Present: Dalton J. and Jayewardene A.J.

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MICHELIN & CO. *v.* DON LEO.

329—D. C. Colombo, 14,179.

Prescription—Claim by foreign company carrying on business in Ceylon—Fixed place of business—Residence—Absence beyond the seas—Ordinance No. 22 of 1871, s. 15.

The plaintiff company, which is registered in France, carried on a business in Ceylon in the sale of tyres. The company had an attorney, who resided in Ceylon a few months each year. It had no registered office in Ceylon, but had rented a warehouse from a local firm, which acted as distributing agents of the tyres to customers, registered by the attorney.

In an action by the company for the value of tyres sold the defendant pleaded prescription.

Held, that the plaintiff company was resident within the Island and was n otentitled to rely on the disability of " absence beyond the seas " in answer to the plea of prescription.

The expression " person " in section 15 of the Prescription Ordinance includes a corporation.

[1] *(1909) 11 N. L. R. 151.* [2] *(1921) 23 N. L. R. 235.*

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THE plaintiff company (Michelin & Co,), which is a Joint Stock Company registered in France, sued the defendant to recover a sum of Rs. 3,271·93, being the value of motor tyres purchased by him. The defendant pleaded prescription, and in answer to the said plea the company claimed the benefit of section 15 of Ordinance No. 22 of 1871, viz., absence beyond the seas, whereby the term of prescription was prevented from running. It appeared that the company did a large business in tyres in Ceylon. It has no registered office here, but it employed an attorney for the purpose of its business in India and Ceylon, who spends five to six months a year in Ceylon. For the purpose of storing goods, it rents a warehouse from E. B. Creasy & Co., who supplied the tyres to customers, registered by the company. The registered customers are agents of the company for the sale of their goods and are paid by commission.

The learned District Judge held that the company was resident in Ceylon, and was not entitled to claim the benefit of the disability of "absence beyond the seas."

Hayley (with him *Garvin*), for plaintiff, appellant.

E. G. P. Jayatilleke (with him *Navaratnam*), for defendant, respondent.

May 4, 1926. DALTON J.—

This appeal raises a question under the Prescription Ordinanace The plaintiff company claims from the defendant the sum of Rs. 3,271·93, balance of sum due for goods sold and delivered. The last payment made by the defendant on account of his indebtedness was on February 24, 1923, and this action was commenced on November 26, 1924. The defendant pleaded the claim was prescribed under the provisions of section 9 of the Prescription Ordinance, 1871, where the term of prescription is one year. The plaintiff company, however, pleads the benefit of section 15, absence beyond the seas, whereby the term of prescription was prevented from running. The District Judge answered the only issue in the case, "is the plaintiff's claim prescribed," in favour of the defendant, and the plaintiff now appeals. There is no finding as to whether or not the plaintiff company was residing in Ceylon, although it is found they were carrying on business here.

The evidence shows that the plaintiff company is registered in France. It has an attorney for the purposes of its business in India and Ceylon; he spends five to six months a year in Ceylon. It has no registered office here, and it is admitted there has been no compliance with any requirements of section 111 of the Joint Stock Companies Ordinance, 1861, in respect of foreign companies carrying on business in the Island. The latter fact, however, is of course not conclusive that it has no place of business established in the Island,

for in practice the requirement of the law is frequently evaded, but it may be pointed out that the power of attorney (P 1) definitely provided for the attorney carrying out the provisions of the law in this respect.

It has certain registered customers in the Island to whom goods are supplied, of whom the defendant is one. It is admitted also that it does a large business in tyres here. For the purpose of storing the goods it rents a warehouse from E. B. Creasy & Co. When one of these registered customers requires goods, they obtain them from E. B. Creasy & Co., who themselves have no authority to sell by retail. If any individual wishes to purchase any of the plaintiff company's goods, he is referred to the registered customers. Creasy & Co. receive and collect payment for the tyres sold, and the proceeds are paid by them into the plaintiff's account at a bank in Colombo. They are not entitled to operate on that account. The registered customers are agents of the plaintiff company for the sale of their goods and they are paid by commission. E. B. Creasy & Co. also would appear to be paid by commission, but the evidence is not very definite on the latter point. It is quite definite, however, that they are paid as warehousemen.

