mr. Creese, for the Unit Company, we will state as shortly as possible in our own words the reasons why, as it seems to us, the appeal must fail.

Mr. Talbot submitted in support of his case the following three propositions: (1) The powers of shareholders as such do not invest them with the central management and control of the company's business. (2) But where a company is a wholly-owned subsidiary the powers of the parent company with regard to the dismissal of directors and the provision of finance upon which the conduct of the subsidiary's business may depend put the parent company in a position to assume and exercise *de facto* the management and control of the company's business. (3) Whether or not the parent company assumes an exercise *de facto* of the management and control of the subsidiary's business is a question of fact.

For our part we are prepared to accept each of these propositions as correct. The first of them is clearly established by the decision of this Court in *Stanley* v. *Gramophone and Typewriter, Ltd.*, 5 T.C. 358. Wynn-Parry, J., referred to this case in his judgment and cited extracts from the judgments of Sir Herbert Cozens-Hardy, M.R., and Buckley, L.J.(1). We need not repeat them, but would refer only to a few passages from the judgment of Fletcher Moulton, L.J., which are perhaps of equal interest and relevance. At page 376, he said:

> "This legal proposition that the legal corporator cannot be held to be wholly or partly carrying on the business of the corporation is not weakened by the fact that the extent of his interest in it entitles him to exercise a greater or less amount of control over the manner in which that business is carried on. Such control is inseparable from his position as a corporator and is a wholly different thing both in fact and in law from carrying on the business himself. The Directors and employees of the corporation are not his agents, and he has no power of giving directions to them which they must obey. . . . [The shareholders'] course is to obtain the requisite majority to remove the directors and put persons in their place who agree to their policy. This shows that the control of individual corporators is something wholly different from the management of the business itself."

(1) *See* page 725 *ante*.

(Romer, L.J.)

The Lord Justice then proceeded to examine what he described as " a more difficult question ", namely the position which arises when one individual owns the whole of the shares in a corporation—which is permissible under German law, or was at all events permissible when *Stanley's* case(1) was decided. He said, at page 377 :

> " Treating it as an abstract proposition of law, I am of opinion that the acquisition of the whole of the shares of a Corporation by one individual does not, of itself, alter the nature of his relationship to the Corporation. His *de facto* control when he possesses 98 per cent. is probably complete from a practical point of view, and although it is, no doubt, rendered more complete in theory when he possesses himself of the whole of the shares, it is still of the nature of a control exercised by corporators over the Corporation, and does not make him and the Corporation in any sense identical. The Directors of the Corporation do not become his agents. Their duties are still controlled by the rules and constitution of the Corporation itself. Nor is this consideration one of theoretical law only. The fact that the whole of the shares of the Corporation are held by one individual at one moment by no means implies that they will be so at a future time ; and the responsibility of the Directors and Officers of the Corporation is to the Corporation itself, whatever be its composition at any moment as to the number of corporators. It would be no excuse to them, when called to account in the regular way and at the regular periods according to the constitution of the corporation, to plead that they obeyed the directions of the corporators at a particular moment (unless given in the manner prescribed by the constitution of the Corporation) and on the strength of such directions failed to obey the corporate rules."

If then authority were required to establish Mr. Talbot's first proposition, one need go no further than *Stanley's* case to find it. Mr. Talbot's third proposition is also correct ; the question of *de facto* control, if it should be relevant in any case, must clearly be one of fact. Mr. Borneman, for the Crown, was inclined to dispute the validity of Mr. Talbot's second proposition on the ground that it was inconsistent with the judgments and decision in *Stanley's* case. A study of those judgments shows, however, in our opinion, that there is no such inconsistency, for they recognise that a shareholder who holds sufficient shares in a company can *de facto* control its affairs by his ability to remove directors who disagree with his policy and to vote others into their places. The weakness of Mr. Talbot's second proposition, to our mind, is not that it is inconsistent with authority but that it is irrelevant to the issue which falls to be decided.

Mr. Talbot was certainly able to point to passages in the judgments of learned Judges who decided previous cases as supporting, at first sight, the view that the place in which is to be found the actual management or control of a company's business determines the residence of the company. We will quote a few examples. In *De Beers Consolidated Mines, Ltd.* v. *Howe*, 5 T.C. 198, at page 213, Lord Loreburn, L.C., accepted and enunciated the principle that

> " a Company resides, for purposes of Income Tax, where its real business is carried on . . . and the real business is carried on where the central management and control actually abides."

Mr. Talbot naturally laid stress on the use by Lord Loreburn of the word " actually ". In *American Thread Co.* v. *Joyce*, 6 T.C. 1, at page 18, Hamilton, J., after referring to Lord Loreburn's test in the *De Beers* case, said :

> " This test, ' the real business is carried on where the central management and control actually abides ', does not differ to my mind in substance from the tests mentioned in earlier cases, such as ' the conduct and management, the head and

(1) 5 T.C. 358.

> brain of the trading adventure' in the *San Paulo Railway* case in 3 Tax Cases(1), or the expression which has not been uncommonly used by Commissioners 'the head and seat and directing power of the affairs', but, owing to its being compact and precise, it appears to me to be the convenient one for adoption."

In the same case, on appeal to the House of Lords, Lord Halsbury said(2) that the real test

> "which, after all, is only a question of analogy—you cannot talk about a Company residing anywhere—and that which has been accepted as a test, is where what we should call the head office in popular language is, and where the business of the Company is really directed and carried on in that sense."

