1951

Jan. 8

June 25

BETWEEN:

GEORGE EDWIN BEAMENT.....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .....} RESPONDENT.

Revenue—Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, ss. 7A(1), 9(1)—Words "resident" and "ordinarily resident" in s. 7A(1) of the Act have no technical meaning—Whether a person was resident or ordinarily resident in Canada is a question of fact—Where there is no physical presence of the taxpayer or any abode taxpayer is not resident or ordinarily resident in the jurisdiction—Appeal dismissed.

Prior to 1939 the appellant resided and practised law in Ottawa. In September 1939 he enlisted in the Canadian Army and went overseas in 1940 where he held a number of military appointments. While overseas he married and established a home. He returned to Canada with his family on May 8, 1946. During the period 1940-1945, the appellant remained a member of an Ottawa legal firm, which he gave as being his business address, maintained a bank account in Ottawa and paid income tax on his Canadian income. In his income tax return for the taxation year 1946 the appellant sought to deduct from tax a sum of $657 on the ground that at no time in the said year, prior to May 8, he was resident or ordinarily resident in Canada. The Minister disallowed the deduction and the appellant appealed to the Income Tax Appeal Board which dismissed his appeal.

Held: That the words "resident" and "ordinarily resident" in s. 7A(1) of the Income War Tax Act have no technical meaning. The question whether in any year a person was "resident" or "ordinarily resident" in Canada within the meaning of said section is a question of fact. *Thomson* v. *Minister of National Revenue* (1945) Ex. C.R. 17 followed.

2. That where there is no physical presence of the taxpayer nor any abode or place of habitation it follows that the taxpayer is not "resident" or "ordinarily resident" in the jurisdiction. However, if the appellant was not physically present in Canada in 1946 prior to May 8, he had an abode or place of habitation in Canada.

3. That the appellant, during the period in which he was absent from Canada, continued to be "ordinarily resident" therein.

APPEAL from the decision of the Income Tax Appeal Board dismissing the appellant's appeal against his 1946 assessment.

The appeal was heard before the Honourable Mr. Justice Angers at Ottawa.

M. H. Fyfe for appellant.

R. S. W. Fordham K.C. and *P. H. McCann* for respondent.

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The facts and questions of law raised are stated in the reasons for judgment.

ANGERS J. now (June 25, 1951) delivered the following judgment:

This is an appeal from the judgment of the Income Tax Appeal Board rendered on December 21, 1949, dismissing the appeal of George Edwin Beament to the said Board.

In the statement of reasons to be advanced in support of the appeal the appellant alleges substantially:

the assessment appealed from has disallowed the appellant's claim to a deduction from tax in the sum of $657, under the provisions of section 7A(1) of the Income War Tax Act, although on the facts as above set forth he is entitled to the benefits of that section; in this connection the following reasons are advanced:

(*a*) *Taxability and consideration of section 9(1) of the Act.* The appellant was clearly liable to personal income tax with respect to all his taxable income for the year 1946 under the provisions of section 9(1). On the facts above set forth his liability to tax falls with the provisions of subsections (*a*), (*b*), (*d*) and (*h*) of that section. This liability to tax under section 9(1) is not contested by the appellant, who recognized and accepted it, as an examination of his T. 1—General (1946) discloses. In considering section 9(1), it is to be noted that residence or being ordinarily resident in Canada, although being a condition which is set out in subsection 9(1) (*a*), is only one of a number of conditions upon which an individual becomes liable to income tax. It is clear from an examination of this section that there are a number of classes of persons who are clearly neither resident nor ordinarily resident in Canada, but who are liable to personal income tax under subsections (*d*), (*e*), (*f*) and (*h*) of section 9. It should be noted that the scheme of this section 9(1) is not to base liability to personal income tax on the condition of being resident or ordinarily resident in Canada, but then to define a number of situations such as are covered by subsections (*b*) to (*h*) and to declare that in such situations the individual shall be deemed for all purposes of the Act to be "resident or

ordinarily resident in Canada." On the contrary, this section defines eight main conditions upon which the right to impose income tax on the personal income of the individual is based, but none of these conditions requires that the individual, in order to be liable to personal income tax, shall be "resident or ordinarily resident in Canada" during the whole of the taxation year.

