1952

*May 14, 15
*Oct. 7

GEORGE EDWIN BEAMENT .....APPELLANT;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Income tax—Absence from Canada on military service—Whether "resident" or "ordinarily resident" in Canada—Income War Tax Act, R.S.C. 1927, c. 97, s. 7A(1).

The appellant, prior to volunteering for active service with the Canadian Army in 1939, practised law in Ottawa, where he lived with his parents. In 1940, he went overseas and while there married, in 1941, a British subject previously domiciled in the United Kingdom and, thereafter, established a matrimonial home in that country. He remained overseas until May 1946, except for a few weeks in 1941 when he returned to Canada in connection with his military duties. From the date of his marriage until May 1946, his wife and, subsequently, his children remained in the United Kingdom. In May 1946, the appellant, his wife and their children came to Canada and took up permanent residence in Ottawa where he resumed his law practice.

During his absence abroad, the appellant continued as a non-active partner in a Canadian law firm and income tax returns covering partnership and investment income were filed on his behalf. During this period, he maintained a bank account and a safety deposit box in Ottawa, and his civilian clothes were stored at his parents' residence.

In his income tax return for 1946, the appellant sought a deduction under s. 7A(1) of the *Income War Tax Act* for the period of absence in 1946 on the ground that he was not previously "resident" or "ordinarily resident" in Canada in the year 1946 prior to his return in May. The Minister's disallowance of the deduction was upheld in appeals to the Income Tax Appeal Board and the Exchequer Court of Canada.

Held: The appeal should be allowed; since throughout the period in question the appellant was resident either in the army quarters or in the rented dwelling in which his wife was living, or in both, he was entitled to the deduction claimed.

Held: The words "resident" and "ordinarily resident" should be given the everyday meaning ascribed to them by common usage, there being no definition of these words in the *Income War Tax Act.*

Held: Even if it could be said that the residence of the appellant was throughout that period extraordinary, in the sense of being out of the usual course of his life considered as a whole, it would not follow that he had an ordinary residence in Canada; it would rather follow that he ceased to have anywhere a residence which was ordinary in the corresponding sense.

Held: Bearing in mind all the facts in this case and particularly that during that period the appellant was physically absent from Canada, had therein no dwelling or other place of abode to which he could as of right return and was maintaining his matrimonial home in the United Kingdom, he was not at any time during the relevant period resident or ordinarily resident in Canada.

*PRESENT: Kerwin, Kellock, Estey, Locke and Cartwright JJ.

In all appeals from judgments of the Exchequer Court in proceedings by way of appeal from the Income Tax Appeal Board, the reasons for judgment given by members of the Board should be included in the Appeal Case filed in the Supreme Court of Canada.

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APPEAL from the judgment of the Exchequer Court of Canada, Angers J. (1), dismissing the appellant's appeal from a decision of the Income Tax Appeal Board in respect of the appellant's 1946 assessment for income tax.

M. H. Fyfe Q.C. for the appellant. The appellant was not during the period in question resident in Canada because he was not physically present in Canada and had no abode or place of habitation there. He was not resident, he was out of Canada. Residence implies a place of abode and personal presence.

Not being resident in Canada, the appellant could not be ordinarily resident in Canada. Where the expressions "resident" and "ordinarily resident" are both used, the latter is narrower than the former with the result that a person who is not resident in Canada cannot be found to be ordinarily resident in Canada. If "resident" is given its fullest meaning, the expression ordinarily resident becomes superfluous.

The fact that the appellant went overseas on active service is no ground, in the circumstances, for saying that he remained ordinarily resident in Canada. Residence is to be distinguished from domicil.

A person can be resident in more than one place, but since ordinarily resident is narrower than resident, a person can be ordinarily resident in more than one place only if his stay in each place is substantial and habitual. Having changed his whole way of life by marrying in the United Kingdom and setting up matrimonial homes there and being present there, the appellant was during the whole period ordinarily resident in the United Kingdom and not in Canada.

