[WESSELS, J.A.]
different persons, the defendant is not required to justify every detail when in fact the gravamen of the charge has been amply justified. Why do we allow a defendant to justify at all, "Because," in the words of LITTLEDALE, J., in *McPherson* v. *Daniels* (10 B. & C. p. 272), "it shows that the plaintiff is not entitled to recover damages; for the law will not permit a man to recover damages in respect of an injury to a character which he either does not or ought not to possess." Hence the Courts have modified the general rule by saying that the defendant need only justify the main charge or gist of the libel,—"he need not justify immaterial details or mere expressions of abuse which do not add to its sting and would produce no different effect on the mind of the reader than that produced by the substantial part justified" (*Gatley* p. 496).

Now the impression left upon the mind of the judge by the evidence adduced by both plaintiff and defendant was that (1) the conditions in both the tea and luncheon rooms were substantially uncleanly; (2) that the conditions were such that the public was incommoded, and (3) that the public were justified in complaining of the uncleanliness and improper service. If a person were to describe such conditions as filthy I do not think that I could quarrel with him. The impression that the recorded evidence has left on my mind is that the conditions were filthy, and though to describe them as indescribably filthy might appear somewhat overstated to a person of a calm temperament, it might well appear to be such to a person of an excitable nature. The sting of the libel is that the tea rooms and the luncheon room were in a state of uncleanliness, that scraps of meat and vegetables were lying about the floor and that the tablecloths were unduly stained with grease and other stains. Whether the grease spots were so large or so frequent that it was necessary to save one's clothes from contact with them is not of much importance. Even if it is not true that one had to turn back the greasy tablecloths to save one's clothes from contact with them, the libel was still justified if it was true that the tablecloths were unduly stained with grease, mustard, etc., and if the *tout ensemble* were in an uncleanly condition. The fact that there is some exaggeration in the language used does not deprive a plea of justification of its effect. The test is whether the exaggeration leaves a wrong

[WESSELS, J.A.]
impression on the reader's mind to the detriment of the plaintiff. In the words of Lord COCKBURN, "If you think there was an exaggeration of the facts to the detriment of the plaintiff's character, your verdict must be for him." *Gwynn* v. *S.E. Railway Co.* (18 L.T.R. at p. 740). Even, therefore, if there was some exaggeration in the use of words such as "indescribable," or in saying that the tablecloth had to be turned back on account of the grease, then yet the justification is proved, for only "as much must be justified as meets the sting of the charge and if anything be contained in the charge which does not add to the sting of it, that need not be justified"—per BURROUGH, J., in *Edwards* v. *Bell* (1 Bing 404).

Nor is the defendant required to prove that the conditions described were such throughout the whole day: if these conditions existed over a considerable period of the luncheon time or tea time and incommoded a considerable number of people, the charge of uncleanliness is justified. I fully concur with my brother STRATFORD'S analysis of the evidence and the conclusions he has come to in that respect.

Appeal accordingly dismissed.

Appellant's Attorneys: *Wertheim, Becker & Leveson*, Johannesburg; Respondent's Attorneys: *Bell & Dewar*, Johannesburg; *Reitz & Wiley*, Bloemfontein.

MILLIN, *Appellant* v. COMMISSIONER FOR INLAND REVENUE, *Respondent.*

(BLOEMFONTEIN.)

1928. *February* 28; *March* 16. SOLOMON, C.J.; WESSELS, J.A., and CURLEWIS, J.A.

Revenue.—Income tax.—Source of income.—Amounts received by virtue of work or labour.—Royalties on books written in Union and published abroad.—Act 40 *of* 1925, *sections* 7 *and* 9 (1) (*b*).

Where a novelist wrote books in the Union but granted to her publishers in England the right of printing and publishing her novels in book form in Great Britain and elsewhere, they undertaking to pay her a percentage of the published price of the novels as royalties.

Held, that inasmuch as the royalties were not paid to her for the labour she had expended on the novels, but for the right to publish them, such royalties had not been received by virtue of any work or labour done in the carrying on in the Union of any trade within the meaning of section 9 (1) (*b*) of Act 40 of 1925.

