[HIGH COURT OF AUSTRALIA.]

THE COMMISSIONER OF TAXATION . . APPELLANT;

AND

MILLER . . . . . RESPONDENT.

H. C. OF A. 1946.

BRISBANE, *June* 19, 20.

SYDNEY, *Aug.* 15.

Latham C.J., Rich and Dixon JJ.

Income Tax (Cth.)—Assessment—Residence of taxpayer—Employment on boat in territorial waters of New Guinea and Papua—Income derived from sources within those territories—Board of Review—Residence—Question of law—Question of fact—Appeal—Income Tax Assessment Act 1936-1943 (*No.* 27 *of* 1936—*No.* 10 *of* 1943), ss. 7, 178, 196.

Whether or not a person is "resident" within the Territories of Papua, Norfolk Island or New Guinea within the meaning of s. 7 of the *Income Tax Assessment Act* 1936-1943 is a question of fact, and, under s. 196 of that Act, an appeal will not lie to the High Court from a decision of a Board of Review on a question of residence unless the facts before the Board were incapable of the legal complexion placed upon them by the decision.

So *held* by *Rich* and *Dixon* JJ.

Per Latham C.J. (dissenting on this point): It is not a condition precedent to the jurisdiction and duty of the High Court to hear such an appeal that it should be shown that the Board has made an erroneous decision upon a question of law.

APPEAL under *Income Tax Assessment Act.*

This was an appeal by the Commissioner of Taxation from the decision of a Board of Review upholding an objection by Herbert Miller to an assessment to income tax in respect of income derived in the year ended 30th June 1943.

Herbert Miller, in 1940, acquired a newly built fishing boat (the *Sunshine*) and used it for deep-sea fishing off the coast of Queensland, he and his wife living on the boat. In July 1942, whilst at Mackay, the boat was impressed for the use of the United States Armed

H. C. OF A. 1946.

COMMISSIONER OF TAXATION v. MILLER.

Services, being taken into the Small Ships Section of the Transportation Service. Miller was retained as the master of the boat; there was no written agreement, and Miller, under orders, operated the boat from Cairns, apparently remaining in Queensland waters.

On 1st October 1942, Miller signed a formal agreement with the Small Ships Section by which he agreed to serve for six months as master of the boat in question or any other vessel operated by the Section to which he might be assigned. A second agreement in identical terms was entered into at the end of six months for a further period of six months. Both agreements stated Miller's home port as Cairns. Late in 1942, he left on the boat for New Guinea, arriving at Milne Bay on 12th December. Under the terms of the agreements, the Small Ships Section engaged to furnish him free of charge with quarters and subsistence aboard the boat to which he was assigned. In fact he lived on the boat during the whole period of the agreement, his wife living at Cairns where she enjoyed an allotment of part of his salary. From 12th December 1942 until he left the service in October 1943, the boat was based at Milne Bay and, with the exception of a run north-east to Oro Bay and another to Normanby and Ferguson Islands, the boat worked in Milne Bay carrying supplies between ships at anchor and the shore. During this period, Miller did not go ashore and at no time, it was said, did his boat go outside the three mile limit. His only absence was during a short period of leave which he spent in Queensland.

In an assessment dated 31st July 1944, the Commissioner of Taxation assessed to tax the whole of the income derived by Miller during the year ended 30th June 1943. The taxpayer lodged an objection under the *Income Tax Assessment Act* 1936-1943 on the ground, *inter alia*, that the greater part of his income was exempt under s. 7 of the Act. The Board of Review held that Miller was, during the period 12th December 1942 until 30th September 1943, a resident of the Territories of New Guinea and Papua within the meaning of that section and that, therefore, the Act did not apply to income derived by him during that period from sources within those Territories.

The Commissioner of Taxation appealed to the High Court from this decision. It was agreed by the parties that the evidence given before the Board of Review should be treated as evidence given before the Court, and neither party adduced any further evidence.

