

VOL. V.—PART III.

No. 271.—COURT OF EXCHEQUER (SCOTLAND), FIRST
DIVISION.—3rd and 22nd November, 1904.

COOPER v.
CADWALADER.

COOPER (Surveyor of Taxes) v. CADWALADER.⁽¹⁾

Income Tax, Schedule D (4th and 5th Cases).—An American ordinarily resident in New York, with no place of business in the United Kingdom, rents a house and shooting rights in Scotland, where he spends about two months continuously in each year. The owner of the house keeps it wind and water tight, besides bearing the expense of keeping the ground in order, and paying the wages of the gamekeeper, watcher, housekeeper, and housemaid. The shootings are under the entire management of the keeper.

Held, that the Appellant was a person "residing in the United Kingdom" within the meaning of Schedule D of the Act of 1853, Section 2, and liable to assessment to Income Tax accordingly.

CASE.

At a meeting of the General Commissioners of Income Tax for the District of Brechin, in the County of Forfar, held at Brechin on the 15th day of December 1903, John Lambert Cadwalader appealed against an assessment of £3000 made upon him under Schedule D of the Income Tax Acts for the year ending the 5th day of April 1904. The assessment was made under authority of the Finance Act of 1903 (3 Edward VII., cap. 8, sec. 5), 16 and 17 Vict., cap. 34, sec. 2, and 5 and 6 Vict., cap. 35, sec. 100, cases fourth and fifth.

The following facts were found or admitted :—

1. The appellant is an American citizen, and has his ordinary residence at No. 13 Thirty-fifth Street, New York, where he practises his profession as a barrister.

2. By minute of lease entered into between the factors and commissioners for the Right Honourable The Earl of Dalhousie of the first part, and the appellant of the second part, dated 16th March and 2nd and 3rd April 1900, there was let to the appellant

(1) 12 S.L.T.R. 449.

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for the period of three years from 1st February 1900, at the yearly rental of £1500, payable in advance on 1st February yearly. All and Whole the sole and exclusive right of shooting and sporting over the grouse shootings of Millden, together with Millden Lodge and the furniture therein, and also with a right of fishing in the rivers and streams within the bounds of the territory let, upon *inter alia* the conditions following:—(a) The furniture and other effects in the lodge and out-buildings were to be delivered over per inventory to the second party, who bound himself to keep and maintain them in good order during the currency of the said lease, and on the expiry thereof to deliver the same in an equally good state, ordinary wear and tear excepted. (b) The first parties undertook to maintain the whole buildings wind and water tight, and to bear the expense of keeping in order the grounds attached to the lodge, to pay all rates and taxes imposed in respect of said tenancy, and also to pay the wages of a housekeeper and housemaid and one game-keeper and a watcher, all of whose services should be at the disposal of the second party. (c) The shootings were to be under the entire management of the present keeper, or any other keeper to be appointed by the first parties, but the services of said keeper and under-keeper to be at the service of and under the control of the second party during the shooting season. Upon grounds reasonable and satisfactory to the first parties, the second party might require the removal of any of the servants mentioned in fact 2 (b) and the substitution of others.

3. The said lease,* a copy of which was put in and forms part of this Case, was continued by agreement for one year, to 1st February 1904, and by subsequent agreement, dated 3rd and 6th October 1903, the lease was renewed for a period of two years from 1st February 1904. These agreements also form part of the Case

4. The appellant is a bachelor. He and his valet, whom he brings with him from America, reside at Millden continuously for a period of two months each year during the grouse shooting season. He employs a caterer from London, who supplies all food and servants. The guests at his house are mostly from America. When the appellant takes possession of Millden, the housekeeper and housemaid remove from the lodge and do not return until he goes away. The female servants are paid board wages by the first parties.