Held, further, that since her faculties were employed within the Union both in writing the novels and in dealing with her publishers, the source of the income was in the Union within the meaning of section 7 of the Act and that the royalties had rightly been included in the taxable income of her husband.

The case of *Commissioners of Taxation* v. *Kirk* (1900, A.C. 588), discussed.

The decision of the Witwatersrand Local Division in *Millin* v. *Commissioner for Inland Revenue*, confirmed, but on different grounds.

Appeal from a decision of the Witwatersrand Local Division (FEETHAM, J.), given on a case stated under sec. 60 of the Income Tax Act of 1925 by the Special Court for hearing Income Tax appeals.

The facts were set out as follows by FEETHAM, J.:

The question of law raised in this case relates to income received by Mrs. Millin, the wife of the appellant, in the form of royalties paid to her by publishers in respect of works of fiction composed and written by her in the Union, and printed and published in England and the United States of America. Such royalties are payable to Mrs. Millin under contracts entered into by her with her publishers, and are remitted to her in the Union through her London agents.

The question is whether this income falls within the definition of "gross income" contained in sec. 7 of the Income Tax Act as income received or accrued from any source within the "Union or deemed to be within the Union."

The contracts made by Mrs. Millin with her publishers, and the method by which such contracts are concluded, are fully described in the case, and the position may be summarised as follows:—The contract with the English publishers for the publication of a novel provides that the publishers shall have the sole right of publication of the novel in book form in the United Kingdom of Great Britain, its Colonies and Dependencies, and in Ireland, that rights of translation and dramatisation and all rights in the novel other than publication in book form as above stated are reserved by the author; that certain royalties are payable by the publisher to the author subject to specified deductions; and that at the expiration of seven years from the date of first publication in book form, or at the expiration of any subsequent period of one year, the agreement may be terminated by either party on giving three months' notice of intention to do so. Contracts with English publishers are negotiated by Mrs. Millin's London agents, to whom the manuscripts of her novels are entrusted; the terms arranged between the agents and a publisher are embodied in a contract which is prepared in duplicate: one copy is signed by the publisher, and the other is sent by the agents to the Union for signature by Mrs. Millin who signs that copy and returns it to her agents: the agents then exchange the copy signed by Mrs. Millin for the copy signed by the publisher. The procedure as to the American contracts is similar, except that for the purpose of negotiating such contracts the London agents employ agents in New York. All sums payable to Mrs. Millin under either English or American contracts are paid to her London agents and are remitted by them to Mrs. Millin in the Union after deduction of their commission.

In addition to writing novels, Mrs. Millin also makes regular contributions of literary and other articles to certain newspapers published in the Union.

It was contended on behalf of the appellant before the Special Court that the source of that portion of the appellant's taxable income which was represented by the amount of royalties received on her works of fiction was in England and not within the Union.

It was contended on behalf of the Commissioner that Mrs. Millin carried on within the Union the occupation of writer of literary articles and fiction; that the amount in question had been received by her by virtue of the work done by her in carrying on in the Union that occupation; and that the amount was therefore to be deemed to have accrued within the Union under the provisions of sec 9 (1) (*b*) of the Act.

S. S. Taylor, K.C. (with him *R. Stratford*), for the appellant: The copyright in the book written by the appellant's wife belongs to her. See Schedule III to Act 9 of 1916, secs. 1 (1) (*a*), 3 and 5, and sec. 143 of the Act. In effect she leased certain of her rights to the publishers for a term, the publishers having the right to use the rights in book form. It is really in law leave and licence to use the product of her brain in book form for seven years. She is taxable in England on the royalties under sec. 25 of 17 and 18 George V, chapter X. Mrs. Millin is using in England property she has created. See *In re Graydon* (1896, 1 Q.B. 417).

The words "by virtue of" in sec. 9 (1) (*b*) have no technical meaning. Mrs. Millin is not paid for her work and labour, but for the result of it. See *Tulloch* v. *Marsh* (1910, T.P.D. 453). The section means that the payment must be in exchange for work and labour.

