BETWEEN:

1946 Sept. 24
1949 Jan. 31

FRANK C. BOWER .... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Excess profits tax—The Excess Profits Tax Act, 1940, S. of C. 1940, c. 32, s. 7(b)—Whether profits of optometrist exempt from liability to excess profits tax—Onus of proof of compliance with conditions of exemption prescribed by s. 7(b) on appellant—Meaning of "profession"—The Optometry Act, R.S.S. 1940, c. 221, ss. 2(1), 29(1)—Carrying on a profession a question of fact—Whether profits of a profession dependent on personal qualifications a question of fact.

The appellant is an optometrist at Humboldt, Saskatchewan, and claimed that his profits were exempt from liability to taxation under The Excess Profits Tax Act, 1940, by reason of section 7(*b*) thereof. He had attended the School of Optometry at Toronto, served an internship with a practising optometrist in Saskatchewan, passed an examination set by the University of Saskatchewan, obtained a professional certificate from the Saskatchewan Optometric Association, of which he was a member, and was licensed to practise as an optometrist or optician. His office consisted of a waiting room, a refracting room and a laboratory. There was a neon sign overhanging the entrance with a pair of eyes painted on it. He carried a professional card in seven local papers, put his name and description on cards, notes and blotters sent to former patients, but did no other advertising. The appellant kept a case history sheet for each person who consulted him complaining of visual defects, headaches or sore eyes. If there was any disease or pathological condition of the eyes he referred the patient to a medical doctor, but if there was no such condition he examined their eyes with a view to ascertaining the correction required to remedy any defect of visual acuity that might be disclosed. If glasses were required he wrote the prescription on the case history sheet. Then a suitable mounting or frame was selected and the necessary measurements for fitting the patient were taken. The appellant did not grind any lenses but otherwise assembled the frames and mountings. He then verified the lenses to make sure they answered the prescription and fitted them to the patient. The appellant charged an all inclusive fee for all the services rendered including the supplying of the glasses, without breaking it up in any way. The appellant did not sell goggles or binoculars or other similar articles, nor make up prescriptions for doctors or other optometrists. The Minister decided that the appellant's profits were not the profits of a profession within the meaning of section 7(*b*) of the Act. Being dissatisfied with the Minister's decision the appellant brought his appeal to this Court.

Held: That the onus of showing that the assessment appealed against is erroneous either in fact or in law lies on the appellant.

2. That since the appellant is claiming the benefit of exemption from liability by reason of the provisions of section 7(*b*) of the Act, he must show that every condition prescribed by it for the granting of the exemption has been complied with.

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3. That the appellant must show that he was carrying on a profession, that the profits sought to be charged were the profits of such profession and that such profits were dependent wholly or mainly upon his personal qualifications. The onus of proof of these matters, which are all questions of fact, is on the appellant.

4. That whether a man carried on a profession is in the last resort a question of fact.

5. That the appellant combined the professional services of an eye specialist with the business of a dispenser of glasses but that fact cannot constitute his combined activities the carrying on of a profession.

6. That even if the appellant's combined activities as optometrist and optician constituted the carrying on of a profession and the profits sought to be charged were the profits of such profession, the appellant would have to prove that the profits were wholly or mainly dependent upon his personal qualifications.

7. That the appellant's profits were not wholly or mainly dependent upon his personal qualifications.

APPEAL under the Excess Profits Tax Act, 1940.

The appeal was heard before the Honourable Mr. Justice Thorson, President of the Court, at Saskatoon, Saskatchewan.

A. H. Bence for appellant.

L. C. R. Batten K.C. and *E. S. MacLatchy* for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

THE PRESIDENT now (January 31, 1949) delivered the following judgment:

This appeal raises the question whether the profits of an optometrist are exempt from liability to taxation under The Excess Profits Tax Act, 1940, Statutes of Canada, 1940, chap. 32. The appellant, an optometrist at Humboldt in Saskatchewan, was assessed for excess profits tax under the Act for the years 1940 and 1941. He appealed to the Minister who affirmed the assessments on the ground that his profits were not the profits of a profession within the meaning of section 7(*b*) of the Act. Being dissatisfied with the Minister's decision he brought his appeal to this Court.

The appellant contends that his profits in 1940 and 1941 were not liable to taxation under the Act by reason of section 7(*b*) thereof, which, so far as relevant, reads as follows:

> 7. The following profits shall not be liable to taxation under this Act:—
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> (*b*) the profits of a profession carried on by an individual or by individuals in partnership if the profits of the profession are dependent wholly or mainly upon his or their personal qualifications and if in the opinion of the Minister little or no capital is employed . . .

The onus of showing that the assessment appealed against is erroneous either in fact or in law lies on the appellant. To succeed in his appeal he must bring his case within the ambit of the express terms of the section and, since he is claiming the benefit of exemption from liability by reason of its provisions, he must show that every condition prescribed by it for the grant of the exemption has been complied with. It was agreed that little or no capital was employed, so that the Court need not concern itself with this condition of exemption. But compliance with the other conditions must be clearly proved. The appellant must show that he was carrying on a profession, that the profits sought to be charged were the profits of such profession and that such profits were dependent wholly or mainly upon his personal qualifications. The onus of proof of these matters, which are all questions of fact, is on the appellant; if he fails in respect of any of them his appeal must be dismissed.

