

No. 5*.—HIGH COURT OF JUSTICE (KING'S BENCH DIVISION).—
26TH JUNE, 1918.

COURT OF APPEAL.—20TH AND 26TH MARCH, 1919.

THE COMMISSIONERS OF INLAND REVENUE *v.* MAXSE.⁽¹⁾

Excess Profits Duty—Exception—Profession—Journalist owning and publishing magazine to which he is principal contributor—Finance (No. 2) Act, 1915 (5 & 6 Geo. V, c. 89), Section 39 (c)—Case stated—Findings of fact.

The Respondent was the sole proprietor, editor and publisher of a monthly magazine which he purchased for £1,500. Up to 1905 he had to provide capital to cover losses on publication, but thereafter practically no capital was required. The revenue was derived from sales of the magazine, advertisements, and reprints of articles mostly written by the Respondent.

⁽¹⁾ Reported K.B.D., [1918] 2 K.B. 715, and C.A., [1919] 1 K.B. 647.

Prior to the war the Respondent wrote a large part, though not the bulk, of each number of the magazine, and its sale was largely due to the popularity of his writings. When war broke out he greatly increased his personal contributions and did most of the writing.

Having been assessed to Excess Profits Duty for the accounting period ending 31st May, 1915, in respect of the profits arising from the magazine, he appealed to the General Commissioners on the ground that such profits arose solely from his exercise of the profession of journalism, and that he was within exception (c) in Section 39 of the Finance (No. 2) Act, 1915. The General Commissioners accepted his contention and discharged the assessment.

The King's Bench Division held that the Respondent was carrying on an ordinary commercial business, that there was no evidence on which the General Commissioners could find that he was exercising a profession, and that he was accordingly liable to Excess Profits Duty.

Held, in the Court of Appeal, that the Respondent was both exercising the profession of a journalist and editor, in respect of which he was entitled to exemption from Excess Profits Duty under Section 39 (c) of the Finance (No. 2) Act, 1915, and carrying on the business of publishing a magazine, in respect of which he was assessable to duty, that the profits of such profession and business were separable for Excess Profits Duty purposes, and that, in arriving at the profits of the publishing business, a reasonable allowance must be made for his professional services as editor of and contributor to the magazine.

CASE

Stated under 43 & 44 Vic., Cap. 19, Sec. 59, and 5 and 6 Geo. V, Cap. 89, Sec. 45 (5), by the Commissioners for the General Purposes of the Income Tax Acts for the Division of St. Paul, Covent Garden, in the City of Westminster for the opinion of the King's Bench Division of the High Court of Justice.

1. At a meeting of the Commissioners for the General Purposes of the Income Tax Acts for the Division of St. Paul, Covent Garden, in the City of Westminster, held at the Tavistock Hotel, Covent Garden, on Wednesday the 8th day of December, 1914, Leopold James Maxse (hereinafter called the Appellant), the sole proprietor, editor and publisher of the "National Review", appealed against the assessment to Excess Profits Duty of £1,000 made on him by the Commissioners of Inland Revenue in respect of the profits arising from the "National Review" for the accounting period 1st June, 1914, to 31st May, 1915, claiming

that he was exempt from the duty under 5 & 6 Geo. V, cap. 89, sec. 39 (c), on the ground that his profits should be regarded as arising solely from his exercise of the profession of journalism.

The facts submitted are as follows :—

2. The Appellant was educated at King's College, Cambridge, and afterwards proceeded to read for the Bar; but having abandoned that intention owing to bad health he took to writing and in 1893 he purchased the publication known as the "National Review" for the sum of £1,500. He has been sole proprietor thereof and editor and publisher of the magazine of that name since that date.

3. In 1899 Appellant paid a visit to Berlin and became convinced that the German Government was pursuing an aggressive policy and intended to attack this country; and since that date he has consistently used the "National Review" for the purpose of calling attention to the danger and has personally written innumerable articles in it with that end in view.

4. From 1893 to 1905 the publication of the "National Review" resulted in a loss; but since that date profits have been made each year. Trading and Profit and Loss Accounts and Balance Sheets have been prepared annually to 31st May each year; and the year to 31st May, 1915, is therefore the first accounting period under Section 38 of the Finance (No. 2) Act, 1915.

5. The exact liability on the figures has not yet been ascertained; but the profits of the first accounting period exceed the pre-war standard (*viz.* : the average profits of the best two of the three pre-war years plus the statutory allowance of £200) by approximately £2,000. Duty on this excess at 50 per cent. is £1,000, the amount assessed.

6. It is agreed between parties that the amount of the assessment is subject to adjustment if the Appellant's contention that he is exempt from duty fails.

7. The "National Review" is a monthly magazine dealing with politics and matters of general interest, more particularly from the national and imperial standpoint. It is sold at 2s. 6d. a copy or for an annual subscription of 30s. The subscriptions are all paid in advance and the sales are for cash.

8. The earnings are derived from the sales of single copies of the magazine, from the subscriptions, from advertisements to the extent shown hereafter, and from the sales of sundry publications being reprints of articles which have appeared in the "National Review" and practically all written by Appellant.

9. The outgoings comprise payments to contributors, cost of paper and printing, advertising distribution, rent and office expenses, &c. The Appellant buys the paper and has the magazine printed for him by an independent contractor.