As to the source of the income under sec. 7 she is not taxable because the capital is not employed in the Union. The source does not depend on the place where the income is earned. See *Overseas Trust Corporation, Ltd.* v. *C.I.R.* (1926, A.D. 444); *Smidth & Co.* v. *Greenwood* (1921, 3 K.B. 583, at p. 593 *ad fin*); *Commissioner of Taxes* v. *William Dunn & Co.* (1918, A.D. 607, at pp. 609 and 615) referring to *Lovell & Christmas, Ltd.* v. *Commissioner of Taxes* (1908, A.C. 46). The only result of Mrs. Millin's work in the Union is to produce the capital asset, for use in England where the fruits are earned.

She is not carrying on a business or trade in the Union. Her

income arises from the sale of her *ms.* in England. See Rydge on *Commonwealth Income Tax Acts*, p. 54.

If the Court is against me on the interpretation of sec. 9 (1) (*b*), there should be an apportionment of income, only a portion of the income being earned in the Union. See sec. 19. The principle of apportionment was adopted in *Commissioner of Taxation for N.S.W.* v. *Meeks* (19 C.L.R. 568) based on *Commissioners of Taxation* v. *Kirk* (1900, A.C. 588).

The whole source of the income must be within the Union under sec. 7 (1) to render the income taxable. Apportionment was applied in Australia, though there is nothing in the Australian or New Zealand Acts dealing with the subject. See Rydge on *Commonwealth Income Tax Acts*, pp. 46 and 54 and *Mount Morgan G.M. Co.* v. *Commissioner of Income Tax, Queensland* (33 C.L.R. 76, at pp. 98 and 113). See secs. 16, 17 and 18 of our Act. There would be no difficulty here in apportioning the income if the principle is applicable.

N. J. de Wet, K.C. (with him *M. Murray*), for the respondent: The question of apportionment does not arise here. As the Commissioner has assessed, the burden of proof is placed on the taxpayer. See sec. 57 which does not appear in the Australian Act. The Australian cases were based on a misapprehension of the decision in *Kirk's* case (*supra*). See Rydge on *Commonwealth Income Tax Acts* (pp. 45, 46, 47). The principle of apportionment is in conflict with *Overseas Trust Corporation, Ltd.* v. *C.I.R.* (*supra*). The headnote in *Kirk's* case is too wide. The Court was careful to point out in that case that at least some of the income was assessable. It is difficult to discover the principle on which apportionment was based. *Rydge* (*ibid*, p. 43) dealing with the source of income gives much the same definition as was accepted in the *Overseas Trust Corporation* case (*supra*). The passage in *Rydge* (at p. 45) is in conflict with the maxim *Qui facit per alium facit per se*. See *Overseas Trust Corporation* case (at p. 458). If the sale took place through an agent in England, there was no business in England carried on by Mrs. Millin.

The receipts are admittedly income, the product of wits and labour. See *C.I.R.* v. *Lunnon* (1924, A.D., at p. 98). In this case it is the labour of writing the book which produces the income, not its sale. See *Lovell & Christmas, Ltd.* v. *Commissioner for Taxes* (*supra*) and *Overseas Trust Corporation* case (*supra*), at pp.

[SOLOMON, C.J.]

446, 453, 454). The Commissioner might have decided that Mrs. Millin had produced a valuable article as in the case of diamonds on hand which were held to be assessable in *de Beers Consolidated* v. *C.I.R.* (1922, W.L.D. 184).

As to sec. 9 (1) (*b*) the words " service rendered " are more applicable to a contract of employment, but the words " work and labour " are wide enough to cover this case.

Taylor, K.C., in reply: Sec. 39 in the New South Wales Act is equivalent to our sec. 67 and the *onus* is thrown on the taxpayer just as in our sec. 57.

The publishers of the books are not Mrs. Millin's agents.

de Beers case (*supra*) is distinguishable because diamonds are floating capital.

Cur. adv. vult.

