[HIGH COURT OF AUSTRALIA.]

THE AUSTRALASIAN TEMPERANCE AND GENERAL MUTUAL LIFE ASSURANCE SOCIETY LIMITED . . . . . } PLAINTIFF;

AGAINST

HOWE . . . . . DEFENDANT.

H. C. OF A. 1922.

MELBOURNE, *May* 12.

SYDNEY, *Dec.* 12.

Knox C.J., Isaacs, Higgins, Gavan Duffy and Starke JJ.

Constitutional Law—High Court—Original jurisdiction—Matters between "residents of different States"—Action by or against corporation—The Constitution (63 & 64 *Vict.* c. 12), *secs.* 75 (IV.), 100.

Sec. 75 of the Constitution provides that "In all matters . . . (IV.) between States, or between residents of different States, or between a State and a resident of another State . . . the High Court shall have original jurisdiction."

Held, by *Knox* C.J., *Higgins* and *Gavan Duffy* JJ. (*Isaacs* and *Starke* JJ. dissenting), that the words "residents" and "resident" in sec. 75 (IV.) refer to natural persons only and not to artificial persons or corporations.

Held, therefore, by *Knox* C.J., *Higgins* and *Gavan Duffy* JJ. (*Isaacs* and *Starke* JJ. dissenting), that a company formed in Victoria under Victorian law and having its management and control there and carrying on business in each of the other States, was not entitled to bring an action in the High Court against a resident of a State other than Victoria.

CASE STATED.

In an action in the High Court brought by the Australasian Temperance and General Mutual Life Assurance Society Ltd. against Ellen Howe, a case was stated by *Knox* C.J. which was substantially as follows:—

1. This is an action commenced by writ of summons for foreclosure of a mortgage given by defendant to plaintiff.

2. The property assigned by way of mortgage consists (as appears from the assignment) of defendant's interest under the will of Ellen Howe, late of St. Arnaud in the State of Victoria. By the will the defendant is entitled to the residue of the testatrix's property after the death of defendant's mother, who has a life interest. The available assets of the said deceased now consist of the following investment made by the trustees under the will, namely, moneys lent on mortgage of freehold lands, &c., situate in Victoria, numbered 332,729, registered 1st September 1910, the amount of principal being £1,650 at 5½ per cent.

3. The said assignment by way of mortgage was executed in the State of Victoria.

4. The defendant mortgagor never having paid any interest, this action was brought to enforce the plaintiff's security. Before the commencement of the action the defendant had removed to and now resides in New South Wales.

5. The plaintiff's motion for judgment came on for hearing before me on 2nd November 1921 and on 24th February 1922.

6. The plaintiff carries on the business of life assurance, and was incorporated in Victoria on 6th December 1876, and duly registered under the *Companies Statute* 1864 of the State of Victoria as a company limited by guarantee.

7. The head office of the plaintiff from which its affairs are managed is situated in Melbourne. The annual meetings of the shareholders of the plaintiff are held in Melbourne, and the directors meet and reside in Melbourne. The business of the plaintiff extends throughout Australia.

8. The position of the plaintiff in other States is as follows:— New South Wales.—The plaintiff was registered under the New South Wales *Companies* (*Amendment*) *Acts* No. 22 of 1906 and No. 9 of 1907 on 13th September 1917 as a Victorian company carrying on business in New South Wales. The present public officer of the plaintiff, who is the agent of the plaintiff in the State of New South Wales under sec. 7 of the New South Wales Act No. 22 of 1906, was appointed on 21st January 1921 as the plaintiff's general agent in New South Wales by the board of directors at the head office, Melbourne, by appointment under seal. Pursuant to art. 57 (b) of

H. C. OF A. 1922. AUSTRAL-ASIAN TEMPERANCE AND GENERAL MUTUAL LIFE ASSURANCE SOCIETY LTD. v. HOWE.

the articles of association local directors have been appointed in New South Wales. Western Australia.—Sec. 5 of the *Companies Act* 1893 (W.A.) (56 Vict. No. 8) provides that the Act shall not apply to a company which carries on the business of life assurance either alone or together with any other business nor to any company formed for the purpose of carrying on the business of banking. Sec. 25 of the *Life Assurance Companies Act* 1889 (W.A.) (53 Vict. No. 12) requires that every foreign company shall appoint a person resident in Western Australia as general agent. This has been done by power of attorney first lodged on 16th September 1904. Such general agent was appointed by the board of directors of the plaintiff at Melbourne. South Australia.—The plaintiff was registered first on 27th March 1888, under the *Companies Act Amendment Act* 1886 (S.A.) (No. 375), now replaced by Part VIII. of the *Companies Act* 1892 (S.A.), No. 557. By sec. 196 of the latter Act the plaintiff was required to appoint an attorney in South Australia. Powers of attorney have from time to time been registered, the last power filed being dated 6th September 1907. The attorney was appointed by the board of directors of the plaintiff at Melbourne. Queensland.—The plaintiff was registered under the *British Companies Act of* 1886 on 20th April 1903. Tasmania.—The plaintiff was registered under the *Life Assurance Companies Acts* of 1874 and 1889 on 25th October 1905.

9. The only State in which there are local directors of the plaintiff is New South Wales. These are appointed by the board of directors of the plaintiff at the head office in Melbourne. The local directors have not a seal, and all documents requiring the seal of the plaintiff must be executed by the board of directors in Melbourne. The local directors have no power to deal with investments. Their powers are limited to receiving the insurance business undertaken.

10. In the other States the public officer is the manager appointed by the board of directors at the head office.

11. No Federal income tax is imposed upon life assurance companies, but a return under the Federal *Land Tax Act* is lodged from the head office at Melbourne in respect of lands held by the plaintiff in all the States.

12. The manager of the plaintiff in each State has certain prescribed powers under the power of attorney; but, even where he has power to sue, he is not authorized to do so without reference to and express instructions from the head office in Melbourne. The duties and powers of the managers in other States are practically the same as those of the local board in New South Wales.

13. All investments received in any State are submitted to and dealt with by the board of directors at the head office in Melbourne. Thereafter all matters arising out of or incidental to those investments are dealt with solely by such board of directors. All the documents are in fact executed by the board at the head office in Melbourne, and nowhere else. Every proposal for an investment which is submitted in each State, including New South Wales, is in the first instance received by the manager of the local branch of the plaintiff, and is by him submitted to the head office in Melbourne. The board of directors at the head office deals with it, and the various solicitors acting for the plaintiff in those States receive instructions from the head office with regard to the preparation of the necessary documents. When these documents are prepared and executed by the various mortgagors they are sent to the head office in Melbourne for execution.

14. Upon the motion for judgment I reserved for the consideration of a Full Court the following question:—

> Upon the facts stated herein are the plaintiff and the defendant residents of different States within the meaning of sec. 75 (IV.) of the Constitution?

The nature of the arguments sufficiently appears in the judgments hereunder.

Owen Dixon K.C. (with him *Lewers*), for the plaintiff.

There was no appearance for the defendant.

During argument reference was made to *Quick and Garran's Constitution of the Australian Commonwealth*, p. 777; *Curtis's Jurisdiction of the United States Courts*, 2nd ed. p. 152; *Shaw* v. *Quincy Mining Co.* (1); *Taylor* v. *Crowland Gas and Coke Co.* (2);

(1) (1892) 145 U.S., 444.

(2) (1855) 11 Ex., 1.

H. C. OF A. 1922.

AUSTRAL-ASIAN TEMPERANCE AND GENERAL MUTUAL LIFE ASSURANCE SOCIETY LTD. v. HOWE.

Adams v. *Great Western Railway Co.* (1); *Dicey's Conflict of Laws*, 2nd ed., p. 162; *Jones* v. *Scottish Accident Insurance Co.* (2); *La Campagnie Générale Transatlantique* v. *Thomas Law & Co.*; *La Bourgogne* (3); *De Beers Consolidated Mines Ltd.* v. *Howe* (4); *M'Mahon* v. *North-Western Railway Co.* (5); *American Thread Co.* v. *Joyce* (6); *Jones* v. *League* (7); *Dunlop Pneumatic Tyre Co.* v. *Actien-Gesellschaft für Motor und Motorfahrzeugbau vorm. Cudell & Co.* (8); *Cesena Sulphur Co.* v. *Nicholson* (9).

Cur. adv. vult.

Dec. 12.

The following written judgments were delivered:—

KNOX C.J. AND GAVAN DUFFY J. The plaintiff is a company incorporated in Victoria; and its principal office, from which the general management of its business is conducted, is in that State. It has offices and carries on business in all the other States of the Commonwealth. The defendant is a resident of New South Wales, and the company claims to be entitled to sue her in this Court by virtue of sec. 75 (IV.) of the Constitution, which confers original jurisdiction on the High Court in all matters "between residents of different States."

The question turns on the meaning of the word "residents." On the one side it is said to be confined to natural persons; on the other side it is said to extend to the artificial persons called corporations, to which the law attributes an existence apart from and independent of the existence of their constituent members. The rule is that words used by the Legislature should be given their plain and natural meaning unless it is manifest from the general scope and intention of the statute that injustice and absurdity would result from so construing them (per *Jervis* C.J. in *Mattison* v. *Hart* (10)). By plain and natural meaning is meant the literal and popular, as opposed to a figurative or technical, meaning. Now, what is the literal and popular meaning of the noun substantive "resident"? We say

(1) (1861) 6 H. & N., 404.
(2) (1886) 17 Q.B.D., 421.
(3) (1899) A.C., 431.
(4) (1905) 2 K.B., 612; (1906) A.C., 455, at p. 457.
(5) (1870) I.R. 5 C.L., 200.
(6) (1911) 104 L.T., 217; (1913) 108 L.T., 353.
(7) (1855) 18 How., 76.
(8) (1902) 1 K.B., 342, at p. 347.
(9) (1876) 1 Ex. D., 428, at p. 453.
(10) (1854) 14 C.B., 357, at p. 385.

"noun substantive" because in the English language the meaning of the adjectival form of a word is often extended while the substantive form retains its original literal meaning. This is a natural and even an inevitable evolution in the case of epithets, because they denote, not permanent things, but variable qualities. They are elusive, not necessarily conveying precisely the same meaning to any two persons, and they are constantly used to express imperfect analogies. For example, the words "attendant," "incumbent," "coadjutant," "respondent," "dependent," when used as substantives always denote an individual, while the same words used as adjectives are subject to no such restriction. This divagation has taken place in the use of the word "resident." Its meaning when used as a noun is, according to the *Oxford Dictionary*, "one," that is, a natural person, "who resides permanently in a place." But according to the same authority the adjectival form, while primarily applying to individuals, may also be used in relation to corporeal things and abstract ideas. Corporations are not residents in any literal sense, because they cannot perform the essential function which the term connotes: they cannot *live* in some particular part as distinguished from all other parts of the earth. But it sometimes happens that words lose their literal meaning when used in popular speech. Is that so with the word "resident" when used as a substantive? If one read in a gazetteer or year-book a statement that in the High Court residents of one State may sue residents of another State, and a resident of one State may sue or be sued by another State, would he think that the statement had any reference to corporations; or, if he did so think, would it be because of the natural meaning of the words or because in his opinion no sufficient reason existed to justify the Legislature in conferring jurisdiction on the Court with respect to natural, and withholding it with respect to artificial, persons? If such a one read in a newspaper that the residents of Lille had suffered great pecuniary loss owing to the occupation of that city by the German Army, what meaning would he attribute to the word "residents"? Would he suppose that it included corporations? We think not, unless he allowed himself to be swayed by the consideration that the statement would be much more complete if it included them than if it did not. Counsel for the plaintiff company

H. C. OF A. 1922.

AUSTRAL-ASIAN TEMPERANCE AND GENERAL MUTUAL LIFE ASSURANCE SOCIETY LTD. v. HOWE.

Knox C.J. Gavan Duffy J.

did not in so many words ask us to sophisticate our judgment by considering which interpretation of the word "residents" would give the most complete and satisfactory jurisdiction to this Court, but he urged that the object of the section was to give the High Court jurisdiction over litigation, and that it should therefore be read as including all persons whether natural or artificial who might become parties to a litigation. This is no more than to say that we should first attribute an intention to Parliament, and then construe its language so as to carry out that intention. But we must gather the intention of Parliament from the words of its enactment, and neither the words which we are asked to interpret nor their context afford any reason for supposing that Parliament desired to give jurisdiction over corporations as well as over natural persons, rather than over natural persons only. On the contrary, the sub-section seems to assume that a resident of one State cannot at the same time be a resident of another, and such an assumption, though accurate if the word "residents" includes only natural persons, is strained and unreasonable if it includes corporations. At any given time a man must be living, and therefore residing, in some specific place; but this is not so with a corporation. It is a mere metaphor to say that a corporation resides anywhere, and there is no substantial reason for saying that it resides in the State in which it is incorporated rather than in the State in which its operations are conducted, or in the State from which they are directed. The fact that a corporation cannot really reside anywhere has been judicially recognized (see per *Mathew* L.J. in the *Dunlop Case* (1) and per *Fletcher Moulton* and *Farwell* L.JJ. in *Saccharin Corporation Ltd.* v. *Chemische Fabrik von Heyden Aktiengesellschaft* (2)). But, finding that certain statutes which prescribed residence as a criterion of liability either expressly or impliedly dealt with corporations, the Courts, both in America and England, have felt themselves constrained to assume that corporations for the purposes of those statutes must be taken to be capable of residing somewhere, and have then proceeded to determine whether they resided in some particular place. In America it was held that a corporation resided only in the State under the laws of which it had been incorporated; but this view has never found favour in the

(1) (1902) 1 K.B., at p. 349. (2) (1911) 2 K.B., 516, at pp. 524, 526.