10. The following is an abstract from the Appellant's Trading Accounts for the 5 years ended 31st May, 1915, and shows the principal items of Revenue and Expenditure each year :—

	To 31.5.15	31.5.14	31.5.13	31.5.12	31.5.11
Net sales	4,498	3,275	3,467	2,907	3,146
Subscriptions	2,021	2,210	2,011	2,319	2,460
Advertisements	745	1,187	902	880	909
Other receipts	105	—	3	3	31
	7,369	6,672	6,383	6,109	6,546
		Average	6,427.		
Contributors	964	1,388	1,396	1,586	1,548
Printing	1,253	1,466	1,432	1,377	1,325
Paper... ..	727	812	829	790	779
Advertising	174	467	420	287	348
Dispatch	514	452	524	521	533
Advertisement commission...	195	371	255	243	258
Trade allowances	30	27	31	35	57
Stationery	89	93	82	61	76
	3,946	5,076	4,969	4,900	4,924
			Average	4,967.	
Gross profit	3,423	1,596	1,414	1,209	1,622
Percentage on total receipts	46	24	22	20	24

ANALYSIS OF CERTAIN OF ABOVE ITEMS.

Receipts year to 31.5.15	7,369	
Average 4 preceding years	6,427	Increase £942.
Contributions 31.5.15	964	
Average 4 preceding years	1,480	Decrease £516.
Other expenses 31.5.15	2,982	
Average 4 preceding years	3,481	Decrease £499.
Total expenses 31.5.15	3,946	
Average 4 preceding years	4,967	Decrease £1,021.

In addition to the above outgoings there are the usual office expenses such as rent, telephone, wages, light, insurance, &c.

11. The Appellant employs a manager at a salary of £250 per annum, and 2 clerks who do the advertisement canvassing and the account keeping, &c. The rent of his office has varied from £150 to £63 a year. It is now £63 a year.

12. The distribution of the magazine is effected through the wholesale houses.

13. Prior to the outbreak of war the Appellant always wrote a large part of each monthly number of the " National Review " himself, but the bulk of the matter was contributed by others. The part written by the Appellant was devoted to the expression of his own political views and especially the German question, and was generally written in a very trenchant style. The sale of the Review was largely due to the popularity of Appellant's own writings. When war broke out, fearing the magazine might be ruined, and to effect economies, he greatly increased his personal contributions and has continued ever since to do most of the writing.

14. The number of pages contributed by the Appellant and the number contributed by others for three pre-war numbers of the " National Review " and similar figures for three numbers published since the outbreak of war are as follows :—

Statement of number of pages contributed by Appellant and by others.	Number of pages occupied by advertisements.
Feb. 1914. Maxse 63 pages. Others 113 pages...	16 pages. 4 insets.
May 1914. " 42 " 136 " ...	20 " 3 "
June 1914. " 38 " 155 " ...	20 " 4 "
Oct. 1914. " 122 " 38 " ...	10 " 4 "
Nov. 1914. " 111 " 49 " ...	18 " 4 "
Dec. 1914. " 135 " 25 " ...	18 " 2 "

15. The following is a copy of the contents page of the volume of the " National Review " for the six months September, 1914, to February, 1915, which the Appellant put in to show the extent of his personal contributions :—

Author.	—	Page.
A Naval Correspondent	The Conduct of the War at Sea ...	747
" " "	Justice for the Navy ...	929
Enstein, Lewis (late American Minister at Costa Rica)	The War and American Policy ...	357
" " "	American Peace Dreams ...	837
Maxse, L. J. " ...	Episodes of the Month ...	1, 157, 317, 477, 637, 797
	Greater Britain ...	146, 304, 461, 624, 780, 949
Low, A. Maurice ...	American Affairs ...	134, 292, 448, 612, 768, 937

Author.	—	Page.
Maxse, L. J. ...	The Fight against Pan Germans :—	
	i. Is the Potsdam Party Killed or Scotched ?	41
	ii. German Responsibility ...	51
	iii. The Imperial Superman ...	63
	iv. Our Pacific Press ...	70
	v. A Study in Pacific Diplomacy	92
	vi. Waiting to See ...	111
	vii. " A Scrap of Paper " ...	122
" ...	The War against the Huns :—	
	i. Under the Heel of the Press Bureau	214
	ii. The German Jew and the German Empire	229
	iii. A Semitic Symposium ...	243
	iv. Russian Diplomacy ...	251
	v. Furor Teutonicus ...	262
	vi. Fresh Light on the Potsdam Policy	269
	vii. The German Emperor's Latest	279
	viii. War at any Price ...	288
" ...	Sidelights on the Great War :—	
	i. Partisans and Patriotism ...	377
	ii. " It's a Long, Long Way to Philadelphia "	389
	iii. " We have no desire to Humiliate the German People "	403
	iv. Anti-Preparation ...	414
	v. What every Cabinet Minister Knew	422
	vi. Pinchbeck Napoleons ...	433
	vii. The Problem of the Speyer...	440
" ...	On some things not generally known :—	
	i. " Great is Diana of the Ephesians "	518
	ii. Washington and Philadelphia	538
	iii. Desirable Aliens ...	560
	iv. Undesirable Aliens ...	564
	v. Dishing the City ...	574
	vi. Rigging the Press ...	583
	vii. Concerning Reuter ...	595
	viii. Non-combatants and Combatants	606
" ...	Round about the Great War :—	
	i. Sir Moritz's Nightmare ...	681
	ii. The French Yellow Book...	694
	iii. The German Emperor and the King of the Belgians	704
	iv. Italian Revelations ...	712
	v. The Man in the Street and the Man in the Cabinet	719
	vi. " Germany is my Spiritual Home "	725
	vii. Mr. Bonar Law's Disclosure	739

Author.	—	Page.
Maxse, L. J. ...	The Diary of the War	757
„ ...	Haldaneism in High Places :—	
	i. A Fatal Friendship	869
	ii. Fools and Tools	879
	iii. “ The British Canossa ”	886
	iv. The Potsdam King	895
	v. Sir John Brunner’s Grievance	903
	vi. The Contraband Controversy	917
Mitford E. Bruce ...	Japan and the War in Europe	851
Platt, T. Comyn ...	Feeding the Troops at the Front	860
Redesdale, Lord ...	St. Petersburg in 1863-4	201

16. From 1893 to 1905 onwards in such years as the Appellant failed to realise a profit he had to provide capital to carry on. At the present time practically no capital is required by the Appellant.