Postea (March 16th).

SOLOMON, C.J.: This is an appeal from a judgment of the Witwatersrand Local Division given on a question of law stated for its determination under sec. 60 of the Income Tax Act of 1925 by the Special Court for hearing Income Tax appeals. The facts of the case are fully set out in the stated case and in the judgment of the learned Judge in the court below, and there is no necessity for recapitulating them.

The question to be determined is whether royalties received by Mrs. Millin from her publishers in London were rightly included in the taxable income of her husband, the appellant, as having accrued from a source within the Union, or from a source deemed to be within the Union. That question was answered in favour of the Commissioner for Inland Revenue both by the Special Court and by the Witwatersrand Local Division, and it now comes before us for a final decision.

The main case set up for the Commissioner was that Mrs. Millin carried on within the Union the " trade " of a writer of works of fiction for profit; that the royalties received by her were profits derived from that trade; and that, as the trade was carried on by her in Johannesburg, the profits accrued to her from a source within the Union. That Mrs. Millin carried on a trade, in the wide sense in which that word is used in the Income Tax Act, including, as it

[Solomon, C.J.]

does, any occupation or calling, is not open to question. Her calling consisted in writing works of fiction for profit. It was a business which did not depend upon capital within the ordinary meaning of that term, but simply upon her own brains. But the production of works of fiction was only part of her trade; if it had stopped there no profit would have accrued to her. Something further had to be done to realise a profit from her work. The novel had to be published and sold. Being the owner of the copyright or "the sole right of producing the work in a material form," she, in the words of the stated case, granted to her publishers the right of printing and publishing it in book form in Great Britain and elsewhere, they undertaking to pay her a percentage of the published price of the novel as royalties. And it was from these royalties that her income was derived. Her business thus consisted, not only in writing the book, but also in subsequently dealing with her copyright, a business involving, as the learned Judge said, the exercise of both literary and commercial faculties. Upon these facts he held that she carried on her trade as an authoress partly in the Union and partly in England, where she makes the contracts with her publishers, and that, consequently, there was "substance in the contention that, as part of her business is carried on overseas, her income cannot be correctly described as derived from a source within the Union." I am unable to agree with this view, for if any income is earned by her in the Union, to that extent it would be from a source within it, and would be assessable for the tax. The learned Judge, however, did not definitely decide this point in favour of the appellant; he held that there was substance in that contention, and there left it, for on another ground he came to the conclusion that she was liable under the provisions of sec. 9 (1) of the Act. That section provides:

"An amount shall be deemed to have accrued to any person from a source within the Union, whenever it has been received by or has accrued to or in favour of such person by virtue of, (*b*) any service rendered or work or labour done by such person in the carrying on in the Union of any trade, whether the payment for such service or work or labour is made or is to be made by a person resident in or out of the Union and wherever payment for such services or work or labour is made or is to be made."

[Solomon, C.J.]

Does the production of a novel by Mrs. Millin fall within the words of this section? It is true that she expended labour on the book, but she is not paid for her labour but for the novel which she has produced by the exercise of her literary faculties and by her labour. There appears to me to be a vital distinction between paying a person for his labour and paying him for an article which he has produced by his skill and labour. If I employ a carpenter to make a chair and agree to pay him, say so much an hour for his work; he is paid for his labour, not for the chair. On the other hand, I employ him on contract to make me a chair and agree to pay him a certain amount for it; I pay him for the chair, not for his work or labour. So here the royalties received by Mrs. Millin were not paid to her for the labour that she had expended on her novel, but for the right to publish it. Sec. 9 (1) (*b*) deals with the case of a person carrying on any trade in the Union, who is paid for his services or work or labour in such trade, and it provides that the amount which he receives shall be deemed to have accrued to him from a source within the Union, no matter whether the payment is made by some one outside the Union, and without regard to the place where such payment is made. For example, a capitalist in England employs a mining engineer in the Union to prospect for gold for him, and engages to pay him so much a day or month for his work: it matters not that, in terms of the engagement, payment is to be made in London, the amount received is deemed to have accrued from a source within the Union. If Mrs. Millin had been engaged by a publisher to write a novel, and was to be paid by the amount of labour that she had expended on the book, say so much per day or so much per sheet of manuscript, the section would apply. But I fail to see how it can be applied to a case like the present, where she is not employed by anyone, and where she is not paid for her labour. Stress was laid by the learned Judge on the words "by virtue of" in the section, but I agree with counsel for the appellant that it is merely a convenient expression to employ in connection with each of the sub-secs. (*a*), (*b*), (*c*), (*d*), which obviated the necessity of using a different word or words before each sub-section. In my opinion, as applied to sub-sec. (*b*), it merely means "for," so that the section would refer to any amount received "for any services or work or labour done."