Lukin, for the appellant. The taxpayer was not a prior resident of Papua. His permanent abode was in Queensland where his home port, Cairns, is situated. He had no intention of establishing a home

in Papua and had not the "quality" of a resident of Papua (*Commissioners of Inland Revenue* v. *Lysaght* (1)). The taxpayer's claim was based on casual physical presence alone: *Income Tax Assessment Act* 1936-1943, ss. 7, 196 (1). The decision involves a question of law. Where all the material facts are fully founded and the only question is whether the facts are such as to bring the case within the provisions, properly construed, of some statutory enactment, the question is one of law only (*Farmer* v. *Cotton's Trustees* (2)). Where the question is whether there is any evidence to support a decision the matter is a question of law (*Levene* v. *Commissioners of Inland Revenue* (3)). An error in law includes the absence of evidence on which the decision could properly be founded (*Commissioners of Inland Revenue* v. *Lysaght* (4)). Miller was not a resident of Papua because he did not go there for the purpose of establishing a residence (*Attorney-General* v. *Coote* (5)). A residence must be not for a temporary purpose but with an intention to dwell permanently or for a considerable time. The definition in the Oxford Dictionary is as set out by Viscount *Cave* in *Levene* v. *Commissioners of Inland Revenue* (3). See also *Egyptian Delta Land and Investment Co. Ltd.* v. *Todd* (6); *Gregory* v. *Deputy Federal Commissioner of Taxation* (*Western Australia*) (7); *Koitaki Para Rubber Estates Ltd.* v. *Federal Commissioner of Taxation* (8); *Bayard Brown* v. *Burt* (9); *In re Young* (10). In *Rogers* v. *Inland Revenue* (11) the principle was established that residence with regard to sailors means residence on shore, and that every sailor has a residence on land and goes to sea not for the purpose of residence but for the purpose of his business. Unless there is an intention to make a permanent abode in Papua, he is not a resident (*Commissioners of Inland Revenue* v. *Combe* (12)). [As to the three mile limit, reference was made to *Secretary of State for India* v. *Chelikani Roma Rao* (13).]

Julius, for the respondent. The decision of the Board of Review was a finding of fact, which the Court will not disturb (*Levene* v. *Commissioners of Inland Revenue* (14); *Robertson* v. *Federal Commissioner of Taxation* (15)). The taxpayer was a resident of Milne Bay, New Guinea. He previously lived on the boat with his wife. On account of the exigencies of war, he could not have his wife on the

(1) (1928) A.C. 234, at p. 244.
(2) (1915) A.C. 922, at p. 932.
(3) (1928) A.C. 217, at p. 222.
(4) (1928) A.C. 234, at p. 250.
(5) (1817) 4 Price 183, at p. 187 [146 E.R. 433, at p. 434].
(6) (1929) A.C. 1, at p. 12.
(7) (1937) 57 C.L.R. 774, at p. 778.
(8) (1941) 64 C.L.R. 241, at p. 251.
(9) (1911) 5 Tax Cas. 667.
(10) (1875) 1 Tax Cas. 57.
(11) (1879) 1 Tax Cas. 225.
(12) (1932) 17 Tax Cas. 405.
(13) (1916) L.R. 43 Ind. App. 192.
(14) (1928) A.C. 217.
(15) (1937) 57 C.L.R. 147.

H. C. OF A. 1946.

COMMISSIONER OF TAXATION v. MILLER.

boat. At all times his home was on the boat in New Guinea. He entered into a contract to reside on the boat in New Guinea, where he had a home before the ship was taken over for war service. This case is distinguishable from *In re Young* (1) and from *Rogers* v. *Inland Revenue* (2), as the boat was previously the taxpayer's residence and he remained within the territorial waters of New Guinea and Papua.