17. It was contended by Counsel for the Appellant that the Appellant was exempt by virtue of the provisions of Sect. 39 (c) of the Finance (No. 2) Act, 1915, and he submitted in support of his contention :—

(a) That the profession of journalism is one in which capital expenditure is required in order to educate and train a person who is about to enter the profession for fitness therein. The early years of a journalist’s profession are usually unprofitable, and thus it is either necessary for a journalist to acquire an interest in a paper or incur further capital expenditure in paying his expenses of living. The profits of journalism are dependent on the ability and personal capacity of the journalist. The total capital expenditure required for the profession of journalism is not more than that required for other professions such as law or medicine ; and the total capital expenditure actually incurred by the Appellant in his profession (including the acquisition of the “ National Review ”) was not more than is normal in the case of a successful journalist in a high class of journalism. The profits were earned by the Appellant in this case by reason of his personal qualifications and the requirement of such capital as had been expended by him was insignificant compared with the personal qualification required to earn the profits.

(b) That the Appellant has at all times held pronounced political views and his object in buying the “ National Review ” was that he might practise his profession of journalism in such a way as not to be subject to any supervision or control and so as to be able to express his own views with complete freedom.

- (c) That Appellant was a journalist pure and simple and that the fact that he had purchased the "National Review" did not alter his position. The only difference between Appellant and other journalists was that he had purchased a paper to exploit his own brains. He was not expending capital on the exploitation of the brains of others. That journalism is a profession within the meaning of Sec. 39 of 5 & 6 Geo. V, cap. 89, and that the "National Review" requires no capital expenditure as the money received from sales exceeded the amount of the expenditure and subscriptions were payable in advance.
- (d) That the word "comparatively" in the Section must be construed by reference to a comparison of the capital employed with the personal qualification. Here the capital is insignificant in comparison with the personal qualifications. The Appellant's success was not the result of the skilful use of capital in itself, but was the outcome of his personal qualities aided by a small expenditure of capital. The Appellant's whole history was that of a professional man.
- (e) That the Appellant's expenses would bear comparison with those of any other professional man say a solicitor. The only commercial receipt was for advertisements, and the commercial side of the "National Review" was negligible. That it would defeat the object of the Sections if, because there was a small amount received which was not attributable to the Appellant's brain, he were held to be liable to the Excess Profits Duty. He claimed that such receipts were comparable to those of a doctor who derives a small part of his profits from the sale of drugs—or a schoolmaster who derives a part of his profits from the food of his boarders. That the receipts from advertisements depend on circulation and the circulation had been increased by Appellant's own writings. In the volume of the "National Review" September, 1914, to February, 1915, the Appellant wrote 722 pages out of 956.
- (f) That the Appellant acquired the "National Review" not with the idea of running a journal in the ordinary way, but as a means of bringing his views before the public. And that the profits are dependent on the Appellant's personal qualifications and mainly dependent on his personality as a journalist.

18. On behalf of the Crown it was contended that the undertaking acquired and carried on by the Appellant was a business within Section 39 of the Finance (No. 2) Act, 1915, and did not

come within the terms of exception (c) in that section. In support of such contention it was submitted :—

(a) That the income derived from the publishing of a magazine is derived primarily from the sale of a commodity ; it must be regarded as a business within the meaning of Sect. 39 of 5 & 6 Geo. 5, cap. 89, and liable to Excess Profits Duty accordingly. That there was a clear distinction to be drawn between the activities of the Appellant and those of a journalist who contributed to the press. The nature of Appellant's accounts showed that his activities constituted a well-defined business. It might be compared with that of a doctor carrying on a nursing home ; or that of an actor running a theatre or touring company and playing the leading part himself.

(b) That from the statement set out in paragraph 14 it was clear that the production of the " National Review " was a business before the outbreak of the war ; and that the fact that the Appellant had contributed a large proportion of the articles since the outbreak of the war for the purpose of effecting economies did not alter the nature of the undertaking. That the analysis of certain items from the accounts set out in paragraph 10 showed that the increased profits in the year to 31st May, 1915, were not solely due to the decreased amount paid to contributors. The receipts for year to 31st May, 1915, were £7,369 as against average receipts for the 4 preceding years of £6,427, *i.e.* an increase of £924. Payments to contributors for the year to 31st May, 1915, were £964 compared with £1,480 the average for the 4 preceding years, *i.e.* a decrease of £516. And other expenses (printing, paper, &c.), were £2,982 for the year to 31st May, 1915, as against £3,481, the average of the 4 preceding years, *i.e.* a decrease of £499. That the accounts clearly indicated that the concern was a business one inasmuch as whereas the net profits of a journalist would be 90 per cent. or more of the receipts, the " National Review " had not only resulted in a loss for a number of years, but had never made a profit of more than 24 per cent. of the receipts in the best of the three years preceding that ended 31st May, 1915.

(c) That the fact that the capital employed was small was not material ; the business being a cash business little capital was required. Numerous businesses were run on small capital. And moreover it was admitted, that considerable capital had been sunk by Appellant in building up the " National Review." A valuable property with a considerable goodwill had been created.

(d) That with regard to the personal element, this was an important factor in all journals; *e.g.* the cases of Mr. St. Leo Strachey and "The Spectator" and Mr. Garvin and "The Observer." But these journals were no more likely to come to an end if deprived of the services of the gentlemen in question than the "National Review" if it lost the services of the Appellant.