5. In the valuation roll of the County of Forfar the appellant is entered as tenant and occupier of the Millden shooting lodge and shootings, and he is charged to all the local and imperial rates and taxes applicable to such occupancy, though the proprietor relieves him of these taxes under the provisions of the

* The documents referred to in this paragraph are omitted from the present volume for reasons of space.

lease. The appellant is an alien, and is not entitled to vote, though his name appears in the register of persons entitled to vote in the election of a member to serve in Parliament for the County of Forfar.

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6. When the appellant or his friends are not living at Millden, the lodge is under the care of the female servants referred to in fact 2 (b), and is available for the appellant's return, at any time.

7. The appellant has no place of business in the United Kingdom.

8. During the appellant's stay in the United Kingdom he maintains and keeps open for his return his residence in New York, to which he could have returned at any time. He also pays all taxes due by him in New York in respect of his dwelling-house or his profession.

The appellant, who was represented by his agent, Mr. David G. Shiell, solicitor, Brechin, contended that he was not a person "residing in the United Kingdom" within the meaning of the Income Tax Acts, and quoted in support of his contention sec. 39 of 5 and 6 Vict., cap. 35, *Lloyd v. Sulley*, Court of Exchequer, Scotland, 12th March 1884, 11 R., p. 687; and *Colquhoun v. Brooks*, House of Lords, 9th August 1889.

The Surveyor of Taxes, on the other hand, contended that *Lloyd v. Sulley* proved the appellant's liability, and in support of his contention that section 39 of 5 and 6 Vict., cap. 35, did not exempt the appellant, he quoted *The Attorney-General v. Cooté* (1817), 4 Price 183, a decision given on section 51, 46 Geo. III., cap. 65, which was a provision similar to that contained in section 39 of 5 and 6 Vict., cap. 35.

The Commissioners being of opinion that the appellant was not liable, sustained the appeal and discharged the assessment, and the Surveyor of Taxes having immediately expressed his dissatisfaction with the determination of the Commissioners as being erroneous in point of law, and having duly required in writing a Case to be stated for the opinion of the Court of Exchequer in accordance with 43 and 44 Vict., cap. 19, sec. 59, this Case has been stated and signed accordingly.

P. CHALMERS,)
T. MAULE GUTHRIE,) Commissioners.

Brechin, 18th April 1904.

This case was heard on the 3rd and 22nd November 1904, and judgment delivered on the latter date.

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OPINIONS.

The Lord President.—The question in this case is whether the Appellant, Mr. Cadwalader, is assessable to Income Tax, in respect of his occupancy of a house and shootings belonging to the Earl of Dalhousie, at Millden, in Forfarshire.

The Appellant is an American citizen, having his ordinary residence in New York, where he practises as a barrister.

By a minute of lease entered into between the Commissioners of the Earl of Dalhousie of the first part, and the Appellant of the second part, dated 16th March and 2nd and 3rd April, 1900, there was let to the Appellant for the period of three years from 1st February, 1900, at the yearly rental of £1,500, payable in advance on 1st February yearly, the sole and exclusive right of shooting and sporting over the grouse shootings of Millden, together with Millden Lodge and the furniture therein, and also with a right of fishing in the rivers and streams within the territory let. It was stipulated in the lease that the furniture and other effects in the Lodge and outbuildings should be delivered over, per inventory, to the Appellant, who bound himself to keep and maintain them in good order during the currency of the lease, and on the expiry thereof to deliver them back to the lessors in an equally good state, ordinary tear and wear excepted. The lessors undertook to maintain the whole buildings wind and water tight, and to bear the expense of keeping in order the grounds attached to the Lodge, to pay all rates and taxes imposed in respect of the Appellant's tenancy, and also to pay the expenses of a housekeeper and housemaid, as well as of one gamekeeper and a watcher, all of whose services would be at the disposal of the Appellant. It was further stipulated that the shootings should be under the entire management of the keeper appointed by the lessors, but that the Appellant should have the services of the keeper and under-keeper, who were to be under his control during the shooting season. It was also stipulated by the lease that the Appellant might, upon grounds reasonable and satisfactory to the lessors, require the removal of any of the servants mentioned, and the substitution of others. By subsequent agreements the lease was renewed until the expiry of two years from 1st February, 1904.