D. W. Mundell Q.C. and F. J. Cross for the respondent. In the absence of a statutory definition, these words should receive the meaning given to them by common usage. The expression "resides" means to dwell permanently or for a considerable period of time, to have one's settled or usual

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abode, or to live in or at a particular place. The expression "ordinarily" means, amongst other things, usually, commonly, and as is normal or usual.

In accordance with the test in *Thomson* v. *Minister of National Revenue* (1), the question whether a person resides or ordinarily resides at a place is one of fact. Amongst the facts to be considered is the original and continuing status of the person and the general mode of his life. Continual and uninterrupted physical presence is clearly not necessary and absence for a large part of a particular tax period does not prevent a person being resident and much less ordinarily resident. Where a person is absent the question of whether his absence interrupts his ordinary residence depends on the nature and purpose of his absence—whether it is to abandon his residence or is extraordinary, exceptional, temporary or accompanied by a sense of transitoriness or of return. Storage of personal belongings, maintenance of banking arrangements, the presence of an abode to which the person is free to come even though he has no proprietary interest, and the existence of family ties are all significant as indicating a retention of residence. Finally, the whole of the person's course of conduct with respect to his absence, including his conduct in returning, may be looked at to determine whether his absence resulted in his ceasing to be resident.

Using the language in its ordinary and popular sense, he ordinarily resided in Canada throughout this time. Canada being the appellant's ordinary residence in 1939, all factors to be considered support the view that he continued to be ordinarily resident in Canada during the period of his service in the forces. These factors demonstrate that his absence was merely temporary and deviatory and was not a change or final departure from his usual and settled mode of life.

The reason for the appellant's absence was that he enlisted for and went on active service in the Canadian forces at the outbreak of the war. An absence for this purpose, rather than giving rise to any inference that the appellant abandoned Canada as the place where he ordinarily resided, gives rise to an inference that Canada

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was to continue as his place of ordinary residence. Moreover all the other circumstances indicate that Canada continued to be the place where the appellant ordinarily resided. The ties of family between the appellant and Canada, both personal and in business, remained uninterrupted. He made arrangements to preserve, as far as possible, the continuity and pattern of his ordinary life and interests, business and social, in Canada pending his return.

The judgment of the Court was delivered by:—

CARTWRIGHT J.:—This is an appeal from the judgment of Angers J. (1) pronounced on June 25, 1951, dismissing an appeal by the appellant from a decision of the Income Tax Appeal Board with respect to his income tax assessment for the year 1946, and disallowing the claim of the appellant that the tax payable by him for that year should be reduced by the sum of $657.

The question to be determined is whether between January 1, 1946 and May 8, 1946, the appellant was "resident or ordinarily resident in Canada" within the meaning of those words as used in section 7(*a*) of the *Income War Tax Act*. That section so far as it is relevant to this inquiry reads as follows:—

> 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, 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 facts are as follows. Before September 2, 1939, the appellant admittedly was ordinarily resident in Canada, living at Ottawa. He was a barrister and solicitor practising in Ottawa in partnership with his brother. He was a bachelor and lived with his parents in Ottawa in circumstances to be mentioned in greater detail hereafter. The appellant was also, at this time, a member of the Non-Permanent Active Militia of Canada. He held the rank

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of major and was in command of a Field Battery. On the outbreak of war he volunteered for active service. He was attested in the forces on September 2, 1939 and was placed in command of a battery. From September 2, 1939, to June, 1946, the appellant was in the Canadian Active Service Force.

On 25th August, 1940, the appellant sailed for England arriving there on 5th September, 1940. While in England, the appellant was married on 22nd February, 1941, in Oxford, England, to a British subject previously domiciled in the United Kingdom. At that time, the appellant was attending the Staff College at Camberley, Surrey, and at the time of his marriage as aforesaid established a home for himself and his wife in a rented furnished house nearby where they lived until mid-May, 1941. At that time, he was attached for training to the 6th British Armoured Division in Cambridgeshire and he rented a furnished flat in Cambridge to which his wife moved. On September 12, 1941, under orders, he sailed from Liverpool, arriving in Halifax on 23rd September, 1941, to take up an appointment with the 5th Canadian Armoured Division at Camp Borden, Ontario. His wife remained in England and in October obtained a lease of another furnished house in Cambridge, "Grange Croft", Grange Road, Cambridge, which the appellant continued to rent until November, 1943. On 10th November, 1941, the appellant, under orders, sailed from Halifax with the 1st Canadian Armoured Brigade for England arriving there on 23rd November, 1941.