The Commissioners held that the Appellant was exempt from assessment to Excess Profits Duty and discharged the assessment.

The Crown thereupon expressed their dissatisfaction with the determination of the Commissioners as being erroneous in point of law and duly required them to state and sign a Case for the opinion of the High Court of Justice, which we have stated and do sign accordingly.

Dated this 18th day of January, 1918.

SAMUEL BIRD,
GEORGE A. MACMILLAN,

Commissioners of Taxes for the Division of St. Paul,
Covent Garden, in the City of Westminster.

Witness—

W. M. BOULTON,
Clerk to the Commissioners.

The case came before Sankey, *J.*, in the King's Bench Division on the 26th June, 1918, when judgment was given in favour of the Crown, with costs.

The Attorney-General (Sir Frederick Smith, K.C.) and Mr. T. H. Parr appeared as Counsel for the Crown, and Hon. W. Finlay, K.C., and Mr. A. M. Latter for the Respondent.

JUDGMENT.

Sankey, J.—This is a Case stated under 43 and 44 Victoria, Chapter 19, Section 59, by the Commissioners for the General Purposes of the Income Tax Acts for the Division of St. Paul, Covent Garden, for the opinion of this Court.

The question which is raised, putting it quite briefly, is this—whether the Respondent, Mr. Maxse, who is the sole proprietor, editor and publisher of the "National Review," is chargeable with Excess Profits Duty in respect of the profits arising from the "National Review" for the accounting period between 1st June, 1914, and 31st May, 1915. The case for the Respondents made

(Sankey, J.)

before the Commissioners was that he was exempted from the Excess Profits Duty by reason of the fact that he carried on a profession within the meaning of Section 39 (c) of the Finance (No. 2) Act, 1915. The Commissioners acceded to his contention. They set out in the Case which is brought before the Court a number of facts and a very great number of contentions, and they say that the Commissioners held that the Appellant was exempt from assessment to Excess Profits Duty and discharged the assessment. From that determination the Crown brings this appeal in the form of a Special Case to this Court.

Now several cases came before this Court yesterday, and one of them turned upon the Sub-section the provisions of which the Respondent in this case prays in aid and I ventured to lay down what I conceive to be the law with regard to that Section yesterday in the case of the *Commissioners v. North & Ingram*.⁽¹⁾ That was a case where the two Respondents carried on the profession of a boarding preparatory school, and I held that they were entitled to the benefit of the exception and were not chargeable to Excess Profits Duty.

It is therefore unnecessary for me to go at any length into the law in this case, but for the purpose of making my judgment understood, I must refer very briefly to the two Sections which are material in the present case. Excess Profits Duty was imposed by Section 38 of the Finance (No. 2) Act, of 1915, and the trades and businesses to which it applied were set out in the following Section, Section 39, which provides that—"The trades and businesses to which this Part of the 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"—then one of the exceptions to which the Excess Profits Duty is not applied is—"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."

The question which falls for my determination is whether Mr. Maxse can claim the benefit of those words, whether he does carry on a profession of the class indicated in Sub-section (c). Broadly speaking, trades are to be taxed and professions are to be exempt, except the case of a profession which approximates to a trade by reason of its profits being derived from its capital expenditure rather than from the personal qualifications of the person by whom it is carried on.

Now in order to determine whether the Respondent is entitled to the benefit of that Sub-section, it is necessary to see first whether he did in fact carry on a profession, because if he did

(1) [1918] 2 K.B. 705.

(Sankey, J.)

not carry on a profession, then he does not come within the Sub-section. Even if he does carry on a profession, it is necessary to consider the subsequent provisions of the Sub-section and to see whether it is a profession of that character which is exempted by the Sub-section; two stiles have to be got over, first, the consideration of whether it is a profession, second, the consideration of whether it is a profession of the character indicated in the exempting clause.

Now Mr. Finlay, on behalf of the Respondents, has said that this is really a question of fact for the Commissioners and, they having come to a conclusion and a proper conclusion upon a question of fact, I am not entitled to disturb their findings, and as a considerable portion of the argument has been delivered upon that point, I think it is necessary for me to state clearly my view with regard to it. Cases for the opinion of the High Court are regulated by Section 59 of the Taxes Management Act, 1880, where it says—"The appellant or the surveyor may, if dissatisfied with the determination as being erroneous in point of law, declare his dissatisfaction to the commissioners who heard the appeal," and Mr. Finlay says, and says rightly in my view, that the only questions which fall for my determination in this Court are questions of law; but Mr. Parr, on behalf of the Crown, drew my attention to certain remarks made by the Master of the Rolls (Lord Cozens-Hardy) in the case of *Stanley v. The Gramophone and Typewriter, Ltd.*, 5 T.C. 358, at page 374. I have already referred in the course of the argument, and indeed at the beginning of my judgment, to the manner in which this Case is stated, where certain facts are set out, then a great number of contentions, and finally the two and a half lines in which the Commissioners say "The Commissioners held that the Appellant was exempt from assessment to Excess Profits Duty and discharged the assessment." Mr. Parr says that I am entitled therefore to look at this case in the same sort of way as the Master of the Rolls said that he was entitled to look into the case of *Stanley v. Gramophone, Ltd.* The learned Master of the Rolls says⁽¹⁾: "The question arises on a Case stated by the Commissioners. It is undoubtedly true that, if the Commissioners find a fact, it is not open to this Court to question that finding unless there is no evidence to support it. If, however, the Commissioners state the evidence which was before them and add that upon such evidence they hold that certain results follow, I think it is open, and was intended by the Commissioners that it should be open, to the Court to say whether the evidence justified what the Commissioners held. I am satisfied that the Case stated by the Commissioners falls under the latter head. They have carefully stated the evidence, but they have not, in my opinion, to use words found in one of the authorities, 'stated the Appellants out of Court.'"