The Appellant is a bachelor, and he resides with his valet, whom he brings with him from America, at Millden, continuously for a period of two months in each year during the grouse shooting season. A caterer from London supplies him with food and servants. His guests at Millden are chiefly Americans. When he takes possession of Millden the housekeeper and housemaid remove from the Lodge, and do not return until he leaves. They receive board wages from the lessors.

The Appellant is entered in the valuation roll of the County of Forfar as tenant of the Millden shooting lodge and shootings,

and he is charged with all local and imperial rates applicable to his occupancy, although the lessors relieve him of those rates and taxes under the stipulations of the lease.

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When the Appellant, or his friends, are not living at Millden, the Lodge is under the care of the female servants above mentioned, and is available for the Appellant's return at any time.

The Appellant has no place of business in the United Kingdom, and, during his stay here, he maintains and keeps open his residence in New York, so that he could return to it at any time. He also pays all rates and taxes due by him in New York in respect of his house and his profession.

The answer to the question depends upon whether the Appellant was, during the year of assessment, a "person residing in the United Kingdom," within the meaning of Schedule D of the Act of 1853, section 2. The Appellant maintained that he was not a person "residing in the United Kingdom" within the meaning of that section, while the Surveyor of Taxes contended that he possessed that character, and the Commissioners sustained the appeal and discharged the assessment, whereupon the Surveyor of Taxes expressed his dissatisfaction with their determination, and required a case to be stated for the opinion of the Court.

I am of opinion that the decision of the Commissioners was erroneous, and that the Appellant is assessable. He has, in effect, a lease of heritage in Scotland, he occupies personally the subjects let to him for a considerable portion of each year, and when he is absent in America these subjects are kept in readiness for his return. His occupation of the subjects is not of a casual or temporary character, but is substantial, and as regards some of its incidents is continuous.

Domicile has no bearing on the question, and where a person has in fact a residence in the United Kingdom he is chargeable as a person residing there, although he may also have a residence, or residences, out of the United Kingdom. *Lloyd v. Sulley*, 11 R. 687, 2 Tax Cases 37. In that case the Lord President said: "The only question which can be raised upon that (the Statute) is whether Mr. Lloyd was, for the year 1883-84, to which alone this case applies, 'residing' in the United Kingdom. There is no mention in this taxing clause of the character of the residence being ordinary residence, or temporary residence, or residences for any particular part of the year or proportion of it; 'residing in the United Kingdom' are the only words which we have to guide us." I am not leaving out of view that if or in so far as the case of *Lloyd v. Sulley* may be held to be an authority for charging a person resident in the United Kingdom with duty in respect of the profits of a trade carried on exclusively abroad and not received in this

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country, it must be taken to have been overruled by the decision in *Colquhoun v. Brooks*, 14 L.R. App. Cas. 493, but this does not, in my judgment, affect its authority for the purpose for which I now refer to it. The judgment in *Lloyd v. Sulley* does not appear to have proceeded to any extent upon the fact of Mr. Lloyd being a British subject.

A master mariner, having a house in the United Kingdom, in which, when at home, he resides personally, and in which, when he was absent, his wife and family continued to reside, was held liable to be assessed for Income Tax as a "resident in the United Kingdom," *in re Young*, 12 S.L.R. 602, 1 Tax Cases 57, and the fact of his absence from the United Kingdom during the year of assessment was held not to relieve him from liability. If a person continues to have a residence in the United Kingdom, he is resident there in the sense of the Acts, *Rogers v. Inland Revenue*, 16 S.L.R. 682, 1 Tax Cases 225. A person may have more than one residence, if he maintains an establishment at each. Further, it is not necessary that the trade or business or other source of income, of the person sought to be charged, should be carried on or exercised in this country.