No assistance is available from any Canadian decision for this is the first time that the section has been before the Court, but there are several helpful decisions in the United Kingdom on a similar enactment there, namely, section 39(*c*) of the Finance (No. 2) Act, 1915, which provided, in part, as follows:

> 39. The trades and businesses to which this Part of this Act applies are all trades or businesses (whether continuously carried on or not) of any description carried on in the United Kingdom, or owned or carried on in any other place by persons ordinarily resident in the United Kingdom, excepting—
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> (*c*) any profession the profits of which are dependent mainly on the personal qualifications of the person by whom the profession is carried on and in which no capital expenditure is required, or only capital expenditure of a comparatively small amount . . .

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and, in the amended form which may have been the source of the section under review, section 12(3) of the Finance (No. 2) Act, 1939, which reads, in part:

> 12. (3) The carrying on of a profession by an individual or by individuals in partnership shall not be deemed to be the carrying on of a trade or business to which this section applies if the profits of the profession are dependent wholly or mainly on his or their personal qualifications . . .

The first decision to which I refer is that of the Court of Appeal in *Commissioners of Inland Revenue* v. *Maxse* (1). There the respondent was the sole proprietor, editor and publisher of a monthly magazine. His earnings were derived from sales of the magazine, advertisements and reprints of articles mostly written by him. Before the war he wrote a large part of each number, and, though some of the matter was contributed by others, the sales were largely due to the popularity of his own writings. When war broke out he increased his personal contributions and did most of the writing. Having been assessed for excess profits duty he appealed to the General Income Tax Commissioners and contended that the profits were earned by reason of his personal qualifications, that the capital expenditure was small in comparison with the personal qualifications required to earn the profits, and that he was exempt from duty by virtue of section 39(*c*) of the Finance (No. 2) Act, 1915. The General Commissioners accepted this contention and discharged the assessment, but their decision was reversed by Sankey J., who held that the respondent was carrying on a commercial business and not a profession within section 39(*c*) and was therefore liable to duty. His decision was reversed by the Court of Appeal which held the respondent was carrying on the profession of a journalist, author or man of letters, and also the business of publishing his own periodical, that the proper course to be followed where such a course was possible, was to sever the profits of the profession and those of the business and assess only in respect of the latter, and that in the present case, the profits of the two businesses could be separated by debiting the profits of the publishing business with a proper sum for the respondent's professional activities as contributor and editor and assessing him only for the balance. Apart from this equitable disposition of the

(1) (1919) 1 K.B. 647.

matter, the decision is important for its statement as to what is meant by the word "profession". At page 657, Scrutton L.J. said:

> The next question is what is a "profession"? I am very reluctant finally to propound a comprehensive definition. A set of facts not present to the mind of the judicial propounder, and not raised in the case before him, may immediately arise to confound his proposition. But it seems to me as at present advised that a "profession" in the present use of language involves the idea of an occupation requiring either purely intellectual skill, or of manual skill controlled, as in painting and sculpture, or surgery, by the intellectual skill of the operator, as distinguished from an occupation which is substantially the production or sale or arrangements for the production or sale of commodities. The line of demarcation may vary from time to time. The word "profession" used to be confined to the three learned professions, the Church, Medicine and Law. It has now, I think, a wider meaning.

In *Currie* v. *Commissioners of Inland Revenue* (1) the Court of Appeal held that the question whether a particular person carries on a profession within the exception of section 39(*c*) of the Finance (No. 2) Act, 1915, is one of fact to be determined by the Special Commissioners. At page 335, Lord Sterndale M.R. said:

> Is the question whether a man is carrying on a profession or not a matter of law or a matter of fact? I do not know that it is possible to give a positive answer to that question; it must depend upon the circumstances with which the Court is dealing. There may be circumstances in which nobody could arrive at any other conclusion than that what the man was doing was carrying on a profession; and therefore, looking at the matter from the point of view of a judge directing a jury, the judge would be bound to direct them that on the facts they could only find that he was carrying on a profession. That reduces it to a question of law. On the other hand there may be facts on which the direction would have to be given the other way. But between these two extremes there is a very large tract of country in which the matter becomes a question of degree; and where that is the case the question is undoubtedly, in my opinion, one of fact;

And Scrutton L.J.,, after agreeing that "whether a man carried on a profession is in the last resort a question of fact", made the following observation, at page 343:

> I myself am disposed to attach some importance in findings as to whether a profession is exercised or not to the fact that the particular man is a member of an organized professional body with a recognized standard of ability enforced before he can enter it and a recognized standard of conduct enforced while he is practising it. I do not for a moment say it settles the matter, but if I were deciding a question of profession I should attach some importance to that particular feature.

In several cases the facts were similar to those in the present case. In *Webster* v. *Commissioners of Inland Revenue* (2) they were as follows: the appellant was an

(1) (1921) 2 K.B. 332. (2) (1942) 2 All E.R. 517.