Lukin, in reply, referred to *In re Young* (1); *Rogers* v. *Inland Revenue* (2); *Federal Commissioner of Taxation* v. *Munro* (3). There must be some permanency in order that there be a residence in New Guinea or Papua.

Cur. adv. vult.

Aug. 15.

The following written judgments were delivered:—

LATHAM C.J. This is an appeal from a decision of a Board of Review constituted under the *Income Tax Assessment Act* 1936-1943, s. 178, upholding the claim of the respondent, Herbert Miller, that the Act does not apply to certain income derived by him. Section 7 of the Act is in the following terms:—

"(1) This Act shall extend to the Territories of Papua, Norfolk Island and New Guinea, but shall not apply to any income derived by a resident of those Territories from sources within those Territories.

(2) Any taxpayer who is resident in a Territory specified in this section shall, for the purposes of assessment and payment of income tax on income derived from sources in Australia, be deemed to be a resident of Australia."

The Board held that Miller was, during the period 12th December 1942 until 30th September 1943, a resident of the Territories of New Guinea and Papua and therefore that the Act did not apply to income derived by him during that period from sources within those Territories. The question in this proceeding arises with respect to the income derived by the respondent during the twelve months ended 30th June 1943. It was agreed by the parties that the evidence given before the Board should be treated as evidence given before the Court, and neither party adduced any further evidence.

The facts established by the evidence are that the respondent Miller owned a fishing boat which he used in Queensland waters. From August 1940 he lived with his wife on the boat. The boat was impressed for service with the United States Small Ships Section Transportation Service, and Miller was employed as master of the

(1) (1875) 1 Tax Cas. 57.
(2) (1879) 1 Tax Cas. 225.
(3) (1926) 38 C.L.R. 153, at p. 181.

vessel, first under an oral agreement, and later under two written agreements each relating to six-monthly periods, the first commencing on 1st October 1942, and the second on 1st April 1943. Under these agreements, he was employed at a salary of £85 6s. 9d. a month and Cairns in Queensland was described as his home port. He went on the boat to New Guinea and arrived in Milne Bay on 12th December 1942. He discharged his duties in the territorial waters of Papua and New Guinea. Except during a period of 27 days' leave which he spent in Queensland, from 12th December 1942 until 1st October 1943, he did not land. It has not been disputed that the money which he earned as his pay was derived from a source within the Territories. Miller's wife remained in Queensland, living first at Cairns and then at Brisbane, but spending some time with relatives at another place, Wooloowin, in Queensland. Upon these facts, the Board held that the respondent was a resident of the Territories of Papua or New Guinea continuously from 12th December 1942 to 30th September 1943.

There is an appeal to this Court from a decision of a Board of Review only if the decision of the Board involves a question of law: *Income Tax Assessment Act* 1936-1943, s. 196 (1). It has frequently been said that residence is a question of fact: See, e.g., *De Beers Consolidated Mines Ltd.* v. *Howe* (1), per Lord *Loreburn*: "This" (the question of place of residence) "is a pure question of fact." In *American Thread Co.* v. *Joyce* (2), however, Lord *Haldane* L.C., with the concurrence of four learned lords, after referring to certain facts found by the Inland Revenue Commissioners, said: "The only other question—the question of law—is that of residence." The distinction between questions of law and questions of fact is not always easy to draw: See, e.g., *Farmer* v. *Cotton's Trustees* (3), per Lord *Parker of Waddington*:—

"My lords, it may not always be easy to distinguish between questions of fact and questions of law for the purpose of the Taxes Management Act, 1880, or similar provisions in other Acts of Parliament. The views from time to time expressed in this House have been far from unanimous, but in my humble judgment where all the material facts are fully found, and the only question is whether the facts are such as to bring the case within the provisions properly construed of some statutory enactment, the question is one of law only."

