APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice Napier.

THE MUNICIPAL COUNCIL OF COCANADA (DEFENDANT), APPELLANT,

v.

THE 'CLAN' LINE STEAMERS, LIMITED (PLAINTIFF), RESPONDENT *

1918, Nov. 11, 14 and 26.

District Municipalities Act (Madras Act IV of 1884), sec. 53—Shipping Company—Ships calling at ports to load and unload goods—Calling at Cocanada for loading goods—Agent at Madras—Sub-agent at Cocanada—Contracts with shippers entered into only by agent at Madras—Company, whether trading or carrying on business at Cocanada—Company, whether liable to be taxed in Cocanada.

Where a shipping company, which earned profits by carriage of goods by sea and in the course of its business called at several ports in various parts of the world, was in the habit of loading and unloading goods at Cocanada, and it appeared that the Company had its principal Agent at Madras who employed a Sub-Agent at Cocanada but that all contracts with shippers could be and were entered into only by the Agent at Madras, and the Company was assessed by the Municipality of Cocanada to pay tax under section 53 of the District Municipalities Act (IV of 1884) for exercising its trade and carrying on business in Cocanada:

Held, that the Company was not exercising any trade or carrying on business in Cocanada so as to be liable to be taxed under section 53 of the Madras District Municipalities Act, because the freight-earning contracts with the shippers were not entered into at the port of Cocanada.

Grainger & Son v. *Gough*, (1896) A.C., 325, and *Lovell and Christmas, Limited* v. *Commissioner of Taxes*, (1908) A.C., 46 (P.C.), followed.

APPEAL against the judgment and decree of COUTTS TROTTER, J., in the exercise of the Ordinary Original Civil Jurisdiction in O.S. No. 219 of 1917.

The material facts appear from the judgment.

Venkatasubba Rao and *Radhakrishnayya* for appellant.

D. Chamier and *Dr. Pandalai* for respondent.

WALLIS, C.J.—The question in this appeal is whether the Clan Line of Steamers, who have their registered office in Glasgow, are liable under section 53 of the Madras District WALLIS, C. J.

* Original Side Appeal No. 2 of 1918.

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Municipalities Act, 1884, to pay profession tax in Cocanada on the ground that they are persons exercising within that municipality one of the professions, trades or callings specified in the schedule, which includes persons 'carrying on business as a company,' and also 'ship-owners.' The Clan Line steamers call at Cocanada to take in cargo for Europe, and also unload there any cargo consigned to Cocanada of which there is very little. They are represented in various matters by Messrs. Ripley & Co., Sub-Agents engaged by Messrs. Gordon Woodroffe & Co., the Clan Line's Agents at Madras. Messrs. Ripley have no authority to contract with shippers for the allotment of cargo space under letters of engagement such as are now common. Shippers apply direct to Gordon Woodroffe & Co.; if they apply to Messrs. Ripley, the latter forward the application to be dealt with by Gordon Woodroffe & Co., or take their instructions by telegraph if the time is short. They issue shipping orders to shippers who have secured space, sign the bills of lading for cargo shipped, and receive the freight where it is payable in advance, as it is in all cases where the goods are consigned to London for transhipment to America. They also settle the bills of the dubash who is employed by Gordon, Woodroffe & Co. to supply the ships with necessaries and pay the doctor who is similarly employed. They apparently collect any freight that may be payable on the small quantity of cargo landed.

Having regard to these facts, it may be said that in one sense the Clan Line carry on business at Cocanada through Messrs. Ripley, but what we have to see is whether it is such an exercise of their trade or carrying on business within the municipality as to bring the case within the language of the statute, which is indistinguishable from that of similar taxing Acts both in England and the Colonies. Those cases have been reviewed by the learned Judge and have again been considered by us, but it is unnecessary to go behind the decision of the House of Lords in *Grainger & Son* v. *Gough*(1) and the more recent decision of the Privy Council in *Lovell and Christmas, Limited* v. *Commissioner of Taxes*(2). In *Grainger & Son* v.

(1) (1896) A.C., 325. (2) (1908) A.C., 46 (P.C.).

Gough(1) the fact that Lonis Roederer, who carried on business at Reims in France, employed an agent and a large number of sub-agents in England to canvass for orders for his champagne, which were sent to Reims for acceptance, was held not to make him a person exercising a trade within the United Kingdom, even when coupled with the further facts that the agents in England sometimes received the price of the goods sold for transmission to their principal, and that the principal's name appeared in the "London Directory" as carrying on business at 21 Mincing Lane, London. Lord HERSCHELL, L.C., pointed out that in previous cases of this nature where liability was established the contracts of sale had been habitually made in the United Kingdom, and observed that there was a broad distinction between trading with a country and carrying on a trade within a country, and that it was impossible to say that merchants and manufacturers who export their goods to all parts of the world exercise or carry on their trade in every country in which their goods find purchasers. A wine merchant, he said, exercised his trade by making or buying wine and selling it again with a view to profit, and, if all he did was to solicit orders in England, he could not be said to exercise his trade there.

Lord WATSON reviewed the earlier decisions and observed :

"There may, in my opinion, be transactions by or on behalf of a foreign merchant in this country so intimately connected with his business abroad that without them it could not be successfully carried on, which are nevertheless insufficient to constitute an exercise of his trade here within the meaning of schedule D."