English Courts (see per *Mathew* L.J. in the *De Beers Case* (1)). In England the law appears to be that facts which would establish residence for the purposes of one statute may not establish it for the purposes of another. Sometimes the inquiry is whether any part of the business is carried on in some specified locality; at other times, whether the business as a whole is so carried on. In *Goerz & Co.* v. *Bell* (2) *Channell* J. said:—"The appellants' counsel drew my attention during the argument to a dictum of *James* L.J. in *Ex parte Breull*; *In re Bowie* (3), in which it is pointed out that a word like 'residence' might be, and probably was, used in different statutes with different meanings, and that (for example) that which constitutes residence for registration purposes might not necessarily amount to residence for the purpose of assessment to the income tax. I entirely accept that view, and I must therefore look at the *Income Tax Act*, which is the particular Act which I have to construe, and consider the meaning of the expression 'residence in the United Kingdom' as there used." This method of interpretation has apparently been followed, and less has been required to establish residence for the purpose of the service of a writ than to establish residence for the purposes of income tax. The *Dunlop Case* (4) is a typical case. There the Court had to deal with an application to set aside service of a writ on a foreign company. Order XI., rule 1 (*c*), of the Rules of Court provides for the case where "any relief is sought against any person domiciled or ordinarily resident within the jurisdiction." Order LXXI., rule 1, interprets the word "person" as including a body corporate. Being a person, the corporation was considered capable of being "resident" within the meaning of the rule, and the only further question for the Court to determine was whether in fact it was resident at a place within the jurisdiction so as to be capable of being served with a writ there. The corporation, who were manufacturers of motor-cars abroad, had hired a stand at the Crystal Palace for a period of nine days, and there exhibited articles of their manufacture at a cycle show. It was held that the corporation were carrying on business so as to be resident at that spot. So is the *De Beers Case* (5). There the

(1) (1905) 2 K.B., at p. 641.
(2) (1904) 2 K.B., 136, at p. 144.
(3) (1880) 16 Ch. D., 484.
(4) (1902) 1 K.B., 342.
(5) (1906) A.C., 455.

H. C. OF A. 1922.

AUSTRAL-ASIAN TEMPERANCE AND GENERAL MUTUAL LIFE ASSURANCE SOCIETY LTD. v. HOWE.

Knox C.J. Gavan Duffy J.

Act of Parliament imposed a tax on persons residing in the United Kingdom, and it was assumed that the word "person" included a corporation. Lord *Loreburn* said (1):—"Under the 2nd section of the *Income Tax Act* 1853, Schedule D., any person residing in the United Kingdom must pay on his annual profits or gains arising or accruing to him 'from any kind of property whatever, whether situate in the United Kingdom or elsewhere,' and also 'from any profession, trade, employment, or vocation, whether the same shall be respectively carried on in the United Kingdom or elsewhere.' Now, it is easy to ascertain where an individual resides, but when the inquiry relates to a company, which in a natural sense does not reside anywhere, some artificial test must be applied." The House of Lords did not decide that a corporation could "reside" anywhere within the natural meaning of that word, but merely that, as a corporation must be taken to be a "person" capable of "residing" within the meaning of the Act, the corporation in question could most properly be held to reside for the purposes of the Income Tax Acts where it kept house and did its real business, and that was in England, although all its mining operations were conducted in South Africa, and the diamonds produced by them, sold there. "The real business," said Lord *Loreburn* (2), "is carried on where the central management and control actually abide."

Since the hearing our brother *Isaacs* has drawn our attention to the case of *Royal Mail Steam Packet Co.* v. *Braham* (3). An enactment of the Legislature of Jamaica provided for certain procedure in an "action against a person residing out of Jamaica." The Judicial Committee of the Privy Council held that in that enactment the word "person" included a corporation, and that a corporation might be said to reside because the word "residing" was no more inapplicable to a corporation than the word "domicile," which is frequently used with regard to the supposed local habitation of corporate bodies.

These cases and cases of their class afford us no assistance in determining whether the noun substantive "resident" applies to any but natural persons, but they may be useful in helping us to dispose

(1) (1906) A.C., at p. 457. (2) (1906) A.C., at p. 458.
(3) (1877) 2 App. Cas., 381.

of the last argument raised on behalf of the plaintiff company. It was said that the word "residents" must have the same meaning in sec. 75 (IV.) and in sec. 100, and that to confine the meaning to natural persons in sec. 100 would prevent corporations from enjoying the benefits conferred by it. The latter section runs as follows: "The Commonwealth shall not, by any law or regulation of trade or commerce, abridge the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation." We do not assent to the proposition that a particular word is *necessarily* to be given the same meaning wherever it is found in a given statute. The decision of the House of Lords in *Pharmaceutical Society* v. *London and Provincial Supply Association Ltd.* (1) affords an instance to the contrary. In that case it was held that in the statute then under consideration the word "person" was to be construed in one section as including, and in another section as excluding, a corporation. So here, if no absurdity or injustice arises from attributing its natural meaning to the word "residents" in sec. 75, it should have that meaning, though if absurdity or injustice arises from attributing its natural meaning in sec. 100 it may be necessary to there give it an extended meaning. But if the word is to have the same meaning in both sections, what is there in sec. 100 to suggest that that meaning should include corporations? The language and collocation of the section suggest that its purpose is to protect the rights of the State and the people of the State, and not to benefit foreigners who may choose to carry on operations in a State through the instrumentality of an incorporated company. We do not propose to determine the matter without the benefit of argument, but, if the word "residents" does not include corporations, we at present see no difficulty in construing sec. 100 as protecting the rights of individuals resident within the State, whether those rights are exercised immediately by themselves or mediately through an incorporated company. On the other hand, if it includes corporations and has the same meaning as in sec. 75 (IV.), it can include only such corporations as would be included in sec. 75 (IV.), namely, those which reside in one State only. But "residence," we have seen, is not to be determined merely

(1) (1880) 5 App. Cas., 857.

H. C. OF A. 1922.

AUSTRAL-ASIAN TEMPERANCE AND GENERAL MUTUAL LIFE ASSURANCE SOCIETY LTD. v. HOWE.

Knox C.J. Gavan Duffy J.

by the fact that operations are carried on at a particular place. A company having its residence and its operations within a State would come within the protection of the section as a "resident," while another conducting similar operations within the State, but having its residence outside, would not. In these circumstances the protected company might be a foreign company and all its members foreigners, and the unprotected company might be incorporated under the laws of the State in which it carried on operations and all its members might be resident there. Was this the intention of the framers of the Constitution or of the Imperial Parliament, which gave it legislative force ?

In our opinion the answer to the question submitted should be No.

ISAACS J. This case raises a highly important constitutional question which as the Commonwealth grows will, as present events tend to show, be of increasing consequence, and incidentally, in the circumstances, it involves considerations of not merely inter-State but even of international importance, regarding the status of foreign corporations. The concrete question for decision in the case stated by the learned Chief Justice is: "Upon the facts stated herein are the plaintiff and the defendant residents of different States within the meaning of sec. 75 (IV.) of the Constitution ?" I entertain no doubt the question should be answered in the affirmative. The action is for foreclosure of a mortgage of property in Victoria. The defendant, it is stated, "resides" in New South Wales. I assume that the word "resides" in par. 4 of the case stated connotes that the defendant is a "resident" of New South Wales within the meaning of the constitutional provision referred to. On that assumption the only problem is whether the plaintiff is a "resident of a different State." The plaintiff is a corporation, and so the first question to be answered is whether a corporation can be said to be a "resident" of a State. A corporation once created is by common law a "person" (see *Royal Mail Steam Packet Co.* v. *Braham* (1); *Pharmaceutical Society's Case* (2); *Grant on Corporations*, p. 4 (n.), and *Foote on Private International Jurisprudence*, 4th ed.,

(1) (1877) 2 App. Cas., 381. (2) (1880) 5 App. Cas., at pp. 861, 868-869.

p. 125). This is one of the most deeply rooted doctrines of our law (*Coke's Institutes*, 2 Inst., 722) and it is the starting-point from which the Courts in England, basing themselves purely on the common law, have by its beneficial flexibility kept abreast in the case of corporations of the general advance of a progressive society. In this case it is not necessary for the Court to do any more than follow the same well-defined course of judicial action—a course I shall endeavour to trace, and a course in which the Judiciary, as part of the living organism of the State, has endeavoured to apply the wide principles of the common law so as to co-operate in and aid the commercial and industrial progress of the whole community. Having regard to the position occupied by corporations in the daily life of the nation, and even internationally, and their assumption of so many of the functions performed by individuals, it is not surprising that tribunals of the highest eminence, the House of Lords and the Privy Council, have firmly held that modern enactments applying to natural persons should, unless by express words or some inconsistency the contrary is shown, be taken to include corporations. More particularly is this demanded when construction is applied to an organic instrument of government which from its nature affects the powers of a people as a whole, and is couched for their welfare in brief but comprehensive terms. I agree with my learned brothers the Chief Justice, *Higgins* and *Gavan Duffy*, that the question turns on the meaning of the word "residents." But I cannot agree in holding that corporations are excluded from the legal meaning of the term in the Australian Constitution. That a corporation does "reside" has been long an acknowledged doctrine of the law. The word "resident" connotes some "person," and necessarily includes that word, and to exclude corporations without any context pointing to exclusion would not only, in my opinion, be a forced construction, and one running contrary to many decisions of great authority, but would, for no apparent reason, leave a gap between "States" and natural persons which would be very wide and as time proceeds must become wider and more serious.

Having the misfortune so to differ, I find that I do so for several reasons, one of which is as to the constructional guide to the proper interpretation of statutes. Where measuring-rods, so to speak, are

H. C. OF A. 1922.

AUSTRAL-ASIAN TEMPERANCE AND GENERAL MUTUAL LIFE ASSURANCE SOCIETY LTD. v. HOWE.

Isaacs J.

different, this of itself must necessarily lead to different results. Then there is the question of the applicability to corporations of the word "resident" as a noun. I am greatly influenced by the long line of English decisions which have gradually and increasingly recognized corporations as real existences, doing more and more in organization the daily work of society, and assuming more and more the responsibilities and functions of individuals. I shall endeavour to make my position clear as to each of these.

1. *Rule of Construction.*—I entirely accept the rule stated by *Jervis* C.J. in *Mattison* v. *Hart* (1), that the words of the Legislature are *primâ facie* to be given "their plain and natural meaning," though the quoted words that follow need, in my opinion, the qualification that we find in other cases. But I am unable to agree in thinking that by plain and natural meaning is meant the literal and popular, as opposed to figurative or technical, meaning. I quite agree that statutes should, *primâ facie*, be construed "literally." But that only means, as I understand it, that the document is to be construed according to the grammatical and ordinary sense of the *actual words* employed in the Act itself—the rule of Lord *Wensleydale* in *Grey* v. *Pearson* (2) (per Lord *Shaw* in *R.* v. *Halliday* (3)). This was the basis of the judgment of the majority in *Amalgamated Society of Engineers* v. *Adelaide Steamship Co.* (4). But I know of no authority which makes the word "popular" equivalent to "plain and ordinary." The terms may in some instances coincide. In the *Amalgamated Engineers' Case* (5) the judgment of the majority relied on cases establishing that the "natural sense" was the *primâ facie* sense to adopt. But the "natural" sense of any word must depend on the subject matter in connection with which it is used and on its collocation. It is not necessarily the same as the "popular" sense: it cannot even be said to be primarily the same. The natural sense of an expression may be its "legal" or technical sense. In *Stephenson* v. *Higginson* (6) Lord *Truro* said: "In construing an Act of Parliament, I apprehend every word must be understood according to the legal meaning,

(1) (1854) 14 C.B., at p. 385.
(2) (1857) 6 H.L.C., 61.
(3) (1917) A.C., 260, at p. 303.
(4) (1920) 28 C.L.R., 129, at pp. 151-152.
(5) (1920) 28 C.L.R., at pp. 148-149.
(6) (1852) 3 H.L.C., 638, at p. 686.

unless it shall appear from the context that the Legislature has used it in a popular or more enlarged sense." So per Lord *Robertson* in *Lord Advocate* v. *Stewart* (1). What is there said has very special application to this case. Lord *Robertson* says:— "The principle that in statutes words are to be taken in their legal sense has . . . a special cogency when the words in question represent only legal conceptions. The popular use of such words does not represent the primary meaning of the words, but some half understanding of them." When we have regard to the course of judicial decisions, and see how the words "reside" and "residence" have been adopted as legal conceptions attributable to corporations, we have then to consider whether that legal conception is not equally applicable to the noun "resident." Whether it is so or not will be dealt with later; it is the mode of approaching that question that is now under consideration. But, further, the Privy Council has also expressed its opinion as to the popular meaning of words in a statute. In *The Lion* (2) Lord *Romilly*, delivering judgment, says: "The meaning of particular words in an Act of Parliament, to use the words of *Abbott* C.J., in *R.* v. *Hall* (3), 'is to be found *not so much in a strict etymological propriety of language, nor even in popular use*, as in the subject or occasion, on which they are used." See also *Maxwell*, 6th ed., p. 95. *Willmott* v. *London Road Car Co.* (4) may be usefully referred to in this connection as an illustration. There the judgments of very eminent Judges are in places pointedly directed to the question of construction of formal documents and to the danger of a Court proceeding to construe words in legal instruments by analogy to the manner in which persons understand the same words in ordinary parlance. For instance, *Fletcher Moulton* L.J., referring to Lord *Blackburn* in the *Pharmaceutical Society's Case* (5), says (6): "He intends, I think, to indicate that as we proceed from common parlance towards the most technical legal documents there will be a gradually increasing probability that the full legal sense is to be attached to the word." So per *Farwell* L.J., who says (7):—"It is certainly true, as Lord *Blackburn* pointed

(1) (1902) A.C., 344, at p. 356.
(2) (1869) L.R. 2 P.C., 525, at p. 530.
(3) (1822) 1 B. & C., 123, at p. 136.
(4) (1910) 2 Ch., 525.
(5) (1880) 5 App. Cas., 857.
(6) (1910) 2 Ch., at p. 533.
(7) (1910) 2 Ch., at p. 536.