In *Inland Revenue Commissioners* v. *Lysaght* (4), it was said that a decision on a question of residence was a finding of fact and that,

(1) (1906) A.C. 455, at p. 458.
(2) (1913) 108 L.T. 353, at p. 354.
(3) (1915) A.C. 922, at p. 932.
(4) (1928) A.C. 234, at pp. 249, 250.

H. C. OF A. 1946.

COMMISSIONER OF TAXATION v. MILLER.

Latham C.J.

where review was limited to questions of law, such a decision "cannot be reviewed unless it is made out to be based on some error in law, including the absence of evidence on which such a decision could properly be founded." In the present case, it is contended for the appellant that there was no evidence upon which a decision that Miller was resident in Papua could properly be founded. The decision of the Board that there was such evidence involved a question of law: See *Morley* v. *Lawford & Co.* (1); *Federal Commissioner of Taxation* v. *Broken Hill South Ltd.* (2). When a question of law is involved, there is a right of appeal, not merely a discretionary power in the Court to entertain an appeal: Section 196 (1). In hearing the "appeal," the Court is exercising original and not appellate jurisdiction: *Federal Commissioner of Taxation* v. *Munro* (3), and on appeal (4). When the "appeal" comes before the Court, the whole decision of the Board of Review, and not merely the question of law, is open to review: *Ruhamah Property Co. Ltd.* v. *Federal Commissioner of Taxation* (5). In that case, *Isaacs* J. (6) agreed with the other four members of the Court that, if the decision of the Board involved a question of law, "then the whole case is within the original jurisdiction of the Court." But he proceeded to say: "If the Board's decision, on examination, be found to be unaffected by any erroneous view of the law—as, for instance, if it be found that the question of law has been correctly apprehended, then, in my opinion, on a true construction of the sub-section, it is the duty of this Court to abstain from altering the Board's conclusion of fact." It may become necessary upon an appropriate occasion to consider whether this view of the effect of the provision for appeal to the Court is consistent with the express statement in the majority judgment that "the whole decision of the Board and not merely the question of law is then" (i.e. upon an appeal) "open to review." There are, I think, difficulties in construing s. 196 (1) as meaning that, if the Board was right in its law, the Court is precluded from considering any questions of fact, but that if the Board was wrong in its law, the Court should, or may, consider all questions of law and fact, giving due weight, doubtless, to the decision of the administrative body on questions of fact. It should be remembered that the evidence before the Court may be different from that which was given before the Board, and further, that s. 196 (2) provides a procedure whereby, upon a reference by the Board, the Court may

(1) (1928) 14 Tax Cas. 229, at pp. 241, 242.
(2) (1941) 65 C.L.R. 150.
(3) (1926) 38 C.L.R. 153, at p. 181.
(4) (1931) A.C. 275.
(5) (1928) 41 C.L.R. 148, at p. 155.
(6) (1928) 41 C.L.R., at p. 151.

determine questions of law and questions of law only. But I do not find it necessary to determine these questions in the present case, because I am of opinion that the decision of the Board was right upon both questions of law and questions of fact.

It has been contended that the respondent was not resident in the Territories because he did not voluntarily choose the Territories as a place of residence. He went there because he was directed to go there under his contract of employment. It appears to me that the same thing might be said of many millions of people in the world who reside in a particular place only because they have to do their work at or near that place. But, if voluntary choice is to be regarded as an important element in determining residence, I see no reason why it should not be said that the respondent, in entering into an agreement to serve in such places as might be specified, voluntarily ordered his life so as to reside from time to time in those places as required by the exigencies of his duties.

Next, it was said that his residence was in Australia because he left his wife there. But whether or not a husband must be held to have a home wherever his wife may happen to be from time to time, that fact is immaterial in the present case. It is well established that an individual may have two residences : See the cases cited by *Dixon* J. in *Gregory* v. *Deputy Federal Commissioner of Taxation (W.A.)* (1).