This exposition by Lord Halsbury of the test to be applied was referred to by Lord Sumner in *Todd* v. *Egyptian Delta Land and Investment Co., Ltd.*, 14 T.C. 119; and he said, at page 151:

> "This expression of opinion can only mean that for both British and foreign companies alike the test is where on the facts (including among all the others the fact of incorporation here or there) the company's business is really directed and carried on."

Relying on such judicial utterances as these—and there are others to the like effect—Mr. Talbot contends that on the findings of the Commissioners it is clear that the central management and control of the subsidiaries actually abides in London and it is from there that their business is really directed and carried on. Mr. Borneman, however, met this contention, and in our opinion successfully met it, in two ways. First he said that the scope and significance of judgments can only be truly assessed in the light of the facts of the particular cases in which they are delivered. This of course is undeniably true. All the judgments to which we have referred, and on which Mr. Talbot relied, were delivered in what we might call ordinary cases, and there is no reason at all to suppose that the Judges had in mind such a case as the present in which *de jure* management is vested in one company whilst *de facto* control is vested in another. In none of the relevant authorities was so special a case referred to in argument or adverted to in the judgments. Judicial language is only authoritative in so far as it is directed to the particular subject-matter which is present to the speaker's mind; and whatever its apparent width, it has no force, even persuasive, outside the limits of its intended application. Accordingly the passages from the various judgments and speeches to which we have referred and on which Mr. Talbot sought to rely do not, in our opinion, advance the Appellant's case.

The second point which Mr. Borneman took is, we think, equally well founded. He submitted that it is a legitimate assumption that, whatever Judges may have said with regard to acts or other elements which may determine residence, such acts or elements were envisaged as being regular and not irregular, constitutionally lawful and not unlawful. We think that this must *prima facie* be so, and the relevance of the consideration arises very directly in relation to Article 67 of Table A in the First Schedule to the Companies Ordinance of Kenya, 1933. This Article, which was incorporated in the articles of association of each of the subsidiaries, provides (so far as material) that

> "the business of the company shall be managed by the directors, who may . . . exercise all such powers of the company, as are not, by the Ordinance, or by these articles, required to be exercised by the company in general meeting".

(1) At pp. 344-5. (2) 6 T.C., at p. 165.

(Romer, L.J.)

If, submitted Mr. Borneman, as the Special Commissioners have found, the business of the companies was in fact being managed by the parent company and not by the subsidiaries' own directors, the provisions of Article 67 were being wholly disregarded; and an act such as that, the flouting of a term of a subsidiary company's constitution, can never have been judicially contemplated as being a guide to the residence of that company. In other words, says Mr. Borneman, where the Judges have referred to the place where the central management and control is to be found they mean the constitutional management and control and nothing else. As we say, we accept that submission, and the result of accepting it is that, inasmuch as under the constitutions of the subsidiaries their management and control was vested in their directors in Kenya and in them alone, there is no warrant in the authorities for attributing to the subsidiaries a second residence in England by reason of the usurpation of the directing power by the parent company.

The conclusion that only constitutional, and therefore authorised, management and control are relevant to an enquiry as to the residence of a company seemed to the learned Judge, as it seems also to us, to be strongly borne out by the judgment of this Court in *Union Corporation, Ltd.* v. *Commissioners of Inland Revenue,* 34 T.C. 207. In the course of that judgment there appears (at page 271) the following passage, which Wynn-Parry, J., cited:

> "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."

Sir Raymond Evershed, M.R., who read the judgment of the Court, then referred to a passage 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. This passage is also cited by the learned Judge and so we will not repeat it. We will, however, refer to the learned Judge's conclusion on the matter(1), with which we respectfully and entirely agree:

> "In my view this passage is conclusive of the question before me. In the first place, the words of the Master of the Rolls, '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', indicate to my mind that he was contemplating only an exercise of authority which could properly be exercised within the framework of the constitution of the company concerned. This conclusion is, I think, inevitable when one considers the phrase used by Dixon, J., 'the superior or directing authority'. In that context 'authority' must have a narrower meaning than 'power'. It must connote something which has been regularly established and, because of that regular establishment, is entitled and able to exercise direction. To my mind, the board of the parent company cannot fall within the phrase 'superior or directing authority'. As such it has no authority over the boards of the African subsidiaries. True, those boards may accept the instructions of the board of the parent company; but they are not bound to do so. It may be that they do accept instructions, because failure to do so would result in dismissal, but acceptance in fact of such instructions does not mean that the board of the parent company have authority to give the instructions. As I have said, they have no such authority. It must follow, to my mind, that in applying the test adumbrated by the Master of the Rolls no weight or attention can be given to the activities of the board of the parent company in relation to Unit and the African subsidiaries for the purpose of considering whether or not any of them

(1) *See* page 726 *ante.*

> are resident in the United Kingdom. In the result it cannot be said that any part of the superior and directing authority of these companies can be said to exist in the place claimed as a residence, namely, the United Kingdom. Further, even if 'authority' could be regarded as being synonymous with 'power', the word 'power' in the context would have to be read as 'power regularly exercised'."

We should perhaps make a brief reference to two cases upon which Mr. Talbot and Mr. Creese respectively placed some reliance. The first was *Scottish Co-operative Wholesale Society, Ltd.* v. *Meyer*, [1958] 3 W.L.R. 404. In that case a company formed a subsidiary and caused its own nominees to be appointed on to the board of directors. These nominees exercised their powers in the interests of the parent company and to the detriment of the subsidiary to such an extent that the latter's business came virtually to a standstill. Some minority shareholders accordingly presented a petition under Section 210 of the Companies Act, 1948, for an order on the parent company to purchase their shares. The House of Lords held they were entitled to the relief sought and that, to quote from the headnote, the parent company

> "had acted towards the minority shareholders of the [subsidiary] company in an oppressive manner, and that this conduct through the nominee directors of the company, who were also directors of the society, amounted to conduct of the affairs of the company, since the transactions of the two could not be separated."

