[HIGH COURT OF AUSTRALIA.]

GILLETT . . . . . APPELLANT;
PLAINTIFF,

AND

THE NATIONAL BENEFIT LIFE AND PROPERTY ASSURANCE COMPANY LIMITED . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1918.

SYDNEY, *April* 5, 18.

Gavan Duffy, Powers and Rich JJ.

Company—Foreign company—Registration—Service of process on foreign company after ceasing to carry on business in New South Wales—Companies (Amendment) Act 1906 (*N.S.W.*) (*No.* 22 *of* 1906), *secs.* 7-13—*Companies (Amendment) Act* 1907 (*N.S.W.*) (*No.* 9 *of* 1907), *sec.* 2.

Sec. 7 (1) of the *Companies (Amendment) Act* 1906 (N.S.W.) provides that "Every company or society formed or incorporated in any country, colony, or State other than New South Wales and carrying on business in New South Wales shall, within six months from the commencement of this Act, or before commencing to carry on business in New South Wales, register—(*a*) its name . . . ; (*c*) the name and place of abode or business of the person appointed by such company or society to carry on the business of such company or society in New South Wales; and (*d*) the situation of the principal office of such company or society in New South Wales. The person so registered shall be deemed to be the agent of such company or society, and shall be called the public officer of the company or society, and such office shall be the registered office of such company or society for the purposes of this Act." Sec. 13 provides that "All communications and notices may be addressed to such registered office of such company or society, and service of any notice or legal process at such office, or on the agent of the company or society whose name is registered pursuant to this Part, shall be deemed to be service upon the company or society."

Held, that sec. 13 does not apply to a foreign company which has complied with sec. 7 but has since ceased to carry on business in New South Wales, and, therefore, that service of a writ at the registered office in New South Wales of a foreign company after it had ceased to carry on business in New South Wales was properly set aside.

Decision of the Supreme Court of New South Wales: *Gillett* v. *National Benefit Life and Property Assurance Co.*, 17 S.R. (N.S.W.), 298, affirmed.

APPEAL from the Supreme Court of New South Wales.

The National Benefit Life and Property Assurance Co. Ltd. was a company incorporated in England under the *Companies Act* of the United Kingdom and carrying on business there. On 15th September 1914 the Company was registered in accordance with the provisions of Part III. of the *Companies (Amendment) Act* 1906 (N.S.W.), and Samuel Charles Sadler and Alan Speer were registered as the public officers of the Company in New South Wales, and 13 Bond Street, Sydney, was registered as its principal office in New South Wales. On 7th October 1914 Alan Speer was substituted as the public officer of the Company. The Company carried on business in New South Wales until about 5th October 1915, when the employment of Speer as agent of the Company was terminated, and he gave notice to the Registrar-General of New South Wales that the Company had ceased to carry on business in New South Wales and no longer had an office there, and that he was no longer the agent or public officer of the Company.

On 26th February 1915 the Company issued in Sydney to McIntosh and Sons Ltd. and Richard Herbert Gillett a policy of fire insurance in respect of a motor-car. The motor-car was on 15th August 1915 destroyed by fire.

On 24th February 1917 Gillett instituted an action in the Supreme Court of New South Wales against the Company to recover the amount alleged to be due under the policy of insurance. The writ in the action was served on Alan Speer at 13 Bond Street, Sydney, on 23rd March 1917. The Company thereupon took out a summons to set aside the service of the writ on the ground that the Company was not resident and did not carry on business in New South Wales, and that the person upon whom the writ was served was not a servant or officer of the Company or in any way connected with the

H. C. OF A. 1918.

GILLETT v. NATIONAL BENEFIT LIFE AND PROPERTY ASSURANCE CO. LTD.

Company. The summons was heard by *Ferguson* J., who ordered the service of the writ to be set aside. On appeal by the plaintiff the order of *Ferguson* J. was affirmed: *Gillett* v. *National Benefit Life and Property Assurance Co.* (1).

From that decision the plaintiff now, by special leave, appealed to the High Court.

Flannery, for the appellant. The object of Part III. of the *Companies* (*Amendment*) *Act* 1906 was to put foreign companies which complied with the provisions as to registration in the same position with regard to service of legal process as companies incorporated in New South Wales, so that whether they continued to carry on business there or not service might be made at the registered office. Before the Act a foreign company might be sued in New South Wales if it carried on business there, or if it agreed that it might be sued there. The provisions of Part III. would be a very cumbrous mode of providing for the proper means of serving a foreign company while it carried on business in New South Wales. [Counsel referred to *Halsbury's Laws of England*, vol. v., p. 20; *Tharsis Sulphur and Copper Co.* v. *La Société des Métaux* (2).]