(*b*) *Residence of the appellant.*

The facts relevant to the residence of the appellant during the years 1939 to 1946 inclusive are fully hereinabove set out. "Being resident or ordinarily resident" in a particular jurisdiction is a question of fact and not one of law. These terms are not defined anywhere in the Act. With respect to residence, unlike the question of domicile, the intention of the individual is in no sense an ingredient in determining the question. Personal presence in a jurisdiction at some time during the year either by the husband or by the wife and family is essential to establish residence within it. The term "ordinarily resident" is broadly equivalent to habitual residence in the sense of being in the jurisdiction or coming to the jurisdiction year after year. It is submitted, on a consideration of the facts hereinabove set forth, that some time after February 22, 1941, and well before January 1, 1946, the appellant ceased to be resident or ordinarily resident in Canada. Accordingly he was neither "resident nor ordinarily resident in Canada" on January 1, 1946, and he did not become resident or ordinarily resident in Canada during the year 1946 until he and his family arrived in Canada on May 8, 1946.

(*c*) *Application of section 7A(1) of the Act.*

This section provides for a deduction from the tax in favour of a taxpayer who qualifies under subsection (*a*) or (*b*) taken in conjunction with the ensuing phrase in the body of the section defining the conditions. The appellant's claim for a deduction in this case rests on subsection (*a*). The amount of the

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deduction from tax is determined in accordance with a formula based upon the proportions set out in the body of the section.

In order to deprive the appellant of the benefit of this section, it will be necessary to hold as a matter of interpretation that the phrase "during the taxation year" in subsection (*a*) does not apply to the first antecedent phrase "not being previously resident." This would involve interpreting this subsection as though it were to read "not being previously resident (at any time in Canada) or ordinarily resident in Canada during a taxation year . . .". It is submitted that such an interpretation would involve reading into this subsection words which do not appear in it and would also involve offending well established principles in the interpretation of statutes. The phrase "in Canada" where it is first used in this subsection must apply to the first antecedent as well as to the immediate antecedent. The phrase "in Canada during a taxation year" is one phrase which appears a number of times in the same form throughout the section. If part of it must apply to the first antecedent, the whole of it must apply likewise. Similarly when the phrase "during the said taxation year" appears in the subsection (*a*) it must apply to its first antecedent as well as to its immediate antecedent in order that its first antecedent can bear any meaning.

It is submitted that the correct interpretation of subsection (*a*) is:

> not being previously resident in Canada during a taxation year or not being previously resident in Canada during a taxation year becomes resident in Canada during the said taxation year or becomes ordinarily resident in Canada during the said taxation year.

Applying this interpretation to the taxation year in question, namely 1946, the phrase "the year 1946" needs merely be inserted in place of the expressions "a taxation year" and "the said taxation year" as they appear above, so that it then reads:

> not being previously resident in Canada during the year 1946 or not being previously ordinarily

> resident in Canada during the year 1946 or becomes ordinarily resident in Canada during the year 1946.

The succeeding phrase of the body of the section lends strong support to the contention hereinabove set out. It reads:

> so that he neither resided nor was ordinarily resident in Canada during the whole of the taxation year . . .

It is clear that the corresponding phrase "during the whole of the taxation year" must apply to its first antecedent "resided" as well as to its immediate antecedent "ordinarily resident." This same principle of interpretation must be applied throughout the section in order that all expressions used may bear a reasonable meaning and that a result offending common sense may be avoided.

On the basis of the interpretation of section 7A(1) hereinabove set out it is submitted that this section clearly applies to the appellant in accordance with the following tests:

1. he was not resident in Canada in the year 1946 previous to May 8;

2. he was not ordinarily resident in Canada in the year 1946 previous to May 8;

3. he neither resided in Canada during the whole of the year 1946 nor was he ordinarily resident in Canada during the same period.

It is submitted that the appellant is entitled to deduct from the tax otherwise payable by him under section 9(1) of the Act a portion of such tax that bears the same relation to the whole tax as the number of days in the period January 1 to May 8, 1946, bears to 365. It is understood that the correctness of the calculation based on this formula and set out in the statement appended to the T.1—General (1946) return of the appellant is not in dispute.