On this evidence it is urged for the defendant (respondent) that the plaintiff company has a place of business established in Ceylon to satisfy the requirements which come within the term "residence," and that, therefore, it being admitted that they carry on business here, they cannot be said to be absent beyond the seas.

It is also urged that the provisions of sections 14 and 15 do not extend to corporations, the doubt expressed by Shaw J. in *Dodwell & Co. v. John*[1] being relied upon. This case, however, went to the Privy Council, and I think it is clear from the judgment there (*20 N. L. R. 206*) that the expression "person" in section 14 has been taken to include a corporation, having regard to the provisions of section 3B of the interpretation Ordinance, 1901.

For the appellant company we have been referred to several cases. It is urged that the business was conducted for the company by E. B. Creasy & Co., merely as agents of the company at their own premises where they conducted their own business, and that the plaintiff company whilst they were trading *with* Ceylon were not carrying on a trade *within* the Island. The distinction sought to be drawn here is referred to by Lord Herschell in *Grainger & Son v. Gough*,[2] where he points out that many merchants and manufacturers export their goods to all parts of the world, without it being thereby possible to say that they exercise or carry on their trade in every country in which their goods find customers. But the position of the present appellants is very different from that of M. Louis Roederer of Reims, the foreign merchant whose business was under consideration in *Grainger & Son v. Gough* (*supra*). All that could be shown

[1] *18 N. L. R. 147.*

[2] *(1896) A. C. 335.*

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there was that the appellant firm were the agents in Great Britain for the sale of Roederer's wine, and they canvassed for orders for him. Any orders obtained were sent to their principal, and all contracts for sale consequent thereon and all deliveries to the customers were made in France. The stock from which these sales were made was kept in France, neither he nor the appellant company on his behalf keeping any stock in England. The appellant company was paid by commission only if the orders obtained by them were executed, and had no other interest in the sale. It was held on these facts that M. L. Roederer did not exercise a trade in the United Kingdom within the meaning of the Income Tax Acts.

The other case cited was *La Compagnie Generale Trans-Atlantique v. Thomas Law & Co.*[1] The question that arose for decision was whether or not the foreign corporation was carrying on business in England in such a way as to be resident within the jurisdiction so that service by the plaintiffs, Thomas Law & Co., on the agent at his office in London of a writ in an Admiralty action *in personam* for damage by collision on the high seas was good service on the defendant corporation under the rules of Court. The corporation, a French company, were large shipowners whose principal place of business was in Paris. They leased and paid the rent of an office in Leadenhall street, London, where applications for freight and passage could be made to the company's agent. They agreed to be chargeable for income tax, legal expenses, and advertisements, but the agent himself paid the staff, furnished and kept up the office, and carried on other business of his own there. So far as the defendant corporation was concerned he was paid by commission on freight and passage money. In seeking an answer to the question to be decided, which was purely a question of fact, as pointed out by Lord Halsbury, when the matter came before the House of Lords, A. L. Smith L.J. asked whether the business carried on in Leadenhall street was the business of M. Fanet, the agent, or was it the business of the company. He has no doubt that the premises were taken for the purpose of the company's business. In the same way, one may ask for what purpose did the company here hire a warehouse from E. B. Creasy & Co. Was it for the purpose of E. B. Creasy & Co. carrying on their own business, part of which was to act as agents for the company, or was it for the purpose of carrying on the business of the plaintiff company? Having regard to the facts, it seems to me that, so far as the evidence goes, the answer is clear that the warehouse was taken that the company might carry on its business there, by keeping its stock of supplies, whence the various agents in the Island might draw their requirements, sent in through E. B. Creasy & Co. The remarks of Collins L.J. in *La Compagnie Generale Trans-Atlantique v. Thomas Law & Co.* (*supra*) are also very pertinent here. How has the company