He referred in this connexion, as did Lord DAVEY, to *Sully* v. *Attorney-General*(2), where it was held that the purchase of goods in England, by a branch of an American firm established there, of goods which it is intended to re-sell at a profit in New York, 'does not, of itself, constitute an exercise of the trade in the United Kingdom when that department of the business from which profits or gains are directly realized is carried on in another country.' These two cases were followed and applied by the Judicial Committee in *Lovell & Christmas, Limited* v. *Commissioner of Taxes*(3). In that case the question

(1) (1896) A.C., 325. (2) (1860) 5 H. & N., 711.
(3) (1908) A.C., 46 (P.C.).

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was whether any of the profits of the appellant's business, which consisted of the sale of provisions on commission in London, were 'derived from New Zealand' within the meaning of the New Zealand Statute, because the appellants had agents in New Zealand who contracted with shippers there that they should consign their goods to the appellants in London for sale on commission in consideration of advances made to them against the bills of lading. The New Zealand Court held the appellants liable on the ground that these contracts from which profits resulted were made in New Zealand, but the Judicial Committee reversed the decision. Their Lordships, after referring to *Grainger & Son* v. *Gough*(1) and distinguishing *Erichsen* v. *Last*(2) and citing *Sully* v. *Attorney-General*(3) with approval, observed that the decisions did not furnish authority for going further back, for the purpose of taxation, than the business from which profits are directly derived and the contracts which form the essence of that business. In the case before them they were of opinion that the business which yielded profit was the business of selling goods on commission in London, and that the earlier arrangements entered into in New Zealand were merely transactions the object and effect of which was to bring goods from New Zealand within the net of the business which was to yield a profit.

Looking at the facts of the present case in the light of these decisions, I think there is no ground for holding that the Clan Line exercises a trade at Cocanada. It is a shipping company which earns profits by the carriage of goods by sea, and in the course of its business trades, in Lord HERSCHELL'S language, with, but not necessarily within, port towns in various parts of the world. It has not been contended before us that a ship-owner exercises his trade at all the ports at which his steamers habitually call to discharge or load cargo, which latter operation may involve entering there and then into contracts with shippers. In the absence of other arrangements the ship-owner is represented by ship's master in all the business incidental to loading and unloading, and it is open to question whether the fact that this business is done by a resident agent himself carrying on a

(1) (1896) A.C., 325. (2) (1881) 8 Q.B.D., 414.
(3) (1860) 5 H. & N., 711.

business there and not by the master makes any difference. It is unnecessary to pursue this question, because it is, I think, clear upon the authorities that, where, as in the present case, the freight-earning contracts with shippers which enable profits to be earned by sea carriage are not entered into at the port in question by the ship's master or the local agent of the ship-owner, but elsewhere, the ship-owner cannot be held to exercise his trade at the port, merely because he employs a shipping agent there to attend to other matters, such as issuing shipping orders and signing bills of lading pursuant to contracts already made and receiving payment of advance freight.

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It was, however, argued that such contracts were made in Cocanada in some instances, because Messrs. Ripley & Co. delivered to shippers there letters of engagement sent by Gordon, Woodroffe & Co. from Madras. I agree with COUTTS TROTTER, J., that this is not shown to have happened, and that, even if it did happen in a few instances, what we have to see is where in substance the business of making contracts was carried on and controlled, and that this was not at Cocanada. The Appeal fails and must be dismissed with costs.

NAPIER, J.—I entirely agree with the judgment just delivered by the learned Chief Justice, but as the case is one of great importance I would like to add a few words with regard to the contentions of the appellant. We were asked to examine a certain number of old cases in which the carrying on of business has been found, to ascertain what facts were there proved and if we found some of those facts to exist in this case to hold that carrying on business is established. I agree with the learned Chief Justice that it is not open to us to do so in a case of this class. It may be that some of the learned Judges in *Tiechler, etc.*, v. *Anthorpe*(1), *Pommery* v. *Apthoro*(2), *Erichsen* v. *Last*(3), *and Werle & Co.* v. *Colquhoun*(4) have used language indicating their application of tests other than those applied in *Grainger & Son* v. *Gough*(5); but the House of Lords in this last case have distinctly ignored those tests and treated those cases as decisions turning on the question where was the contract made. In two of those cases BRETT, L.J., has used this as the test, and, as pointed

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(1) (1885) 52 L.T. (N.S.), 814. (2) (1886) 56 L.J. (Q.B.), 155.
(3) (1881) 8 Q.B.D., 414. (4) (1888) 20 Q.B.D., 753.
(5) (1896) A.C., 325.

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out by the learned Chief Justice, both Lord HERSCHELL and Lord WATSON in the House of Lords case accept this test and the Privy Council in *Lovell and Christmas Limited* v. *Commissioner of Taxes*(1) have followed this case. Whatever therefore may have been the view of JESSEL, M.R., or FRY, L.J., in two of those earlier cases we must accept this proposition as established by the House of Lords and the Privy Council, that in this class of cases, if the contract out of which the profit arises is not made in the place where the tax is sought to be imposed, the liability does not arise. I do not mean that if any contract is shown to have been made in the course of a business from which profits are eventually earned, that it is sufficient to impose the liability, for the decisions in *Sully* v. *Attorney-General*(2) by the Exchequer Chamber and in *Lovell and Christmas, Limited* v. *Commissioner of Taxes*(1) show that this test cannot be broadly applied. I may add too that in a case of production or manufacture in the country by a person sought to be assessed the question where the contracts for sale of the proceeds are made may be immaterial. But in this class after the above rulings I do not think it is open to us to consider any other aspect and I therefore agree with COUTTS TROTTER, J., that the plaintiffs are entitled to recover the amount paid.

Messrs. King & Partridge, Solicitors for respondent.

K.R.

(1) (1908) A.C., 46 (P.C.). (2) (1860) 5 H. & N., 711.