H. C. OF A. 1922.

AUSTRAL-ASIAN TEMPERANCE AND GENERAL MUTUAL LIFE ASSURANCE SOCIETY LTD. v. HOWE.

Isaacs J.

out (1), that when you are discussing who is the richest man in London you have not present to your mind a corporation, and that in such a case 'person' does not naturally include a corporation. So, if I say 'I saw a crowd of persons in Trafalgar Square' I necessarily mean natural persons and not corporate individualities; but when the Court has to construe a lease made in 1900 different considerations apply, and bearing in mind that a large proportion of the owners of property, as lessees or grantees, in 1900 were incorporated bodies, the inference is irresistible in such a document that 'person' includes 'corporation.'"

I am consequently constrained to hold that "literal and popular" are not interchangeable with "plain and natural," and to rely on the "subject or occasion" of the use of the word "resident" in order to ascertain its "natural" meaning for present purposes.

I will add only this further rule of construction: that, when a Court is ascertaining the meaning of a word in an Act of Parliament, the Court has regard to the way that word has been judicially construed before the Act was passed (see per Lord *Loreburn* L.C. in *North British Railway Co.* v. *Budhill Coal and Sandstone Co.* (2)). As I think "resident" as a noun is really judicially construed when "resident" as an adjective in the same connection has been so abundantly interpreted, this rule seems to me very apposite.

2. *Sec. 75 of the Constitution.*—That section is in these terms:—"In all matters—(I.) Arising under any treaty: (II.) Affecting consuls, or other representatives of other countries: (III.) In which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party: (IV.) Between States, or between residents of different States, or between a State and a resident of another State: (V.) In which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth: the High Court shall have original jurisdiction." It is abundantly established that "resident," and its cognate terms "reside," "residing" and "residence," are terms not of art or defined legal import, but of very flexible meaning, acquiring whatever precision they have in any given case from their surroundings.

(1) (1880) 5 App. Cas., at p. 869. (2) (1910) A.C., 116, at p. 127.

James L.J. in *Breull's Case* (1) says: "There are cases in which it has been judicially decided, and I think rightly, that the words 'residence' and 'business' have no actual definite technical meaning, but that you must construe them in every case in accordance with the object and intent of the Act in which they occur." He calls them further on "elastic words," and sets himself to examine the object and intent of the provision in which they are found. *Cotton* L.J. (2) agrees with that view, and so does *Lush* L.J. The multitudinous meanings appropriate to the words in diverse surroundings can be seen by a reference to *Stroud's Dictionary*, vols. III. and IV., under those words. I refrain from more specific mention of the cases there cited, except to direct attention to one class of cases (cited on p. 1733 of vol. III.) which hold that for some purposes a man's place of business is properly his "residence" while in another class for other purposes (p. 1731) it is held to be where he lives. The cases as to corporations try to find for various purposes an analogy to each class as close as the circumstances permit. *Breull's Case* and the numerous authorities which it summarizes unquestionably settle the law so far as natural persons are concerned, and it appears to be in no way different in the case of the artificial persons called corporations. I am clearly of opinion, first, that corporations not only have in contemplation of law a "residence," and also that no invariable meaning of that term exists in the case of corporations; and, further, that the House of Lords has more than once so decided. That tribunal has held that the mere carrying on business is "residence" for one purpose, but not of itself sufficient for another. I shall presently refer more particularly to those decisions, but in the meantime, and for the sake of dealing with this case more connectedly, I will assume that in the case of corporations "reside" and its cognate term "resident" are so far flexible that they depend for their meaning not alone on the nature of the subject "corporations" but also on the nature and scope of the instrument in which those words are used.

I, therefore, on this assumption turn to the document in which the expressions "residents" and "residents of different States" and "resident of another State" occur, in order to discover

(1) (1880) 16 Ch. D., at pp. 486-487.

(2) (1880) 16 Ch. D., at p. 487.

H. C. OF A. 1922.

AUSTRAL-ASIAN TEMPERANCE AND GENERAL MUTUAL LIFE ASSURANCE SOCIETY LTD. v. HOWE.

Isaacs J.

their meaning apart from coercive authority. To begin with, that document is a great instrument of government, creating new judicial power, and, therefore, having no real analogy to a curial rule of practice regulating the service of Court process within the territory in matters already within the judicial power of the tribunal. In the next place, the judicial power enacted by sec. 75 is vested in this Court in such a manner that while on the one hand even the Federal Parliament cannot withdraw or abridge it, on the other hand no litigant can merely by voluntary submission bring himself within it. In cases of mere service of process within the territory, submission is effectual. These considerations are essential to be borne in mind when one class of decisions are read which deal with the residence of corporations within the territorial limits for the purpose of service as distinguished from judicial power. The contrast is well illustrated by the two cases of *British Wagon Co.* v. *Gray* (1) and *Montgomery, Jones & Co.* v. *Liebenthal* (2). Sec. 75, in conferring original judicial power on this Court, does so in five cases. In every one of them the principle of *political identification or differentiation is present.* In the first, a "treaty" connotes two distinct political organisms. The second expressly mentions "other countries." The third relates to the Commonwealth or someone identified with it. The fifth relates solely to Commonwealth officers. The fourth is the one in hand. It begins with the case of matters "between States"; it ends with matters "between a State and a resident of another State," and the medial case is "between residents of different States." The same thread of thought runs through every paragraph. The entire section is based upon the political character of the litigants, regarding each as in some way an integer of a particular political organism. In the fourth paragraph, the test of that integral connection is whether the litigant other than a State is a "resident" of some State.

It is to be borne in mind that sec. 75 of the Constitution is not concerned with venue any more than with service of process. It was when passed, and therefore still is, unconcerned with any form of procedure Act that might be passed. Procedure was, so to

(1) (1896) 1 Q.B., 35. (2) (1898) 1 Q.B., 487.

speak, beneath the dignity of the Constitution, and was left to the legislative discretion of the Parliament. The judicial power it confers is not to be limited in its exercise by the territory of States: it is co-extensive with Australia. The action may be brought and tried in the High Court without the least regard to the territorial limits of States, except so far as residence within those limits is necessary to designate the justiciable character of the litigants. The provision is not for the purpose of supplementing the judicial power of States to summon other States or the residents of other States to their bar. The cause of action may arise not only under State law, but also under Commonwealth law or even under foreign law. It is plainly and simply the investiture of a *new tribunal* at once Federal and National, but unconnected politically with either of the litigants rather than with the other, with the power of determining justiciable controversies where the opposing litigants have an inter-State or quasi inter-State character. It confers on the "residents" of different States the right—the constitutional right—of entering the Australian Court for the determination of contested claims, and is a right as valuable to a corporation as to an individual. The action, if tried within the State territory of the defendant, as it may be, is neither more nor less convenient to him than if the tribunal were a State tribunal. If tried in the State territory of the plaintiff, it is perhaps more convenient to the plaintiff but less convenient to the defendant than if the defendant's State forum were sought. And if for any special reason it is thought desirable to try the cause with or without a jury in a neutral State, the object of the constitutional provision is even more distinctly perceived.

What, then, is the proper meaning of the expression "residents of different States"—and where both opposing litigants are natural persons? I am in substantial accord with the opinion expressed by Sir *John Quick* and Sir *Robert Garran*, in their work on the Constitution (at p. 776). Residence in a State for the purpose of this section, in effect say those learned authors, should be interpreted as involving a suggestion of State membership, and of a character to identify the litigant to some extent with the corporate entity of the State. I would add (what I believe is implicit in their observations) that the identification by reason of residence of the litigant with

H. C. OF A. 1922.

AUSTRALASIAN TEMPERANCE AND GENERAL MUTUAL LIFE ASSURANCE SOCIETY LTD. v. HOWE.

Isaacs J.

one State connotes his exclusion from similar identification by reason of residence with any other State. If I were to express it in a word, it is "status." Every Australian is, when all the facts are known, residentially identifiable pre-eminently with some one State, and he is therefore a "resident" of that State, and of that State alone, for the purposes of sec. 75 (IV.). The expression "resident of another State," literally read, would include every person who in fact resided in another State, even though he also resided in the litigant State. But just as the word "another" requires exclusion of the litigant State by pointing to some distinct State, not being the litigant State, so when in the collocation of the sub-section that distinct State is indicated as "another State," it places that distinct State in the same position so far as the sub-section is concerned as the litigating State, and thereby excludes all other States. The expression is not negatively "non-resident of that State" or "a resident of another State or States," but simply and affirmatively "a resident of another State." For instance, a man has his family, his home, and his chief place of business in Melbourne; he opens a branch establishment in Adelaide and another in Perth, and personally lives in Perth and in Adelaide respectively a week in every month for the purpose of conducting the branch there. In one sense he "resides" in Adelaide and in Perth, and could be served with State process there. But even while there, can there be any doubt that for the purposes of sec. 75 (IV.) of the Constitution, his "quality," so to speak, or his "status" is a "resident" of Victoria. Unquestionably he would be so during the time he was not in Adelaide or in Perth, but does his character then change or does it remain constant? The American case of *Jones* v. *League* (1) affords some analogy where a natural person is concerned; and it is unnecessary to say more as to the American cases.

What difference in this respect exists in the case of a corporation? Here I have to test the provisional assumption I made earlier.

3. *Modern Legal Views as to Corporations.*—The Constitution bears date 1900. No doubt a few years on either side would make no appreciable difference as to the views held by Courts with respect to corporations being residents. But a great gulf lies between the

(1) (1855) 18 How., 76.

legal thought of that year and the legal thought of even half a century before, as to the legal personality of corporations and their investiture with the rights and liabilities of individuals. Without a due appreciation of that change one is apt to meet the problems of 1900 and to-day with the mental attitude fitting more suitably the circumstances of life of a former time when corporations occupied an entirely different place in the world's affairs. But before coming to the particular instance of "residence" in relation to a corporation and in order to understand it better—for that is only one instance of the change I refer to—the general movement is deserving of attention.

It is now firmly settled that a corporation is a real person. It is "a legal and artificial person" (*Colonial Building and Investment Association* v. *Attorney-General of Quebec* (1)). *Salomon* v. *Salomon & Co.* (2) established its reality: Lord *Herschell* (3) said it is "a distinct legal *persona*"; Lord *Halsbury* L.C. held it to be "a real thing" (4), and to have "a *real existence*" (5). The last fifty years, or even less, have witnessed a marked change in the attitude of legal thought towards corporations. From the early notions of abstraction (*Sutton's Hospital Case* (6)) and purely metaphysical existence, really a fictional existence, the convincing facts of life in commerce and in industry, the movements of corporations across the seas, their activities in various countries at the same time and particularly their constant suppression of individual action, have forced upon the Courts, by means of the wonderful adaptability of the common law, the abandonment of the notion of fictional existence and the recognition of the reality of corporations. And as these corporations more and more assume the functions of individuals, so more and more the law attributes to them conceptually and by analogy individual attributes in keeping with the social functions they are in fact performing. This is done on the one simple ground that "*corporations are for civil purposes to be regarded as persons, i.e., as principals acting by agents and servants*" (per Lord *Lindley* for the Privy Council in *Citizens' Life Assurance Co.* v. *Brown* (7)).

(1) (1883) 9 App. Cas., 157, at p. 166.
(2) (1897) A.C., 22.
(3) (1897) A.C., at p. 42.
(4) (1897) A.C., at p. 33.
(5) (1897) A.C., at p. 34.
(6) (1612) 10 Rep., 23a, at p. 32b.
(7) (1904) A.C., 423, at p. 426.

H. C. OF A. 1922.

AUSTRALASIAN TEMPERANCE AND GENERAL MUTUAL LIFE ASSURANCE SOCIETY LTD. v. HOWE.

Isaacs J.