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ophthalmic optician and a member of the Worshipful Company of Spectacle Makers, of the British Optical Association and of the Joint Council of Qualified Opticians; these bodies conducted examinations the passing of which required extensive knowledge of the human eye on the part of candidates and laid down a code of ethics with which the members had to comply; the appellant had waiting and consulting rooms with two shop windows for the exhibition of spectacles or spectacle frames; he had a small neon sign in front of the shop and advertised in the local papers in a form approved by the Council; his activities consisted of testing the eyesight of his customers, making out a prescription for the spectacles required, obtaining them from a spectacle maker, checking them with the prescription and fitting them to his customer; for these services he charged one amount without any separate fee for sight testing or prescribing, although he stated that he took into account a sum of 5s. for sight testing and, except in certain cases, a further sum of half a guinea for prescribing; if, after a sight test, the customer required another pair of spectacles the only charge made was for the second pair of spectacles. The appellant contended that he was carrying on a profession and that the profits of that profession were dependent wholly or mainly on his personal qualifications. The Commissioners for the General Purposes of Income Tax found that the appellant was carrying on the business of supplying and selling spectacles to which the eye-testing was ancillary and confirmed the assessments. MacNaghten J. agreed with this conclusion and dismissed the appeal from the Commissioners' decision. At page 518, he repeated the view expressed by Lord Sterndale M.R. in *Currie's* case (*supra*) in the following terms:

> The question whether an individual is carrying on a "profession" is a question of fact, and it has been pointed out that the facts of the case as found by the commissioners may be such that it would be impossible to hold that he was carrying on a "profession", or, on the other hand, that it would be unreasonable to deny that he was carrying on a "profession"; and as between those two extremes there may be intermediate cases in which it would be possible for one person to come to one conclusion, and for another person to come to the opposite conclusion but that, if there is evidence to support the conclusion at which the commissioners have arrived, then that conclusion cannot be set aside by the court.

MacNaghten J. then went on to say:

> On the facts as stated by the commissioners, I do not see how they could come to any other conclusion than that at which they did arrive.

It seems clear on the facts stated by the commissioners that the appellant was carrying on the trade of a vendor of spectacles, and that he was not exercising any profession at all.

With respect, I suggest that all that MacNaghten J. was called upon to determine was whether there was any evidence to support the Commissioners' conclusion and that when he had decided that there was such evidence, his own opinion as to whether the appellant was or was not carrying on a profession was irrelevant.

In *Carr* v. *Inland Revenue Commissioners* (1), a similar case came before the courts, except that the findings of fact by the Commissioners went the other way. There the facts were as follows: the appellant was a qualified optician; he had served an apprenticeship to his father for 5 years, had gained experience by working with and assisting oculists and opthalmic surgeons for over 17 years, including experience in the fitting of contact lenses, and became a member of the National Association of Opticians and the Joint Council of Qualified Opticians after furnishing evidence of his training and experience and recommendations of members of the medical profession; he had a waiting room and two consulting rooms at his premises, and on each side of the entrance had a small shop window front used for the display of types of optical frames without glasses and unpriced; his name appeared once upon the front of the premises without the addition of any advertising matter beyond his description and he did not advertise in any journal; his evidence was that his profits were wholly derived from fees paid for his advice to patients who consulted him as to appliances necessary to improve their eyesight and from his own assembly of such appliances to his own prescription and the subsequent supply thereof to his patients; the fee charged was an inclusive one to include the sight-testing and the appliance supplied (such item not being shown separately on the statements rendered by him to persons consulting him) except in cases where after examination no appliance was supplied when a fee for examination was charged; the proportion of such cases was very small; sometimes he obtained glasses from other opticians but this happened only very occasionally. On these facts the Commissioners found that the appellant's profits were dependent wholly or mainly on his personal

(1) (1944) 2 All E.R. 163.

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qualifications and that he was carrying on a profession within the meaning of the section. On an appeal from their decision MacNaghten J. took the view that, although they had found as a fact that the appellant was carrying on a profession, the right view of the case was that he was not carrying on a profession within the meaning of the section but was conducting the business of selling spectacles and reversed the decision of the Commissioners, but his judgment was unanimously reversed by the Court of Appeal which held that, if there was evidence upon which the Commissioners could find as they did, the trial judge was not entitled to take a different position, and that there was ample evidence for the Commissioners to find as they did. That is all that the Court of Appeal was called upon to decide. The case does, however, contain useful observations. In the first place, it is well to emphasize that it does not decide generally that opticians carry on a profession. Scott L.J. thought that the facts were adequate to justify the Commissioners' conclusion and that whether he personally would have come to the same conclusion or not was irrelevant. He also expressed the view that on the evidence before them the Commissioners could have decided the other way. Du Parcq L.J. put the matter even more clearly. At page 166, he said:

> I hope that nobody will think that we are deciding here that opticians as a class are all carrying on a profession. We are, of course, deciding nothing of the kind. We are simply saying that in this particular case it was open to the Commissioners to find on the facts that the appellant was carrying on a profession. Speaking for myself, if the Commissioners had found the other way, I should not have been in the least inclined to say that it was not open to them to do so. I think it would have been; and I will not say how I would have been likely to decide the case if I had been sitting in their place.