(*d*) *Interpretation of statutes generally.*

It has been suggested on behalf of respondent that the application of section 7A(1) of the Act to the

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facts of this case, in accordance with the reasons outlined above, produces a result which was not intended by the draughtsmen of this section. This may or may not be so, but the irrelevance of this suggestion needs not be laboured. It is well established law that the interpretation of a statutory enactment must be found within the words which the Parliament has used in the enactment and that the unexpressed intention, even of the legislators themselves, is entirely irrelevant to the question of interpretation.

In his reply to the notice of appeal dated September 24, 1949, the Minister of National Revenue says in substance:

that at no time did the appellant cease to be ordinarily resident in Canada;

that the status of appellant, while out of Canada, remained that of a member of the Armed Forces of Canada temporarily overseas;

that the matters alleged by appellant do not afford grounds under the provisions of the Income War Tax Act for the relief claimed;

that the appellant's income for the taxation year 1946 has been properly assessed under the said Act.

In another reply to the notice of appeal dated July 21, 1950, the Minister of National Revenue admits all the allegations therein contained, save the allegation concerning the residence of the appellant, and says that the latter was always at liberty to return, and did in fact return, to his father's residence at Ottawa, in which the appellant still had his personal effects and belongings.

The respondent, in reply to the whole of the notice of appeal, adds:

that the facts and circumstances set forth by the appellant do not bring him within the provisions of section 7A (1);

that at no material time did the appellant cease to be ordinarily resident in Canada;

that the status of the appellant, while he was out of Canada, remained that of a member of the Armed Forces of Canada temporarily overseas;

that the facts set out by appellant rendered him resident or ordinarily resident in Canada in the taxation year 1946.

The question at issue in this appeal is whether the appellant in respect of the year 1946 is entitled to take advantage of the relief offered by section 7A of the Act, which poses the question of whether or not he is a person who, not having been previously resident or ordinarily resident in Canada during 1946, became resident or ordinarily resident during that year.

The evidence discloses that, prior to his enlistment in the Canadian Active Service Force in September 1939, the appellant was a partner in the firm of Beament & Beament carrying on a law practice in the City of Ottawa and that during the period of his war service he continued as a non-active partner in the said firm and on his discharge in 1946 resumed his activities therein. The evidence further reveals that, prior to his enlistment, the appellant was unmarried and lived with his parents in Ottawa.

In August 1940 Beament sailed with his regiment for England. On February 22, 1941, he was married in England to a British subject domiciled in the United Kingdom. Immediately after his marriage he established a matrimonial home in the United Kingdom, which he continued to maintain until his return to Canada in May 1946. While in the United Kingdom the appellant and his family resided in rented premises at such places as were convenient, having regard to appellant's military duties and the conditions imposed by war.

The evidence shows that in September 1941 he was ordered to return to Canada to take up an appointment with the 5th Canadian Armoured Division at Camp Borden, in the Province of Ontario. He stayed in Canada for a period of approximately two months and returned to England with the 1st Canadian Armoured Brigade. During his stay in Canada his wife remained in England.

It appears that from November 1941 until July 1944 the appellant lived in England, holding divers appointments in the Canadian Army; in July 1944 he proceeded to France as a member there. Later he returned to England and resumed living with his wife and children.

The proof establishes that in June 1945 he was appointed to command the Canadian Army University in the United

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Kingdom, that this was a military appointment, notwithstanding that the duties were of a civilian character, that the University completed its tasks at the end of April 1946 and that consequently the appellant abandoned his command at that time.

In May 1946 Beament brought his family to Canada, arriving in Halifax, N.S., on the 8th.

It appears from the evidence that during the whole period of his overseas service the appellant was attached to the Canadian Army and that he did not receive his discharge until after his return to Canada in May 1946.

The proof reveals that during the period 1940-1946 the appellant maintained a bank account and a safety deposit box in a branch of one of the Chartered Banks in Ottawa and that they were operated for him in connection with his Canadian income under a power of attorney in favour of his father. It further reveals that, while overseas, Beament kept a personal account in the London, England, Branch of the Bank of Montreal.