[SOLOMON, C.J.]

The connection in the present case between the labour and the receipt of the royalties is too remote to bring the case within the words of the section.

I pass on then to consider the main question raised in this appeal, which was whether the amount received by Mrs. Millin from royalties was from a source within the Union. For the appellant it was contended, in the first place, that it accrued from a source in England. The contention may be shortly stated as follows: Mrs. Millin, by writing a work of fiction, produced a capital asset, viz., the copyright of her book: by the contract made with her publishers she granted them a licence to publish the novel in book form, the copyright remaining her property: the royalties which she received came from the use made by her of this capital asset: and the source of her income must be taken to be in the place, viz., London, where her capital was employed. But this contention cannot be sustained, for it is based on the fallacy that the copyright of any work produced by Mrs. Millin is a capital asset. That copyright is, in my opinion, not capital. In the case of the *Commissioner of Taxes* v. *Booysen's Estates* (1917, T.P.D. 278), it was pointed out that income was sometimes the product of capital invested, and sometimes was earned by the labour or the wits of the recipient. Mrs. Millin's business of writing novels was based, not upon capital, but upon her wits and labour. By the exercise of these she produces, let us suppose, a novel a year and sells the copyright outright, say, for £1,000. Can there be any doubt that this amount, less any expenses to which she may have been put, would represent the income of her business for the year, and it cannot make any difference in principle that, instead of receiving a lump sum for the copyright, she is remunerated by royalties spread over a term of years. In the latter case the profits from her business would accrue to her, not in one sum but in driblets, and the tax would be spread over a number of years. But in principle there is no distinction between the two cases, and I cannot concur in the contention that the copyright was capital and that it was the employment of this capital which produced the income.

But it is further contended on behalf of the appellant that in any event the business was carried on partly in the Union and partly in England; that her income should have been apportioned by the Commissioner, and that the appellant should have been

[SOLOMON, C.J.]

assessed only upon that portion of her income which was earned in the Union. To that it is replied on behalf of the respondent, in the first instance, that the question does not arise in this case. The appellant objected generally to the inclusion in his assessment of the royalties received by Mrs. Millin, but he did not claim that any specific deduction should be made from the amount of the assessment. In these circumstances counsel for the respondent relies upon sec. 57 of the Act, which provides that "the burden of proof that any amount is exempt from or not liable to the tax chargeable under this Act or is subject to any deduction shall be upon the person claiming such exemption, non-liability, deduction, abatement or set-off." He contends that, as no claim to deduction from the assessment was made by the appellant, he is precluded from now raising the question. In the view which I take of the case it is unnecessary to express any opinion upon this argument, inasmuch as on the merits I agree with the respondent's contention that the source of the whole amount of Mrs. Millin's royalties was in the Union. In the case of an ordinary business based upon capital it has been held in this Court that, in determining the source of the income, regard must be had to the place where the capital was employed which produced the profits. *Commissioner of Taxes* v. *William Dunn & Co., Ltd.* (1918, A.D. 614).

