[HIGH COURT OF AUSTRALIA.]

ROBBINS HERBAL INSTITUTE . . . APPELLANTS;

AND

THE FEDERAL COMMISSIONER OF TAXATION . . . . . } RESPONDENT.

H. C. OF A. 1923.

BRISBANE, *June* 15-18, 21, 23.

Starke J.

War-time Profits Tax—Assessment—Business to which tax applies—Exemption of profession—Meaning of "profession"—Herbal Institute—War-time Profits Tax Assessment Act 1917-1918 (*No.* 33 *of* 1917—*No.* 40 *of* 1918), *secs.* 4, 8 (1) (*d*).

Sec. 7 of the *War-time Profits Tax Assessment Act* 1917-1918 levies a tax upon all war-time profits from any business to which the Act applies; by sec. 4 of the Act "'business' includes any profession or trade," &c.; and by sec. 8 the Act applies to all businesses of any description deriving profits from sources within Australia, with certain exceptions, one of which is stated in sec. 8 (1) (*d*) as follows: "Any profession the profits of which depend mainly on the personal qualifications of the person by whom it is carried on, and in which comparatively little or no capital expenditure is required."

The appellants, who carried on business under the name of "Robbins Herbal Institute" on freehold premises owned by them, professed to cure diseases by herbal remedies. They did not possess any of the qualifications of practitioners in medicine or surgery, nor any special knowledge of medical botany as applied to treatment of human diseases. They prescribed for their patients, and their prescriptions were dispensed by employees on their premises who did not possess any recognized qualifications in dispensing. They made charges, generally of a named sum per month, and those charges included without differentiation the charge for the advice given and for the herbs and herbal medicaments supplied. The latter were largely procured from America and China, and could not readily be purchased locally when required. The appellants were assisted by a staff comprising two trained nurses and a masseur. On the advice of the appellants vapour baths and massage treatment were also given by their employees at the business premises, and special charges were made therefor.

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Held, that the appellants did not exercise or carry on any profession within the meaning of the Act, and were not included in the exception stated in sec. 8 (1) (*d*); and, therefore, that they were not exempt from war-time profits taxation.

Held, also, that the words "comparatively little or no capital expenditure" do not refer to the capital, such as business premises, actually being used, but refer generally to capital expenditure, such as for stock, required for a profession of the character referred to in sec. 8 (1) (*d*) of the Act.

APPEAL from the Federal Commissioner of Taxation.

William Ernest Robbins and his wife Adeline Cordelia Robbins carried on the calling or business of medical herbalists in partnership under the name of "Robbins Herbal Institute." The nature of their undertaking and of their personal qualifications with respect thereto is stated in the judgment hereunder.

The Commissioner of Taxation issued an assessment, under the *War-time Profits Tax Assessment Act* 1917-1918, of the war-time profits tax payable by the partners for the year 1916-1917; and they, being dissatisfied with such assessment, lodged an objection claiming that no part of the profits earned by the partnership was subject to war-time profits tax as the business was exempted by sec. 8 (1) (*d*) of the Act, and that if any part was subject to the tax an allowance should be made of the amount attributable to massage treatment. The Commissioner of Taxation disallowed the objection, and at the request of the taxpayers the said objection was treated as an appeal under sec. 28 (4) of the Act.

The appeal came on for hearing before *Starke* J., at Brisbane.

The material evidence given is stated in the judgment hereunder.

Evidence was tendered for the purpose of proving successful treatment of patients by herbal remedies, but *Starke* J. intimated that evidence of that character, whether by the appellant or other witnesses, would be rejected as irrelevant.

Macrossan (with him *McGill*), for the appellants. The business of the appellants is a profession. The question of whether they carry on a trade or business or a profession is one of degree (*Currie* v. *Commissioners of Inland Revenue* (1); *Cecil* v. *Commissioners of Inland Revenue* (2)); and, looking at the whole undertaking, the profits are the

(1) (1921) 2 K.B., 332, at p. 341. (2) (1919) 36 T.L.R., 164.

result of the appellants' intellectual skill and scientific knowledge and depend mainly on their personal qualifications. The charges made are for professional advice—the herbal remedies are given to patients as individual medicines. The term "profession" has latterly received an extended meaning (*Commissioners of Inland Revenue* v. *Maxse* (1)). The employment of assistants does not prevent the calling from being a profession (*Commissioners of Inland Revenue* v. *North and Ingram* (2)); the name is no criterion; and the fact that the appellants are not members of an organized professional body having a standard for qualification does not in itself determine the question. At the least, a considerable portion of the profits is derived from a profession, and as the professional and exempted profits cannot be separated from the non-exempted profits, no part of the profit is taxable. If, however, a separation can be made, the non-exempted profits alone are taxable (*Commissioners of Inland Revenue* v. *Maxse* (1)).