In his income tax return for the taxation year 1946 the appellant claims an exemption under the provisions of section 7A(1) of the Income War Tax Act, the material portion whereof reads thus:

> 7A (1). A taxpayer who
>
> (*a*) not being previously resident or ordinarily resident in Canada during a taxation year becomes resident or ordinarily resident in Canada during the said taxation year, or
>
> (*b*) being resident or ordinarily resident in Canada during a taxation year, ceases to be resident or ordinarily resident in Canada during the said taxation year
>
> so that he neither resided nor was ordinarily resident in Canada during the whole of the taxation year, may deduct from the tax otherwise payable by him under subsection one of section nine of this Act, a portion of the said tax that bears the same relation to the whole tax as the period in the taxation year during which he neither resided nor was ordinarily resident in Canada bears to the whole taxation year.

The Minister refused to allow the deduction claimed by appellant on the ground that he was ordinarily resident in Canada throughout the taxation year (1946) and was not entitled to the said deduction. The appellant thereupon appealed the assessment for the year 1946 on the ground that at no time in the said year, prior to May 8, he was resident or ordinarily resident in Canada and that

consequently he is entitled to the deduction provided by section 7A (1). The issue herein is therefore wholly concerned with this question.

During the hearing of the appeal discussion arose concerning the meaning and scope of the word "previously" in section 7A (1). Two members of the Income Tax Appeal Board adopted the opinion that the word "previously" is limited by the words "during a taxation year" when first used in this subsection and that this interpretation is made certain by a reading of the whole section. As stated by the said members, there being no ambiguity in the words used, the question to be decided in the present instance is whether the appellant was or was not "resident" or "ordinarily resident" in Canada from the beginning of the year 1946 to the date of his return to Canada in May.

The Minister, in his answer to the appeal, confines his submission to the sole question as to whether or not during the said period the appellant was "ordinarily resident" in Canada. It is hardly necessary to note that the words "resident" and "ordinarily resident" in section 7A (1) have no technical meaning and that the question whether in any year a person was "resident" or "ordinarily resident" in Canada within the meaning of said section is a question of fact: *Thomson and Minister of National Revenue* (1). The headnote is satisfactorily comprehensive and I deem it apposite to quote a part thereof (p. 18):

Held: That a person must reside somewhere.

2. That constant personal presence is not essential to residence there and that a person may continue to be resident in a place although physically absent from it.

3. . . .

4. That the question of whether a person is ordinarily resident in one country or in another cannot be determined solely by the number of days that he spends in each; he may be ordinarily resident in both if his stay in each is substantial and habitual and in the normal and ordinary course of his routine of life. *Levene* v. *The Commissioners of Inland Revenue,* (1928) 13 T.C. 486 followed.

5. That the terms "residing" and "ordinarily resident" in section 9(*a*) of the Income War Tax Act have no technical or special meaning and that the question whether in any year a person was "residing or ordinarily resident in Canada" within the meaning of the section is a question of fact. *Lysaght* v. *The Commissioners of Inland Revenue,* (1928) 13 T.C. 511 followed.

(1) (1945) Ex. C.R. 17.

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This judgment was affirmed by the Supreme Court, Taschereau, J., dissenting (1). Some remarks by Rand, J., seem to me relevant (p. 224):

> The gradation of degrees of time, object, intention, continuity and other relevant circumstances, shows, I think, that in common parlance "residing" is not a term of invariable elements, all of which must be satisfied in each instance. It is quite impossible to give it a precise and inclusive definition. It is highly flexible, and its many shades of meaning vary not only in the contexts of different matters, but also in different aspects of the same matter. . . .
>
> The expression "ordinarily resident" carries a restricted signification, and although the first impression seems to be that of preponderance in time, the decisions on the English Act reject that view. It is held to mean residence in the course of the customary mode of life of the person concerned, and it is contrasted with special or occasional or casual residence. . . .