The case is also of importance for its observations as to the meaning of the word profession. Scott L.J. thought that the definition propounded by Scrutton L.J. in *Maxse's* case (*supra*) was too sweeping and preferred that of Lord Sterndale M.R. in *Currie's* case (*supra*). In addition, he set out several considerations that seemed to him to point to the fact that the appellant was carrying on a profession. At page 164, he said:

> On these findings of fact, it seems to me that the following six considerations point to his carrying on a profession: (i) There was no advertising, even outside the premises; (ii) he had the appropriate waiting room and two consulting rooms; (iii) no prices were mentioned in con-

nection with the seven or eight types of frame exhibited in his little windows for the observation of patients; (iv) he carried out the functions of examing and testing eyesight and prescribing the suitable glasses—in itself a process calling for much skill and experience—and assembling them in their frames, meaning, no doubt, that they were set in the frames, for example, at the appropriate angle, which, of course, is essential; (v) his net earnings, whatever they were called, were very substantial, particularly in relation to the expenditure on material, that is, on what would be called the stock-in-trade of a business; and finally, (vi) the proportion between those earnings and the item for stock-in-trade, so called in the account, was very large in relation to the stock-in-trade—far larger than it would normally be in any trading business.

The observations of Du Parcq L.J. on the subject are also very useful. His view was that it was dangerous to try to define the word "profession" but subject to that he said, at page 166:

I think that everybody would agreed that, before one can say that a man is carrying on a profession, one must see that he has some special skill or ability, or some special qualifications derived from training or experience. Even there one has to be very careful, because there are many people whose work demands great skill and ability and long experience and many qualifications who would not be said by anybody to be carrying on a profession.

Ultimately one has to answer this question: Would the ordinary man, the ordinary reasonable man—the man, if you like to refer to an old friend, on the Clapham omnibus—say now, in the time in which we live, of any particular occupation, that it is properly described as a profession? I do not believe one can escape from that very practical way of putting the question; in other words, I think it would be in a proper case a question for a jury, and I think in a case like this it is eminently one for the Commissioners. Times have changed. There are professions today which nobody would have considered to be professions in times past. Our forefathers restricted the professions to a very small number; the work of the surgeon used to be carried on by the barber, whom nobody would have considered a professional man. The profession of the chartered accountant has grown up in comparatively recent times, and other trades, or vocations, I care not what word you use in relation to them, may in future years acquire the status of professions. It must be the intention of the legislature, when it refers to a profession, to indicate what the ordinary intelligent subject, taking down the volume of the statutes and reading the section, will think that "profession" means. I do not think that the lawyer as such can help him very much.

The two cases last cited are excellent illustrations of the fact that under the United Kingdom Act the Court's appellate jurisdiction is confined to questions of law. Findings of fact by the Commissioners are binding upon it if there was any evidence to support such findings and it has no jurisdiction to reverse them no matter what its own opinion of the facts might be. Thus, if the findings in the

Webster case (*supra*) or the *Carr* case (*supra*) had been the reverse of what they were, as they might have been, the appeal therefrom in each case would have been dismissed. In Canada, of course, the situation is different, for the Court's appellate jurisdiction extends to questions of fact as well as to points of law. Consequently, the findings of fact by the Minister involved or implied in the assessment are not binding upon the Court and it may come to its own conclusions in respect of any of them.

I should also refer to *Neild* v. *Commissioners of Inland Revenue* (1). This is another illustration of the importance of findings of fact by the Commissioners and the limited scope of the Court's jurisdiction in respect thereof. There the facts were as follows. The taxpayer was a member of the British Optical Association, the Worshipful Company of Spectacle Makers and the Joint Council of Qualified Opticians. His premises included a waiting room and a consulting room. Optical frames without glasses and unpriced were exhibited in a show window at the entrance to his premises. He advertised in the local press, in magazines and on cinema screens and buses on lines approved by the British Optical Association. If a person troubled about his eyesight called on him, he would examine his eyes and ascertain whether there was any disease. If he found any, he would advise him to consult an oculist. If, on the other hand, he thought there was no disease, he would prescribe spectacles, which he and his mechanics would make in accordance with his prescription. He would then test such spectacles and fit them. He charged a fee of 10s. 6d. for examination of the eyes and supplying the prescription in cases where he did not himself make the spectacles and a fee of 5s. for examinations without a prescription. A fee of 5s. was included in his inclusive charge for examination and supplying of the spectacles. Occasionally he made up spectacles from prescriptions brought to him. He was assessed to excess profits tax on the sum of £1,402, this amount being arrived at by deducting his standard profit of £1,500 from his net profits of £2,902. The General Commissioners held that £750 out of his net

(1) (1946) 2 All E.R. 405;
(1947) 1 All E.R. 480;
(1948) 2 All E.R. 1071.

profits was professional and the remainder trading profit but did not say whether they affirmed or reduced the assessment.