From 23rd November, 1941, until July, 1944, the appellant remained continuously in England holding a succession of appointments in the Canadian Army. On 20th January, 1942, his son was born at "Grange Croft". Towards the end of November, 1943, the appellant moved his family from Cambridge to a rented furnished house in Fetcham, Surrey. On 4th May, 1944, his daughter was born in this house.

In July, 1944, the appellant proceeded with Headquarters First Canadian Army to the Normandy bridgehead in France. At about the same time, he moved his wife and two children from Fetcham to a rented furnished house in Lancashire. He maintained his family there until May,

1945, when he moved them to a rented furnished house in Scotland. He maintained his family there until mid-September, 1945, when he moved them back to the South of England to a rented furnished house in Watford, Hertfordshire, where he and his family lived together from mid-September, 1945, until they came to Canada in May, 1946. At the end of June, 1945, under orders of competent military authority, the appellant relinquished his appointment in the Netherlands as Brigadier, General Staff, 1st Canadian Army, and proceeded to England to take up a new appointment, as President of the Khaki University of Canada in the United Kingdom, which he held until the latter part of April, 1946.

During the period from 23rd November, 1941, to the end of April, 1946, the appellant spent all his leave periods with his wife and their children in the United Kingdom at one or other of the places set out above. The appellant, his wife and their children sailed from Southampton on 4th May, 1946, and landed at Halifax on 8th May, 1946.

While the appellant was overseas, the law practice in which he was a partner was carried on by salaried employees of the partnership as his partner was also overseas in the armed forces. Income tax returns were filed in Canada on behalf of the appellant by his father for the taxation years when the appellant was overseas, his father acting under a Power of Attorney from the appellant, the liability to tax being founded on section 9(1) (*d*) of *The Income War Tax Act* reading as follows:—

> 9(1): There shall be assessed, levied and paid upon the income during the preceding year of every person, other than a corporation or joint stock company, ...
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> * * *
>
> (*d*) who, not being resident in Canada, is carrying on business in Canada at any time in such year;

On the income tax return filed on behalf of the appellant for the year 1940 the question on the form "Address of Present Residence?" was answered "9 Marlborough Ave., Ottawa, Carleton, Ontario (Overseas)". On the returns filed on his behalf for the years 1941 to 1945, both inclusive, this question was answered either "Cambridge, England", "Active Service—England" or "Active Service Overseas".

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Before he left Ottawa, the appellant was a member of the Rideau Club of Ottawa and the Royal Ottawa Golf Club, near Hull, P.Q., and throughout his service in the forces he continued to be a member of these Clubs.

While overseas, the appellant maintained a bank account and a safety deposit box in a bank in Ottawa which were operated on his behalf in connection with his Canadian income and Canadian securities under Power of Attorney given to his father. While overseas the appellant continuously operated a personal bank account in a branch of a Canadian bank in London, England.

Shortly prior to the appellant proceeding with his family to Canada in May, 1946, he requested his father to endeavour to arrange for him the rental of a suitable house in the Ottawa area to which he could bring his family after their arrival and such a rental was arranged for him of a house in Rockcliffe.

Prior to September 2, 1939, the appellant was living at the home of his parents at 9 Marlborough Avenue, Ottawa, as a roomer and boarder at an agreed monthly rate. Under this arrangement, the appellant occupied the bedroom at the rear of the second floor of the house. When the appellant volunteered for active service in September, 1939, these arrangements were terminated and the appellant's civilian clothing and personal belongings were packed away in a box room at 9 Marlborough Avenue. The appellant lived in Government quarters from 3rd September, 1939, with his unit. Shortly after the appellant had terminated his arrangements for living at 9 Marlborough Avenue, his father took over the room which the appellant had occupied and used it as his personal bedroom and dressing room and continued to do so until the year 1946. When the appellant returned to Canada on duty on 23rd September, 1941, he was granted a week-end's leave which he spent as the guest of his parents, occupying the spare guest room at 9 Marlborough Avenue.