We do not think that that case is of any assistance. It shows that *de facto* control of a company's business from outside can constitute an oppressive conduct of its affairs for the purposes of Section 210 of the Companies Act, 1948, but that is far removed from showing that such control can affect the company's residence.

The second case was *Daimler Co., Ltd.* v. *Continental Tyre and Rubber Co. (Great Britain), Ltd.*, [1916] 2 A.C. 307. In that case one of the questions in debate was, in substance, whether a company which was incorporated in England but whose shareholders (save one) and directors were Germans resident in Germany could sue in this country in time of war between the two countries. Lord Parker of Waddington, with the concurrence of other of the Law Lords, expressed the view that (to quote again from the headnote):

> "The character of individual shareholders cannot of itself affect the character of the company; but the enemy character of individual shareholders and their conduct may be material on the question whether the company's agents or the persons de facto in control of its affairs are in fact adhering to, taking instructions from, or acting under the control of enemies."

We cannot ourselves see how that view, or any of the speeches of their Lordships in that case, have any bearing on the effect on the residence of a company of its business being carried on under extraneous control. The only matter which their Lordships were discussing was the extent to which the character of an English company (British on the one hand or enemy on the other) should be determined by the character of those who *de facto* controlled its affairs.

It only remains to say that, for the reasons which we have explained, and which are in substance the same as those expressed in the learned Judge's judgment, this appeal, in our opinion, fails and must be dismissed.

Mr. J. R. Phillips.—My Lords, may I ask that the appeal be dismissed with costs?

Jenkins, L.J.—Yes, that follows.

Mr. John Creese.—And may I ask that the Company be granted leave to appeal?

Jenkins, L.J.—The Crown does not as a rule oppose that?

Mr. Phillips.—No, my Lord, I am not instructed to oppose that.

Jenkins, L.J.—Very well then, you may take your leave.

Mr. Creese.—I am much obliged to your Lordships.

The Company having appealed against the above decision, the case came before the House of Lords (Viscount Simonds and Lords Radcliffe, Goddard, Cohen and Keith of Avonholm) on 2nd and 3rd November, 1959, when judgment was reserved. On 30th November, 1959, judgment was given unanimously against the Crown, with costs.

Mr. F. Heyworth Talbot, Q.C., and Mr. J. Creese appeared as Counsel for the Company, and Mr. Roy Borneman, Q.C., and Mr. Alan Orr for the Crown.

Viscount Simonds.—My Lords, the Appellant Company is a wholly-owned subsidiary of an English company, Alfred Booth & Co., Ltd. So are three companies, Booth & Co. (Africa), Ltd., Booth & Co., Ltd., and Bulleys Tanneries, Ltd., all of which are companies registered in Kenya under the laws of that colony. To these three companies, to which I will sometimes refer as "the African subsidiaries", the Appellant Company made certain payments in the years 1952 and 1953 and claims to be entitled under Section 20 of the Finance Act, 1953, to deduct them for the purpose of its assessment to Income Tax under Case I of Schedule D for the relevant years. It is common ground that it is entitled to do so if, and only if, such companies were then

> "resident in the United Kingdom and carrying on a trade wholly or partly in the United Kingdom."

My Lords, the claim of the Appellant Company was sustained by the Commissioners for the Special Purposes of the Income Tax Acts, but upon a Case Stated by them was rejected by Wynn-Parry, J., whose decision was affirmed by the Court of Appeal. It will, I think, appear that the point for your Lordships' consideration in the present case is a short one, though any mention of so vexed a question as the residence of a company is likely to give rise to prolonged discussion. Here there are findings of fact which learned counsel for the Crown was constrained to admit that he could not challenge, and the only question is whether the conclusion in law which the Special Commissioners drew from those facts was correct.

I should like at the outset to say that this Case was stated with conspicuous clarity for the opinion of the Court and that the detailed and careful review of the facts by the Special Commissioners led them irresistibly to the conclusion which they thus state:

> "We find . . . that the boards of directors of the African subsidiaries (who are the people one would have expected to find exercising control and management) were standing aside in all matters of real importance and in many matters of minor importance affecting the central management and control, and we find that the real control and management was being exercised by the board of directors of Alfred Booth & Co., Ltd., in London."

This being their conclusion of fact, it is not surprising that as a matter of law they concluded that these companies were resident in London. For it has been trite law for two generations or more that a limited company

> "resides, for purposes of Income Tax, where its real business is carried on"

and that its

> "real business is carried on where the central management and control actually abides."