A strong case on this point is that of *Overseas Trust Corporation Ltd.* v. *Commissioner for Inland Revenue* (1926, A.D. 444). There a financial and investment company, registered in Cape Town, was formed to take over certain interests held by one L. These interests consisted mainly of shares and debentures in mining companies in the Union. Amongst other transactions, the company had, through brokers, sold in Germany certain shares at a price fixed by it which yielded a profit. It was held that this profit was earned from capital employed in the Union, and that the amount was properly included in the income of the company. In his judgment the CHIEF JUSTICE, after deciding that the profits were income, not capital, proceeded: "It remains to localise the source of this income. This is an enquiry in some cases of considerable difficulty. This Court in *Dunn & Co.'s* case looked to the place where the capital was employed to earn the income, in determining the source of that income." And he concludes thus: "The resulting profit sprang neither from busi-

[SOLOMON, C.J.]
ness nor service, but from the employment within the Union of the capital expended in the acquisition of the shares." And in my judgment in that case I said: "If we apply the test laid down in *Dunn & Co.'s* case it seems clear that the capital employed to earn the sum of money in question was what was spent in the purchase of the shares. This purchase took place in Cape Town, and that is where the capital was employed for the purpose of earning this profit." If we apply the same test here it would appear that the source of the whole amount received for royalties was in the Union. It is true that in this case no capital in the ordinary sense of that term was employed by Mrs. Millin. It was the exercise of her wits and labour that produced the royalties. They were employed in the Union, and it matters not, on the analogy of the *Overseas Trust* case, that the grant to her publishers of the right to publish her book was contained in a contract made in England. Her faculties were employed in the Union both in writing the book and in dealing with her publishers, and, therefore, on the test applied in the cases cited, the source of the whole of her income would be in the Union.

The only difficulty in arriving at this conclusion arises out of the decision of the Privy Council in the case of *Commissioners of Taxation* v. *Kirk* (1900, A.C. 588). There a company carried on the business of mining in New South Wales. A certain portion of the crude ore extracted from the mine was treated by the company in their works. No contracts of sale were made in New South Wales, but only in London and Melbourne, and profits were made by the sales. The question raised in a special case stated for the Court was whether the companies had *any* income in New South Wales, within the meaning of the Income Assessment Tax Act of that Colony. It was held by the Supreme Court of New South Wales, following a previous decision in the case of *In re Tindal*, that the company had no assessable income. This decision was reversed by the Privy Council, which answered the question submitted to the Supreme Court in the affirmative. It was pointed out in the judgment that there were four processes in the earning of this income: (1) The extraction of the ore from the soil, (2) the conversion of the crude ore into a merchantable product, (3) the sale of the merchantable product, and (4) the receipt of the moneys arising from the sale. So far as relates to the first two of these processes it was held that the income was earned and

[SOLOMON, C.J.]
accrued in New South Wales, and that the fallacy of the judgment in the case of *In re Tindal* was in leaving out the initial stages and fastening their attention on the final stage in the production of the income. Their Lordships, therefore, answered in the affirmative the question whether the company had *any* income within the meaning of the Income Tax Act. It will be observed that the Court did not lay down that only portion and not the whole of the income was earned in New South Wales. That was not the question that it had to answer, and it confined itself strictly to answering the question put to it. This decision has been the subject of considerable discussion in the High Court of Australia. In *Rydge's* treatise on the Commonwealth Income Tax Acts it is stated that in *Kirk's* case their Lordships divided the earning of the income tax into four processes and held that the company was only liable to New South Wales income tax on the profits made on the processes followed in that State. That, as I have pointed out, is not what the Privy Council decided, for that question was not before it. *Rydge* then proceeds to say that the High Court of Australia followed this principle in the case of *Commissioners of Taxation for New South Wales* v. *Meeks* (19 C.L.R. 568). There an English company had an office in Melbourne, Victoria, and conducted its operations of mining and treating ore in New South Wales. The company in London agreed to sell a quantity of concentrates produced in New South Wales, giving delivery in that State. The contract of sale was cancelled in consideration of a payment of £63,000. It was held that part of this amount was income derived from a source in New South Wales. This passage from *Rydge* does not, however, adequately set out the decision in *Meek's* case. What was decided was that the £63,000, less commission and brokerage, should be treated as profits from the business of mining and treating and smelting ore, which was carried on by the company mainly, if not altogether, in New South Wales, and therefore it should be brought into account in ascertaining the income of the company, subject, however, to the right of the company to show that portion of it was not attributable to the business which was carried on in New South Wales. In the judgment of GRIFFITH, C.J., it is said: "If the corporation can establish a case for apportioning it by attributing any part of it to a source in England, where the corporation is registered, or in Victoria, where

[SOLOMON, C.J.]
it conducts some business operations, the Commissioners will no doubt give effect to their representations."