Simple as this principle now seems, and deeply rooted in our law as it is when applied between individuals, its applicability has only in comparatively recent times been gradually recognized where corporations are concerned. The reluctance to apply it fearlessly in face of the artificial personality of a corporation has only been overcome by degrees; and, with great respect, it appears to me that is the chief cause of difference of opinion in this case. For instance, it was in 1842, in *Maund* v. *Monmouthshire Canal Co.* (1), that it was definitely decided that trespass to land would lie against a corporation for an act done by an agent within the scope of his authority. The notes of that case show how variously the matter was regarded—even so learned a writer on the subject of corporations as Mr. *Kyd* expressing an opinion against it on the ground that "the action supposes a *personal* act, of which the corporation is incapable in its collective capacity." This was, of course, clinging to antiquated doctrine; and, *Tindal* C.J. presiding, the Court ruled that a corporation was capable of trespass. In 1851, in *Eastern Countries Railway Co.* v. *Broom* (2), the question was raised by no less a person than *Willes*, then counsel, that an action of trespass for assault and battery does not lie against a corporation aggregate. *Blackstone* was cited as clear to that effect, and other authorities were relied on, all resting on the want of physical personality. The point was overruled. In 1859 the absence of physical personality was again the ground of objection: in *Green* v. *London General Omnibus Co.* (3) it was contended by *Giffard*, counsel for the company, that malicious acts could not be legally imputed to a company. *Sutton's Hospital Case* (4) and other cases were cited. Learned counsel said (5): "The question is how far the old rule of law in this respect is modified by the recent decisions on the subject." Opposing counsel began by saying (6): "The old doctrine as to corporations is no longer tenable." *Erle* C.J., in ruling for plaintiff, said (7): "The doctrine relied on by Mr. *Giffard*—that a corporation, having no soul, cannot be actuated by a malicious intention,—is more quaint than substantial."

Between the argument of Mr. *Giffard* in 1859 and the decision of

(1) (1842) 4 Man. & G., 452.
(2) (1851) 6 Ex., 314.
(3) (1859) 7 C.B. (N.S.), 290.
(4) (1612) 10 Rep., 23a.
(5) (1859) 7 C.B. (N.S.), at p. 294.
(6) (1859) 7 C.B. (N.S.), at p. 296.
(7) (1859) 7 C.B. (N.S.), at p. 302.

Salomon's Case (1) by Lord *Halsbury* L.C. in 1897—a period of forty-two years—a notable advance of legal thought had been made. But in the meantime the process was gradual. In 1867, in *Barwick* v. *English Joint Stock Bank* (2), *Willes* J., who as counsel had fifteen years before contended against liability for personal trespass, held a corporation liable for deceit, and that the fraud of its agent was properly described in law as the fraud of the corporation. In 1876 the case of *Owston* v. *Bank of New South Wales* (3) was heard in New South Wales, and so eminent a jurist as Sir *James Martin* C.J. held (4) that " malice, being essentially a state of mind, cannot be attributed to a corporation which has no mind." Two other Judges held the contrary on the ground of agency. In the Privy Council (*Bank of New South Wales* v. *Owston* (5)) their Lordships referred to the decision of *Alderson* B. in *Stevens* v. *Midland Counties Railway Co.* (6), decided in 1854, as supporting Sir *James Martin's* view. They did not determine it, because Mr. *Benjamin*, in view of recent decisions, abandoned the objection. In 1880, in *Edwards* v. *Midland Railway Co.* (7), the same question was again raised, and was fully considered by *Fry* J., and on the authority of *Green's Case* (8) he held against *Stevens's Case.* Nevertheless, in *Abrath* v. *North-Eastern Railway Co.* (9) Lord *Bramwell* stated his opinion to the contrary notwithstanding it was, as he said (10), " old-fashioned." In 1904, in *Citizens' Life Assurance Co.* v. *Brown* (11), the Privy Council, speaking by Lord *Lindley*, disagreed with Lord *Bramwell*, and agreed with *Willes* J. in *Barwick's Case.* In 1910 a decided advance was made in *Willmott* v. *London Road Car Co.* (12) by a very powerful Court of Appeal, consisting of *Cozens-Hardy* M.R., *Fletcher Moulton* L.J. and *Farwell* L.J. It was held that in a lease " a respectable and responsible person " included a corporation. I think it could be safely said that forty years earlier the opposite decision would have been the more probable. The arguments and judgments are illuminative of the modern view

(1) (1897) A.C., 22.
(2) (1867) L.R. 2 Ex., 259.
(3) (1876) Knox, 36.
(4) (1876) Knox, at p. 47.
(5) (1879) 4 App. Cas., 270, at p. 282.
(6) (1854) 10 Ex., 352.
(7) (1880) 50 L.J. Q.B., 281.
(8) (1859) 7 C.B. (N.S.), 290.
(9) (1886) 11 App. Cas., 247, at p. 250.
(10) (1886) 11 App. Cas., at p. 253.
(11) (1904) A.C., at p. 426.
(12) (1910) 2 Ch., 525.

H. C. OF A. 1922.

AUSTRALASIAN TEMPERANCE AND GENERAL MUTUAL LIFE ASSURANCE SOCIETY LTD. v. HOWE.

Isaacs J.

of corporations. Many instances of the course of progress I have endeavoured to indicate are mentioned. Lord *Cozens-Hardy* M.R. (1) says: "It seems to me that the better view (which I think is in accordance with *modern policy and the trend of all mercantile proceedings*) is to say that a company in a clause of this kind is a person who may be both respectable and responsible." It is to be noted that *Romer* J., in *Harrison Ainslie & Co.* v. *Corporation of Barrow-in-Furness* (2), had not yet arrived at that view. *Farwell* L.J. says (3):—"I am of the same opinion. We are considering the true construction of a clause in a lease of 1900. One has to remember that in the year 1900 the development of the one man company principle had gone very far and that limited companies were very numerous." I may observe that 1900 was the year of the Constitution. *Fletcher Moulton* L.J. put the test this way (4): "Now do the two epithets which qualify the word 'person' indicate that the narrower sense is to be given to the word; in other words, are they *so personal, so individual, that they preclude our including those artificial persons recognized by the law whom we call corporations.*" In *Daimler Co.* v. *Continental Tyre and Rubber Co. (Great Britain) Ltd.* (5) Lord *Parker* with reference even to the enemy character of a corporation took "agency" as the starting-point of analogy to a human personality. He said: "The acts of a company's organs, its directors, managers, secretary, and so forth, functioning within the scope of their authority, are *the company's acts* and may invest it definitively with enemy character." And then he went on to say that the same thing could be predicated of "control" by the corporators. By this decision "enemy character" was added to the list of analogies between corporations and human beings—worlds away from the doctrine of *Sutton's Hospital Case* (6). *Pratt* v. *British Medical Association* (7), where the question of malice on the part of a corporation was again suggested, contains a useful citation by *McCardie* J. of some cases showing the gradual recognition of a company's liability in that domain of jurisprudence.

4. *Residence as applied to a Corporation.*—I have now to consider

(1) (1910) 2 Ch., at p. 532.
(2) (1891) 63 L.T., 834, at p. 836.
(3) (1910) 2 Ch., at p. 536.
(4) (1910) 2 Ch., at p. 535.
(5) (1916) 2 A.C., 307, at pp. 340-341.
(6) (1612) 10 Rep., 23a.
(7) (1919) 1 K.B., 244, at p. 280.

the law with reference to the "residence" of a corporation. An individual can reside in but one place in the sense of having his "home"; but he can reside in several places in several of the numerous senses illustrated in *Stroud's Dictionary*. Why should this be different in the case of a corporation? There are two classes of cases which, when placed side by side, show clearly to my mind that in contemplation of law there is no essential difference *in this respect* between a natural person and a corporation, subject, of course, to the fact that one *person* is natural and the other artificial, and therefore not a physical presence, but what the law, adopting a legal conception, considers equivalent to physical presence applies in the case of a corporation. Where acts are so clearly physical as to be impossible except in the case of a human being, of course corporations are excluded. The *Pharmaceutical Society's Case* (1) illustrates this. A corporation cannot eat, drink or marry. But in the multitudinous instances where it can operate as well as a human being, there is room for the play of common law principles to keep pace with national progress. And so there are possible differences in the meaning of "reside" and its corresponding terms in the case of corporations.

Class I. of the cases referred to include *Newby* v. *Von Oppen* (2); *Haggin* v. *Comptoir d'Escompte de Paris* (3); *Russell* v. *Cambefort* (4); *La Compagnie Générale Transatlantique* v. *Thomas Law & Co.*; *La Bourgogne* (5); *Actiesselskabet Dampskib Hercules* v. *Grand Trunk Pacific Railway Co.* (6); *Okura & Co.* v. *Forsbacka Jernverks Aktiebolag* (7), and *Thames and Mersey Marine Insurance Co.* v. *Societa di Navigazione a Vapore del Lloyd Austriaco* (8). Before *Newby's Case* it was well established that a foreign company could trade in England (by comity—see *Bateman* v. *Service* (9)) and sue there. But as to suing it in England *Newby's Case*, in 1872, provisionally held that that was allowable where the foreign company traded there. In 1889 this was followed in *Haggin's Case*, and finally established in 1899 in *La Bourgogne*. In *Okura & Co's Case* and the *Thames and Mersey Case* it was very clearly dealt

(1) (1880) 5 App. Cas., 857.
(2) (1872) L.R. 7 Q.B., 293
(3) (1889) 23 Q.B.D., 519.
(4) (1889) 23 Q.B.D., 526.
(5) (1899) A.C., 431.
(6) (1912) 1 K.B., 222.
(7) (1914) 1 K.B., 715.
(8) (1914) 111 L.T., 97.
(9) (1881) 6 App. Cas., 386.

H. C. OF A. 1922.

AUSTRAL-ASIAN TEMPERANCE AND GENERAL MUTUAL LIFE ASSURANCE SOCIETY LTD. v. HOWE.

Isaacs J.

with, and I know of no more explicit exposition of the matter than is contained in the judgments of Lord *Wrenbury* and Lord *Phillimore* (as they are now) in *Okura & Co.'s Case* (1). The *Thames and Mersey Case* (2) completed the position by indicating what, in the case of the company represented in England by an agent instead of its own officers, would for the purpose then in hand constitute its presence in England.

The matter, *so far*, may be thus summarized:—(1) A natural person may be served with a writ if found in England, that is, if he is "there." (2) A company, like an individual, may be served with a writ if it is "there." (3) Being an artificial person, it can be "there" only metaphorically or as a legal conception. (That, I apprehend, is what Lord *Halsbury* means when he said, in *La Bourgogne* (3), the appellants are resident here "in the only sense in which a corporation can be resident," and what Lord *Phillimore* (then *Phillimore* L.J.) meant when he said, in *Okura & Co's Case* (4), "in the case of a trading corporation residence means the carrying on of its business"—Lord *Phillimore*, of course, did not intend to run counter to standing decisions of the House of Lords.) (4) A company is "there" metaphorically when it carries on its business there, because "residence" is a recognized term applied to corporations, and the physical act of carrying on its business by individuals is indispensable to the company's "residing" at all. (5) "Residing" is for this purpose not a term found in any document: it is used in judgments only and merely to see whether the corporation is "there"; if it is, it can be served (Lord *Wrenbury* (then *Buckley* L.J.) in the *Actiesselskabet Case* (5)). (6) But the company for this purpose "carries on its business" in England not merely when it does so in its own premises, by its own officers, but also when (a) it carries out there a subsidiary object, as raising of money to run a railway in Canada (*Actiesselskabet Case* (5)), or (b) a person carrying on his own business in his own premises does as a general agent of the company in a special part of his premises systematically make by its authority

(1) (1914) 1 K.B., 715.
(2) (1914) 111 L.T., 97.
(3) (1899) A.C., at p. 433.
(4) (1914) 1 K.B., at p. 722.
(5) (1912) 1 K.B., at p. 227.

contracts between the company and the public (*Thames and Mersey Case* (1)).

The last-mentioned proposition, number 6, indicates two things. On the one hand it indicates that the metaphorical "residence" of the company is far removed from the notional "home" of an individual, the political attribution which his status as a "resident" creates. On the other hand it indicates that the legal conception of "residence" spoken of is the mere presence as a legal conception required for service of process, which in the case of an individual would be satisfied by his momentary physical presence if then found. Reference may, on this point, be usefully made to the observations of Lord *Cranworth* L.C. in *Carron Iron Co.* v. *Maclaren* (2).

Class II. of the English cases are not doubtful. Before mentioning them it is well to bear in mind the case already mentioned, the *Actiesselskabet Case* (3), where Lord *Wrenbury* is careful to say that the Court has not in the first class of cases to interpret the word "reside." In the second class that word has to be interpreted, and we find that, even when a company is concerned, the signification of "reside" or "resident" is found not by a rigid and invariable reference to carrying on business, but by the object and scope of the enactment. This class of cases includes such as *Attorney-General* v. *Alexander* (4); *Cesena Sulphur Co.* v. *Nicholson* (5); *Jones* v. *Scottish Accident Insurance Co.* (6); *San Paulo (Brazilian) Railway Co.* v. *Carter* (7); *De Beers Consolidated Mines Ltd.* v. *Howe* (8), and *New Zealand Shipping Co.* v. *Stephens* (9). This, without more, is a very formidable list, and, what is very material, the *cases deal directly with the word "reside" or "resident" where found in a document in relation to a corporation.* It may at once be said that they are entirely repugnant to the idea of any restriction of that word to the mere "carrying on of business," which would suffice to make the company "resident" in the parlance of judgments dealing with service within the jurisdiction.