It was maintained on behalf of the Appellant that his case fell within section 39 of the Income Tax Act, 1842, by which it is provided no person who shall on and after the passing of the Act actually be in Great Britain for some temporary purpose only, and not with any view or intent of establishing his residence therein, and who shall not actually have resided in Great Britain (now the United Kingdom, *see* the Act of 1853, sec. 5) at one time, or several times, for a period equal in the whole to six months in any one year, shall be charged with the duties mentioned in Schedule D. as a person residing in Great Britain, in respect of the profits or gains received from or out of any possessions in (Ireland or) any other of Her Majesty's dominions, or any foreign possessions, or from securities in (Ireland or) any other of Her Majesty's dominions, or foreign securities, but nevertheless every such person shall, after such residence in Great Britain for such space of time as aforesaid, be chargeable to the said duties for the year commencing on the sixth day of April preceding. This provision appears to be directed to prevent temporary residents for less than six months in one year from being charged in respect of profits received from abroad, but it does not appear to me to apply to a case like the present. I do not think that the Appellant can reasonably maintain that he is in the United Kingdom "for some temporary purpose only, and not with any view or intent of establishing his residence therein," in the sense of the section, as he took Millden with the view of establishing his residence there during a material part of each year and maintaining his connection with it as tenant during the rest of the years, and he has a residence always ready for him if he should choose to come to it. It is not necessary in order to a person being chargeable that he

shall have his sole residence in the United Kingdom. A man can have residences in more countries than one, although he can only have one domicile.

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For these reasons I am of opinion that the decision of the Commissioners was erroneous, and that the Appellant is liable to the assessment in question, the amount of the assessment being, as is conceded, open to adjustment.

Lord Adam.—My Lord, the question in this case is whether the respondent was a person residing in the United Kingdom in such circumstances as to make him liable to assessment under Schedule D, of the Income Tax Act of 1853. The respondent is an alien. He is an American, but that makes no difference in the application of the Act, so far as what the Act says, which is that any person residing in the United Kingdom shall be liable. Now, in order to reside a person must have a residence, and the question is, what residence has the respondent here? He is tenant under a lease of some two or three years of Millden Lodge and shootings. Millden Lodge is a furnished house. It is kept up for him and is placed at his disposal to go to at any time of the year he chooses. In fact, he has occupied it in the past, and probably will in the future, continuously for two months in each year, with all the comforts and necessaries of a man of wealth, as if it were his own house, but it makes no difference living in a furnished house. That is the mode of residence of this gentleman. Can it be said that during, for example, these two months in which he is residing continuously in Millden Lodge that he is not residing there? Where is he residing? He is residing, in my humble opinion, in Millden Lodge, and therefore residing in the United Kingdom; and if that be so, then it humbly appears to me that he is a person in the sense of the Act residing in the United Kingdom, and assessable under the Act. We know that numerous persons have two houses, with two residences, in the United Kingdom. For example, many people go into their winter residence and their summer residence, and they reside an equal part of the year in each, or they may not, but when they are residing in their houses they are residing in the United Kingdom, and therefore in such a case as that the question does not arise, because if they are residing in the United Kingdom it does not matter what house they reside in. But when you come to a person who has one or two residences, one residence in this land and one residence abroad, what is to be said? That is not a very common case, but the question arises between two residences, one in the United Kingdom and another abroad. It arose, as your Lordship has referred, in the case of *Lloyd*. There Mr. Lloyd had a residence of his own, because he had bought it, in which he resided for three and a half months in each year, but his business lay in Italy. He had his principal residence in Italy. In that case it was merely a question of residence. Now, it was held that