(1) 5 T.C. 358, at p. 374.

(Sankey, J.)

I do not think that that passage in the judgment of the learned Master of the Rolls bears the interpretation which Mr. Parr seeks to put upon it. I do not think it is open for this Court to say that the finding of the Commissioners is against the weight of the evidence, nor do I think it possible for this Court in any way to find its own facts. They must state the facts and the Court must accept the facts as stated and decide any question of law which may arise as to them. There is one exception. The only question of law which can arise is when there is no evidence upon which the Commissioners could have come to the conclusion of fact which they have professed to come to. In *The American Thread Company v. Joyce*, 6 T.C. at page 163, the Lord Chancellor says: "It is not for us to enter into the question how, on the materials which came before the Inland Revenue Commissioners, we should have dealt with the question of fact. In saying that, I am far from wishing to indicate that I dissent in any way from the conclusion that the Inland Revenue Commissioners arrived at when they stated a Case containing a conclusion on the question of fact which arises. What I mean is that the Taxes Management Act of 1880 precludes us from looking at the finding of the Commissioners, except in so far as it is necessary to see whether there was any evidence which could have supported it." I believe that to be the true law, but it is quite immaterial whether I believe it to be the true law or not, it is the law as laid down by the House of Lords, and I do not think it conflicts with what the Master of the Rolls said in the other case of *Stanley v. Gramophone, Ltd.*⁽¹⁾ What the Master of the Rolls said must be regarded *secundum subjectam materiam*, that is, he was speaking with reference to the facts of the case, and as pointed out in other judgments in the same case, he was really considering the question which I believe to be the proper question: Was there any evidence upon which the Commissioners could have come to the findings of fact which they did? I am a little surprised at this time of day that this question should be raised, but I hope, indeed I had already thought, that the question had long been settled, and I propose at any rate in this case to go on the question where there was any evidence upon which the Commissioners could have come to the determination they in fact have done.

It is therefore necessary to examine, I hope quite briefly, the facts in the case. Mr. Maxse purchased the "National Review" as far back as the year 1893, and since that date he has been the sole proprietor and editor and publisher of the magazine. A few years afterwards, in 1899, he visited Berlin, satisfied himself—these are the facts set out in the Case—that the German Government intended to attack this country, and since that date he has

(¹) 5 T.C. 358, at p. 374.

(Sankey, J.)

constantly used the "National Review" for the purpose of calling attention to what he conceived to be this danger. At first he was rather unsuccessful, a voice crying (may I say) in the wilderness, and the paper did not prosper. During this time he wrote himself repeatedly for the paper, but he also invited and received the articles of numerous other contributors. When the War broke out it is found by the Case that Mr. Maxse very much increased the number of his own personal contributions. It is found that, fearing the magazine might be ruined and to effect economies, he greatly increased his personal contributions, and has continued ever since to do most of the writing. Then the Case sets out a recital of the number of articles which he wrote and I think I was told, and I have no reason to doubt its correctness, that his contributions amounted to about seven-ninths of the total.

Now it is said that he exercised a profession the profits of which are dependent mainly upon the professional qualifications of himself and in which no capital expenditure is required or only capital expenditure of a comparatively small amount. As far as that latter part of the Section is concerned in which no capital expenditure is required or only capital expenditure of a comparatively small amount, I think that that is found by the Commissioners to be so, because they say in paragraph 16 of their findings "From 1893 to 1905 onwards in such years as the Appellant failed to realise a profit he had to provide capital to carry on. At the present time practically no capital is required by the Appellant." So that if it be a profession, it certainly is a profession in which no capital expenditure is required or only a capital expenditure of a comparatively small amount.

Now the next question is (perhaps I may be putting the cart before the horse rather, but one has to do it in this case in order to see whether it is evidence on which the Commissioners could come to the conclusion of fact they have done)—is it a profession, the profits of which are dependent mainly on the professional qualification of the person by whom the profession is carried on? That depends upon paragraph 13 of the Case where the Commissioners find that: "Prior to the outbreak of war the Appellant always wrote a large part of each monthly number of the 'National Review' himself, but the bulk of the matter was contributed by others. The part written by the Appellant was devoted to the expression of his own political views and especially the German question, and was generally written in a very trenchant style. The sale of the 'Review' was largely due to the popularity of Appellant's own writings." I think that is a finding of fact which makes the Respondent, as he now is, come within those words that the profits are dependent mainly on the professional qualifications of the person by whom the profession is carried on. It appears to me (and I purposely try to avoid any knowledge that a judge cannot help having in

(Sankey, J.)

matters outside the Court) from the Case as stated that the profits of this "National Review" are dependent mainly on the professional qualifications of Mr. Maxse. It looks to me, if Mr. Maxse by any misfortune ceased to be able to write for the "National Review," the career of the "National Review" might not possibly be a very lengthy one; but that may be a false prophecy.

But I have now to consider what appears to me to be the real question in this case. Is this a profession which is carried on by Mr. Maxse? I assume that the Commissioners have found it is a profession, and the question for me is whether there was evidence upon which they could find it was a profession. I do not think it could be said in law that a man who merely publishes a magazine is carrying on a profession. I see all the difference in the world between him and a journalist who sends in articles to the various daily, weekly, or monthly newspapers and gets remunerated for his articles by cash or cheques from the proprietors or publishers; I should have no doubt in saying that a gentleman who carried on that occupation (I use a neutral word) is carrying on a profession, but it seems to me that Mr. Maxse is not quite in that position. He does not get paid in the same way as a journalist does for his articles: his remuneration is derived from the sale of a commodity in the open market. It is found in the Case (paragraph 8 I am reading) that—

"The earnings are derived from the sales of single copies of the magazine, from the subscriptions, from advertisements to the extent shown hereafter, and from the sales of sundry publications being reprints of articles which have appeared in the 'National Review' and practically all written by Appellant."