In *Attorney-General* v. *Alexander* (4) the question turned on

(1) (1914) 111 L.T., 97.
(2) (1855) 5 H.L.C., 416, at p. 444.
(3) (1912) 1 K.B., at p. 227.
(4) (1874) L.R. 10 Ex., 20.
(5) (1876) 1 Ex. D., 428.
(6) (1886) 17 Q.B.D., 421.
(7) (1896) A.C., 31.
(8) (1905) 2 K.B., 612; affd. (1906) A.C., 455.
(9) (1906) 96 L.T., 50, per *Bray* J.; affd. (1907) 24 T.L.R., 172 (C.A.).

H. C. OF A. 1922.

AUSTRAL-ASIAN TEMPERANCE AND GENERAL MUTUAL LIFE ASSURANCE SOCIETY LTD. v. HOWE.

Isaacs J.

whether the Imperial Ottoman Bank "resided" in England. It was incorporated in Turkey and established as a State bank for the Ottoman Empire with its central administration in Turkey. Unquestionably it had a branch or agency in London, conducted, not by strangers, but by a committee of the bank and an English sub-committee in the bank's own premises, and the business done there was the ordinary business of bankers. But upon the construction of the word "residing" in the *Income Tax Act* it was held that the bank was not residing in England. *Kelly* C.B. said (1): "Now, I am clearly of opinion that upon the case now before the Court, the Imperial Ottoman Bank cannot be said to be 'resident' in this country; that the business carried on in London is a mere branch or agency, and not the bank itself; and that London is not *the chief seat of carrying on the business of the bank.*" He refers to the charter of incorporation, and says: "If, therefore, this corporation can be said to be resident anywhere, I am of opinion that it must be *resident in Constantinople*, where alone it has its '*seat*,' under the express terms of the charter; and the branches or agencies, which it establishes in London, Paris, or elsewhere, are not the establishment, *the bank itself*, but only branches of that bank which has its seat at Constantinople." *Cleasby* B. (2) thought the bank was not even "carrying on its business" in London, but conceded that "some of its business is carried on here" and, nevertheless, thought it was not "resident" for the purpose in hand. *Amphlett* B. said (3):—"What, then, is the reasonable meaning of a corporation residing anywhere? It appears to me that it is this, that a corporation may be said to reside *wherever it has its seat.*" The Court therefore decided that the "seat" of the company—not necessarily the place of incorporation, because the Court looked further into the facts to find the actual seat of the company—determined its place of "residence" in the sense appropriate to the *Income Tax Act*. The *Cesena Case* (4) is doubly important because it has been approved by the House of Lords. *Huddleston* B. (5) referred to *Alexander's Case*, and followed it. His words (6)—"The artificial

(1) (1874) L.R. 10 Ex., at p. 30.
(2) (1874) L.R. 10 Ex., at p. 33.
(3) (1874) L.R. 10 Ex., at p. 34.
(4) (1876) 1 Ex. D., 428.
(5) (1876) 1 Ex. D., at p. 453.
(6) (1876) 1 Ex. D., at p. 454.

residence which must be assigned to the artificial person called a corporation is the place where *the real business* is carried on. The difficulty is in applying *that principle* to the facts of each case"—are manifestly subsequently adopted in the *De Beers Case* (1). The learned Baron proceeds to deal with the onus of proof, and indicates what it is the Court must be satisfied of as a matter of fact. He states it thus: "Then I have to ask myself where was the place where *the real and substantial business* was carried on—where was *le centre de l'entreprise*, the central point?" And he answers it for that case on the facts. I emphasize that portion of the learned Baron's judgment because by and since the *De Beers Case* it seems to be finally accepted *as the law—the principle of law* determining the true "residence" of a company, apart from the so-called "residence" for territorial submission to the territorial jurisdiction of a Court and in respect of its acknowledged judicial power. *Jones's Case* (2) is notable for two reasons: first, because for the purpose in hand an individual carrying on business was regarded as "residing" at the principal place where he carried it on and not at his branches; next, by analogy, a Scottish insurance company having its principal place of business in Scotland with several branches in England and even a chief office for England in London, was held not to come within the words "ordinarily resident" in England. (*Judicature Rules*, Order XI., r. 1.) In the *San Paulo Case* (3) the observations of Lord *Halsbury* L.C. at pp. 38-39, of Lord *Watson* at pp. 41-42, and of Lord *Davey* at p. 43, are to the same effect, and support the *Cesena Case* (4). They show the two senses in which the expression "carry on business" is used; and they show very distinctly that the meaning to be given to "resides" when interchanged with "carrying on business" depends on the particular sense in which the latter expression is used. The *De Beers Case* (5) is most valuable, and, as I think, decisive. *Collins* M.R., after referring to cases of the *La Bourgogne* type as wholly opposed to the argument of counsel that a foreign corporation could not in any sense reside in England, proceeded (6): "It may

(1) (1906) A.C., 455.
(2) (1886) 17 Q.B.D., 421.
(3) (1896) A.C., 31.
(4) (1876) 1 Ex. D., 428.
(5) (1905) 2 K.B., 612; (1906) A.C., 455.
(6) (1905) 2 K.B., at p. 637.

H. C. OF A. 1922.

AUSTRAL-ASIAN TEMPERANCE AND GENERAL MUTUAL LIFE ASSURANCE SOCIETY LTD. v. HOWE.

Isaacs J.

be, no doubt, that a residence which would be sufficient for the purposes of service would not be such as to bring a foreign corporation within the operation of a taxing Act" (I would interpose *à multo fortiori* as to a Constitution). *Cozens-Hardy* L.J. (1) says the same thing. There is no doubt in the minds of those learned Judges that "residence" of a corporation does not always mean the same thing. Then, in the House of Lords, Lord *Loreburn* L.C. (2) laid down the law in terms which I consider so important for the interpretation of the Constitution that I venture to quote the whole relevant passage. The learned Lord Chancellor says first: "Now, it is easy to ascertain where an individual resides, but when the inquiry relates to a company, which in a natural sense does not reside anywhere, some artificial test must be applied." Then comes what I regard as the important statement of the law:—"In *applying the conception of residence to a company, we ought, I think, to proceed as nearly as we can upon the analogy of an individual.* A company cannot eat or sleep, but it can keep house and do business. We ought, therefore, to see where it really keeps house and does business. An individual may be of foreign nationality, and yet reside in the United Kingdom. So may a company. Otherwise it might have its *chief seat* of management and its *centre* of trading in England under the protection of English law, and yet escape the appropriate taxation by the simple expedient of being registered abroad and distributing its dividends abroad. The decision of *Kelly* C.B. and *Huddleston* B. in the *Calcutta Jute Mills Co.* v. *Nicholson* (3) and the *Cesena Sulphur Co.* v. *Nicholson* (4), 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.*" That would be idle talk if the only test were where the company carries on business in the sense sufficient for the cases of Class I. Then the Lord Chancellor proceeds to say that, applying that rule to the case, it becomes a mere question of fact whether the circumstances answer it. Lord

(1) (1905) 2 K.B., at p. 643.
(2) (1906) A.C., at p. 458.
(3) (1876) 1 Ex. D., 437.
(4) (1876) 1 Ex. D., 428.

Macnaghten, Lord *Robertson* and Lord *Atkinson* contented themselves with simple agreement. Lord *James of Hereford's* reasoning was practically in accord with that of the Lord Chancellor. In *New Zealand Shipping Co.* v. *Stephens* (1) the company did one-third of its freight business in Great Britain, but, in order to see whether the company was "resident" there, neither *Bray* J. nor the very eminent Court of Appeal thought it sufficient to rest on the fact that the company "carried on business" there, or, in other words, was "there." *Bray* J. considered the facts by the light of the principle laid down in the *De Beers Case* (2) and found that "the real business" was carried on in London, and that "the central management and control abided there." The Court of Appeal affirmed this decision, and the judgment of the Master of the Rolls shows that the rule as stated by *Bray* J. was the proper rule by which to gauge the facts. There is one learned author whose eminence entitles me to quote his work—Lord *Lindley* in his work on *Companies* (6th ed., vol. II., at p. 1223) summarizes the law even before the *De Beers Case* precisely as stated in that case by the House of Lords. He there points out that the view presented is that taken not only by the decision of English Courts, but also by the most recent writers on international private law; and that is the aspect appropriate to the present question. On the next page he refers to the residence for the purpose of service of writs.

The *Steam Packet Co.'s Case* (3), as I may call it for brevity, has close application to the matter we are considering. A Jamaica Act regulating procedure in the Supreme Court provided that "In any action against *a person residing* out of Jamaica it shall be lawful . . . to order that service of the writ . . . may be made" on some person in Jamaica. The question was whether the Act applied to a corporation. The Privy Council decided in the affirmative, and laid down several propositions. It is, of course, undeniable, and I think I may add common ground, that the word "resident" is short for "person who is a resident"; for nothing else can be meant. Animals and inanimate objects are of necessity excluded. The only question at

(1) (1906) 96 L.T. 50; (1907) 24 T.L.R., 172.
(2) (1905) 2 K.B., 612; (1906) A.C., 455.
(3) (1877) 2 App. Cas., 381.

H. C. OF A. 1922.

AUSTRAL-ASIAN TEMPERANCE AND GENERAL MUTUAL LIFE ASSURANCE SOCIETY LTD. v. HOWE.

Isaacs J.

issue on this branch is whether "resident" is confined to a *natural* person. Now, starting with the common position that "resident" means "a person who is a resident"—which is exactly equivalent to the words "person residing" in the Jamaica Act—the common law propositions laid down by the Privy Council in the *Steam Packet Co.'s Case* (1) do, as I venture to think, conclude the question I am now considering. I formulate those propositions, giving as authority the words of the judgment in quotation:—(1) *At common law "person" primâ facie includes a corporation.* "It was contended for the appellants that the enactment in the 19th section applied only to natural persons; but their Lordships see no reason thus to limit its operation. 'Person,' when used in a legal sense, is an apt word to describe a corporation as well as a natural person" (2). (2) *To limit the word to natural persons, there must be found something in the enactment*, either in words or object, showing *the intention* to do so. "Nothing in the context, nor in the object of the enactment in question, indicates an intention to limit its application to the latter. The purpose was to enable those who entered into contracts in *Jamaica* with persons residing out of the island, but carrying on business by means of agents there, to sue them on such contracts in the Supreme Court of the Colony. It is obvious that this power is as necessary and convenient in the case of corporations as in that of natural persons" (2). (3) "Residence" and "domicile" *do not indicate a limitation to natural persons*—but are *primâ facie* as *applicable to corporations as to natural persons.* "It was argued that the words 'residing out of Jamaica' indicated an intention to confine the provision to the latter; but the word 'residing' is no more inapplicable to a corporation than 'domicile,' which is frequently used with regard to the supposed local habitation of corporate bodies" (2). (4) These conclusions are based on the common law and independently of any interpretation Act. "It is not necessary, in their Lordships' view, to resort to this clause" (of the Interpretation Act) "to support the construction they are disposed to put on the word 'person' in the Procedure Law" (3). Having regard to the whole circumstances, some particularly to be mentioned presently, but including the absurd and unjust effect of a

(1) (1877) 2 App. Cas., 381. (2) (1877) 2 App. Cas., at p. 386.
(3) (1877) 2 App. Cas., at p. 388.

contrary view in relation to sec. 100 of the Constitution—as to which, I think it sufficient to say, I respectfully dissent from the views expressed in the judgments of my learned brothers—not only is there no reason for excluding corporations, but there is very strong reason for including them.

5. *Corporations as "Residents."*—This is the last link in the long chain of consideration which, in the circumstances, I have found necessary to pursue to establish the law of the case. Is the noun "resident" so exclusively human in its signification that it is legally unsuitable for a corporation without express application? Once admit, as the cases cited unmistakably force us to admit, that it is proper to say, in legal terms, of a corporation that "it is here," that it has a "local habitation" (1), that it has a "residence," say in Victoria, and that it "resides," say in New South Wales, and that it is "resident," and that all this is by force of common law principles recognized by the Courts, and at times recognized by the Legislature, facing the facts of life; what frontier line of legal or practical thought can separate the two phrases "the corporation is resident" and "the corporation is a resident"? I frankly can see none, and, therefore, cannot judicially draw one. But I am not alone in that inability. I shall take one class of cases, namely, the English income tax cases, because there the Legislature has specifically used the words "residing" and "resident" in Schedule D to the *Income Tax Act* 1918. The words are: "any person residing in the United Kingdom" and "any person . . . although not resident." That is to say, those words are used in the participial or adjectival form only; nowhere does the word "resident" appear as a noun.

Now, the question is whether men accustomed to ordinary English and especially to accurate legal English would think it appropriate or inappropriate to speak of corporations coming under those provisions as "residents," substantively or not. First, I shall refer to the well-known work *Dowell on the Income Tax*. As early as the 3rd ed. (1890), at p. xiii., he says: "The income tax has for object the taxation of income from every source in the United Kingdom and the income of '*residents*' from sources out of the Kingdom." In the

(1) (1905) 2 K.B., at p. 640.

H. C. OF A. 1922.

AUSTRALASIAN TEMPERANCE AND GENERAL MUTUAL LIFE ASSURANCE SOCIETY LTD. v. HOWE.

Isaacs J.