Delohery, for the respondent. The governing words in Part III. are "carrying on business in New South Wales." At the time of the passing of the Act a foreign company could be sued, in New South Wales, only if it was present and was carrying on business there (*City Finance Co.* v. *Matthew Harvey & Co.* (3)). No form of writ was provided for service on an entity which was at the time of service entirely outside the jurisdiction, and Part III. of the *Companies* (*Amendment*) *Act* 1906 was passed with relation to the existing law. It will be presumed that the jurisdiction intended to be given by Part III. was territorial. [Counsel also referred to the *Common Law Procedure Act* 1899 (N.S.W.) (No. 21 of 1899), sec. 4; *Flower* v. *Allan* (4); *Forrest* v. *Pittsburgh Bridge Co.* (5).]

Flannery, in reply. The mischief aimed at by Part III. was that foreign companies carried on business for a time in New South

(1) 17 S.R. (N.S.W.), 298.
(2) 58 L.J.Q.B., 435.
(3) 21 C.L.R., 55.
(4) 2 H. & C., 688.
(5) 116 Fed. Rep., 357.

Wales and then went away, so that they could not be sued there. Grammatically sec. 13 is subject to no limitations in respect of the company continuing to carry on business, and none should be imported.

Cur. adv. vult.

The judgment of the COURT, which was read by RICH J., was as follows :—

This is an appeal from an order of the Supreme Court of New South Wales affirming an order made by *Ferguson* J. whereby his Honor set aside the service of a writ in an action brought by the appellant to recover damages from the respondent Company under a policy of fire insurance. The respondent Company is a company incorporated and registered in London under the provisions of the *Companies Act* of the United Kingdom. In September 1914 the respondent Company was registered under the provisions of the New South Wales *Companies (Amendment) Act* 1906, and registered its office and one Speer as its public officer. After that date the Company carried on business in New South Wales and issued a policy of insurance to the appellant. In August 1915 a claim arose under this policy. In October 1915 the Company ceased in fact to carry on business in New South Wales, and Speer ceased in fact to be its agent. On 18th August 1916 Speer informed the Registrar-General as Registrar of Joint Stock Companies that the Company had ceased to carry on business in New South Wales and to occupy any office therein, and that his engagement as agent and public officer of the Company was terminated. On 22nd March 1917 the plaintiff issued a writ, and on 23rd March 1917 served it on Speer at the place registered as the office of the Company. The Company moved to set aside the service of the writ, and *Ferguson* J. granted the application and set aside the service. The appellant then applied to the Supreme Court of New South Wales to set aside that order. The Supreme Court, however, affirmed the order, and from it this appeal is now made to us.

The question for our determination turns upon the construction of the New South Wales *Companies (Amendment) Act* No. 22 of 1906 as amended by the *Companies (Amendment) Act* 1907.

H. C. OF A. 1918.

GILLETT v. NATIONAL BENEFIT LIFE AND PROPERTY ASSURANCE CO. LTD.

The relevant parts of the former Act are :—

Sec. 7 (1): "Every company or society formed or incorporated in any country, colony, or State other than New South Wales and carrying on business in New South Wales shall, within six months from the commencement of this Act, or before commencing to carry on business in New South Wales, register—(*a*) its name and a copy of its memorandum and articles of association, or any like document; (*b*) a balance sheet containing a statement of its assets and liabilities at a date not more than twelve months prior to the date of such registration; (*c*) the name and place of abode or business of the person appointed by such company or society to carry on the business of such company or society in New South Wales; and (*d*) the situation of the principal office of such company or society in New South Wales. The person so registered shall be deemed to be the agent of such company or society, and shall be called the public officer of the company or society, and such office shall be the registered office of such company or society for the purposes of this Act. Every company or society which fails to comply with this provision, and any person carrying on in New South Wales the business of any such company or society which has failed to comply with such provision, shall be liable to a penalty not exceeding five pounds for every day during which business shall be carried on."

The section deals with foreign companies and societies already carrying on business within New South Wales at the passing of the Act, and with those wishing to do so in the future. With respect to the latter the effect of the section is simply to prohibit them from so carrying on business until they have complied with the requirements of the Act with regard to registration, and to impose a penalty on them and their agents if they do so. It has no application to companies or societies not carrying on business in New South Wales.

Secs. 8, 9 and 10 as amended appear to be applicable to a foreign company or society which is carrying on business within New South Wales, and not to have any application to such a company or society before it has commenced to carry on business there or after it has ceased to do so. These sections are intended for the information and protection of persons dealing or intending to deal with foreign companies or societies in New South Wales. To construe

them otherwise would be to hold that the Legislature of New South Wales had attempted to impose a wholly unnecessary burden upon foreign companies and societies not carrying on business within its territorial jurisdiction.