I just draw attention in passing to the revenue referred to in that paragraph, and I take the last year before the War. The accounts were made up to the 31st May. They show a sum of nearly £7,000 receipts, and out of that over £1,000 are derived from advertisements. That does not look to me to be like the case of a man who is carrying on a profession. Then it is found that Mr. Maxse buys the paper and has the magazine printed for him by an independent contractor; but paragraph 11 states that he employs a manager at a salary of £250 per annum and two clerks who do the advertisement canvassing and the account keeping. I think that again shows that this is not a case of a profession but a business. The income which Mr. Maxse derives from, again I will call it, the occupation or the undertaking, is really derived from the publishing of a magazine, and as contended on behalf of the Crown, is derived primarily from the sale of a commodity. As I have already pointed out Mr. Maxse is not like an ordinary journalist. In this particular case he receives neither the remuneration of an ordinary journalist, nor, in my opinion, does he perform the function of an ordinary

(Sankey, J.)

journalist. I think that there is no evidence on which the Commissioners could have found that he was exercising a profession. I think that he is carrying on an ordinary commercial business, and the profits (that is what one has to look at) are derived from the sale of a commodity in the open market. A number of instances were put to me as analogies. I have always been taught, in the two days that I have been trying these cases under the Finance (No. 2) Act, 1915, to be cautious, and I do not intend to express a single opinion upon any case outside the case I am dealing with. For the reasons I have tried to give, I think that in this case the Crown is entitled to succeed, although I should like to express a hope that the case may be taken to a higher Court, for the matter is one which I have only come to a conclusion upon after very considerable hesitation.

Mr. Parr.—The appeal will be allowed with costs?

Sankey, J.—Yes.

Mr. Maxse having appealed against the decision of the King's Bench Division, the case came before the Court of Appeal (Swinfen Eady, *M.R.*, and Warrington and Scrutton, *L.JJ.*) on the 20th March, 1919, when judgment was reserved. Hon. W. Finlay, *K.C.*, and Mr. A. M. Latter appeared as Counsel for Mr. Maxse, and the Solicitor-General (Sir Ernest Pollock, *K.C.*) and Mr. T. H. Parr for the Crown.

On the 26th March, 1919, judgment was given unanimously against the Crown, with a modifying declaration, varying the judgment of the Court below.

JUDGMENT.

Swinfen Eady, M.R.—This is an appeal by Mr. Maxse from the judgment of Mr. Justice Sankey upon a Case stated by the General Income Tax Commissioners for St. Paul, Covent Garden, and it raises a question as to the liability of the Appellant for Excess Profits Duty.

In 1893 the Appellant purchased for £1,500 the "National Review," a monthly magazine, and has since been sole proprietor, editor, and publisher of it. He buys the paper, and has the magazine printed for him.

He employs a manager at a salary of £250 a year, and two clerks who do the advertisement canvassing and account keeping. The yearly rent of the office is £63, and the distribution of the periodical is effected through wholesale houses.

(Swinfen Eady, M.R.)

Before the war the Appellant wrote personally a large part of each monthly number, but the bulk of the matter was contributed by other writers, whom the Appellant paid for their contributions. The sales of the magazine were largely due to the popularity of the Appellant's own writings.

Since the war the Appellant has largely increased the proportion of his own contributions contained in each number, which now consists mostly of his own writings.

The figures given in the Case show that the magazine has a considerable sale, and that some of the income is derived from advertisements.

Mr. Maxse contends that he is not liable to Excess Profits Duty, on the ground that he carries on the profession of journalism, and that he falls within the exception (c) in Section 39 of the Finance Act.

On the other hand, it is contended by the Inland Revenue Commissioners that Mr. Maxse carries on the business of publishing the "National Review," deriving profits from the sale of it to the public, and is in quite a different position from a journalist who is paid for his contributions, and is not interested in the profits of the periodical in which his writings are published.

It must be borne in mind that the appeal from the Income Tax Commissioners only lies upon a point of law, and that the decision of the Commissioners upon the facts is final, assuming that there is evidence upon which they might come to the conclusions at which they have arrived.

The Income Tax Commissioners held that Mr. Maxse was exempt from assessment to Excess Profits Duty and discharged the assessment. This involves a finding:—(1) That the business carried on by Mr. Maxse was the profession of journalism; (2) that the profits of it were dependent mainly on the personal qualifications of the person by whom the profession was carried on; (3) that the profession was one in which no capital expenditure was required, or only capital expenditure of a comparatively small amount.

Mr. Justice Sankey pointed out that findings (2) and (3) were findings of fact which could not be disturbed, and no question was raised before us on these findings. The learned Judge then pointed out that the real question was whether there was any evidence upon which the Tax Commissioners could find that Mr. Maxse was carrying on a profession, and he held that it could not be said in law that a man who publishes a magazine was carrying on a profession, and on this ground he reversed the decision of the Income Tax Commissioners. He added that he saw all the difference between a journalist who sent in articles for which he was paid by the proprietors or publishers as to which he would have no doubt that a person who carried on that occupation was carrying on a profession, and a person who was only

(Swinfen Eady, M.R.)

remunerated for his articles by the sale of a commodity in the open market.

In my opinion, Mr. Maxse is carrying on the profession of a journalist, author, or man of letters by writing numerous articles, which are published monthly, and also by editing the magazine, from which he derives pecuniary profit. An author would not cease to be such if he published, or procured to be published, his own works at his own expense, and looked only for his remuneration to the sale of a commodity (to wit, his books) in the open market. The truth is that Mr. Maxse is a journalist and editor, and is also carrying on the business of publishing a magazine, but the fact that he is a publisher does not prevent him from also exercising the profession of a journalist.