This test has not only been reasserted and applied over and over again in judicial decisions: it has now also received legislative recognition, see Section 468 (7) of the Income Tax Act, 1952. It cannot be questioned by your Lordships. The familiar words that I have cited come from Lord Loreburn, L.C.'s speech in *De Beers Consolidated Mines, Ltd.* v. *Howe*[1], [1906] A.C. 455, at page 458. At that time the possibility of an artificial person such as a limited company residing in two countries at one and the same time had not been fully examined. Twenty years later in *Swedish Central Railway Co., Ltd.* v. *Thompson,* 9 T.C. 342, at page 352, Rowlatt, J., saw no difficulty in such a concept and indeed found it easier for a corporation to have two residences than for a natural person and, though in the same case in the Court of Appeal Atkin, L.J., said that he felt constrained by authority to come to a different conclusion, and in the House of Lords Lord Atkinson in a powerful dissenting speech[2] took the same view, it must now be regarded as clear law that an artificial person may, like a natural person, have more than one residence. The relevance of this consideration is that at an early stage in the proceedings, before the Special Commissioners, I think, it was admitted on behalf of the Appellant Company that the African subsidiaries were resident in Africa. I do not know what considerations led to this admission being made, but it appears to me to have no weight, if it is conceded as a matter of law that a company may have two residences. It is not necessary for me, and I count it my good fortune, on this occasion at any rate, to determine in what sense a company may be said to reside not only in that country in which, and in which alone, the central management of its business is exercised, but in another country also. I share to the full the difficulty entertained and expressed by Sir Owen Dixon in *Koitaki Para Rubber Estates, Ltd.* v. *Federal Commissioner of Taxation,* 64 C.L.R. 15 and 241, to which reference was made in the judgment of the Court of Appeal. I leave to others the reconciliation of the *Swedish Central Railway Company* case, to which I have referred, and the *Egyptian Delta* case[3], 14 T.C. 119.

What, then, my Lords, were the reasons which led the Courts below to hold in the face of this finding of fact and this state of the law that the African subsidiaries were not resident in the United Kingdom? Undoubtedly they raise a difficult and interesting question of law, which if decided in the manner now contended for by the Crown must have far-reaching and probably deplorable consequences for the Revenue. For the contention of learned Counsel for the Crown which has so far found favour with the Courts is no less than this, that if by the constitution of the company, that is, by its memorandum and articles of association interpreted in the light of the relevant law, that is, in this case the law of Kenya, the management of the company's business is contemplated as being exercised, and ought therefore to be exercised, in Kenya or at any rate outside the United Kingdom, then for the purpose of British Income Tax law the facts are to be disregarded and the control and management which as a fact are found to abide in the United Kingdom are to be regarded as abiding outside it. There is no doubt, I think, that the management of the African subsidiaries, which were incorporated in Kenya under the Kenya Companies Ordinance and regis-

(1) 5 T.C. 198, at p. 213. (2) 9 T.C., at pp. 376–386.
(3) Todd *v.* Egyptian Delta Land and Investment Co., Ltd.

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tered in Nairobi, was placed in the hands of their directors and that their articles of association expressly provided that directors' meetings might be held anywhere outside the United Kingdom. Nor can there be any doubt —for this is the unchallengeable finding of the Commissioners—that the management of the businesses of the companies was not exercised in the manner contemplated. Whence it follows that the businesses were conducted in a manner irregular, unauthorised and perhaps unlawful. It is this fact which led the learned Judge to say, in words that were approved by the Court of Appeal:

> "It must follow, to my mind, that . . . no weight or attention can be given to the activities of the board of the parent company in relation to Unit"

—the Appellant Company—

> "and the African subsidiaries for the purpose of considering whether or not any of them are resident in the United Kingdom."

So also the Court of Appeal, observing upon the test of residence laid down in the authorities, said that there was

> "no reason at all to suppose that the Judges had in mind such a case as the present in which *de jure* management is vested in one company whilst *de facto* control is vested in another",

and again they insisted that it was

> "acts or other elements . . . regular and not irregular, constitutionally lawful and not unlawful"

that must be regarded in determining the question of management and therefore of residence.

My Lords, I should certainly be prepared to admit that the many Judges who in the past have pronounced upon this question had not in mind such a case as this. But, with great respect to those who take a different view, the present case does not seem to lie outside the principle underlying their judgment. Nothing can be more factual and concrete than the acts of management which enable a Court to find as a fact that central management and control is exercised in one country or another. It does not in any way alter their character that in greater or less degree they are irregular or unauthorised or unlawful. The business is not the less managed in London because it ought to be managed in Kenya. Its residence is determined by the solid facts, not by the terms of its constitution, however imperative. If indeed I must disregard the facts as they are, because they are irregular, I find a company without any central management at all. For, though I may disregard existing facts, I cannot invent facts which do not exist and say that the company's business is managed in Kenya. Yet it is the place of central management which, however much or little weight ought to be given to other factors, essentially determines its residence. I come, therefore, to the conclusion, though truly no precedent can be found for such a case, that it is the actual place of management, not that place in which it ought to be managed, which fixes the residence of a company. If it were not so, the result to the Revenue would be serious enough. In how many cases would a limited company register in a foreign country, prescribe by its articles that its business should be carried on by its directors meeting in that country, and then claim that its residence was in that country though every act of importance was directed from the United Kingdom?

In my opinion, Wynn-Parry, J., and the Court of Appeal have adopted a wrong test in this admittedly difficult case. I would allow this appeal and restore the determination of the Commissioners. The Crown must pay the Appellant's costs here and below.

(Viscount Simonds.)

My Lords, since writing this opinion I have been privileged to read the opinion which my noble and learned friend, Lord Radcliffe, will deliver, and I wish to add that I concur in his observations and in particular in the manner in which he would reconcile the two decisions of this House to which I have referred and in his view of the weight that should be given to the admission made by the Appellant concerning the residence of the subsidiary companies in Kenya.

Lord Radcliffe.—My Lords, it seems that the opinion of this House on the important question raised by the appeal differs from the unanimous judgment of the Court of Appeal and the judgment of Wynn-Parry, J., in the High Court. I think, therefore, that I ought to say in my own words why it is that I regard these judgments as incorrect. It is best to begin by making it plain what are the essential facts of the case and what is the exact question which requires decision.