On a further hearing they dismissed the taxpayer's appeal on the ground that his business was mainly of a commercial nature. MacNaghten J. read the Commissioners' decision as amounting to a finding that the taxpayer was really carrying on two businesses, one the profession of optician and the other the trade of spectacle maker, and that £750 of the net profits was due to the former, and, following *Maxse's* case (*supra*), held that the sum of £750 should be deducted from the total net profits and ordered that the assessment be reduced by £750. From this judgment the Crown appealed. When the matter came before the Court of Appeal, Lord Greene M.R. held that the Commissioners had not made findings on the issues of fact before them and directed the appeal to stand over and the Case to be remitted to them for answer and report on the following questions, namely, "(*a*) whether the profit of the taxpayer appealed from, or any, and, if so, what, part thereof, was derived from the carrying on of a profession. (*b*) If question (*a*) is answered in the affirmative, whether the profit so derived was dependent wholly or mainly on the personal qualifications of the taxpayer". The Commissioners then answered these questions as follows: "(1) That of the profit, the subject of the assessment appealed from, £750 was derived from the carrying on of a profession. (2) That the profit of £750, so derived, was dependent wholly or mainly on the personal qualifications of the appellant". They thus made specific findings of fact in line with what MacNaghten J. had assumed to be the meaning of their previous finding. When the matter came before the Court of Appeal the second time, Tucker L.J. held that there was no evidence on which the Commissioners could find that part of the profit of the taxpayer's business was derived from the carrying on of a profession, since there was no evidence that the carrying on of the professional part of the business was separate from the rest of it. The Court, therefore, allowed the appeal from MacNaghten J.'s judgment and restored the original assessment.

Counsel for the appellant relied mainly upon *Carr* v. *Commissioners of Inland Revenue* (*supra*). That case seemed

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to set the pattern which he followed in establishing the facts of his client's case. Evidence for the appellant was given not only by the appellant himself but also by Mr. Henry C. Arnold and Mr. Harold C. Arnold, president and registrar respectively of the Saskatchewan Optometric Association. Several contentions of an argumentative nature were made in the course of their testimony; I think that it would be desirable to set out the facts first and deal with the contentions later.

The appellant's evidence was as follows. He took a year's course at the School of Optometry at Toronto, passed the examinations conducted by the Board of Examiners in Optometry of the Province of Ontario under the regulations of the Optometry Act, 1919, of Ontario, and on July 21, 1924, became entitled to registration in Ontario as an Optometrist. He then served a year of internship with a practising optometrist in Saskatchewan, as required by the Saskatchewan Optometric Association, passed an examination set by the University of Saskatchewan and on July 30, 1925, obtained a professional certificate from the Saskatchewan Optometric Association whereby he became a duly registered member of the Association and entitled to be styled an optometrist or optician and to enjoy all the privileges set forth in The Optometry Act, 1924, of Saskatchewan. He has been a member of the Association ever since and, having paid the prescribed fee, held an annual license from it for the years 1940 and 1941. The Association holds annual summer refresher courses at the University of Saskatchewan in which lectures are given in various optometrical subjects and also in subjects relating to the eye and the appellant has attended at least ten of the fourteen courses thus held. The appellant's office is on the Main Street in Humboldt and consists of three rooms, the front one nearest the street being the waiting room, from which a door leads to the middle or refracting room, with a door leading from it to the back room which is used as a laboratory. The appellant's name is across the window of the front room with the word "Optometrist" underneath. There is also an overhanging neon sign, on which a pair of eyes is painted, to show the entrance to the office. This sort of sign is not now permitted by the Association under a by-law passed in 1945

and the appellant has asked electricians to remove it but they have been too busy to do so. The front window of the office has Venetian blinds, which are let down in the daytime, behind which there is a space of twenty-eight inches covered with a dark velvet cloth, on which fitting sets used to be displayed, but about the time when the Venetian blinds were put up in 1941 these sets were removed and nothing has been displayed there since. There is no indication of the cost of frames or mountings anywhere in the office. The appellant carries a professional card in seven local papers, two inches by one column wide. Up to about 1941 or 1942 his card carried the words "To see better see Bower". This kind of card was not then contrary to the regulations of the Association, but now the card permitted by it must be limited to the name and address of the optometrist and the word "optometrist". The appellant puts his name and address and the word "Optometrist" on the case which he supplies to his patient and on cards sent to former patients advising them of the time since he examined their eyes and telling them it is time for re-examination, and on notes advising them as to the care of their glasses and on blotters with tests for determining visual acuity. Apart from these means he does no advertising. Persons complaining of visual defects, headaches or sore eyes come to the appellant either of their own initiative or because they have been referred by a medical doctor, dentist or a previous patient. The appellant's activities in connection with a person's coming to his office were described by him in detail. He keeps a case history sheet (Exhibit 14) for each person who consults him on which he records his name, address, age, occupation, date of examination and name of person by whom he was referred. The patient's visual acuity is then taken without glasses and with present glasses. The first examination of the eyes by any instrument is by the opthalmoscope to ascertain whether there is any diseased or pathological condition of the eyes in which case the appellant refers the patient to a medical doctor and proceeds no further with his own examination. If there is no such condition the appellant proceeds with a number of tests involving the use of instruments, such as an opthalmometer, static and dynamic retinoscope, refractor head, cross cylinder and others, with