Part III of the Finance Act applies to the trade or business of a publisher, and the profits arising from this trade or business are to be "separately determined for the purpose of this part of the Act," and are to be determined on the same principles as the profits and gains of a business would be determined for the purpose of Income Tax, subject to the statutory modifications.

The profits of exercising the profession of a journalist are exempted by Section 39 (c), and the Finance Act does not impose any Excess Profits Duty upon them, and therefore such duty cannot be levied upon them, and the direction about determining gains and profits upon the same principles as for the purpose of Income Tax has no application to profits arising from the profession of a journalist. The proper course to be followed where a trade or business liable to the duty is carried on in connection with a trade or business not so liable was decided by Mr. Justice Sankey in *Commissioners of Inland Revenue v. William Ransom & Son, Ltd.*⁽¹⁾, [1918] 2 K.B. 709. Where it is possible to separate one business from the other, so as fairly to arrive at the separate profits of the taxable business this should be done, and there is nothing in law to prevent it being done. In that case the business of husbandry, including medicinal herb growing, was carried on in connection with a business of manufacturing chemists, and the farm supplied herbs to the chemical factory. One of the directors kept memoranda of the value of the produce transferred to the factory, so that there was no difficulty in ascertaining what amount should be debited to the factory and credited to the farm for herbs supplied, and in excluding the profits of the farm for the purpose of the Excess Profits Duty.

So in the present case the amount of the written contributions of Mr. Maxse has already been ascertained. The business of publishing the magazine should be debited with a fair and reasonable sum by way of allowance to Mr. Maxse for his contributions, in the same way as payments to outside contributors are dealt

⁽¹⁾ Page 21 of the present Volume.

(Swinfen Eady, M.R.)

with; also with a proper sum for remuneration as editor. In that manner the professional journalist is paid for his professional services and without excess profits taxation, and the business of publishing the magazine can be assessed to the Excess Profits Duty in respect of profits properly attributable to the publishing business.

Mr. Maxse's Counsel at an early stage of the case said that his client was perfectly satisfied with this procedure, but the Solicitor-General opposed it; nevertheless I am satisfied that it is the only method of fairly giving effect to the Statute.

The difficulty of separating the profits of two businesses is largely one of fact, and in my opinion, for the reasons I have given, it can be done readily in the present case.

The appeal should be allowed and the order of the Court below discharged, and a declaration made that the profits of the publishing business ought to be separately assessed after debiting a proper sum for Mr. Maxse's personal contributions and his work as editor.

Each party is to bear his own costs of the application to the Court below, and any costs already paid under that order to be returned.

The Appellant to have his costs of this appeal against the Inland Revenue Commissioners.

Warrington, L.J.—This is an appeal from a judgment of Mr. Justice Sankey on a Case stated by the Commissioners of Income Tax. The Commissioners held that the Appellant, Leopold James Maxse, was exempt from assessment to Excess Profits Duty and discharged the assessment. Mr. Justice Sankey has reversed this decision. In holding as they did, it is clear that the Commissioners must have found that the profits in question had arisen (1) from a "profession"; (2) that the profits of such profession are dependent mainly on the personal qualifications of the person by whom the "profession" is carried on; and (3) that no capital expenditure is required, or only capital expenditure of a comparatively small amount, so as to bring the Appellant within the exception (*c*) in Section 39 of the Finance (No. 2) Act, 1915. Mr. Justice Sankey has held that there was evidence justifying the findings numbered (2) and (3) above on the personal qualifications of the Appellant, but that there was no evidence sufficient to support the finding numbered (1).

The profits in question arose during the year ending 31st of May, 1915, from the publication of the "National Review," of which the Appellant is the sole proprietor, editor and publisher. It is unnecessary to state the facts in detail—it is enough to say that the Appellant purchased the "National Review" in the year 1893 for the sum of £1,500. From 1893 to 1905 the publication resulted in a loss—since that date profits have been made each year. Prior to the outbreak of the war a large part of each

(Warrington, L.J.)

monthly number was written by the Appellant himself, but the bulk of the matter was contributed by others who were paid by the Appellant, such payments being treated as part of the expenses of publication. Since the outbreak of war, with a view to economy, the Appellant has greatly increased his personal contributions, and during the period in question did most or nearly all the writing. The sale of the "Review" has been largely increased by the popularity of the Appellant's own writing. A portion of the revenue is derived from advertisements.

It is conceded that the profits made by the owner of a magazine or journal from the publication thereof, the owner taking no part in the literary work, would be profits arising from a trade or business, and would not be within exception (c) of Section 39. It is conceded on the other hand that profits made by a writer would be profits arising from a "profession," and in my opinion this would be so whether those profits consist of remuneration received by him from another person or whether they are derived from the sale of his works by the writer himself, or from their publication and sale through another person as publisher, who either pays the author a royalty or a proportion of the profits arising from the publication and sale. The remuneration of an editor of a magazine or a journal would also, in my opinion, be profits arising from a profession.

The result of the Order of Mr. Justice Sankey is to charge the Appellant on profits arising from his work as an author and editor as well as on those arising from the publication of the magazine in its commercial aspect. This, in my opinion, is wrong, and the Order must be set aside. But it does not follow that the Appellant is wholly exempt from duty. The truth is his profits are derived from two businesses, one of which is a profession such as is described in exception (c), and the other of which is not, and in order to arrive at the true result the latter ought to be separately determined as provided by Section 41 of the Act.