I should have thought that there was no doubt that a man resided where he lived, and I do not think that there is any interpretation of the word " reside " by the courts which makes it impossible to apply the ordinary meaning of the word " reside " in the present case. In *Levene* v. *Inland Revenue Commissioners* (2), Viscount *Cave* L.C. said :—

". . . the word ' reside ' is a familiar English word and is defined in the Oxford English Dictionary as meaning ' to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place.' No doubt this definition must for present purposes be taken subject to any modification which may result from the terms of the Income Tax Act and Schedules ; but, subject to that observation, it may be accepted as an accurate ndication of the meaning of the word ' reside.' In most cases there is no difficulty in determining where a man has his settled or usual abode, and if that is ascertained he is not the less resident there because from time to time he leaves it for the purpose of business or pleasure."

(1) (1937) 57 C.L.R. 774, at pp. 777, 778.

(2) (1928) A.C. 217, at p. 222.

H. C. OF A. 1946. COMMISSIONER OF TAXATION v. MILLER. Latham C.J.

In *Cesena Sulphur Co. Ltd.* v. *Nicholson* (1), *Huddleston* B. said: "There is not much difficulty in defining the residence of an individual; it is where he sleeps and lives." In *De Beers Consolidated Mines Ltd.* v. *Howe* (2), the decision in the *Cesena Sulphur Co. Case* (3) was referred to as a decision which had been acted upon for many years, and in applying the conception of residence to a company by analogy to the case of an individual it was said: "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 person can eat and sleep as well as keep house and do business. In the present case, Papua and New Guinea were the places where the respondent, during the relevant period, ate and slept and worked. In my opinion there is not yet any decision which requires the Board of Review or this Court to hold that he did not reside at the place where he lived for a period of over nine months.

In my opinion, the decision of the Board was right and the appeal should be dismissed.

RICH J. The present appeal is brought from a decision of the Board of Review by virtue of a section which allows such an appeal only where the decision "involves a question of law." It has been held that this means that when a question of law is involved in the decision, the appeal lies not merely upon the question of law but from the whole decision. In view of the differences of opinion which are apt to arise as to whether a decision of the Board does involve a question of law, I think it would be desirable that in future a practice should be adopted which is applied in cases where an appeal lies upon questions of law only, that is, to insist that the question of law suggested to be involved should be distinctly taken before the Board and the ruling of the Board obtained upon it: *Smith* v. *Baker & Sons* (4). The practice of lying by, obtaining a decision upon what is, on the face of it, a pure question of fact, and then resorting to every means which ingenuity suggests to endeavour to make out that some question of law lies concealed behind the decision, is undesirable. It has been deprecated in relation to the *Workmen's Compensation Act* in England (*Herbert* v. *Samuel Fox & Co. Ltd.* (5); *Slater* v. *Maconochie* (6)) and leads to much confusion and uncertainty.

The decision of the Board which is challenged in the present case is that one Miller, during a relevant period, was a resident in the territories of New Guinea and Papua. The word "resident" is not

(1) (1876) L.R. 1 Ex. D. 428, at p. 452.
(2) (1906) A.C. 455, at p. 458.
(3) (1876) L.R. 1 Ex. D. 428.
(4) (1891) A.C. 325, at p. 333.
(5) (1916) 1 A.C. 405, at pp. 413, 414.
(6) (1920) 123 L.T. 185.