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a view to ascertaining the correction required to remedy any defect of visual acuity that has been disclosed. When the necessary tests have been made the appellant decides upon his prescription. If glasses are required the prescription for the lenses required is written on the case history sheet. The patient is then seated at the fitting table where a suitable mounting or frame is selected. The bridge of the nose measurement, the temple width, the style and length of the temple and the fitting distance are all entered on the case history sheet and the patient is instructed to come back for a final fitting. The case history sheet is then taken to the appellant's laboratory where he does as much work as he has time for. He does not grind any lenses, but cuts them to size and shape, edges and feathers them off, drills any necessary holes in them, puts them in the frames and fits them in the mountings. The examination of the eyes and the prescription for the lenses is properly the function of an optometrist, and the work done in the laboratory of fashioning the lenses and assembling the glasses is called optician's work. After this work has been done the lenses are verified by a lensometer to make sure that they answer the prescription. When the patient calls for the final fitting the prescription is re-evaluated to determine whether the necessary correction has been effected. He is then advised to come back for servicing of his glasses such as tightening, straightening and adjustment as required and told to come back for a review of his eyes in one, two, or three years. The appellant charges an all-inclusive fee which is entered on the case history sheet. This is for all the services rendered including the supplying of the glasses. The fee is not broken up in any way. No scale of fees is set by the Saskatchewan Optometric Association. If the patient desires an additional pair of glasses the fee is not as large as in the first instance. The appellant does not sell goggles, or binoculars or other similar articles, nor does he make up prescriptions for doctors or other optometrists.

The evidence of Mr. Henry C. Arnold, president of the Saskatchewan Optometric Association, may be dealt with briefly. Almost all the optometrists in Saskatchewan are members of the Association and are governed by its by-laws as well as by The Optometry Act. The Association

has a code of ethics and discipline for its members. It was also instrumental in having a change made in the matter of collecting the provincial 2 per cent educational sales tax. Originally and during the years in dispute, optometrists were required to collect this tax from the persons whom they supplied with glasses, but since 1944 they have not been required to do so. Now they pay the tax on the materials that they themselves purchase. The association has been active in providing refresher courses and additional training for its members at the University of Saskatchewan and has recommended a five year degree course in Optometry there. It has also limited the advertising which optometrists may do and barred them from having their offices located in or with access from merchandising establishments.

Mr. Harold C. Arnold, the registrar of the Saskatchewan Optometric Association, gave evidence as to the requirements for the examinations for the license to practice optometry in Saskatchewan conducted by the Board of Examiners appointed by the University of Saskatchewan and the fees required for annual licenses. He compared the Saskatchewan Optometry Act with the Optometry Acts in the other provinces and said that in Saskatchewan the practice of optometry is considered a profession.

The practice of optometry is defined by section 2(1) of The Optometry Act, R.S.S. 1940, chap. 221, which is described as an Act to regulate the Practice of Optometry, as follows:

2. In this Act, unless the context otherwise requires, the expression:

1. "Practice of optometry" means the employment of any means other than drugs, medicine or surgery for the measurement or aid of the powers of vision or the supplying of lenses or prisms for the aid thereof.

The statutory definition seems to be applicable either to the occupation of an "optometrist" or to that of an "optician", as these terms are ordinarily understood. There is no definition of them in the Act but I think that their meaning and the difference between them is clear. The word "optician" is defined in the New English Dictionary as "2. A maker of or dealer in optical instruments" and in Webster's New International Dictionary, Second Edition, as "2. One who makes, or who deals in, optical glasses and instruments". It is interesting to note that the word

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"optometrist" does not appear at all in the New English Dictionary, but its meaning is given in Webster's as "One who is skilled in and practices optometry" and "optometry" is defined as "1. Measurement of the range of vision; also, loosely, measurement of other visual powers. 2. Hence, scientific examination of the eyes for the purpose of prescribing glasses, etc., to correct defects, without the use of drugs." This definition of "optometry" is wider than that appearing in the New English Dictionary as "the measurement of the visual powers; the use and application of the optometer", the word "optometer" being given the meaning of "A name of instruments of various kinds, for measuring or testing vision, in respect of range, acuteness, perception of form or colour, etc.; *esp.* one for measuring the refractive power of the eye and thus testing long-or short-sightedness".

The Optometry Act governs the Saskatchewan Optometric Association and its members, empowers it to make by-laws for the government and dicipline of its members, vests in its council the power to make by-laws, rules and regulations governing a variety of matters including "the proper and better guidance, government and discipline of members of the association and the regulation of the practice and professional conduct of such members including the making of rules of professional ethics by which the said members shall be governed", and provides for a number of other matters such as examinations for candidates for professional certificates, the issue of certificates and licenses, the cancellation of licenses and revocation of certificates, the registration of members and students, the payment of fees and certain prohibitions and penalties. The Act does not describe the practice of optometry as a profession but uses the word "professional" in a number of contexts, such as "professional conduct", "professional ethics" and "professional services."

Counsel for the appellant contended that the appellant's practice of optometry was a profession and that the profits sought to be charged were the profits of such profession. I am unable to agree. I have no difficulty in finding that so far as he performed the functions of an optometrist, that is to say, the examination of the eyes and the prescription of the necessary correction for any visual defect thereby disclosed, he rendered services of a professional character, but I am unable to find that the work

