Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeals of The Commissioners of Taxation v. *Kirk* (*Public Officer of the Broken Hill Proprietary Block* 10 *Company*) *and The Commissioners of Taxation* v. *Kirk* (*Public Officer of the Broken Hill Proprietary Company*), *from the Supreme Court of New South Wales; delivered* 27*th June* 1900.

Present at the Hearing:

LORD CHANCELLOR.
LORD MACNAGHTEN.
LORD DAVEY.
LORD ROBERTSON.
LORD LINDLEY.

[*Delivered by Lord Davey.*]

The question in these two Appeals is the same viz. whether the Companies respectively had any income in 1897 within the meaning and operation of the New South Wales Land and Income Tax Assessment of 1895 and liable to taxation under the provisions of that Act and the Income Tax Act of 1895. In each case the Company is a Joint Stock Company formed and incorporated in accordance with the law of the Colony of Victoria and having its head office with a board of directors at Melbourne in that Colony. Each Company carries on "the business "of mining" on leasehold lands held from the Crown at Broken Hill in the Colony of New South Wales where the Company has an office and a manager of the mine. A certain portion of the crude ore was in 1897 sold in that state but the greater part was treated by the Company's concentrating plant at Broken Hill. In the case of the Broken Hill Proprietary Company

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a certain portion was treated at the Company's works at Port Pirie in South Australia. Neither Company made any contracts for sale in New South Wales. The sales of the Block 10 Company were made in Melbourne except as to 1,031 tons of tailings consigned to Europe. The sales of the Broken Hill Company's products were made and the purchase money was received either in London or in Melbourne. Both Companies made net profits to a large amount from these business operations. There is no material distinction between the two cases. The decision of the Supreme Court in each case followed a previous decision of the same Court *in re* Tindal 18 N.S.W. L.R. 378.

The following are the material provisions of the Land and Income Tax Assessment Act of 1895 :—

" Sec. 15.—Subject to the provisions of this Act and the " regulations hereunder there shall be charged levied collected " and paid to the Commissioners for the use of Her Majesty an " income tax at such rate per pound as Parliament shall from " time to time declare and enact in respect of the annual " amount of all incomes exceeding 200*l.* per annum.

" (I.) Arising or accruing to any person wheresoever " residing from any profession trade employment or " vocation carried on in New South Wales whether " the same be carried on by such person or on his " behalf wholly or in part by any other person.

" (III.) Derived from lands of the Crown held under lease " or license issued by or on behalf of the Crown.

" (IV.) Arising or accruing to any person wheresoever residing from any kind of property except from land subject to land tax as hereinafter specifically excepted or from any other source whatsoever in New South Wales not included in the preceding sub-sections.

" Sec. 27.—(IV.) No tax shall be payable in respect of " income earned outside the colony of New South Wales.

" Sec. 28.—From the taxable amount so ascertained as " aforesaid every taxpayer shall be entitled to deductions in " respect of the annual amount of (*inter alia*) :

" (1.) Losses outgoings including interest and expenses " actually incurred in New South Wales by the " taxpayer in the production of his income.

" (v.) Notwithstanding the limitation in sub-section (1) " hereof the Commissioners shall in cases where it " may seem to them just allow losses outgoings and " expenses even if incurred beyond the Colony."

The case may be stripped of some irrelevant details which have been imported into it. It is wholly immaterial whether the person to be taxed resides in the Colony or not. The case would be precisely the same if these Companies were New South Wales Companies having their head offices in the Colony. Nor is it material whether the income is received in the Colony or not if it is earned outside the Colony. The Supreme Court have thought in Tindal's case and in these cases that the income was not earned in New South Wales because the finished products were sold exclusively outside the Colony.

The real question therefore seems to be whether any part of these profits were earned or (to use another word also used in the Act) produced in the Colony. This is a question of fact.

At first sight it seems startling that the ultimate result in the form of profit of a business carried on (as found by the Special Cases) in the Colony is not to some extent taxable income there, but if it cannot be brought within the language of the Act that must of course be the result. Their Lordships turn to the construction of the Act. The word " trade " no doubt primarily means traffic by way of sale or exchange or commercial dealing, but may have a larger meaning so as to include manufactures. But if you confine trade to its literal meaning one may ask why is not this income derived (mediately or immediately) from lands of the Crown held on lease under Sec. 15 (Sub-section III.) or from some other source in New South Wales under Sub-section IV.

Their Lordships attach no special meaning to the word "derived" which they treat as synonymous with arising or accruing. It appears to their Lordships that there are four processes in the earning or production of this income (1) the extraction of the ore from the soil; (2) the conversion of the crude ore into a merchantable product which is a manufacturing process; (3) the sale of the merchantable product; (4) the receipt of the moneys arising from the sale. All these processes are necessary stages which terminate in money and the income is the money resulting less the expenses attendant on all the stages. The first process seems to their Lordships clearly within Subs. III. and the second or manufacturing process if not within the meaning of "trade" in Subs. I. is certainly included in the words "any other source "whatever" in Subs. IV.

So far as relates to these two processes therefore their Lordships think that the income was earned and arising and accruing in New South Wales. They exclude from consideration for the purpose of simplicity the treatment in Port Pirie. This point was if possible more plainly brought out in Tindal's case. The Station Department of Tindal's business was there treated as a separate business yielding an assessable income. It is difficult to see why any more than in this case as the mere keeping of separate books containing cross entries of debit and credit between the two departments was a mere matter of convenience and could make no difference in substance. The question in that case as here should have been what income was arising or accruing to Tindal from the business operations carried on by him in the Colony.

The fallacy of the judgment of the Supreme Court in this and in Tindal's case is in leaving

out of sight the initial stages and fastening their attention exclusively on the final stage in the production of the income. The learned Judges refer to some English decisions on the Income Tax Acts of this country which in language and to some extent in aim differ from the Acts now before their Lordships. The language used in the English judgments must of course be understood with reference to the cases then under consideration. In *Sully* v. *Attorney General* 5 H. and N. 711 and in *Grainger and Son* v. *Gough* 1896 Ap. Cas. 325 the question was whether the person sought to be charged was exercising a trade in this country within the meaning of the Acts. In the former case it was decided that the mere purchase of goods in this country for the purpose of enabling a person to trade in America did not constitute the exercise of a trade here. While in *Grainger* v. *Gough* it was held on the facts there found that the sale by a French firm in France to English customers did not constitute the exercise of a trade in England. In such cases the place where the profits come home to the trader may be a very good test of the place where the trade is carried on. But these cases do not appear to their Lordships to have much to do with a case such as the one before them where a business is admittedly carried on in this country. In *Carter* v. *San Paulo Railway Company* 1896 Ap. Cas. 31 all that the House of Lords had to decide was whether a company with a head office in London from which the board of directors governed the operations of the company in Brazil did not exercise a business in England. It would have been difficult to say in that case that the profits or income were not to some extent at any rate earned in Brazil.

Their Lordships are therefore of opinion that the first question stated in the special case on

each of these Appeals should have been answered in the affirmative and that is all they are called upon to say. They will accordingly humbly advise Her Majesty that the two orders of the 13th December 1898 respectively be reversed and instead thereof it be ordered that the Appeal of the Commissioners be allowed and the first question in the special cases be answered in the affirmative and a declaration be made accordingly and that the present Respondent in each Appeal shall pay the costs of the present Appellants in the Court of Review and in the Supreme Court. The Respondents will also pay the cost of these Appeals.