a term of art denoting a field with precisely defined boundaries. Like the word " negligent," it is an ordinary English word extending over a field the boundaries of which constitute a broad limbo with blurred edges. In many cases, including most of those which become subjects of litigation, the question whether a person is a resident of a place, like the question whether he has been negligent, depends not upon the applicability of some definite rule of law, but upon the view taken by a tribunal of whether he comes within a field which is very loosely defined. The question is ordinarily one of degree, and therefore of fact. There are, however, cases (in litigation, exceptional) in which, upon the facts deduced from the evidence of the tribunal no other conclusion is possible than that the propositus is within or without the field, as the case may be, ill-defined though it is. In these cases, the question whether propositus is necessarily within or necessarily without the field is regarded as one of law: Cf. *Noble* v. *Southern Railway Co.* (1). It is not necessary to multiply authorities on the point, because they have recently been collected by the Supreme Court of New South Wales in the cases of *Australian Gas Light Co.* v. *Valuer-General* (2) and *Dennis* v. *Watt* (3). There is nothing in the present case to suggest that any question was raised before the Board as to whether it necessarily followed from such of the evidence as the Board accepted that Miller was or was not resident in the relevant locus. True, it was argued before us that there was no evidence upon which it could be found that he was so resident; and this is in form a question of law. But it is, in my opinion, necessary, in order to bring a case within s. 196, that a question of law should be really, and not merely colourably, involved: Cf. *Hopper* v. *Egg & Egg Pulp Marketing Board (Vict.)* (4). If this were not so, it would follow that, by alleging before the Board or before this Court that there was no evidence of some essential fact, an appeal could be maintained in every case. This is manifestly not the intention of the legislature.

There is, in my opinion, nothing in the present case to suggest that the question whether Miller was a resident is other than one of degree and therefore of fact. In these circumstances, there is nothing to justify our entertaining the appeal. This, of course, presents no obstacle to our dismissing it with costs: *Carr* v. *Stringer* (5); *In re J. H. Robertson's Application for Letters Patent* (6).

(1) (1940) A.C. 583, at pp. 599, 600.
(2) (1940) 40 S.R. (N.S.W.) 126, at pp. 137, 138; 57 W.N. 53, at p. 55.
(3) (1942) 43 S.R. (N.S.W.) 32; 60 W.N. 7.
(4) (1939) 61 C.L.R. 665, at pp. 673, 677.
(5) (1858) El. Bl. & El. 123 [120 E.R. 454].
(6) (1930) 1 Ch. 186, at p. 193.

H. C. OF A. 1946. COMMISSIONER OF TAXATION v. MILLER.

DIXON J. This is an appeal by the Commissioner from a decision of the Board of Review and we must, therefore, be satisfied that it is a decision which involves a question of law. For an appeal does not lie to this Court from the Board of Review except from a decision which involves a question of law: Section 196 (1) of the *Income Tax Assessment Act* 1936-1943.

The question submitted to the Board for decision was whether the taxpayer, during a period falling within the year of income ended 30th June 1943, was a resident of Papua. The question arose under s. 7 (1) which provides that the *Assessment Act* shall extend to the Territories of Papua, Norfolk Island and New Guinea, but shall not apply to any income derived by a resident of those Territories from sources within those Territories. The Board decided that the taxpayer was a resident of Papua during the period in question. The facts upon which the finding depends are within a short compass. The taxpayer, whose domicile was Australian, had lived in Townsville with his wife. His occupation appears to have been that of a deep-sea fisherman. A deep-sea fishing vessel of about 14 tons was built for him in Brisbane and in August 1940, when it was completed, he and his wife gave up their habitation in Townsville and proceeded to live on the boat, which they worked up and down the Queensland coast.

In July 1942 they put into Mackay and at that port their vessel was requisitioned on behalf of the American Army. It was taken into the Small Ships Section of the Services of Supply of the United States Army. That command appointed him master of the craft at a monthly salary and directed him to take her to Cairns. There his wife took up her abode. On 1st October 1942 he signed a formal agreement with the Small Ships Section by which he agreed to serve for six months as master of the craft in question or any other vessel operated by the Small Ships Section to which he might be assigned. The agreement, which contained elaborate provisions, was renewed for a second six months, but, at the end of that time, the taxpayer left the American service and returned to Australia. His vessel remained under requisition.