which he himself described as optician's work, that is to say, the fashioning of the lenses and the assembly of the glasses and mountings was the carrying on of a profession. In my opinion, he combined the professional services of an optometrist with the commercial business of an optician. His services as an optometrist were of the same character as those that would be rendered by an oculist, meaning thereby an eye specialist, and could properly be described as professional. But the rest of his work was of a different nature and was not professional. In my view, an optician who fills a prescription for glasses brought to him from some one else conducts a business that is not a profession, even although he performs the ancillary functions of fitting the customer and subsequently servicing his glasses. I can see no difference between his position and that of a pharmacist who fills a doctor's prescription. Nor can I see how the character of the business can change by reason of the fact that it is conducted by a person who also renders services of a professional character. The fact is that the appellant combined what would have been the carrying on of a profession if it had been done separately with the conduct of a commercial business that was not a profession. The examination of the eyes and the prescription of the necessary glasses were activities of a professional nature, but the supplying of the glasses even with the services ancillary thereto were commercial business transactions. The person who consulted the appellant about his eyesight and was then supplied with glasses was both a patient and a customer. Nor can the fact that the appellant combined the professional services of an eye specialist with the business of a dispenser of glasses constitute his combined activities the carrying on of a profession, any more than a country medical doctor who also runs a drug store could make his drug store business part of his medical profession. While The Optometry Act uses the word professional in several contexts, as already mentioned, it seems to me that it clearly indicates that the supplying of glasses is a commercial transaction of purchase and sale, for section 29(1) provides:

29. (1) Every person practising optometry shall:

(*a*) display his certificate and licence in a conspicuous place in the office or place where he practises and, when required, exhibit such certificate and license to the council or its authorized representatives;

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(*b*) deliver to each *customer* or person fitted with glasses a *bill of purchase* which shall contain his full name, his post office address and the number of his certificate and license, together with a specification of the lenses and frames or mountings supplied and *the price charged therefore.*

The italics are mine. I think that the legislature has stressed the commercial character of the transaction of supplying glasses for the very purpose of preventing optometrists from hiding the price of the glasses supplied by them under the guise of an overall fee for professional services. The fact that optometrists in Saskatchewan do not comply with this section of the Act, as Mr. Henry C. Arnold stated, cannot turn the appellant's commercial activities into the carrying on of a profession or make them part thereof. Under the circumstances, I find that the business which the appellant carried on in 1940 and 1941 was not a profession, notwithstanding the fact that some services of a professional character were rendered. It follows as a matter of course from this finding that the profits sought to be charged were not the profits of a profession within the meaning of section 7(*b*) and that the appellant is not entitled to the exemption granted by it. On this ground alone, therefore, his appeal cannot be sustained.

Even if these findings were erroneous and the proper findings were that the appellant's combined activities as optometrist and optician constituted the carrying on of a profession and that the profits sought to be charged were the profits of such profession, that would not conclude the matter in the appellant's favour. It is not enough for him to show that he was carrying on a profession and that his profits were those of such profession. He must go further, for the profits of a profession are exempt only if they were dependent wholly or mainly upon personal qualifications, and not otherwise. The appellant must, therefore, prove not only that his profits were the profits of a profession, but also that they were wholly or mainly dependent upon his personal qualifications: *Neild* v. *Inland Revenue Commissioners* (1). Whether or not they were so dependent is a question of fact.

This brings me to the contentions of the appellant and his witnesses bearing on this issue. I have already referred

(1) (1947) 1 All E.R. 480.

to the appellant's evidence that he charged only one total fee for everything done for his patient including the supplying of glasses. He said that in fixing such fee he took into consideration the character of the service rendered to the patient, the amount of skill and knowledge required to render it and its value to the patient, and also the patient's ability to pay and the cost of the laboratory materials consumed. There was an indignant denial that he sold glasses at all. The contention was that he sold only his professional services, that in order to render such services he had to purchase opthalmic materials, such as lenses, frames, mountings, temples, pads and the like, that he did not sell any of these things but used or consumed them in the course of rendering his services to his patient, and that such opthalmic material had no use or value apart therefrom. Similar contentions were put forward by Mr. Harold C. Arnold, the registrar of the Saskatchewan Optometric Association. He said that optometrists in Saskatchewan followed a definite principle in setting their fees: the fee depended on the service rendered, namely, visual care; the services rendered consisted of examining, refracting and prescribing, verifying, fitting and re-evaluating, subsequent servicing and the consumption of the opthalmic materials; for these services the optometrist received a fee based upon "first, the type and character of the optometrist, second, the skill, knowledge and judgment required of the optometrist in each individual case, third, the value of the service to the patient and his ability to pay." The fact that Mr. Arnold used almost the same words as the appellant struck me and prompted me to ask whether they were set out in a manual, text or guide or code of ethics, and Mr. Arnold referred to a number of texts and brochures including one entitled "Economics in Visual Eye Care", published by the American Optical Company, in which the considerations put forward by the appellant and Mr. Arnold are stressed.