5th ed. (1902) he says, at pp. xlv. and xlvi., speaking of Pitt's Act of 1799 :—"The tax was charged throughout Great Britain, upon: 1. Absentees . . . 2. Residents . . . ." Then "Absentees were defined as British subjects not resident in Great Britain; *Residents*, as persons residing in Great Britain, and every body, politic or corporate, company, fraternity or society of persons, whether corporate or not corporate, in Great Britain." That is repeated in the 8th ed. (1919), at p. lxv. The "noun" resident was not used in the Act, nor was the word "resident" even as an adjective attached to corporations. Now I turn to Judges; and these references are practically taken at haphazard. In the *De Beers Case* (1) Lord *Collins* (then *Collins* M.R.), speaking of corporations with reference to Order IX., r. 8, says of the cases as to service upon them: "It was necessary, in order to establish the right to treat the foreign corporation as within the jurisdiction, to bring it within the law applicable to *residents* in this country." The learned Master of the Rolls apparently saw no inaccuracy in including corporations among "residents" for that purpose. In 1912, in *American Thread Co.* v. *Joyce* (2), *Fletcher Moulton* L.J. says :—"Now the question where an artificial person like a corporation resides is clearly not a pure question of fact. It would not be so even in the case of an individual. It is a pure question of fact whether an individual was in a house on a particular day or on a particular series of days, but you cannot say whether those acts or presence are sufficient to make him *a resident* in that house until you know what in the eye of the law is sufficient and is necessary to constitute residence. If that is true of an individual, it must be still more evidently true in the case of a corporation in which the word residence cannot in any very natural sense be applied." There, although the words "a resident" are not directly attached to the corporation, there is sufficient to indicate that they are used indiscriminately with "resident" as an adjective, in relation to both individuals and corporations. In *Mitchell* v. *Egyptian Hotels Ltd.* (3) Lord *Sumner* is even more direct. He says :—"My Lords, where *a resident* in the United Kingdom is proprietor of a profit-earning business wholly situate

(1) (1905) 2 K.B., at p. 637. (2) (1912) 6 Tax Cas., 1, at p. 30.
(3) (1915) A.C., 1022, at p. 1039.

and carried on abroad he is chargeable to income tax under case 5 of Schedule D if he takes no part in earning those profits, and, if he takes any part, is chargeable under case 1. *This is true whether the proprietor is a natural or an incorporated person*; whether he takes part in earning the profits in his own person or only by agents or servants." In 1917, in the case of *John Hood & Co.* v. *Magee* (1), *Kenny* J. says:—"The second section of the *Income Tax Act* of 1853 (16 & 17 Vict. c. 34) deals with two potential income tax payers—*the resident* in the United Kingdom and the *non-resident*. *A resident* in the United Kingdom is liable for income tax in respect of the profits from any trade, no matter where the latter may be carried on, whether in the United Kingdom or elsewhere, while a *non-resident* in the United Kingdom," &c. These words were in relation to a company, income tax case depending on "residence." In *Gillette Safety Razor Ltd.* v. *Inland Revenue Commissioners* (2) the question was whether the Gillette Safety Razor Ltd. of England was liable to income tax as agents for a Boston company called the Gillette Safety Razor Co. The Attorney-General (now Lord *Hewart* C.J.) said (3): "Looking at the substance and not at the form of the arrangement" between the two companies, "the business is not the business of *the resident* but of the *non-resident*, and the Act provides that in that case the *non-resident* shall be chargeable to income tax in the name of *the resident*. If it is fair that a *non-resident* should be chargeable to income tax in the name of a *resident* there is no reason why he should not also be liable to excess profits duty in the name of a *resident*." *Rowlatt* J. says (4): "Sec. 31 by sub-sec. 1 extends somewhat the chargeability of a *non-resident*." When the section is looked at, it is observed that even the Imperial Legislature sees no reasonable objection to using the nouns "the resident" and "the non-resident" as interchangeable with the adjectives "the resident" and "the non-resident" followed by the noun "person," and as including a company. And, what is more, the governing words of the section apply the noun "non-residents" to the Act of 1842, not by way of arbitrary definition but as the highest recognition of the common

(1) (1918) 2 I.R., 34, at p. 50.
(2) (1920) 3 K.B., 358.
(3) (1920) 3 K.B., at p. 371.
(4) (1920) 3 K.B., at p. 373.

H. C. OF A. 1922.

AUSTRALASIAN TEMPERANCE AND GENERAL MUTUAL LIFE ASSURANCE SOCIETY LTD. v. HOWE.

Isaacs J.

speech of the people in that connection, confirming the use of the word by Mr. *Dowell* at least as early as 1890. As an indication of the common understanding the head-note of the case also uses the word "non-residents." It is not out of place—as a similar indication—to note that Sir *Robert Garran* and Sir *John Quick* in their *Annotated Constitution* thought there was nothing abnormal in applying the noun "residents" to corporations (see p. 777).

I am therefore justified in formulating the matter in this way:—(1) A natural person is a "resident of a State," in the sense required by sec. 75 (IV.), if by reason of his residential connection with that State he can be properly said to be identified with it as contrasted with all other States. That is, where in fact the nature of his residence (say) in Queensland shows it is his real "home," and so gives him the *status* of a Queenslander, rather than that of a New South Welshman or of a member of any other State. (2) A corporation as an artificial person may be a "resident" of a State within the meaning of the constitutional provision. (3) The "residence" of a corporation for that purpose must be ascertained by a process as nearly as possible analogous to that for a natural person as the law permits, by finding its "home" or "seat of authority." (4) The place of its "home" or "seat of authority" is in every case dependent on the facts as applied to the relevant law. In some cases the facts may be complicated. The birthplace of the trading corporation is one factor, the site of its production is another, the place where the directorate meets is another, but the quest is always to find its real "residence" by the rule stated by Lord *Loreburn* (1), namely, that "the real business is carried on where the central management and control *actually* abides."

It remains, however, to be determined whether this corporation is upon the facts a resident of some State, and, if so, of a "different State," that is, other than the defendant's State of New South Wales.

6. *The Facts.*—The plaintiff was incorporated in Victoria in 1876 under the *Companies Act* 1864. Its head office is in Victoria, where it holds its annual meetings of shareholders, and where the directors meet and reside. Its business extends throughout Australia. It may extend its business to any part of the world (clause 5 of memorandum). It was registered in 1917 in New South Wales under

(1) (1906) A.C., at p. 458.

the *Companies (Amendment) Acts* of that State *as a Victorian company* carrying on business in New South Wales. It has a public officer in New South Wales, appointed by the directors in Victoria. Local directors for New South Wales have been appointed under art. 57 (b), which, however, provides that "local directors, agents," &c., shall at all times be under the "control and government of the board of directors." The company by the Victorian board of directors has also, as a "foreign company," appointed for Western Australia a person resident there as general agent. In South Australia, Queensland and Tasmania it carries on business in its own offices with local managers. All its local managers in States other than Victoria are controlled by and subject to instructions from the head office in Melbourne. Investments are submitted to and dealt with in Victoria. All documents are executed by the board in Melbourne, and nowhere else. Proposals are transmitted to Melbourne, and dealt with there. There can be no possible doubt the plaintiff is in very truth "a Victorian company" created and equipped by the law of that State, having its central administration and its direction in Victoria, with branches in the other States controlled and in all important matters constantly directed from Victoria. Its "home" is in Victoria beyond all question, and, if "resident" in sec. 75 (IV.) means "having one's home," no rational doubt can exist that the company is "resident" in Victoria and in no other State. According to the law of New South Wales this company is in that State regarded as among "foreign companies" (see the heading to Part III. of the *Companies Act* 1906 (No. 22)) although "carrying on business in New South Wales."

The facts narrated show, in my opinion, beyond contest that the company's "home" or "seat of authority" is in Victoria and nowhere else; and, therefore, according to overwhelming authority its true "*residence*" for this purpose is in that State alone.

In these circumstances, I am unable to see any room for doubt, and, in my opinion, the question in the special case should be answered in the affirmative.

HIGGINS J. The plaintiff, a life assurance society, has issued a writ for foreclosure of a reversionary interest mortgaged by the

H. C. OF A. 1922.

AUSTRALASIAN TEMPERANCE AND GENERAL MUTUAL LIFE ASSURANCE SOCIETY LTD. v. HOWE.

Higgins J.

defendant. The Society was incorporated in Victoria, and the defendant resides in New South Wales. On motion for judgment the Chief Justice reserved for the consideration of this Full Court a question of jurisdiction: Are the plaintiff and the defendant residents of different States within the meaning of sec. 75 (IV.) of the Constitution? If the answer be No, the High Court has no original jurisdiction in the matter.

The plaintiff Society was incorporated in Victoria in 1876 as a company limited under the *Companies Act* 1864 (now 1915) by guarantee; but, in pursuance of its memorandum and articles, it has established branches and carried on business in each of the five other States. It has local directors and a general agent in New South Wales, and is registered as a Victorian company carrying on business there. It acts through a general agent under power in Western Australia. In South Australia it is registered under a local Act and acts through an attorney under power. In Queensland it is registered under a local Act; likewise in Tasmania. All documents requiring the company's seal have to be executed by the Victorian board; all suits must be authorized by that board; all investments must be approved by it. There is no seal of the company except that in Melbourne.

Sec. 75 of the Constitution provides that "in all matters . . . (IV.) between States, or between residents of different States, or between a State and a resident of another State . . . the High Court shall have original jurisdiction." Are the plaintiff Society and the defendant "residents of different States"? Unless we are coerced by British legislation to apply the word "residents"—the noun—to a corporation, a corporation that was formed under the *Companies Act* for the purpose of carrying on business in "any part of the world" (memorandum, clause 5), a company that has for its object the acquisition of gain to the company or to its individual members (Victorian *Companies Act* 1915, sec. 9), it would seem obvious that an artificial entity of such a kind could not be called "a resident" of any State. In the *Standard Dictionary* "residence" is said to mean "the place or the house where one resides; domicile; abode; habitation; home": and "resident" means "one who or that which resides, in any sense." *Murray's Dictionary*

defines "residence" as meaning "the place where one resides; one's dwelling-place; the abode of a person": and a "resident" is "one who resides permanently in a place." In interpreting Acts of Parliament it is not usual to accept metaphorical or transferred meanings. Shakespeare speaks of chasing the royal blood "with fury from its native residence," and Milton speaks of "fish within their watery residence." But "a resident," in ordinary language, implies a person of flesh and blood—or, at the very least, an animal. The word does not apply to a comet, or to wind, or to an abstraction, or to a fictitious entity. As stated in *Cesena Sulphur Co.* v. *Nicholson* (1), a case of British income tax, "the use of the word 'residence' is founded upon the habits of a natural man, and is therefore inapplicable to the artificial and legal person whom we call a corporation. But *for the purpose of giving effect to the words of the Legislature* an artificial residence must be assigned to this artificial person, and one formed on the analogy of natural persons. There is not much difficulty in defining the residence of an individual; *it is where he sleeps and lives.*" In other words, a corporation is not, in ordinary parlance, "a resident" anywhere; but if, as in the case of the British Income Tax Acts (see *infra*, and 5 & 6 Vict. c. 35, secs. 1, 40 and 54), an Act clearly applies, for its purposes, such expressions as "residing" or "resident" to corporations, the Courts must find some artificial meaning for the expression as so applied. There is no such Act here.

But the provision of sec. 75 of the Constitution, that the High Court is to have original jurisdiction in matters "between residents of different States," has a history. In the Constitution of the United States the judicial power extends "to all cases, in law and equity . . . between *citizens* of different States." As Rousseau pointed out, in a note to his *Contrat Social*, the title of "citizens" is not applied to the *subjects* of a prince, not even to British subjects. Our Constitution has substituted "residents" for "citizens," avoiding the republican implication (see sec. 117 which uses the expression "a subject of the Queen, resident in any State"). In the United States the provision has had some unexpected developments, so that at the present day corporations are treated as citizens of the

(1) (1876) 1 Ex. D., at p. 452.

H. C. OF A. 1922.

AUSTRALASIAN TEMPERANCE AND GENERAL MUTUAL LIFE ASSURANCE SOCIETY LTD. v. HOWE.

Higgins J.

State where they were created. It appears that until 1844 corporations were allowed to sue and be sued under this provision of the Constitution in the Federal Circuit Courts, but only when all the members of the corporations were citizens of the State which created the corporation; but in 1844 it was held to be sufficient to sustain the exercise of jurisdiction by the Federal Courts under this provision if the corporation was created by a different State from that of which the opposite party was a citizen. The Courts held that it must be conclusively presumed that the members of a corporation created in Kentucky are citizens of Kentucky (*Shaw* v. *Quincy Mining Co.* (1)). That case turned on the interpretation of a Judiciary Act of 1887. The Act provided that "where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district" within a State "of the *residence* of either the plaintiff or the defendant"; and therefore a corporation created in Michigan could not be sued in a New York Federal Court by a citizen of Massachusetts. By doing business in New York, the corporation did not acquire a residence there. As I understand, even if all the business of a company created in Michigan were done in New York, the company is not to be regarded as either a citizen or a resident of New York. Unlike natural persons, a corporation under American law cannot change its "residence"; its "residence," and its only residence, is in the place where it was created.