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although Mr. Lloyd had this other residence, in which he resided part of the year, in Italy, while he had his residence in Scotland he resided three and a half months in Scotland, and he was found liable to be assessed, and, as your Lordship has said, that case is not, so far as I am aware, questioned. There is another case from Ireland, which was a foreign kingdom at the date of the Act in respect of the Income Tax, because I understand Ireland was not assessable, and that was the case of *Cooté*. There this Irish gentleman, who had his residence in Ireland, came over to London, acquired a house, and set up an establishment there. It appears that he resided the whole year in Ireland, except for ten weeks, and there was a case of two residences, one in a district which was subject to Income Tax and one in Ireland which was not, but the Court held that he nevertheless was residing in England for a certain time of the year. Now, I confess I cannot draw a distinction between the ten weeks in *Cooté's* case and the three and a half months in *Lloyd's* case; and in this case there is a residence in each country, and it is not a question of principal residence at all. It is simply a question of residence in this country. Is the person residing in this country? In my humble opinion Mr. Cadwalader was residing in this country, and was liable to assessment. That is, unless his case comes under section 39 of the Act of 1842, and I don't think it does. What that Act says is this: "That no person "who shall after the passing of the Act actually be in Great "Britain for some temporary purpose only, and not with any view or intent of establishing his residence therein," and so on. Now, there might have been a question whether coming here to shoot for a few months in the year was to be considered under the construction of this Act as a temporary purpose. I should have thought it was not, because evidently this part of the Act applies to much more temporary purposes than that, but then in the next sentence it says, "for some temporary purpose only and not with any view or intent of establishing his "residence therein." If we are right, then it was with the view of establishing his residence, if we are wrong on the first point. On these grounds I agree with your Lordship.

Lord McLaren

Lord McLaren.—I think the important question in this case is whether Mr. Cadwalader comes within the exception, because if he does not come within the exception there is the strong presumption, supported by, I think, previous decisions, that the general enacting words are broad enough to apply to his case. Now, the exemption is one that walks upon two legs. It is, first, that the party is not here for a temporary purpose only; and secondly, that he is here not with a view or intent of establishing a residence. If the argument is lame on one of the legs, then the party does not get the benefit of the exemption, because he must be able to affirm both members of the double proposition. There might, I think, be a possible room for difference of opinion as to the meaning of the words "view or intent of establishing a

“residence.” The words are somewhat vague, but they seem to me to recognise what may be called a constructive residence as distinguished from actual residence. It is not that you take a house or country place with a view or an intention of establishing a residence, although you may not have had time to become a resident. Still, if you are looking forward to it, apparently that makes you liable to taxation, because in order to get the benefit of the exemption you must say that you have no view and no intention of acquiring a residence there. But then I think for the purposes of the present case the first point in the exempting clause is quite sufficient, because I don't think that Mr. Cadwalader is in a position to affirm, when he comes year after year during the currency of his lease to spend the shooting season in Scotland, that he is here for a temporary purpose only. I don't mean that you might not frame a definition which would bring this within the scope of temporary purposes, but taking the ordinary meaning of the word, I should say that temporary purposes means casual purposes as distinguished from the case of a person who is here in the pursuance of his regular habits of life. Temporary purpose means the opposite of continuous and permanent residence. Nobody ever supposed that you must reside twelve months in the year in order to be liable for Income Tax, and therefore “temporary” does not mean the negation of perpetuity, but means that it is casual or transitory residence, as distinguished from a residence, of which there may be more than one, but which may be habitual or permanent. I agree with all that has been said by your Lordships, and I think the decision in this case must be in favour of the Crown.

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Lord Kinnear.—I concur.

Lord Kinnear.

The Solicitor-General, K.C.—With expenses.

Lorimer, K.C.—I suggest that this is not a case for expenses.

The Lord President.—Why?

Lorimer, K.C.—In the first place it is a question decided upon the construction of rather vague and possibly ambiguous language in the statute. Now, this is a gentleman who is not responsible in any way for the framing of the language.

The Lord President.—We must follow the result.