[1] (*1899*) *A. C. 431.*

itself dealt with the matter ? It has appointed a manager for India and Ceylon, who, the evidence shows, spends a considerable portion of his time here. It imports its stock and hires a warehouse. Whose trade is carried on there ? It is the trade of E. B. Creasy & Co., so says the company. Unquestionably it is, in my opinion, the trade of the plaintiff company. Why should they pay E. B. Creasy & Co. rent for carrying on their own business ? They are remunerated by the payment of a commission. The defendant company have their various registered dealers in the Island, who it is also admitted are agents of the company, and they draw their supplies from the central store in Colombo, the warehouse rented from E. B. Creasy & Co. The latter collect all sums due and pay them into the defendant's company account in Colombo.

The test prescribed by Collins M. R. in a later case (*Dunlop Pneumatic Tyre Company v. Actien-Gesellschaft Fur Motor Und Motorfahrzeugbau vorm. Cudell & Co.*[2] is set out in the following way :—

> "The true test in such cases is whether the foreign corporation is conducting its own business at some fixed place within the jurisdiction, that being the only way in which a corporation can reside in this country. It can only so reside through its agent not being a concrete entity itself ; but, if it so resides by its agent, it must be considered for this purpose as itself residing within the jurisdiction."

Applying this test to the facts of this case, I am of opinion that a reasonable and proper inference may be drawn from them that the plaintiff corporation was conducting its own business at a fixed place within the jurisdiction, by its agent, E. B. Creasy & Co., and therefore cannot plead the disability of " absence beyond the seas," so as to prevent the period of prescription running.

On this conclusion it is not necessary to deal with the further questions raised on the appeal.

The appeal must, therefore, be dismissed, with costs.

JAYEWARDENE A.J.—

This case raises the question : When a foreign company can be said to be resident within the Island so as to disentitle it to the disability of " absence beyond the seas " under section 15 read with section 14 of the Prescription Ordinance, 1871.

The plaintiff—A. Michelin & Co.—is a joint Stock Company (*Societe Anonyme*) with its head office in France. It sued the defendant in this case to recover a sum of Rs. 3,271·93, being the value of motor tyres purchased by him. The defendant pleaded that the claim was prescribed under section 9 of the Prescription

[1] (*1902*) *1 K. B. 347.*

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Ordinance as the action was not brought within a year of its accrual. The plaintiff's answer to this is that it is not bound by the time limit owing to its absence beyond the seas. The learned District Judge held that the plaintiff company was not so absent as to entitle it to rely on the disability in question. The plaintiff appeals.

It cannot, of course, be denied that a company can exist and reside outside the country in which it is registered or incorporated. Its places of business may, in certain cases, properly be deemed the domicile. Then, if it can acquire a residence in a foreign country by carrying on business there, it cannot be said to be beyond the seas in respect of such country. The question then is : Is the plaintiff company carrying on business here in such a way as to constitute residence in this country ? Although the disability of absence beyond the seas was created by the English Limitation Act passed in the year 1623, from which it was adopted into our law, yet no case can be found in which its application to foreign corporations has been discussed, and when the same question arose in the local case of *Dodwell & Co. v. John & Co.*,[1] this Court in deciding the point applied the principles laid down by the House of Lords in *La Compagnie Generale Trans-Atlantique v. Thomas Law & Co.*[2]—"*La Bourgogne*"—which had held that for purposes of service of process a foreign company may carry on business in a country other than the country in which it has been incorporated or registered, under such circumstances as would enable it to be said that it was resident in that country in the same manner as a company registered there. And this Court held that although Dodwell & Co. had its registered office in England, it was not "absent beyond the seas" within the meaning of sections 14 and 15 of the Prescription Ordinance, as it had a residence and carried on business within the Island. With this view the Privy Council expressly concurred.[3]