If, therefore, we are to follow the American cases, we find ourselves face to face with extraordinary results. Not only must we treat a corporation as a "citizen" (if our Constitution had used that word), but we must treat it as "a resident," and even as "a resident" of the State which created it, not of the State or States in which it carries on its activities. Now, our first duty in dealing with such an expression as "a resident," as it is not a legal or technical term, is to give it such a meaning as it has in common language—*uti loquitur vulgus* (*Attorney-General* v. *Winstanley* (2), per Lord *Tenterden*; *The Fusilier* (3), per Dr. *Lushington*). We are to construe such words "as they are understood in common language." There

(1) (1892) 145 U.S., 444.
(2) (1831) 2 Dow & Cl., 302, at p. 310.
(3) (1864) 34 L.J. Adm., 25, at p. 27.

may be force in the argument that where we have copied the words of the United States Constitution the words should *primâ facie* receive the interpretation which the United States Courts have put upon those words—that we have taken the words with their interpretation. But in sec. 75 we have not taken the same words: "between *citizens* of different States" is not the same as "between *residents* of different States." Moreover, when the Supreme Court of the United States approached the case of *Shaw* v. *Quincy Mining Co.* (1) it had to face previous decisions which laid it down that corporations were "citizens" within the judicial power; and the Court was forced, in expounding the *Judiciary Act* of 1887, to give some meaning to the word "residence" as applied to corporations. Our Court is not under any such logical pressure; we are free to give the phrase used in sec. 75 its ordinary meaning in popular speech. We have no right to twist the meaning of the language used in sec. 75 by analogy to the construction put upon the words used in the United States; we have no right to say that as a corporation in the United States is treated as a citizen of the State where it was incorporated, therefore, under our Constitution, a corporation is to be treated as a "resident" of the State where it was incorporated. "Residence" is a mere question of fact; "citizenship" has legal implications; domicile is an idea of law (*Westlake's Private International Law*, 5th ed., p. 335).

The whole of the argument for the plaintiff is really based on the assumption that the noun "resident" or "residents" must necessarily be applicable to corporations, and that the Court *must* find a meaning for the word as applied to corporations. It is assumed, in fact, that the British Parliament must necessarily have intended by sec. 75 (IV.) of the Constitution to give the same exceptional jurisdiction to the High Court in cases where corporations are concerned as in cases where natural persons are concerned. I can find no valid ground for this assumption; it is wholly based on conjecture as to what a Parliament would be likely to do. What justification is there for finding any such *necessary* intention? Assuming that the scheme would be more symmetrical and complete if the jurisdiction attached not only as between "residents" in different

(1) (1892) 145 U.S., 444.

H. C. OF A. 1922.

AUSTRALASIAN TEMPERANCE AND GENERAL MUTUAL LIFE ASSURANCE SOCIETY LTD. v. HOWE.

Higgins J.

States but as between corporations created in different States, or as between corporations whose principal place of administration is in different States, it does not follow that the phrase should be read as if such words were inserted. The scheme is not symmetrical or complete even if such words were inserted; for, as is admitted, a resident of a Territory cannot sue in the High Court a resident of a State. So, too, sec. 117 does not prevent a State from imposing disabilities on subjects resident in the Territories; and it would seem that, as in the United States, a State may impose disabilities on corporations created in another State though not on citizens of the other State (*Ducat* v. *Chicago* (1)). But it is not for this Court to add to the Constitution what we may think to be desirable for symmetry. If we could consider what is desirable, we might think that if a resident of New South Wales or of Tasmania can sue this Victorian company or be sued by it in the High Court, a resident of Victoria should have the same privilege or burden. We might think that the jurisdiction given in matters "between residents of different States" is a piece of pedantic imitation of the Constitution of the United States, and absurd in the circumstances of Australia, with its State Courts of high character and impartiality. According to *Story and Black* (*Constitutional Law*, 2nd ed., p. 140), the reason for giving to the Federal Courts jurisdiction of controversies between citizens of different States was the apprehension that a citizen sued in Courts of his own State by a non-resident might be able to prevail unjustly in consequence of his local influence, or the prejudice against citizens of other States, or State pride and jealousy. The result of sec. 75 is that an action on a bill of exchange or for breach of promise of marriage may be brought in the High Court if one party happens to be a resident of Wodonga and the other of Albury, but not if one party lives at Albury and the other at Ballina. It appears that actions "between residents of different States" far outnumber all other classes of actions in the Circuit Courts of the United States. But it is not for us to improve the Constitution in either direction; we must act on the words of the Constitution as they stand. If the High Court is to entertain actions "between residents of different States," whatever be the nature of the action, it must do so; but

(1) (1870) 10 Wall., 410.

there is no reason why we should entertain actions between fictitious entities which are not " residents " of different States on the ordinary interpretation of the words.

It is unfortunate that the special case has to be determined without the assistance of an argument from the defendant. The main argument for the plaintiff is that we must treat a corporation as " a resident " of the State where it was created and carries on its principal administrative business. In my opinion, to do so would be to alter the Constitution, not to interpret its words ; whatever the words " residents of different States " mean, they do not mean creations of different States, nor do they refer to the system of administration. Several cases have been cited to us as establishing that a trading company has a " residence " at the place where its principal administrative business is carried on. The cases, when examined, establish no such general proposition. The case of *Taylor* v. *Crowland Gas and Coke Co.* (1) was merely a decision as to the interpretation of the *County Courts Act* (9 & 10 Vict. c. 25, sec. 128). A defendant (including a company) could be sued under the Act in a County Court ; the County Court must be within twenty miles of the place where the defendant " *dwells or carries on his business* " ; and it was said that a company could be sued in a County Court which was within twenty miles of the place where the company carried on its business. The case of *Adams* v. *Great Western Railway Co.* (2) was under the same Act, and, in effect, followed the *Crowland's Case* (and see *Keynsham Blue Lias Lime Co.* v. *Baker* (3)).

But it has also been suggested that a trading company is a resident of any State in which it carries on business ; that this company is a resident not only of Victoria but of each of the other States in which it operates. If this is the true view, it would be equally fatal to jurisdiction here ; for the plaintiff and the defendant here would be, not " residents of different States," but residents of the same State. But I am unable to accept the suggested view. An individual man cannot be said to reside in every place in which he has a branch of his business ; how, then, can a company be said to be a resident of every place in which it has a branch ? (See *Attorney-General* v.

(1) (1855) 11 Ex., 1. (2) (1861) 6 H. & N., 404.
(3) (1863) 33 L.J. Ex., 41.

H. C. OF A. 1922.

AUSTRAL-ASIAN TEMPERANCE AND GENERAL MUTUAL LIFE ASSURANCE SOCIETY LTD. v. HOWE.

Higgins J.

Alexander (1).) Simply to have a branch of one's business in State X is not to have a residence in that State. The words of sec. 75 are not even "residents *in* different States" but "residents *of* different States." These latter words, as used, obviously imply some close connection between the resident and the State, some exclusive link with some one State which cannot at the same time be had with any other State. The notion which is at the root of the words used in sec. 75 (IV.) appears to be the same in substance as the well-known definition of *domicilium* in the Code: "*In eo loco singulos habere domicilium non ambigitur, ubi quis larem ac fortunarum suarum summam constituit, unde rursus non sit discessurus si nihil avocet, unde cum profectus eat peregrinari videtur, quo si rediit peregrinari jam destitit*"—in other words, the notion of home. A place of business is not a place of residence (*Maybury* v. *Mudie* (2)—plea of abatement). "If a man hath a house within two leets, he shall be taken to be conversant where his bed is" (*conversans* = residing) (*Coke*, 2 Inst., 122; and see *St. Mary Colechurch* v. *Radcliffe* (3); *Lambe* v. *Smythe* (4); *Stoy* v. *Rees* (5)).

It is true that for certain particular purposes the words "residence" and "resident" (the adjective) are applied to corporations aggregate, trading companies, &c. For instance, under Order IX., r. 8, of the *Judicature Rules*, it has been held that if for a substantial period of time business is carried on by a foreign corporation at a fixed place of business in England, through some agent, then for that period the company must be considered resident within the jurisdiction for the purpose of serving a writ—you need not send to Brazil, &c., to serve the company (*Newby* v. *Von Oppen* (6); *La Bourgogne* (7); *Dunlop Pneumatic Tyre Co.* v. *Actien-Gesellschaft für Motor &c. vorm. Cudell & Co.* (8)). Moreover, under Order XI., r. 1 (*c*), leave may be given to serve a writ when any relief is sought against any *person*, including a company, "domiciled or ordinarily resident" within the jurisdiction. But then Order LXXI. expressly provides that "person" includes a body corporate;

(1) (1874) L.R. 10 Ex., at p. 34.
(2) (1847) 5 C.B., 283.
(3) (1716) Stra., 59.
(4) (1846) 15 M. & W., 433.
(5) (1890) 24 Q.B.D., 748.
(6) (1872) L.R. 7 Q.B., 293.
(7) (1899) P., 1; (1899) A.C., 431.
(8) (1902) 1 K.B., 342.

and some meaning has to be found for the word "resident" as applied to corporations.

Under the British *Income Tax Act*, also, a foreign corporation registered abroad has been held to be resident in England for the purposes of sec. 2, Schedule D, of the *Income Tax Act* 1853 (*De Beers Consolidated Mines Ltd.* v. *Howe* (1); *Goerz & Co.* v. *Bell* (2)), the real business, the central management and control being in England. Under the words of sec. 1 and sec. 2, Schedule D of the *Income Tax Act* (16 & 17 Vict. c. 34) the tax was imposed on profits arising or accruing to any person residing in the United Kingdom from any trade, whether carried on in the United Kingdom or elsewhere; and "person" included a company incorporated. The Courts were therefore *compelled* to find some meaning for the word "residing" as applied to corporations; and Lord *Loreburn* said (3):—"In applying the conception of residence to a company, we ought, I think, to proceed as nearly as we can upon the analogy of an individual. A company cannot eat and sleep, but it can keep house and do business." Then, in finding the country where the company really kept house and did business, the House of Lords rejected the test of registration, and accepted the test, where does the central management or control actually abide? Lord *Loreburn* said also that "residence of a company within the meaning of the *Income Tax Acts* is not necessarily the same thing as residence for the purpose of serving a writ" (4). But it is, to my mind, a mistake to say, as some text-writers say or imply, that, as a general rule and irrespective of particular Acts or rules, a corporation is resident in any place where it carries on business. *Mathew* L.J., in the *Dunlop Case* (5), points out that a corporation "*can, of course, only be said to reside anywhere in a figurative sense*, and it has been held *for the present purpose*" (service of a writ) "to reside in a place where it carries on its business." Although there is power to allow service of an English writ in England wherever relief is sought against any person (or corporation) "domiciled or ordinarily resident" in England, this power could not be applied to a Scottish insurance company having

(1) (1906) A.C., 455.
(2) (1904) 2 K.B., 136.
(3) (1906) A.C., at p. 458.
(4) (1906) A.C., at pp. 459-460.
(5) (1902) 1 K.B., at p. 349.

H. C. OF A. 1922.

AUSTRAL-ASIAN TEMPERANCE AND GENERAL MUTUAL LIFE ASSURANCE SOCIETY LTD. v. HOWE.

Higgins J.

branches and carrying on business in England (*Jones* v. *Scottish Accident Insurance Co.* (1); *Watkins* v. *Scottish Imperial Insurance Co.* (2)). In the United States Supreme Court also, it has been held in *Shaw* v. *Quincy Mining Co.* (3) that an insurance company created in Michigan does not acquire a residence in the State of New York by doing business there, and that it cannot be sued in New York by a citizen and resident of Massachusetts. Railway companies are not to be treated as dwelling or carrying on business at intermediate stations, but at their principal office (*Aberystwith Promenade Pier Co.* v. *Cooper* (4)).

In my opinion, in the absence of words to the contrary, the expressions in sec. 75 of the Constitution, "residents of different States" and "a resident of another State," refer to residence in the ordinary popular sense, usually involving sleep, shelter and home, and not to carrying on business. A merchant is a resident of his suburb, although all his business is carried on in the city. A corporation, being an artificial incorporeal entity, "without body to be kicked," has no residence in the ordinary sense. If, indeed, there were anything in the Constitution which compelled us to treat a corporation as being "a resident" of some one State, or possibly several States—compelled us to give the words "a resident" an artificial extraordinary sense applicable to corporations—the position would be very different. I can find no such compulsion, no such necessity here; and I fall back on that which the Court of Queen's Bench called "the ordinary sense" of the expression "place of residence" or "place of abode" (*R.* v. *Hammond* (5)).

I have not omitted to consider sec. 100 of the Constitution: "The Commonwealth shall not, by any law or regulation of trade or commerce, abridge the right of a State or of *the residents therein* to the reasonable use of the waters of rivers for conservation or irrigation." Does not this section, it may be asked, conserve the rights of corporations who have lands along rivers in the State; for instance, the rights of a pastoralist company? Perhaps it is sufficient to say that the words used are not the same as in sec. 75;

(1) (1886) 17 Q.B.D., 421.
(2) (1889) 23 Q.B.D., 285.
(3) (1892) 145 U.S., 444.
(4) (1865) 35 L.J. Q.B., 44.
(5) (1852) 17 Q.B., 772, at p. 781.

the words " resident of a State " point to a more intimate connection with the State than " residents therein "—*in* a State. But the purposes for which the words are used in sec. 75 and in sec. 100 are widely different. Sec. 75 is a section conferring a right of suit; sec. 100 merely negatives a right to interfere with conservation and irrigation; and it would be quite consistent to hold that sec. 100 includes all holders of land, property owners, within the State, although sec. 75 refers, irrespective of land, to residents in the usual sense. Whatever is the meaning of sec. 100, however, there is not, in my opinion, anything sufficient in that section to negative the ordinary meaning of the words " residents of States " in sec. 75.