When the appellant and his family returned to Canada in May, 1946, they were invited by the appellant's parents to be their guests for a short time at 9 Marlborough Avenue. As a result of this invitation, the appellant and his wife stayed at 9 Marlborough Avenue for a period of approximately one week and occupied the spare guest room. For

the remainder of the month of May, 1946 the appellant and his wife had a holiday at the Seigniory Club at Montebello, in the Province of Quebec. The appellant's two children and their nursemaid were guests of the appellant's father and mother at 9 Marlborough Avenue for approximately three weeks in May, 1946, and occupied two rooms on the third floor. On 1st June, 1946, the appellant and his family went into possession of the house which the appellant had rented in Rockcliffe.

The Income War Tax Act does not contain a definition of the words "resident" or "ordinarily resident" and it is common ground that they should be given the everyday meaning ascribed to them by common usage.

The question whether, as used in section 7(*a*), the words "ordinarily resident" are more or less comprehensive than, or synonymous with, the word "resident" was argued before us but it does not appear to me to be necessary to pursue this inquiry in this case. It has already received attention in *Thompson* v. *Minister of National Revenue* (1).

In my view, giving to the words in question the interpretation most favourable to the respondent which can be given without doing violence to their commonly accepted meaning, it is impossible to say that the appellant was at any time in the period between November 23, 1941 and the beginning of May, 1946, either resident or ordinarily resident in Canada. Throughout such period, in my opinion, he was resident either in the quarters which he was occupying for the time being in the performance of his military duties or in the rented dwelling in which his wife was living for the time being, or perhaps in both of such places, and was neither resident nor ordinarily resident in any other place.

I have not overlooked the argument of counsel for the respondent that, as was pointed out by Kerwin J. in *Thompson* v. *Minister of National Revenue* (*supra*) at page 213, a person may be a resident of more than one country for revenue purposes, that war is an extraordinary occurrence, that the appellant intended to return to Canada after the war and that, therefore, his residence out of Canada during the period of several years mentioned above should be regarded as "extraordinary" and he should be

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deemed throughout such period to have been "ordinarily resident" in Canada. For the purposes of this argument, I am willing to assume the continuing intention of the appellant to return, although I would have thought the word "hope" more apt than the word "intention" to describe his probable state of mind in this regard. In my view, however, even if it could properly be said that the residence of the appellant was throughout the period from November 23, 1941 to May 8, 1946 extraordinary, in the sense of being out of the usual course of his life considered as a whole, it would not follow that he had during such period an ordinary residence in Canada; it would rather follow that during the years mentioned he ceased to have anywhere a residence which was ordinary in the corresponding sense.

It has frequently been pointed out that the decision as to the place or places in which a person is resident must turn on the facts of the particular case. Bearing in mind all the facts which are set out above, perhaps in unnecessary detail, and particularly that throughout the period in question and for several years prior thereto the appellant was physically absent from Canada, had therein no dwelling house or other place of abode to which he could as of right return and was maintaining his matrimonial home in the United Kingdom, I am of opinion that he was not at any time in such period resident or ordinarily resident in Canada.

Before parting with the matter I should mention a matter of practice with which counsel requested us to deal. We think that in all appeals from judgments of the Exchequer Court in proceedings by way of appeal from the Income Tax Appeal Board the reasons for judgment given by members of the Board should be included in the Appeal Case filed in this Court.

For the above reasons I would allow the appeal and declare that the appellant is entitled to the deduction claimed. The appellant is entitled to his costs in this Court and in the Exchequer Court.

Appeal allowed with costs.

Solicitors for the appellant: *Beament, Fyfe & Ault.*

Solicitor for the respondent: *F. J. Cross.*