The general facts are found for us by the Special Commissioners and are set out in detail in the Case Stated. In my view they admit of only one conclusion, that by the year 1952 every decision of any importance that concerned the running of the businesses in Kenya of the Alfred Booth & Co., Ltd. subsidiaries was being taken in London by directors of the parent company. To manage the subsidiaries in this way was inconsistent with the provisions for their management laid down by their respective articles of association, under which the boards of directors held the managerial power and their meetings could not validly be held in the United Kingdom. On the other hand, this departure of practice from form was not due to any initial intention to conceal the former by the latter. It came about because between 1948 and 1950 the subsidiaries had been operating so unsuccessfully that the parent company decided, to use the words of the Case Stated, see paragraph 5 (2), that:

> "the situation of the African subsidiaries was becoming so serious that it was unwise to allow them to be managed in Africa any longer, and . . . their management must be taken over by the directors of Alfred Booth & Co., Ltd., in London."

On those facts the seat of the "central management and control" of the subsidiaries changed, and passed from Africa to the United Kingdom. This is a straightforward case of *de facto* control being actively exercised in the United Kingdom, while the local directors "stood aside" from their directorial duties and never purported to function as a board of management. Upon those facts the question has arisen whether the subsidiaries are entitled to be regarded as resident in the United Kingdom during the years 1952 and 1953, with the consequence that each of them would fall within the description of

> "a company resident in the United Kingdom and carrying on a trade wholly or partly in the United Kingdom"

for the purposes of Section 20 of the Finance Act, 1953. If they do, then the Appellant Company, which is also an Alfred Booth & Co., Ltd. subsidiary, can treat certain payments which it made to them in those years as "subvention payments" under the Section and accordingly can deduct them from its assessments under Case I of Schedule D for the years 1953–54 and 1954–55.

The Appellant has throughout the case admitted that the three African subsidiaries were at all material times resident in East Africa. This is spoken of as an admission, though it seems to me that it might just as well be described as a claim. The grounds upon which this "admission"

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was founded are not before us. I do not know whether they were supposed to be the fact of incorporation in Kenya, or the adoption of articles of association under the Kenya Companies Ordinance of 1933, or the residence in Kenya of the ostensible directors, or the practical side of business being done in Kenya, or a combination of some or all of these facts. Since it has been common ground between the parties that a company may have more than one residence for the purposes of taxation, I do not think that the admission has any particular bearing on the point that we have to decide; nor has it been so treated in any Court. For my part, however, I wish that the admission had not been made. I do not know precisely what it is intended to concede; and I have found that decisions of Courts are sometimes the less satisfactory on questions of principle because the issue has been prejudiced by the making of an admission which turns out to embody a legal conclusion as well as matters of fact.

The ascertainment of a limited company's residence for tax purposes involves several very familiar propositions. No Statute hitherto has laid down any definition of this residence or prescribed any rules for determining it, except so far as Section 468 (7) of the Income Tax Act, 1952, not only governs that Section but also forms a statutory acceptance of an existing rule. I think that a statutory code could have been provided and on the whole I regret that it has not. On the other hand, the necessity of establishing some common standard for the treatment of different taxpayers meant that the Courts of Law were bound in course of time to produce and apply some general principle of their own to form an acceptable test of residence. No doubt it might have taken a variety of forms—the country of incorporation, the site of general meetings, the site of meetings of the directors' board were all possible candidates for selection as the criterion. In fact, as we know, the principle was adopted that a company is resident where its central control and management abide: words which, according to the decision of the House of Lords that finally propounded the test, *De Beers Consolidated Mines, Ltd.* v. *Howe,* 5 T.C. 198, are equivalent to saying that a company's residence is where its "real business" is carried on.

It is true that the law so declared substitutes a judicial formula for the general words of the Statute, a form of limitation which one normally seeks to avoid. But in the circumstances I believe such a process to have been inevitable, and in my opinion the *De Beers* judgment, followed as it is by a number of other judgments of the highest authority which have accepted the same principle, must be treated today as if the test which it laid down was as precise and as unequivocal as a positive statutory injunction. That means that there is no escape from Lord Loreburn, L.C.'s words, at page 213 of the report:

> "a Company resides, for purposes of Income Tax, where its real business is carried on. . . . I regard that as the true rule; and the real business is carried on where the central management and control actually abides."

I do not know of any other test which has either been substituted for that of central management and control or has been defined with sufficient precision to be regarded as an acceptable alternative to it. To me, at any rate, it seems impossible to read Lord Loreburn's words without seeing that he regarded the formula he was propounding as constituting *the* test of residence. If the conditions he postulated were present, there was residence: if they were not, other conditions did not suffice to make up residence. And so, I think, his meaning was universally understood, not least in judgments of this House (see *American Thread Co.* v. *Joyce,* 6 T.C. 163;

New Zealand Shipping Co., Ltd. v. *Thew*, 8 T.C. 208 ; *Bradbury* v. *English Sewing Cotton Co., Ltd.*(1), [1923] A.C. 744), for the next twenty years.