Therefore, in the decision of the question whether plaintiff company was resident in Ceylon or was absent beyond the seas at the time the cause of action arose, the principles laid down in the English case above cited and similar cases have to be applied. In *Dunlop Pneumatic Tyre Co. v. Cudell & Co.*,[4] which was also concerned with the service of process on a foreign corporation carrying on business in England, and where it was contended the corporation was not resident in England, Lord Collins M.R. said :—

> "It has been held in a number of cases, beginning with *Newby v. Van Oppen*[5] and ending with the case of "*La Bourgogne*" (*supra*), that the true test in such cases is whether the foreign corporation is conducting its own business at some fixed place within the jurisdiction, that being the only

[1] (*1915*) *18 N. L. R. 133.*
[2] (*1899*) *A. C. 431.*
[3] (*1918*) *20 N. L. R. 204.*
[4] (*1902*) *1 K. B. 342.*
[5] *L. R. 7 Q. B. 293.*

> way in which a corporation can reside in this country. It can only so reside through its agent not being a concrete entity itself; but, if it so resides by its agent, it must be considered for this purpose as itself residing within the jurisdiction."

And Romer L.J. said :—

> "The result of the authorities appears to me to be that, if for a substantial period of time business is carried on by a foreign corporation at a fixed place of business in this country, through some person, who there carries on the corporation's business as their representative and not merely his own independent business, then for that period the company must be considered as resident within the jurisdiction for the purpose of service of a writ."

The test as stated by Lord Collins was adopted by Cozens-Hardy L.J. in *De Beers Consolidated Mines, Limited, v. Howe*,[1] where it was held that a foreign corporation might be resident in England for the purposes of income tax. To apply that test to this case. Has it been proved that the plaintiff company has been conducting its own business at some fixed place within the Island ? That it does carry on business in Ceylon is fairly clear. The plaintiff company's attorney, who was called as a witness, stated that the plaintiff company does "not carry on business in Ceylon" but does "a large business in tyres here." Its tyres are shipped and stored in a warehouse belonging to Messrs. E. B. Creasy & Co., Colombo. The tyres are supplied to customers who are approved and registered by the attorney. Every contract or transaction for the sale of tyres is, therefore, entered into by the attorney, who can approve or refuse any one desiring to become a customer. Creasy & Co. cannot register a name without the sanction of the attorney, although they may do so provisionally, subject to confirmation by the attorney. All actions for money due are instituted by the attorney. Creasy & Co. are entitled to receive payment for tyres sold, but the money received must be deposited to the credit of the plaintiff company.

These facts appear from the evidence given in the case, but it was admitted by a witness called for the plaintiff that there is an agreement in writing entered into between Messrs. E. B. Creasy & Co. and the plaintiff company. This has not been produced. Its production would have obviated the necessity of calling oral evidence to prove the terms on which Messrs. Creasy & Co. acted for the plaintiff company, and its non-production entitles the Court to draw the inference that its terms are unfavourable to the plaintiff company's case. Messrs. E. B. Creasy & Co. appear to be managers of the plaintiff company's business in Ceylon.