Under the terms of his agreement of employment, the Small Ships Section engaged to furnish him free of charge with quarters and subsistence aboard the ship to which he was assigned. In fact he lived on the craft during the whole period of the agreement. His wife continued to live at Cairns, which was described as his home port, and there she enjoyed an allotment of part of his salary. From 12th December 1942 until he left the service in October 1943, the craft was based at Milne Bay, Papua, and, with the exception of a run

north-east up to Oro Bay and another to Normanby and Ferguson Islands, she worked in Milne Bay. She was engaged in carrying supplies and plying between ships at anchor and the shore. During that period the taxpayer did not go ashore and at no time, it is said, did his vessel go outside the three mile limit. His only absence was during a short period of leave which he spent in Queensland.

On these grounds, he claimed that from 12th December 1942 until 30th June 1943, the end of the year of income, his salary was derived from a source within Papua and he was a resident of Papua.

The first proposition was not denied and the second was decided in his favour by the Board of Review.

We are, I think, at liberty to take judicial notice of the fact that in 1942 and 1943 Milne Bay was nothing but a military base and that it was only in the last week of August and the first week of September 1942 that the heavy engagement bearing that name had been fought there.

Having regard to the character of the place, I do not think that, had I been in the Board's place, I should have regarded the facts I have stated as leading to the conclusion that the taxpayer was a resident of Papua. But I am not satisfied that their decision involved any question of law. It is not legally impossible for a man to reside in a country, though he lives on a moving craft plying upon its rivers or within its territorial waters. Nor is it legally impossible for a man to reside at a military base, even a forward one.

The two cases of *Levene* (1) and of *Lysaght* (2) are as striking as they are decisive in illustrating the way in which the question of "resident" or "not resident" has become a "question of degree and therefore of fact" (3). Lord *Buckmaster* said (4):—"It may be true that the word 'reside' or 'residence' in other Acts may have special meanings, but in the Income Tax Acts it is, I think, used in its common sense and it is essentially a question of fact whether a man does or does not comply with its meaning. It is, of course, true that if the circumstances found by the Commissioners in the special case are incapable of constituting residence their conclusion cannot be protected by saying that it is a conclusion of fact since there are no materials upon which that conclusion could depend."

Lord *Warrington* said (5): "I have reluctantly come to the conclusion that it is now settled by authority that the question of residence or ordinary residence is one of degree, that there is no technical or special meaning attached to either expression for the

(1) (1928) A.C. 217.
(2) (1928) A.C. 234.
(3) (1928) A.C., at p. 249.
(4) (1928) A.C., at p. 247.
(5) (1928) A.C., at pp. 249, 250.

H. C. OF A. 1946.

COMMISSIONER OF TAXATION v. MILLER.

Dixon J.

purposes of the Income Tax Act, and accordingly a decision of the Commissioners on the question is a finding of fact and cannot be reviewed unless it is made out to be based on some error in law, including the absence of evidence on which such a decision could properly be founded."

As the Board of Review is an administrative body it may be doubted whether a decision by it can be said to involve a question of law because it is based on insufficient evidence. But, no doubt, if the facts coming before the Board were incapable of the legal complexion placed upon them, that would involve a question of law and the difference is not great.

Our jurisdiction is a peculiar one. It is not appellate but original jurisdiction and, once the proceeding is properly before us, then, apart from the use of materials by consent, the facts must be proved in the ordinary way. As Order LIA rule 13 says, the appeal is then by way of original hearing. But the appeal is not properly before us unless the decision of the Board involves a question of law.

The Board have given their reasons and no misapprehension of the meaning of the provision in question is disclosed and no misconception appears as to what amounts to "residence" as a general proposition. No proposition of law appears to have been in contest and no contestable proposition of law appears to have been assumed. It all seems to me to come back to the so-called question of fact. I am, therefore, not satisfied that the appeal lies.

In my opinion, the Commissioner's appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant, *H. F. E. Whitlam*, Crown Solicitor for the Commonwealth.

Solicitors for the respondent, *Cyril Murphy & Mitchell.*

B. J. J.