So far as I am able to perceive, only two qualifications have since appeared which mar at all the simplicity and generality of his test. One is that the facts of individual cases have not always so arranged themselves as to make it possible to identify any one country as the seat of central management and control at all. Though such instances must be rare, the management and control may be divided or even, at any rate in theory, peripatetic. Situations of this kind do not arise just to tease the minds of Judges: they are the product of some peculiar necessity, political or otherwise. The *Union Corporation* case(2), 34 T.C. 207, was of this kind. The facts were not such as to allow of Lord Loreburn's test being applied, and therefore some other basis of decision had to be selected. The solution chosen by the Court of Appeal appears to have been that residence arose in any country in which " to a substantial degree " acts of controlling power and authority were exercised ; and in this the line of reasoning followed was avowedly adapted from the judgment of Owen Dixon, J., in *Koitaki Para Rubber Estates, Ltd.* v. *Federal Commissioner of Taxation,* 64 C.L.R. 15 and 241. It may perhaps still be open to question whether, where the facts are such that Lord Loreburn's test cannot be applied as a whole, the correct way of determining residence is, so to speak, to fragmentate his principle and establish a residence for tax purposes wherever the exercise of some portion of controlling power and authority can be identified. The point does not arise for our decision in this case and I express no view at all upon it. I only note the decision in the *Union Corporation* case as an instance of dual or multiple residence for tax purposes which has its origin in the fact that circumstances do not always make it feasible to apply the Loreburn formula.

The other difficulty which has appeared is the decision of this House in 1925 in the *Swedish Central Railway Company* case(3), 9 T.C. 342. To all appearances that laid down the proposition that, although there was a residence in Sweden by virtue of central control and management being exercised there, there was at the same time residence in England by virtue of incorporation here and the performance here of administrative duties such as exercising the custody of the company's seal and registration of transfers. The novel idea thus appeared that there were some circumstances that could establish residence for a company even though its central management and control were being concurrently exercised elsewhere. Unfortunately it is impossible to discover from the decision what exactly those circumstances are, because, as so often arises under Income Tax procedure when judgment is given on Cases stated by Commissioners, the conclusion of the House involved nothing more positive than that the Commissioners who had heard the case had facts before them upon which it was open to them in law to find that there was English residence. Conversely, when the case of *Todd* v. *Egyptian Delta Land and Investment Co., Ltd.*, 14 T.C. 119, reached this House in 1928, it was held that upon facts not markedly dissimilar from those of the earlier case the Commissioners were entitled to find that there was no residence in England. With these two decisions of equal authority to be reckoned with I think that it is impossible for anyone today to declare with any conviction what are the circumstances, or what is the combination of circumstances, that constitute residence for a company in one taxing jurisdiction at a time when

(1) 8 T.C. 481. (2) Union Corporation, Ltd. *v.* Commissioners of Inland Revenue.
(3) Swedish Central Railway Co., Ltd. *v.* Thompson.

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the central management and control of its affairs are being actively conducted in another.

My Lords, I cannot avoid the opinion that the *Swedish Central Railway Company* decision(1) was an unfortunate one, having regard to the course of authority both before and after its date. Few people can feel that there is any close analogy between the residence imputed to a company and the residence imputed to an individual. While it is not difficult to see that the circumstances that make an individual " resident " may reproduce themselves for him at one and the same time in more than one country, it is much harder, when a company is concerned, to feel satisfied that two quite different tests, depending upon different sets of circumstances, can each be applied concurrently for the purpose of determining residence. For any one taxing authority the relevant question is whether the company is resident within the area of its jurisdiction or non-resident: it is not required to ascertain positively whether or not the company is also resident within another jurisdiction. If the accepted test is that a company is resident in that country where its central management and control abide and the facts are that at the material date that central management and control do not abide in England, it seems that in such cases the nature of the test itself precludes the conclusion that the company is nevertheless resident here.

I am myself of the opinion that the best way of treating the matter is to regard the *Swedish Central Railway Company* and the *Egyptian Delta Land Company*(2) decisions as if they were in effect one decision of the House and the speech of Viscount Sumner in the later case as affording an authoritative commentary on the significance of the earlier. He was party to both of them. If this is done much of the difficulty disappears; for it is clear that Lord Sumner wished it to be understood that the Swedish Central Railway Company's business and administration were of such a nature that what managing and controlling had to be done was in fact done as much on English as on Swedish soil. He regarded the key of the earlier decision as being contained in the words of Lord Cave (see 9 T.C. at page 373):

> " 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."

On this basis the 1925 decision of the House is no more than a decision on that special class of case, such as I have already noticed with reference to the *Union Corporation* case(3), where the facts themselves are genuinely such as not to admit of a finding that central management and control are exercised in or from any one country. There will then be only one category of exception from the principle of the *De Beers* case(4) and not an undefined second class.

My Lords, what I have been saying about this question of double residence has no direct relevance to what has to be decided in the present appeal. I thought it necessary, however, to make some attempt to deal with the background because, owing to the admission that has been made asserting an African residence for the three subsidiaries, we are put in the position, if we allow the appeal, of accepting that each of them has residence in two different countries without passing upon the validity of the alleged residence in Africa or indeed knowing what are supposed to be the determining circumstances that bring it about. I do not think that satisfactory. This case ought not to be regarded as in any sense an authority on the

(1) 9 T.C. 342. (2) 14 T.C. 119. (3) 34 T.C. 207. (4) 5 T.C. 198.

problems of double residence for companies. It deals only with what is a different point, whether, assuming that all the acts which constitute central management and control of the subsidiaries' affairs take place in England, an English residence arises despite the fact that the persons who performed those acts had no authority under the companies' regulations to do so nor could the meetings, if any, at which the decisions to act were taken validly be held in England. It is that point which has been argued before us.

The view which has hitherto prevailed both in the High Court and the Court of Appeal is expressed in the words which appear in the unanimous judgment of the latter Court:

> ". . . only constitutional, and therefore authorised, management and control are relevant to an inquiry as to the residence of a company".

This conclusion, at any rate at first sight, is not attractive to me, since it appears to reduce to a mere formal reading of regulations an inquiry that has generally been regarded as one of "actual fact". It has been built out of two propositions both of which were accepted before us by the Crown's Counsel as containing the essence of his argument.