If we were to follow that decision in the present case we should hold that the Commissioner was justified in including the whole of the amount received by Mrs. Millin as income, leaving it for the appellant to establish a case for apportioning it. In the later case of the *Mount Morgan Gold Mining Co.* v. *Commissioner of Income Tax, Queensland* (33 C.L.R. 76) in which the facts, which it is unnecessary to set out, were very complicated, and where there was considerable difference of opinion amongst the judges, it is not clear that the practice laid down in *Meek's* case was followed. The question which the Court had to answer in that case was " whether a certain sum, or any, and what part of it is taxable income within the meaning of the Income Tax Acts, 1902-1920." The anwser of the Court was that " the said sum cannot be wholly excluded from the taxable income of the taxpayer: the said sum should be apportioned as between Queensland and places outside Queensland for the purpose of ascertaining what portion of the said sum was income arising or accruing from the business operations carried on by the appellant in Queensland." It is not said whether the apportionment is to be made by the Commissioner before assessing the amount of the tax, or whether it is to be made, as was laid down in *Meek's* case, after representations had been made by the taxpayer for reduction of the amount, nor is any principle of apportionment indicated in the judgment.

We are directly concerned, however, in this appeal only with the decision of the Privy Council in *Kirk's* case, and, as I read it, there is nothing in it directly adverse to the views which I have expressed that, following our previous decisions, the whole of the amount received by Mrs. Millin by way of royalties should be included in the income of the appellant.

In the later case of *Lovell & Christmas Ltd.* v. *Commissioner of Taxes* (1907, A.C. 46) no reference was made in the judgment to *Kirk's* case, though it was cited in the argument, and though it would seem to be in point. There the defendant company carried on the business of selling goods on commission in London. Dairy produce was sent to the company in London from all parts of the world and sold by the company on commission. For the

[SOLOMON, C.J.]
purpose of their business they had in New Zealand a salaried officer, and each year they sent out a servant of theirs to New Zealand. These two officers of the company attended meetings of the different butter and cheese factories and endeavoured to persuade the directors to consign their season's output to the company to be sold in London on commission, and offered to make advances against produce. The Supreme Court of New Zealand held that the company was liable to pay income tax upon profits held to have been derived from New Zealand, as these constituted " income derived from business " within the meaning of the income tax acts of that colony. On appeal the judgment was reversed by the Privy Council on the ground that the business which yielded the profit was the business of selling goods in London. It was said that " the earlier arrangements entered into in New Zealand appear to their Lordships to be transactions the object and effect of which is to bring goods from New Zealand within the net of the business which is to yield the profits. To make those transactions a ground for taxing in New Zealand the profits actually realised in London would, in their Lordships' opinion, be to extend the area of taxation further than the authorities warrant."

It would seem that one of the processes, to employ the language in *Kirk's* case, in the earning of profits took place in New Zealand, yet it was held that the whole income was taxable in London, and no portion of it in New Zealand. This confirms the view already expressed that in *Kirk's* case the Privy Council did not decide that, wherever any process in the earning of profits was carried on, some portion of the income was taxable in the country in which the process was carried on.

On the whole, therefore, I come to the conclusion that the appeal should be dismissed with costs.

WESSELS, J.A., and CURLEWIS, J.A., concurred.

Appeal accordingly dismissed.

Appellant's Attorneys: *Hayman & Godfrey*, Johannesburg; *G. A. Hill*, Bloemfontein; Respondent's Attorney: *The Government Attorney*, Johannesburg.