Sec. 11: "A certificate purporting to be under the hand of the Registrar-General (who is hereby required to give such certificate to any person applying for the same on payment of the prescribed fee), and which shall set forth the name of the company or society, and of the agent of and the situation of the principal office of the company or society in New South Wales, shall be *primâ facie* evidence in all Courts that such company or society is incorporated, that the person named therein as agent is the agent of such company or society in New South Wales, and that the office of such company or society in New South Wales is situate as therein stated, and that such company or society, agent, and office have been duly registered under the provisions of this Part of this Act, and of the time of registration, and of all particulars mentioned in such certificate."

This section provides that the certificate shall be *primâ facie*, and therefore rebuttable, evidence of certain specified matters, but does not pretend to provide that it shall be evidence that the company is carrying on business in New South Wales. Proof of that fact must be made otherwise than by production of the certificate. In view of the preceding and succeeding sections it would appear that the words "company or society" mean company or society carrying on business in New South Wales, and that the section has relation only to such companies and societies. In other words, the certificate proves certain facts with respect to such companies and societies, and with respect to them only.

Sec. 12: "When and so often as any such registered office shall be removed, or any other person shall be substituted for the registered agent of such company or society, the like declaration and notice shall be made and given as is hereinbefore required with reference to the registration of a company or society, and if the requirements of this section shall not be complied with, such company or society, and any person carrying on the business of such company or society which has failed to comply with such provisions, shall be liable to a penalty not exceeding five pounds for every day during which the business is so carried on."

H. C. OF A. 1918.

GILLETT v. NATIONAL BENEFIT LIFE AND PROPERTY ASSURANCE CO. LTD.

This section also appears to apply only to companies and societies carrying on business within New South Wales. The words "such company or society" mean a company or society registered under the provisions of sec. 7 for the purpose of carrying on business within New South Wales and so carrying it on. It is such a company or society and the person actually carrying on its business within the territorial jurisdiction of the New South Wales Legislature that are penalized for non-compliance with the section. No penalty is imposed on the person appointed to carry on the business unless he is in fact doing so.

Sec. 13: "All communications and notices may be addressed to such registered office of such company or society, and service of any notice or legal process at such office, or on the agent of the company or society whose name is registered pursuant to this Part, shall be deemed to be service upon the company or society."

The "company or society" mentioned here is the company or society mentioned in the preceding sections, namely, a company or society registered under sec. 7 and carrying on business within New South Wales.

The amending Act of 1907 (which was not brought to the notice of the Courts below or to our notice), by sec. 2, corrects the definition of "company" contained in sec. 2 of the former Act by excluding Part III. from the definition, and so cuts away the argument founded on this definition, that registered foreign companies were intended to be placed on the same footing as local registered companies under Part. I. of the *Companies Act* 1899.

No provision is made in either Act for the deregistration of a company which has ceased to carry on business, and we are pressed to say that the Legislature must have intended that a company, having once registered under sec. 7, should continue liable to be served. We think that if the Legislature had intended to make foreign companies which had registered amenable to process after they had ceased to carry on business within New South Wales, it would have said so in express terms (*Forrest* v. *Pittsburg Bridge Co.* (1); conf. *Ex parte Schollenberger* (2)).

The question, then, is whether in the circumstances of this case

(1) 116 Fed. Rep., 357, at p. 359. (2) 96 U.S., 369, at p. 374.

the respondent Company comes within the operation of sec. 13 of the Act of 1906. In our opinion it does not. Before the Act was passed a foreign company might have bound itself by agreement that service on a person in New South Wales should be sufficient service on the company, or it might, by carrying on business in New South Wales in such a way as to be resident there, have rendered itself liable to service in New South Wales. The Act under review (in addition to affording the public information as to the stability of the company seeking or carrying on trade here) was intended to obviate the difficulties which existed in the case of a foreign company as to the proof of incorporation and of the situation of its principal office, and in respect of the question whether the person served was its head officer in New South Wales. We cannot find in the language used in the Act any intention on the part of the Legislature that the Company should be deemed to be resident or, if not resident, should be deemed to be represented for the purpose of service in New South Wales when in fact at the time it was not doing business there.

Sec. 13 does not extend a foreign company's amenability to service beyond what previously existed. When such a company are, to use the words of the *Earl of Halsbury* L.C. in *La Compagnie Générale Transatlantique* v. *Thomas Law & Co.—La Bourgogne* (1), "resident here in the only sense in which a corporation can be resident . . . , they are 'here'; and, if they are here, they may be served."

For these reasons we agree with the conclusion arrived at by the Supreme Court.

Appeal dismissed with costs.

Solicitors for the appellant, *McGuren & Pollack*, Grafton, by *Pigott & Stinson*.

Solicitors for the respondent, *Minter, Simpson & Co.*

B. L.

(1) (1899) A.C., 431, at p. 433.