On the evidence and contentions put forward, and even if it were conceded that the appellant's practice of optometry was a profession and that his profits for 1940 and 1941 were the profits thereof, I have no hesitation in finding that they were not wholly or mainly dependent upon his personal qualifications. In the first place, I reject the contention that he did not sell glasses but consumed them

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himself in the course of rendering professional services to his patient. In my opinion, this contention is unsound. The appellant both rendered professional services for which he received a fee and sold glasses on which he made a substantial profit. The inclusion of the fee and the price of the glasses in one charge to his patient and customer without showing the price charged for the glasses looks like a device for hiding such price from his customer. Moreover, the contention that he did not sell glasses is inconsistent with his own records, such as his income tax returns and his case history sheets. I shall refer first to the former. In his income tax return for 1940 he reported $11,083.45 under the head of "merchandise sold (total cash and credit sales)", less a closing inventory of $3,295.53, leaving a gross trading profit of $7,787.92 from which he deducted business expenses, leaving a net income from business of $6,208.11 out of a total income of $6,531.48. The 1941 income tax return reported similar items, namely, $12,155.95 as merchandise sold (total cash and credit sales), less a closing inventory of $3,102.65, leaving a gross trading profit of $9,053.30, from which after deduction of expenses there was a net income from business of $7,455.65 out of a total income of $7,505.30. In neither return was there any report of any income from professional fees. The appellant sought to explain away his returns, including his certificate therein that all the statements and information contained in them were true in every respect, by saying that he was ignorant of the proper way to make them, that he had taken the matter to a lawyer in Humboldt, that he had not sold any merchandise, that the items of $11,083.45 for 1940 and $12,125.95 for 1941 under the heading "merchandise sold (total cash and credit sales)" were incorrectly included under such heading, that they represented his total fees charged, as set forth in his case history sheets, and should properly have been reported as fees for professional services. I am unable to accept the explanation that the items referred to should have been reported as fees for professional services. There were two other statements by the appellant which I also found unsatisfactory, namely, that he paid the provincial education sales tax on the amount of his fees for the services rendered by him, and that he could not tell how much of his over-all fee would be for his service

as an optometrist. I do not believe either of these statements. The Education Tax Act, R.S.S. 1940, chap. 55, required every consumer of tangible personal property purchased at a retail sale to pay a 2 per cent tax on the value of such property and required vendors to collect it from purchasers. It is not clear from the evidence whether the appellant collected this tax from his customers in addition to the amount of his total fee or whether he absorbed it himself and paid it out of such fee. It does not matter which course he followed, for the basis on which he computed the tax is clear. On the case history sheets which he kept for each person who consulted him he noted both the amount of his total fee and the amount of the education sales tax. This appears from the case history sheets which were put in by the appellant as Exhibit 15; one, dated 11-25-37, shows a total fee of $18 and an education sales tax of ·30 cents and the other, dated 3-4-40, a total fee of $14 and an education sales tax of ·22 cents. If these case history sheets are samples of the appellant's case history sheets generally, and I see no reason for assuming otherwise, they show conclusively that the appellant did not pay the 2 per cent education sales tax on the amount of his total fee, as he said he did, but on a lesser amount, namely, the total fee less a deduction of $3 in each case. The case history sheets do more than this; they refute the appellant's statement that he could not tell how much of his over-all fee would be for service as an optometrist. I do not think that there was ever any doubt in his mind as to what portion of it represented his fee for professional service and what portion the price at which he sold the glasses. I think that it would be fair to assume from the notations on the case history sheets, Exhibit 15, that in each case the fee for professional service was $3 and the balance represented the price charged for the glasses. Under the circumstances, I think that the items which the appellant included under the heading "merchandise sold (total cash and credit sales)" in his income tax returns, which were made up from the amounts of the total fees shown on his case history sheets, were properly included under such heading, except to the extent of the fee portion thereof. Moreover, the case history sheets have an important bearing on the issue whether the appellant's profits

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depended wholly or mainly upon his personal qualifications. It was only to the extent that they came from his professional services that it could be said that they depended upon his personal qualifications. The rest came from commercial business transactions that did not depend upon personal qualifications. Exhibit 15 shows in respect of two total fees of $18 and $14 that $15 and $11 respectively represented the price charged for the glasses and only $3 in each case the professional fee. I would be greatly surprised if the appellant's case history sheets generally did not show a similar picture. It would, therefore, appear that the bulk of the appellant's profits came from business transactions that did not depend upon personal qualifications. It is, of course, not necessary to go as far as this. It is not for the Crown to show that the appellant's profits were not wholly or mainly dependent upon his personal qualification. The onus is on the appellant to prove that they were. In my opinion, he has wholly failed to discharge such onus.

On the argument Mr. MacLatchy for the respondent suggested that it might be possible for the Court to find that the appellant was carrying on two businesses, one a profession and the other not, and that he was liable to taxation only in respect of the latter. I have given careful consideration to this suggestion but have come to the conclusion that such a disposition of the appeal ought not to be made. Where it is possible to separate two businesses and sever their respective profits there is nothing in law to prevent the course suggested: *Inland Revenue Commissioners* v. *William Ranson & Son, Limited* (1). And this course was followed in *Maxse's* case (*supra*). But the limited range of applicability of the principle in that case was clearly indicated by Tucker L.J. in *Neild* v. *Inland Revenue Commissioners* (2); there must be separate businesses and the profits thereof must be severable. These conditions do not exist in the present case. While I think it would be possible for the appellant by going through his case history sheets to sever his fees for his professional services from the rest of his receipts he could not determine what portion of his expenses would be properly chargeable to each of his activities. Moreover, the fact is that while

(1) (1918) 2 K.B. 709. (2) (1948) 2 All E.R. 1071.

some of his activities were of a professional nature he did not carry on two separate businesses. There was only one business.

The result is that since the appellant has not shown compliance with the conditions of exemption prescribed by section 7(b) of the Act his appeal must be dismissed with costs.

Judgment accordingly.