UNIT CONSTRUCTION CO., LTD. v. BULLOCK (INSPECTOR OF TAXES).

HOUSE OF LORDS

[1960] AC 351, [1959] 3 All ER 831, [1959] 3 WLR 1022, 38 TC 712, 38 ATC 351, [1959] TR 345, 52 R&IT 828

HEARING-DATES: 2, 3, 30 November 1959

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CATCHWORDS:

Income Tax -- Residence -- Company -- Place where management and control is exercised -- Subsidiary company in East Africa -- Parent company in fact exercising central management and control in London -- Finance Act, 1953 (1 & 2 Eliz. 2 c. 34), s. 20 (9).

HEADNOTE:

Three African wholly owned subsidiaries of an english company were companies registered in Kenya. The meetings of the directors of these subsidiaries, in whom the powers of management were vested by the subdiary companies' articles of association, could not validly be held in the United Kingdom; and initially the management of the three African subsidiaries was carried on in Kenya. Subsequently the control and management of the African subsidiaries was taken over by the English parent company and during 1952 and 1953 de facto control of the African subsidiaries was exercised by the directors of the parent company in London (though this was contrary to the articles of association of the African subsidiaries), the local directors of the African subsidiaries standing aside and not exercising their powers of management. An English subsidiary of the parent company sought to deduct, in the computation of its profits for income tax purposes, payments made to the African subsidiaries under s. 20 of the Finance Act, 1953, as being subvention payments to associated companies. By s. 20 (9) of the Act of 1953 a company could not be an "associated company" unless it was resident in the United Kingdom. It was admitted that the three African subsidiaries were resident throughout in East Africa and it was common ground that a company might have two residences.

Held: the place where the central management and control of a company in fact was, though their being there was irregular and contrary to the constitution of the company, nevertheless determined the place of residence of the company; accordingly, the three African subsidiaries were resident in the United Kingdom and the subvention payments were deductible in computing the profits of the English subsidiary, any second residence of the African subsidiaries in East Africa being immaterial for the present purposes.

Dictum of LORD LOREBURN, L.C., in De Beers Consolidated Mines, Ltd. v. Howe ((1906), 5 Tax Cas. at p. 213) applied.

Swedish Central Ry. Co., Ltd. v. Thompson ((1925), 9 Tax Cas. 342) and Todd v. Egyptian Delta Land & Investment Co., Ltd. ((1928), 14 Tax Cas. 119) explained.

Decision of the COURT OF APPEAL (sub nom. Bullock (Inspector of Taxes) v. Unit Construction Co., Ltd.) ([1959] 1 All E.r/. 591) reversed.

NOTES:

As to residence of a company for income tax purposes, see 20 HALSBURY'S LAWS (3rd Edn.) 302, para. 552, 395, para. 723; and for cases on the subject, see 28 DIGEST (Repl.) 251-256, 1113-1134.

For the Finance Act, 1953, s. 20, see 33 HALSBURY'S STATUTES (2nd Edn.) 121.

CASES-REF-TO:

American Thread Co. v. Joyce, (1913), 108 L.T. 353; 6 Tax Cas. 163; 28 Digest (Repl.) 257, 1137.
Bradbury v. English Sewing Cotton Co., [1923] A.C. 744; 92 L.J.K.B. 736; 129 L.T. 546; 8 Tax Cas. 481; 28 Digest (Repl.) 208, 881.
Cesena Sulphur Co. v. Nicholson, Calcutta Jute Mills Co. v. Nicholson, (1876), 1 Ex.D. 428; 45 L.J.Q.B. 821; 35 L.T. 275; 1 Tax Cas. 83, 88; 28 Digest (Repl.) 251, 1113.
De Beers Consolidated Mines, Ltd. v. Howe, [1906] A.C. 455; 75 L.J.K.B. 858; 95 L.T. 221; 5 Tax Cas. 198; 28 Digest (Repl.) 257, 1135.
Egytian Delta Land & Investment Co., Ltd. v. Todd, [1929] A.C. 1; 98 L.J.K.B. 1; 140 L.T. 50; sub nom. Todd v. Egyptian Delta Land & Investment Co., Ltd., 14 Tax Cas. 119; 28 Digest (Repl.) 254, 1124.
Koitaki Para Rubber Estates, Ltd. v. Federal Comr. of Taxation, (1940), 64 C.L.R. 15, 241.
New Zealand Shipping Co., Ltd. v. Thew, (1922), 8 Tax Cas. 208; 28 Digest (Repl.) 258, 1145.
Swedish Central Ry. Co., Ltd. v. Thompson, [1925] A.C. 495; 94 L.J.K.B. 527; 133 L.T. 97; 9 Tax Cas. 342; 28 Digest (Repl.) 254, 1123.
Union Corpn., Ltd. v. Inland Revenue Comrs., Johannesburg Consolidated Investment Co., Ltd. v. Inland Revenue Comrs., Trinidad Leaseholds, Ltd. v. Inland Revenue Comrs., [1952] 1 All E.R. 646; 34 Tax Cas. 207; affd. H.L., [1953] 1 All E.R. 729; [1953] A.c/. 482; 34 Tax Cas. 279; [1953] 2 W.L.R. 615; 28 Digest (Repl.) 446, 1938.