The first proposition lays stress on the consideration that none of the many judicial pronouncements which have asserted control and management to be the test of residence was directed to such circumstances as the present in which the company's own regulations conflict with what has been done. This no doubt is true; but I think it a very large step to deduce from that that such pronouncements, despite the unvarnished plainness of their language, can have no bearing on the issue now before us. After all, the purport of all of them is to repeat that the question where control and management abide must be treated as one of fact or "actuality"; and here control and management in London remain a fact, despite the failure to adapt the companies' articles to the occasion. The articles prescribe what ought to be done; but they cannot create an actual state of control and management in Africa which does not exist in fact. In litigation *inter partes* this sort of situation may perhaps be brought about by the operation of the law of estoppel, but here I see no ground for saying, nor has it been argued, that there is any estoppel either by words or conduct which binds the Appellant in the face of the Revenue.

Ought we, then, to adopt this principle that evidence of what has happened in fact must be excluded by a rule of law if what has been done is inconsistent with the regulations of a company? In my opinion it would be wrong to do so. I cannot see how the corollary of such a principle could fail to be that, if you cannot look beyond what the regulations of the company provide for, it is only those regulations which need to be or indeed can be referred to when a question of residence arises. Companies could be equipped with the most comprehensive sets of constitutions providing for management to be located in this or that selected taxing jurisdiction, and, however much the written requirements were in fact departed from for reasons of convenience or otherwise, all efforts to establish the true facts relating to the actual seat of management would founder on the ground that what had been done was merely "unconstitutional". Certainly limited companies ought to keep their internal regulations up to date and to reform them in accordance with the facts. But I cannot think that such considerations are sufficient to introduce an important qualification upon this accepted test by which you try to ascertain what are the real facts about the seat of management and control and to put in its place what seems to be the merely formal device of studying a set of written regulations. I do not believe that this would conduce to the health of revenue

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administration. I think it much better to adhere to the approach laid down by Lord Loreburn, L.C., in the *De Beers* case[1]:

> "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."

or by Lord Halsbury in *American Thread Co.* v. *Joyce*, 6 T.C. at page 165:

> ". . . the real test . . . and that which has been accepted as a test, is where what we should call the head office in popular language is, and where the business of the Company is really directed and carried on in that sense."

It is said that if we admit evidence of the subsidiaries' real practice and course of business we shall make the Crown's task of revenue collection very much the more burdensome. I should be sorry to do that. Their work is difficult enough as it is: nor indeed is the situation of the taxpayer altogether an amiable one. But residence has hitherto been regularly treated as a question of fact as to which inquiry must be conducted, and I do not see that by rejecting the idea that the printed regulations close the matter and requiring or allowing further investigation as to what really happens we are adding materially to the Crown's burden. If this makes too elaborate a test, the proposed alternative would be altogether too simple; and much of the effective administration of revenue collection will continue to depend, as it always has, upon the measure of candour and responsibility that is shown by the individual taxpayer and his professional advisers.

I would allow the appeal.

My noble and learned friend, **Lord Goddard,** asks me to say that he concurs in this opinion.

Lord Cohen.—My Lords, the short point for your decision is whether three companies incorporated in Kenya, all wholly-owned subsidiaries of an English company, Alfred Booth & Co., Ltd., which I shall hereafter call "the parent company", were at the relevant periods resident in the United Kingdom within the meaning of Section 20 (9) of the Finance Act, 1953. If they were so resident in the United Kingdom, but not otherwise, the Appellant Company, also a wholly-owned subsidiary of the parent company, was entitled in computing its profits for the years 1953–54 and 1954–55 to deduct certain payments, in the Section called "subvention payments", made by it to the African subsidiaries in the years 1952 and 1953.

It has been throughout common ground between the parties that the African subsidiaries were at all material times resident in East Africa, but the Appellant Company contends that they were also resident in the United Kingdom. The admission that the African subsidiaries were resident in East Africa is not destructive of the Appellant Company's contention because ever since the decision of your Lordships' House in *Swedish Central Railway Co., Ltd.* v. *Thompson*, 9 T.C. 342, it has been well established that for Income Tax purposes a company can simultaneously have two residences in different countries.

Both parties accepted the test of residence laid down by Lord Loreburn, L.C., in *De Beers Consolidated Mines, Ltd.* v. *Howe*[2], [1906] A.C. 455, at page 458, where he said:

> "The decision of Kelly C.B. and Huddleston B. in the *Calcutta Jute Mills* v. *Nicholson* and the *Cesena Sulphur Co.* v. *Nicholson*, now thirty years ago,

(1) 5 T.C. 198, at p. 213. (2) *Ibid.*

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 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 bye-law, but upon a scrutiny of the course of business and trading."

Relying on this citation, Mr. Heyworth Talbot for the Appellant Company said that the question where the central management and control actually abide must be a question of fact and that the finding of the Special Commissioners (see paragraph 10 of the Case Stated) that the real control and management was being exercised by the board of directors of the parent company in London is conclusive in his favour.

Mr. Borneman for the Crown did not, I think, seriously dispute that there was evidence on which the Special Commissioners could so find. In any event I think it is plain from the Case Stated as a whole that there was ample evidence to support their conclusion and it is irrelevant whether or not your Lordships would have reached the same conclusion.

Mr. Borneman, however, submitted that the issue between the parties was not a pure question of fact. He pointed out that in none of the reported cases had the real control and management been exercised in breach of the regulations of the company, whereas in the present case the articles of each of the African subsidiaries had been so framed that it should have been impossible for the control and management, vested as it was in the respective boards of directors, to be exercised in London. Thus in article 28 of the articles of association of Booth & Co. (Africa), Ltd., it was provided that

"Directors' meetings may be held anywhere outside the United Kingdom and Clause 81 of Table A shall be construed accordingly."