Contrary to certain judicial pronouncements in the United Kingdom that there is little, if any, difference in substance in the meaning of "resident" or "ordinarily resident", I am of the opinion that the wording of subsection (1) of section 7A makes it clear that Parliament intended that there was a distinction between a taxpayer who was previously a resident and one who was previously an ordinarily resident in Canada.

Counsel for appellant relied on certain decisions rendered in the Courts of the United Kingdom dealing with the meaning of the words "resident" and "ordinarily resident" as used in the Income Tax Act of that country: *Ford* v. *Hart* (2); *Young* v. *Inland Revenue Commissioners* (3); *Rogers* v. *Inland Revenue Commissioners* (4); *Cooper* v. *Cadwalader* (5); *Loewenstein* v. *De Salis* (6); *Reid* v. *Inland Revenue Commissioners* (7); *Levene* v. *Inland Revenue Commissioners* (8); *Inland Revenue Commissioners* v. *Lysaght* (9); *Re Halliday* (10); *Lord Inchiquin* v. *Inland Revenue Commissioners* (11); *Russell* v. *Minister of National Revenue* (12).

(1) (1946) S.C.R. 209.
(2) (1873) L.R. 9 C.P. 273.
(3) (1875) 1 T.C. 57.
(4) (1879) 1 T.C. 225.
(5) (1879) 5 T.C. 101.
(6) (1926) 10 T.C. 424.
(7) (1926) 10 T.C. 673.
(8) (1928) L.T.R. 97.
(9) (1928) 13 T.C. 511.
(10) (1945) O.L.R. 233.
(11) (1948) T.C. 279.
(12) (1949) Ex. C.R. 91.

In addition to the cases hereinabove mentioned counsel for respondent relied on the judgment in *Cohen* v. *Commissioner for Inland Revenue* (1). The headnote, sufficiently exact, reads thus:

> A taxpayer may be "ordinarily resident" within the Union within the meaning of section 30(1) (*a*) of Act 31 of 1941 and therefore not entitled to the exemption from supertax in respect of dividends distributed by a public company and received by him in a tax year notwithstanding the fact that during the whole of that tax year he was absent from the Union.

The chief object of counsel for appellant in relying upon the judgments cited, with the exception of *Ford V. Hart* and *Re Halliday* (ubi supra), was to establish that in every one the taxpayer had spent time in the jurisdiction in the taxation year under review or that he had maintained an abode therein, irrespective of whether he was there himself or not. Counsel contended that in the present case the appellant had not been physically present in Canada in 1946, prior to May 8, and had not had, during the same period, an abode in Canada.

In the *Cohen* case the material facts submitted to the Appellate Division of the Supreme Court of South Africa include a statement that the taxpayer leased a flat in Johannesburg, South Africa, for a term of five years and that on his departure the flat was sublet fully furnished. As stated by two members of the Income Tax Appeal Board, the taxpayer still held a contractual relationship with an abode in South Africa and continued to own the furnishings contained therein.

The same two members of the Income Tax Appeal Board concluded that in the present instance the appellant retained an interest in an already established abode in Canada. They added, however, that they do not think that agreement or disagreement with appellant's argument in this respect would settle the issue involved herein and they said that they adopted the statement of the President in his decision in the case of *Thomson* v. *The Minister of National Revenue* (*supra*), which is thus worded (p. 24):

> The cases, as it will be seen, really carry one no further than the dictionary, and, in the main, are but useful illustrations of the circumstances under which a person may be considered as residing or ordinarily resident in a place or country.

(1) (1945) 13 South African Tax Cases 174.

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Counsel for appellant submitted that the decision in *Rogers* v. *Commissioners of Inland Revenue* (*supra*) is authority for the statement that lack of physical presence during the taxation period is not conclusive in favour of the taxpayer, who claims because of it that he is not resident or ordinarily resident within the jurisdiction. As mentioned by two members of the Income Tax Appeal Board, the appellant herein maintained an abode within the jurisdiction.