INTRODUCTION:

Appeal. Appeal by the taxpayers, Unit Construction Co., Ltd., from an order of the Court of Appeal (JENKINS, ROMER and PEARCE, L.JJ.), dated Feb. 12, 1959, and reported sub nom. Bullock (Inspector of Taxes) v. Unit Construction Co., Ltd., [1959] 1 All E.R. 591, affirming an order of WYNN-PARRY, J., dated July 22, 1958, and reported [1958] 3 All E.R. 186, on a Case Stated under the Income Tax Act, 1952, s. 64. The appellant company had appealed to the Special Commissioners of Income Tax against assessments to income tax made on them under the Income Tax Act, 1952, Sch. D, Case I, for 1953-54 in the sum of £ 110,000 less £ 36,388 capital allowances and for 1954-55 in the sum of £ 200,000 less £ 50,000 capital allowances. The appeal concerned payments made by the appellant company which they claimed to deduct in computing their profits for the purposes of the assessments as follows: £ 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. The sole question in dispute was whether the three companies receiving the payments were companies resident in the United Kingdom in 1952 and 1953 within the meaning of the Finance Act, 1953, s. 20 (9). It was common ground that, if they were so resident, the payments were subvention payments which the appellant company were entitled to deduct in computing their profits under s. 20. The appellant company were an English wholly owned subsidiary and the three companies were wholly owned African subsidiaries of the parent company, Affred Booth & Co., Ltd. The facts in the Case Stated appear in the report of the appeal before WYNNPARRY, J. ([1958] 3 All E.R. at pp. 187-190).

COUNSEL:

Heyworth Talbot, Q.C., and J. L. Creese for the appellant company. Roy Borneman, Q.C., and A. S. Orr for the Crown.

JUDGMENT-READ:

The House took time for consideration. Nov. 30. The following opinions were read.

PANEL: Viscount Simonds, Lord Goddard, Lord Radcliffe, Lord Cohen and Lord Keith of Avonholm

JUDGMENTBY-1: VISCOUNT SIMONDS

JUDGMENT-1:

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 s. 20 of the Finance Act, 1953, to deduct them for the purpose of its assessment to income tax under Case I of Sch. 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 on 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 income tax purposes 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 s. 468 (7) of the Income Tax Act, 1952. It cannot be questioned by your Lord-ships. The familiar words that I have cited come from LORD LOREBURN, L.C.'s speech in De Beers Consolidated Mines, Ltd. v. Howe n(1). 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 Ry. Co., Ltd. v. Thompson n(2), 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. n(3), 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, took the same view n(4), 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 DIXON, J., in Koitaki Para Rubber Estates, Ltd. v. Federal Comr. of Taxation n(5), to which reference was made in the judgment of the Court of Appeal. I leave to other the reconciliation of the Swedish Central Ry. Co. case n(6) to which I have referred and Todd v. Egyptian Delta Land & Investment Co., Ltd. n(7).

n(1) 5 Tax Cas. at p. 213.

n(2) 9 Tax Cas. at p. 352.

n(3) 9 Tax Cas. at p. 370.

n(4) See 9 Tax Cas. at p. 376.

n(5) (1940), 64 C.L.R. at p. 19.

n(6) 9 Tax Cas. 342.

n(7) 14 Tax Cas. 119.

What, then, my Lords, were the reasons which led the courts below to hold in 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, i.e., 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 registered in Nairobi, was placed in the hands of its 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 which were approved by the Court of Appeal n(8):

n(8) [1958] 3 All E.R. at p. 194.

"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 the taxpayers [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 on the test of residence laid down in the authorities, said that n(9) "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", and again they insisted n(9) 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.

n(1959) 1 All E.R. at p. 596.

My Lords, I should certainly be prepared to admit that the many judges who in the past have pronounced on 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 company's costs here and below.

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 company concerning the residence of the subsidiary companies in Kenya.

JUDGMENTBY-2: LORD RADCLIFFE

JUDGMENT-2:

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 para. 5 (2)),

"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 directoral duties and never purported to function as a board of management.

On 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 s. 20 (9) of the Finance Act, 1953. If they do, then the appellant company, which is also an Alfred Booth & Co. 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 Sch. D for the years 1953-54 and 1954-55.

The appellant company 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 on which this "admission" 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 sub-s. (7) of s. 468 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 n(10)), are equivalent to saying that a company's residence is where its "real business" is carried on.

n(10) 5 Tax Cas. at p. 213.

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 opnion, the De Beers judgment n(11), 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 n(10):

n(10) 5 Tax Cas. at p. 213.

n(11) 5 Tax Cas. 198.

"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 n(12); New Zealand Shipping Co., Ltd. v. Thew n(13); Bradbury v. English Sewing Cotton Co. n(14)), for the next twenty years.

n(12) 6 Tax Cas. at p. 165.

n(13) 8 Tax Cas. 208.

n(14) 8 Tax Cas. 481.