This course was suggested by the Court at an early stage of the argument, and was accepted as satisfactory by the Appellant. The Solicitor-General, however, contended that there would be a difficulty in the way of this owing to the reference to Income Tax in Section 41. With all respect to the Solicitor-General, I fail to see any difficulty. The only profits to be determined on the same principles as the profits and gains of the trade or business are, or would be, determined for the purpose of Income Tax are the gains and profits arising from a trade or business to which Part III of the Act applies, and do not include what I may call the Appellant's professional profits. An example of the application of the principle of the separation of excepted profits from those liable to duty is found in *Ransom's case*⁽¹⁾, [1918] 2 K.B. 709.

(1) Page 21 of the present Volume.

(Warrington, L.J.)

So far as the working out of the principle is concerned, I see no difficulty in ascertaining what would be a reasonable sum to allow to the Appellant for the literary work contributed to the magazine and for his remuneration as editor. This would then be treated as one of the expenses of the commercial side of the business, and the profits of that side would be *pro tanto* reduced. The sum so allowed would be profits arising from a profession, and would be free from charge.

I think the appeal must be allowed and an Order made as proposed by the Master of the Rolls.

Scrutton, L.J.—I need not repeat the facts found in the Special Case and referred to by my brothers. Some of the facts found in the Case, however interesting to the biographer of Mr. Maxse or historian of his country, appear to have no legal reference to this appeal.

Excess Profits Duty under Sections 38 and 39 of the Finance Act (No. 2), 1915, is to be levied on "all trades and businesses" with certain exceptions. The exceptions include "employments" and certain "professions." The profits are to be determined on the same principles as "trades or businesses" under the Income Tax Act, except as expressly modified by the Finance Act. "Trades" under Schedule D of the Income Tax Acts are part of a group described as "trades, professions, employments or vocations." The word "businesses" is not used in Schedule D. When one considers that by the Finance Act "professions" and "employments" are expressly excepted from taxation on "trades and businesses," the inference is irresistible that Parliament is using the word "businesses" to cover the "professions, employments and vocations" of Schedule D. If they were not included by the words "trades or businesses" there would be no need to except them.

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 if any manual skill, as in painting and sculpture, or surgery, skill controlled 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. It appears to me clear that a journalist whose contributions have any literary form, as distinguished from a reporter, exercises a "profession"; and that

(Scrutton, L.J.)

the editor of a periodical comes in the same category. It seems to me equally clear that the proprietor of a newspaper or periodical, controlling the printing, publishing and advertising, but not responsible for the selection of the literary or artistic contents, does not exercise a "profession," but a trade or business other than a profession. What, then, is to be done if the same man is both proprietor, editor and contributor? In my view, it can always be determined as a question of fact what is his reasonable remuneration as contributor, having regard to the scale of payment by the periodical and its sales; or, as an editor, having regard to the existing and ordinary remuneration of such people. The question must be approached with care; no fictitious or artificial operations must be allowed to evade Excess Profits Duty (Section 44 (3)); though this would not in my view cover the fixing of reasonable remuneration for work done. And in fixing a reasonable standard of remuneration for a contributor it must be considered whether the rate fixed would involve that the paper is being carried on at a continuous loss if that rate is paid, and whether the available profits should not be reasonably divided between proprietor, editor and contributor, and the profits of the latter two excluded from Excess Profits Tax. It would not be a fair decision to fix a reasonable remuneration for capital and services provided by the proprietor without regard to the total fund available, and let the editor and contributor take the remainder, if any. Nor would it, in my opinion, be fair to fix the reasonable remuneration for the contributor and editor without regard to the total fund available, and let the proprietor take the remainder, if any. An authority for this severance is found in *Commissioners of Inland Revenue v. Ransom*⁽¹⁾, [1918] 2 K.B. 709, where a chemical manufactory had, as an ancillary, a farm for the growth of herbs. Though the company's accounts did not distinguish the two profits, materials existed from which the profits of the farm could be computed and exempted from the tax as profits of "husbandry."

Applying these principles to the present case, Mr. Maxse is exercising the profession of a journalist and of an editor, a profession the profits of which are dependent mainly on his personal qualifications, and in which only small capital expenditure is required. These two facts are found by the Commissioners in his favour. He is also carrying on the business of proprietor of a review, with a manager and clerks, and a revenue from advertisements and the sale of the magazine after paying the expenses of its production, which would include remuneration for editor and contributor. The Commissioners have treated him as not liable for any Excess Profits Duty; the judge below as liable for Excess Profits Duty on the whole combined business. Neither view is, in my opinion, correct; he is liable on his excess

(1) Page 21 of the present Volume.

(Scrutton, L.J.)

profits as proprietor, excluding his reasonable remuneration as editor and contributor, assessed with due regard to the fact that if they were so fixed as to leave no remuneration for the proprietor, no independent proprietor would carry the magazine on. In my view, the Order of the Judge should be discharged, and a declaration made in the terms stated by the Master of the Rolls, which will be substituted for the determination of the General Commissioners that the Appellant is exempt from assessment to Excess Profits Duty.

The Master of the Rolls.—Of course, the effect of the judgment in the form that I have indicated will be that the direction of the Commissioners that the assessment be discharged will stand, although the ground they give that the Appellant was exempt from assessment to Excess Profits Duty is modified by our judgment.

Mr. Finlay.—Quite, my Lord.

The Master of the Rolls.—By discharging the Order below which discharged the Order of the Commissioners, we restore the Order of the Commissioners as regards the result of the assessment.

Mr. Parr.—I do not know whether my friend, Mr. Finlay, will agree not to tax, as we rather want to consider the decision in case we should desire to take the case further.

Mr. Finlay.—Certainly.

The Master of the Rolls.—We do not sanction those arrangements.

Mr. Finlay.—I will meet my friend fairly about it.