A similar provision is to be found in the articles of association of each of the other African subsidiaries.

Mr. Borneman argued, and his argument found favour with both Wynn-Parry, J., and the Court of Appeal, that the observations of Lord Loreburn and of other Judges in decided cases as to the acts or other elements which may determine the residence of a limited company must have envisaged such acts or other elements as being regular and not irregular, constitutionally lawful and not unlawful. Accordingly both Courts below held that since the acts of the parent company on which the Special Commissioners relied constituted a usurpation of the directing power of the African subsidiaries, such acts could not warrant the attribution to the African subsidiaries of a second residence in England.

In reaching this conclusion Romer, L.J., delivering the judgment of the Court, relied on the judgment of the Court of Appeal delivered by Sir Raymond Evershed, M.R., in *Union Corporation, Ltd.* v. *Commissioners of Inland Revenue*, 34 T.C. 207. He cited a passage from that judgment where Sir Raymond Evershed said, at page 271:

"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."

My Lords, I do not read the reference to the

"ordinary constitution of a limited liability company"

(Lord Cohen.)

as evidencing an intention to make any addition to the test indicated by Lord Loreburn, L.C., in the *De Beers* case(1). I think that all Sir Raymond Evershed was saying was that in almost every case the articles of association of a limited company vest the control of the company in the board of directors and that accordingly if you found out that the board of directors habitually met in a particular country, you would thus settle the residence of that company. He plainly had not in mind a case such as the present, where it would appear that the board of directors appointed under the articles did not meet at all during the period relevant to the assessments now in question, nor was he expressing any opinion as to what the right conclusion would be if, for instance, the control was vested not in the board but in managing agents. It seems to me that in the circumstances disclosed in the Case Stated the Commissioners, if the Court of Appeal were right as to the law, might, but for the admission made by the Appellant Company, have been compelled to find that the African subsidiaries had no residence anywhere. Moreover, it may well be asked what the position would have been had the business of each of the African companies been conducted by their duly appointed boards but in disregard of the articles all the board meetings had been held in London and all instructions had been issued from London. Logically, if the Court of Appeal were right, these meetings should be disregarded and the African subsidiaries could not be held to be resident in England, but Mr. Borneman shrank from carrying his argument to this logical conclusion.

Mr. Borneman suggested that unless the application of Lord Loreburn's principle was made in accordance with the Court of Appeal's interpretation of it in the present case, the consequences would be disastrous and companies could vary their liability by moving control to and fro. My Lords, so they could, even on the Court of Appeal's view, if they amended the relevant articles—not a very difficult process in the case of a 100 per cent. subsidiary. Moreover, the adoption of the interpretation of the law laid down by the Court of Appeal could lead to the strange consequences which I have already indicated.

My Lords, I do not think that adherence to the test laid down by Lord Loreburn and to the application thereof which, as I think, has hitherto been adopted—namely, that the question where the central control actually abides is a question of fact for the decision of the Commissioners—will lead to any disastrous consequences. The facts of the case before your Lordships are most unusual. It is surely exceptional for a parent company to usurp the control ; it usually operates through the boards of the subsidiary companies, and had the Commissioners found in the present case that that was what had in substance happened, it may well be that your Lordships could not have disturbed that finding. But they have found to the contrary, and, as I have already said, it seems to me that there was evidence justifying their conclusion.

For these reasons I would allow the appeal.

Lord Keith of Avonholm.—My Lords, there is one point that has given me some difficulty in this case. The Commissioners are not, I think, concerned with whether the powers of directors of a company are exercised in accordance with the constitution of the company. If the actings of a person or corporation are such as to attract liability to tax or give some entitlement to relief from tax, so long at least as these actings are not a

(1) 5 T.C. 198.

facade to cover a reality which has a different result, the Commissioners have, I think, no concern with the legality, or otherwise, of these actings. It is the facts of the case that have to be considered with the legal results that follow. For that reason I could not agree with the ratio of the decision of the Court of Appeal. But when the facts of this case are considered I feel considerable doubt whether they establish that the "African subsidiaries" were at the material times resident in the United Kingdom. What they show is that another company, Alfred Booth & Co., Ltd., resident in London, through its board, exercised the real management and control of the African subsidiaries. There is no suggestion that it was authorised so to do by the boards of the African subsidiaries. It is true that Alfred Booth & Co., Ltd. was the parent company and controlling shareholder of the subsidiary companies, but that does not avoid the fact that it was a different person from the African subsidiaries. I should have thought, therefore, that there might be a question whether the African subsidiaries could be said to be in any sense resident in the United Kingdom in respect that no actings of theirs could be said to show that the central management and control actually abided there. On the other hand, it is a matter of concession that the African subsidiaries have a residence in Africa, and if there is nothing to show that they have also a residence in the United Kingdom the appeal would be bound to fail. This question was not, however, raised on the appeal and did not, as I understand, enter into the decision of the Court of Appeal, and as your Lordships think that on the issues raised in this appeal the appeal should be allowed, I, with some hesitation, am prepared to agree with your Lordships.

Questions put:

That the Order appealed from be reversed.

The Contents have it.

That the determination of the Commissioners for the Special Purposes of the Income Tax Acts be restored and that the Respondent do pay to the Appellants their costs here and below.

The Contents have it.

[Solicitors:—Solicitor of Inland Revenue; Herbert Smith & Co.]