So far as I am able to perceive, only two qualifications have since appeared which mar at all the simplicity and generality of this 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 managements 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, pocitical or otherwise. Union Corpn., Ltd. v. Inland Revenue Comrs. n(15) 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 DIXON, J., in Koitaki Para Rubber Estates, Ltd. v. Federal Comr. of Taxation n(16). 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 on it. I only note the decision in the Union Corpn. case n(17) 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 that has appeared is the decision of this House in 1925 in Swedish Central Ry. Co., Ltd. v. Thompson n(18). 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 estabilish residence for a company, even though its central management and contrl 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 on which it was open to them in law to find that there was English residence. Conversely, when Todd v. Egyptian Delta Land & Investment Co., Ltd. n(19) reached this House in 1928, it was held that, on 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 the

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

n(15) [1952] 1 All E.R. 646; 34 Tax Cas. 207; [1953] 1 All E.R. 729; 34 Tax Cas. 279.

n(16) (1940), 64 C.L.R. 15.

n(17) [1953] 1 All E.R. 729; 34 Tax Cas. 279.

n(18) 9 Tax Cas. 342.

n(19) 14 Tax Cas. 119.

My Lords, I cannot avoid the opinion that the Swedish Central Ry. Co. decision n(18) 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 on 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 nonresident; 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.

n(18) 9 Tax Cas. 342.

I am myself of the opinion that the best way of treating the matter is to regard the Swedish Central Ry. Co. n(20) and the Egyptian Delta Land Co. n(21) 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 Co.'s business and administration were of such a nature that what managing and controlling had to be done were 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, L.C. n(22):

n(20) 9 Tax Cas. 342.

n(21) 14 Tax Cas. 119.

n(22) 9 Tax Cas. at p. 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 Corpn., Ltd. n(23), 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 n(24) and not an undefined second class.

n(23) [1953] 1 All E.R. 729; 34 Tax Cas. 279.

n(24) 5 Tax Cas. 198.

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 on the validity of the alleged residence in Africa or, indeed, knowing what are supposd 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 problems of double residence for companies It deals only with what is a differnt 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 n(25):

n(25) [1959] 1 All E.R. at p. 597.

"... 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 counsel for the Crown 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 appellant 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 company 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 on 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 administration. I think it much better to adhere to the approach laid down by LORD LOREBURN, L.C., in the De Beers case n(26):

n(26) 5 Tax Cas. at p. 213.

"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 or trading";
or by LORD HALSBURY, L.C. (American Thread Co. v. Joyce n(27)):

n(27) 6 Tax Cas. at p. 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, on 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.

JUDGMENTBY-3: LORD COHEN

JUDGMENT-3:

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 sub-s. (9) of s. 20 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 Ry. Co., Ltd. v. Thompson n(28) it has been well established that for income tax purposes a company can simultaneously have two residences in different countries.

n(28) 9 Tax Cas. 342.

Both parties accepted the test of residence laid down by LORD LOREBURN, L.C., in De Beers Consolidated Mines, Ltd. v. Howe n(29), where he said:

n(29) 5 Tax Cas. at p. 213.

"The decision of KELLY, C.B., and HUDDLESTON, B., in the Calcutta Jute Mills Co. v. Nicholson and the Cesena Sulphur Co. v. Nicholson n(30), 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. 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."

n(30) 1 Tax Cas. 83, 88.

Relying on this citation counsel for the appellant company said that the question where the central management and control catually abides must be a question of fact, and that the finding of the Special Commissioners (see para. 10 of the Case Stated n(31)) 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. Counsel 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.

n(31) See p. 833, letter D, ante.

Counsel for the Crown, 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 rt. 28 of the articles of association of Booth & Co. (Africa), Ltd. it was provided that "Directors' meetings may be construed accordingly". A similar provision is to be found in the articles of association of each of the other African subsidiaries. Counsel 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 laful and not unlawful. Accordingly, both courts below held that, since the acts of the parent company on which the Special Commissioners relied constituted an 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 Corpn., Ltd. v. Inland Revenue Comrs. n(32). He cited a passage from that judgment where SIR RAYMOND EVERSHED said n(33):

n(32) [1952] 1 All E.R. 646; 34 Tax Cas. at p. 259.

n(33) [1952] 1 All E.R. at p. 657; 34 Tax Cas. at p. 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" as evidencing an intention to make any addition to the test indicated by LORD LOREBURN in the De Beers case n(34). 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 a company 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 counsel for the Crown shrank from carrying his argument to this logical conclusion.

n(34) 5 Tax Cas. 198.

Counsel for the Crown 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 hundred 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.

JUDGMENTBY-4: LORD KEITH OF AVONHOLM

JUDGMENT-4:

LORD KEITH OF AVONHOLM: My Lords, there is one point that has given me 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 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 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, throught 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 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 fall. 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.

DISPOSITION:

Appeal allowed.

SOLICITORS:

Herbert Smith & Co.; Solicitor of Inland Revenue.