[1] *(1905) 2 K. B. 612 (642).*

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They are not carrying on that business as their own independent business. The plaintiff company, in the only way in which a company can through an agent, enters into contracts in Ceylon, and earns, or attempts to earn, profits here, that would amount to carrying on business in Ceylon. For as Cotton L.J. said in *Erichsen v. Cash*,[1] whenever a foreigner either by himself or through a representative in this country " habitually does and contracts to do a thing capable of producing profit, and for the purpose of producing profits he carries on a trade or business." The fact that the attorney who enters into the contract locally resides in Ceylon for only five or six months in the year cannot make any difference so long as the contracts are entered into and carried out in Ceylon. On this aspect of the case learned Counsel for the appellant relied on two cases : *Minor v. London & North-Western Railway Co.*[2] and *Grainger & Son v. Gough*.[3] In the first case this Court held that Messrs. Pickford & Co., to whom the plaintiff had entrusted certain goods to be conveyed by the defendant company's railway, did not carry on the business of the defenda t company at their offices, but carried on its own business as agents for the receipt and booking of parcels and packages for all the railways generally, but not as servants or managers of any railway company. As the business was held to be Pickford & Co.'s own business, that case has no application here. In the second case it was held that a foreign merchant who canvasses through agents in England for orders for sale of his merchandise to customers in England does not exercise a trade or carry on business in England within the meaning of the Income Tax Acts so long as all contracts for the sale and all deliveries of the merchandise to customers are made in a foreign country. From the facts of the present case as I have stated them above, this case is obviously distinguishable. I would therefore hold that the plaintiff company is carrying on business in Ceylon.

Has it a fixed place of business ? The tyres manufactured by the plaintiff company are, as I have said, shipped to Ceylon and kept at the stores belonging to Messrs. Creasy & Co., who are called its warehousemen. From these stores the tyres are delivered to customers with whom the agent has entered into contracts. Messrs. Creasy & Co. keep files or books for Michelin & Co.'s accounts, and all transactions relating to plaintiff company's tyres are, I presume, entered in those books. Messrs. Creasy & Co. are paid as warehousemen, and also, I believe, a small commission. The fact that Messrs. Creasy & Co. carry on their own business at the same place does not prevent such place from becoming the plaintiff company's fixed place of business : *La Compagnie Generale Trans-Atlantique v. Thomas Law & Co. (supra)*. It pays for the warehousing of its goods, and thereby pays,

[1] *(1881) 8 Q. B. D. 414 (420).* [2] *(1856) 1 C. B. (N. S.) 325.*
[3] *(1896) 3 A. C. 325.*

it may be indirectly, a part of the rent of the warehouse. It has, in effect, rented a part of the warehouse. The business of the plaintiff company is transacted in premises belonging to Messrs. Creasy & Co., who are its managers. Their premises constitute its fixed place of business. I would therefore hold that the plaintiff company had a residence and carried on business inside the Island, and that it was not absent beyond the seas at the time the cause of action arose : *Dodwell & Co. v. John & Co.* (*supra*). The action was, therefore, rightly dismissed.

Before concluding, I would like to refer to the points taken by learned Counsel for the respondent in support of the judgment. He contended that the sections creating the disabilities were not applicable to corporate bodies as the other disabilities, such as infancy, idiotcy, and unsoundness of mind, were inappropriate with reference to corporations. This same contention was raised in *Dodwell's case* (*supra*), and although there was some difference of opinion among the Judges of this Court, the judgment of the Privy Council shows that the disability of absence beyond the seas may be availed of by a corporate body, if it does not reside and carry on business in the Island. This contention must, therefore, be regarded as untenable. He next contended that the plaintiff company could not maintain the action as its business name has not been registered under the Registration of Business Names Ordinance of 1918. I do not think it is necessary to give a decided opinion on this point. But according to my reading of that Ordinance, it has no application to the plaintiff company as it is not carrying on business in partnership with another firm, individual or corporation, or as nominee or trustee of or for another person or corporation, or as agent for any foreign firm. The plaintiff company, however, in my opinion, comes within the operation of section 111 of the Joint Stock Companies Ordinance, 1861, a section which has been added to the main Ordinance by Ordinance No. 7 of 1918, which was passed at the same time as the Ordinance requiring the registration of business names. Non-compliance with the requirements of section 111 does not, however, debar a foreign company from maintaining an action.

The appeal will be dismissed, with costs, as ordered by my brother Dalton.

Appeal dismissed.