It was urged on behalf of appellant that, where there is no physical presence of the taxpayer nor any abode, it follows that the taxpayer is not "resident" or "ordinarily resident" in the jurisdiction. I may say with all due respect that, contrary to the opinion expressed by the majority of the Income Tax Appeal Board, I believe that, if there is no physical presence of the taxpayer nor any abode or place of habitation, one must conclude that in such a case a person upon whom the Minister wishes to impose a tax is not "resident" or "ordinarily resident" in the jurisdiction. Be that as it may, if the appellant was not physically present in Canada in 1946 up to May 8, he had an abode or place of habitation in Canada.

Two members of the Income Tax Appeal Board drew the conclusion that the decision as to whether the appellant was, previous to May 8, "ordinarily resident" in Canada in the year 1946 must be reached by a proper appreciation and correlation of all the facts and circumstances which would weigh in determining the degree, quality or nature of the relationship of appellant in Canada. Briefly, this includes consideration of his residential status before, during and after his military career.

It was argued on behalf of appellant that during the period in which he was away from Canada he had no fixed abode or place of habitation therein, that his absence exceeded five years, that he married while overseas and established a matrimonial home in the United Kingdom and that during that period he returned to Canada only once in 1941, in the course of his military duties. The two members of the Income Tax Appeal Board thought that the weight of these elements is weakened by a consideration of other factors, namely that the appellant was unmarried, that he lived in his parents' home, that he was engaged

in the practice of his profession in Ottawa; that he enlisted for overseas service in the Canadian Army and that at the time of his enlistment he was "ordinarily resident" in Canada. As pointed out by the two members of the Income Tax Appeal Board, it can be said that until his departure for overseas the appellant's customary mode of life was that of a lawyer carrying on his profession and residing in Canada.

The customary mode of life of appellant was broken into by his decision in 1939 to enlist in the Active Service Force of Canada. He would not know how long his military duties would keep him away from his country; this, of course would depend on the duration of the war.

The word "ordinarily" has been contrasted, quite logically I may say, with the word "extraordinarily" in *Inland Revenue Commissioners* v. *Lysaght* (*ubi supra*); observations of Viscount Summer will be found on page 243.

The two members of the Income Tax Appeal Board declared that, in their opinion, the appellant going overseas during the war was in the nature of a special commission of a certain duration and was an extraordinary happening in his life. They added that war is itself an extraordinary happening and that they could not find anything in the evidence to disturb their conviction that the appellant's absence from Canada on military duty was only temporary and was but an interruption of his customary mode of life.

I agree with the two members of the Income Tax Appeal Board that the fact that appellant, during his stay overseas, married and established a matrimonial domicile is natural.

It seems to me significant that the appellant, during the whole period of his service overseas, continued as a non-active partner in the law firm in which he had been practising his profession before leaving Canada and that he resumed his active participation therein on his return to Canada, as soon as military duties were ended.

There is no evidence that, during the period he was overseas, the appellant had made commitments in the

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United Kingdom which would indicate a change in the settled order of his life or an intention to live, at the conclusion of his military duties, elsewhere than in Canada.

Counsel for appellant relied on the judgments in *Ford* v. *Hart* and *re Halliday* (*supra*) as supporting the proposition that, since appellant was on military duties, his movements being controlled by the military authorities and he being consequently unable to return to Canada, he must be considered to be resident elsewhere than in Canada. I may say that I share the opinion of the majority of the Income Tax Appeal Board that these decisions are not in point.

I deem it apposite and fair to note that one of the members of the Income Tax Appeal Board, namely Mr. W. S. Fisher, K.C., expressed a dissenting opinion and was inclined to allow the appeal. His reasons for judgment are sound and well set out. He has had a long experience in income tax matters. I must admit that I felt much hesitation before adopting the view of the majority of the Board.

After carefully perusing the evidence and the able and exhaustive arguments of counsel and studying the doctrine and the precedents, I am satisfied that the appellant, during the period in which he was absent from Canada, continued to be "ordinarily resident" therein. I may say that I quite willingly agree with the two members of the Income Tax Appeal Board that the conduct pursued by appellant is creditable to him and that because of the nature of the service which called him out of Canada I would have liked to find in law a proper basis for allowing his claim. Unfortunately this was not to be, and, in the circumstances, the appeal must be dismissed. The respondent will be entitled to his costs against the appellant, if he deems fit to claim them.

Judgment accordingly.