The cases as to domicile do not help us. No person—or corporation—can be without a domicile (*Udny* v. *Udny* (1)), but many —including tramps and corporations—have not a residence. " Domicile " is a legal concept; " residence " is not—it involves a mere question of fact. Nor does sec. 19 of the British *Interpretation Act* 1889 help us: " The expression ' person ' shall, unless the contrary intention appears, include any body of persons corporate or unincorporate." Here, in sec. 75 (IV.) the word " person " is not even used; and it is irrelevant to say that the noun " resident " means, if expanded, " a person who is resident," for such a statement is not true unless we confine the word " person " to natural persons.

Much reliance, however, is placed on a case of *Royal Mail Steam Packet Co.* v. *Braham* (2). In that case there was an action brought for damages for goods delivered to an English incorporated company for carriage. The action was brought in Jamaica and, as the contract had been made in Jamaica, the Court in Jamaica had admittedly jurisdiction. By sec. 19 of a Jamaican *Supreme Court Act* it was enacted that " in any action against a *person* residing out of Jamaica," in respect of a contract made in Jamaica, the Court might order service of the writ on any servant or agent of the defendant in Jamaica carrying on business " for such *person* "; the Supreme Court had ordered the writ to be served on the company's superintendent in Jamaica, and an appeal was made to the Judicial Committee of the Privy Council against the refusal of the Supreme Court to set aside

(1) (1869) L.R. 1 H.L. (Sc.), 441, at p. 457. (2) (1877) 2 App. Cas., 381.

H. C. OF A. 1922.

AUSTRAL-ASIAN TEMPERANCE AND GENERAL MUTUAL LIFE ASSURANCE SOCIETY LTD. v. HOWE.

Higgins J.

this order. The appeal was dismissed. But in that case the jurisdiction over the English company was undoubted; here the whole question is, is there jurisdiction? If, in the Jamaica case, the mode of service prescribed by sec. 19 were not applicable to English corporations, the alternative would be defeat of justice unless the defendant were directly served in England. In the present case, if there is no jurisdiction in the High Court, there is ample jurisdiction in the Supreme Court of New South Wales. In the Jamaica case, the words "*person* residing out of Jamaica" were used; and the word "person" is as apt to describe a corporation, an "artificial person," as to describe a natural person. The word "person" is not used here. Moreover, the expression in sec. 75 (IV.) of the Constitution is "residents *of* different States," not even "residing *in* different States."

In short, the context and the nature of the provision in the Jamaica Act made it necessary that the provision as to the mode of service in Jamaica should apply as much to artificial persons as to natural persons. A corporation can only be said to be "a resident" of a State if the Act says it expressly or by necessary implication; and the Act here—the Constitution—does not say it. All the cases cited show that the word "reside" or "resident" can be applied to a corporation only when the context of the Act shows that it *must* be so applied; for Parliament can always give its own interpretation of a word for the purposes of an Act. As *Kelly* C.B. said, in *Attorney-General* v. *Alexander* (1): "*If, therefore, this corporation can be said to be resident anywhere*, I am of opinion that it must be resident in Constantinople, where alone it has its seat under the express terms of its charter."

The whole argument in favour of treating the words "residents of different States" as applicable to corporations is finally reduced to this: that it would be unreasonable not to give the jurisdiction to the High Court where a corporation is concerned as well as where individuals only are concerned. This is not a legitimate ground on which to base the interpretation of any Act. It may be that the framers of the Constitution thought that the influence of local sentiment would not be so dangerous in the case of a corporation as

(1) (1874) L.R. 10 Ex., at p. 30.

of private persons. It may be that they recognized the absurdity of allowing a Victorian policy-holder in the Australian Mutual Provident Society to sue in the High Court, and of refusing the same privilege, such as it is, to a New South Wales policy-holder. It is not for us to trace motives, but to interpret language; and unless there is clearly given jurisdiction to the High Court as between a policy-holder resident in Victoria and a New South Wales insurance company, or as between a New South Wales policy-holder and a Victorian company having a branch in New South Wales but having its principal seat of business in Victoria, there is no such jurisdiction. The burden lies on the plaintiff company in this case to show that such jurisdiction is given; and it is not shown. The noun "resident" is, no doubt, as flexible as all non-technical words; but there must be something in the context to bend it from its ordinary meaning—and there is nothing here. We are thrown back on the popular ordinary meaning of the words "residents of different States"; and, in my opinion, the plaintiff not being "a resident" of a different State from the defendant, the answer to the point reserved should be No.

STARKE J. The word "resident," in its primary meaning, signifies, it must be admitted, a natural person, who lives, dwells and has his home in some country or place. It is not strictly applicable to corporate or artificial bodies (*Goerz & Co.* v. *Bell* (1)). But it is very flexible in meaning, and easily controllable by the subject matter and the context in which it is found (*Ex parte Breull*; *In re Bowie* (2); *R.* v. *Justices of Fermanagh* (3), approved by *Holmes* L.J. in *R.* v. *Justices of Tyrone* (4)). This flexibility is more noticeable in the use of the words "resident," "residence," "reside," "residing," for legal purposes than in connection with their ordinary use. Numerous illustrations might be given, but the following will be sufficient for my purpose. A statute gave power to a Court or a Judge to allow service of process out of the jurisdiction in certain cases "against a person residing out of Jamaica." The Judicial

(1) (1904) 2 K.B., at p. 148.
(2) (1880) 16 Ch. D., 484.
(3) (1897) 2 I.R., 559, per *Gibson* J., at pp. 563-564.
(4) (1901) 2 I.R., 497, at pp. 510-511.

H. C. OF A. 1922.

AUSTRALASIAN TEMPERANCE AND GENERAL MUTUAL LIFE ASSURANCE SOCIETY LTD. v. HOWE.

Starke J.

Committee said: "'Person,' when used in a legal sense, is an apt word to describe a corporation as well as a natural person. . . . It was argued that the words 'residing out of Jamaica,' indicated an intention to confine the provision to" natural persons: "but the word 'residing' is no more inapplicable to a corporation than 'domicile,' which is frequently used with regard to the supposed local habitation of corporate bodies" (*Royal Mail Steam Packet Co.* v. *Braham* (1)). Again, in cases of jurisdiction the question frequently arises whether a corporation is present within the territorial jurisdiction of the Courts, and the test is whether the corporation has a place of business and carries on business within the jurisdiction. If so, then it is said to reside or have residence within the jurisdiction (*La Bourgogne* (2); *Dunlop &c. Co.* v. *Actien-Gesellschaft für Motor &c. vorm. Cudell & Co.* (3); *Saccharin Corporation Ltd.* v. *Chemische Fabrik von Heyden Aktiengesellschaft* (4)). Further illustrations are afforded by cases under the Income Tax Acts of Great Britain, which provide that income tax shall be charged in respect of the annual profits or gains accruing to any person residing in the United Kingdom from any trade carried on there or elsewhere. "Residence," in its widest sense, under these Acts, "applies," according to Mr. *Dowell*, "to a class of persons not within the intention of the tax, viz., visitors actually being in" Great Britain "for a temporary purpose only," and the *Income Tax Act* of 1799 specially exempted persons who were in Great Britain for a temporary purpose only (*Dowell on Income Tax Laws*, 8th ed., p. 416). And the Courts have constantly held that a corporation resides, for the purposes of these Acts, "where its real business is carried on," that is, "where the central management and control actually abides" (*De Beers Consolidated Mines Ltd.* v. *Howe* (5)).

It is pointed out in many of these classes of cases that the use of the words "reside" or "residence" or "residing" as applied to artificial bodies is not a very happy one, but it is so common that the use of these terms in relation to such bodies has become customary

(1) (1877) 2 App. Cas., at p. 386.
(2) (1899) A.C., 431.
(3) (1902) 1 K.B., 342.
(4) (1911) 2 K.B., 516.
(5) (1906) A.C., at p. 458.

in legal terminology. None of the decisions above referred to depend, in my opinion, upon any special statutory definition or upon the use of any particular word as a substantive or as a verb or as an adjective: the determining factors are the subject matter and the context. We must therefore turn to the Constitution itself, and consider the purpose of the provision that the High Court shall have original jurisdiction in all matters between States or between residents of different States or between one State and a resident of another State.

It is founded upon a somewhat similar provision in the Constitution of the United States, which extends the judicial power of the United States to controversies between two or more States or between citizens of different States or between a State and citizens of another State. "One great object" of the provision of the American Constitution "was to have a tribunal . . . presumed to be free from local influence, and to which all who were non-residents . . . might resort for legal redress" (*Gordon* v. *Longest* (1)). "State attachments, State jealousies, State prejudices, and State interests might sometimes obstruct or control the regular administration of justice." As a matter of history, this fear, little grounded in point of fact in Australia, led to the passing of the provision in the Australian Constitution (see *Quick and Garran's Annotated Constitution of the Australian Commonwealth*, pp. 773-778; *Harrison Moore's Commonwealth of Australia*, 2nd ed., pp. 491-494).

Another, and perhaps a more practical, object of the clause may have been to render process and judgments more effective. The service of process and the enforcement of judgments beyond the limits of a State were somewhat technical proceedings. These technicalities have, however, been largely removed by the passing of the *Service and Execution of Process Act* 1901-1912, enacted pursuant to the power granted by sec. 51 (xxiv.) of the Constitution. Still, the point is that the Constitution itself endeavoured to cure these defects. They affected both natural and artificial persons alike. Indeed, in the case of controversies between States and between a State and a resident of another State, the High Court

(1) (1842) 16 Pet., 97, at p. 104.

H. C. OF A. 1922.

AUSTRAL-ASIAN TEMPERANCE AND GENERAL MUTUAL LIFE ASSURANCE SOCIETY LTD. v. HOWE.

Starke J.

was given jurisdiction in the case of an artificial or non-natural person, namely, a State.

The mischief and defects to be remedied, the remedy provided by the Constitution, the reason of that remedy, the inclusion of artificial bodies such as States within the clause—all these considerations convince me that the terms "residents" and "resident" in sec. 75 (IV.) of the Constitution include as well artificial as natural persons. This undoubtedly has been the view accepted in Australia, both by text-writers and by the profession (see *Quick and Garran*, p. 777), and even this Court has entered judgments both in favour of and against corporations. True, the question of jurisdiction was not argued in connection with these judgments, and I refer to them, not as authorities, but in support of the statement that the received view was heretofore in favour of the jurisdiction of this Court.

If, however, a corporation be covered by the provision in sec. 75 (IV.) of the Constitution, then "residence has been appointed" as the test of the Court's jurisdiction in the case of a corporation, and it becomes necessary to determine what constitutes residence for that purpose (*Foote on Private International Law*, 4th ed., pp. 138-139). The mere presence within a State will not do; for a corporation might carry on business within two or more States. The fact that the management and control of the company actually abide in one State enables us to say that the business of the company is carried on there; but that, again, is not enough, for the Constitution contemplates the attachment of the "resident" to some one State to the exclusion of any other State. Therefore we must adopt some test of residence that will conform to the idea that the "resident" is attached to or is incorporated in the people of some one State of the Commonwealth. In short, in the case of a corporation, its residence will, for the purpose of the Constitution, sec. 75 (IV.), depend upon its political attachment to some one State in the Commonwealth. And this, in truth, is a question of fact. In the present case, the company was formed in Victoria and its head office is there; the management and control of the company actually abides in Victoria and the meetings of its members are held there. On these facts, I feel no difficulty in saying that the company is attached to Victoria and is a "resident" there. The defendant is, according to the case

stated, a resident of the State of New South Wales. Consequently the question stated in the case, should, in my opinion, be answered in the affirmative.

Question answered No. Costs to be costs in the action.

Solicitors for the plaintiff, *Darvall & Horsfall.*

B. L.

H. C. OF A. 1922.

AUSTRALASIAN TEMPERANCE AND GENERAL MUTUAL LIFE ASSURANCE SOCIETY LTD. *v.* HOWE.

Cons *Edmunds* v *Pickering* (1999) 75 SASR 407

[HIGH COURT OF AUSTRALIA.]

HARRIS . . . . . APPELLANT;
PLAINTIFF,

AND

JENKINS . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

H. C. OF A. 1922.

ADELAIDE, *Aug.* 25, 28, 29.

SYDNEY, *Dec.* 15.

Knox C.J., Higgins and Starke JJ.

Trustee and Cestui que Trust—Undue influence—Discharge of claim of beneficiary under will in favour of trustee—Validity—Consideration—Family arrangement.

By his will made in 1882 a testator, who died in 1890, gave his real and personal estate to his wife and his only son, whom he appointed his executors, upon trust to continue his business with the same discretion and control as the testator himself had. He directed that after the death or marriage of his wife his son should hold the trust estate with the like powers and for the same purpose, and that out of the estate the trustees or trustee should pay to each of the testator's four daughters, when they should respectively attain the age of twenty-one years or marry under that age, the sum of £200. He directed that, in the event of the death of his son subsequently to the death of the testator's wife, his estate should be realized and the proceeds divided equally