Feez K.C. (with him *Real*), for the respondent. No exemption in the Act applies to the appellants' business; which is not a profession, i.e., an occupation requiring intellectual skill or manual skill controlled by intellectual skill (*Commissioners of Inland Revenue* v. *Maxse* (3)). Considerable capital expenditure on herbs and plant is required, and part of the profits at least is derived from the sale of those herbs and charges for massage and bath treatment. The appellants have not discharged the onus of proving that they fall within the exemption of sec. 8 (1) (*d*). Further, the question is one of fact, which has been determined by the Commissioner, and as there is ample evidence to support his finding the Court will not interfere (*Christopher Barker & Sons* v. *Commissioners of Inland Revenue* (4); *Currie* v. *Commissioners of Inland Revenue* (5)). [He also referred to the meaning of "profession" in the *Century Dictionary* and the *Oxford Dictionary*.]

Cur. adv. vult.

(1) (1919) 1 K.B., 647, at p. 650.
(2) (1918) 2 K.B., 705.
(3) (1919) 1 K.B., at p. 657.
(4) (1919) 2 K.B., 222, at p. 230.
(5) (1921) 2 K.B., 332.

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June 23.

The following written judgment was delivered :—

STARKE J. The *War-time Profits Tax Assessment Act* 1917-1918 levied a tax upon all war-time profits from all businesses (which includes, by the interpretation of the word "business" in sec. 4, all professions and trades) of every description deriving profits from sources within Australia, excepting, so far as is material to this case, any profession the profits of which depend mainly on the personal qualifications of the person by whom it is carried on, and in which comparatively little or no capital expenditure is required. William Ernest Robbins and his wife were engaged in Queensland, during the financial year 1916-1917 in a calling—to use a neutral term—described by them as "medical herbalists," which they carried on under the style of the "Robbins Herbal Institute." They thereby earned a considerable sum of money, and the Commissioner of Taxation assessed them to war-time profits tax in respect of those earnings, in accordance, as he contends, with the provisions of the Acts already mentioned. An appeal has been brought by Robbins and his wife to this Court against the assessment, and the appellants insist that their calling is a profession within the exception above mentioned, and so exempt from the war-time profits tax. The question therefore is, what is a profession for the purposes of the exception in the Acts ?

One view was that it was any calling which depends mainly on the personal qualifications of the person by whom it is carried on. But this interpretation is too wide : it ignores the dominant word profession, and is opposed to the opinion expressed in *Commissioners of Inland Revenue* v. *Maxse* (1) and in *Currie* v. *Commissioners of Inland Revenue* (2).

Formerly, Divinity, Medicine, and the Law were known as the professions or the learned professions, but the War-time Profits Tax Acts do not so limit the use of the word profession, and except "any profession." According to the *Oxford Dictionary*, edited by Sir James Murray, a profession is a vocation in which a professed knowledge of some department of learning or science is used in its application to the affairs of others, or in the practice of an art founded upon it. *Scrutton* L.J., in *Commissioners of Inland Revenue* v.

(1) (1919) 1 K.B., 647. (2) (1921) 2 K.B., 332.

Maxse (1), says that the word, "in the present use of language involves the idea of an occupation requiring either purely intellectual skill, or else 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 word implies, as is pointed out in the *Century Dictionary*, professed attainments in special knowledge as distinguished from mere skill, "knowledge" which is "to be acquired only after patient study and application" (see *United States* v. *Laws* (2)). Thus many vocations may fall within the accepted and ordinary use of the word; such, for instance, as those of architects, accountants, engineers, journalists, bankers, and so forth. But whether a person in any given case carries on a profession is a question of degree and always of fact (*Cecil* v. *Commissioners of Inland Revenue* (3) ; *Currie* v. *Commissioners of Inland Revenue* (4)).

In the present case the appellants profess to cure the diseases of mankind by the use of herbal remedies. But they certainly have none of the qualifications of practitioners in medicine and surgery. And, indeed, the *Medical Act* 1867 of Queensland provides that any person who shall represent himself to be a medical practitioner or use any title or term which may be construed to mean that he is qualified to perform the duties of either physician or surgeon shall be guilty of an offence; and, further, that no person shall be entitled to recover any charge in any Court of law for medical or surgical advice, or attendance, or the performance of any operation, or for medicine compounded and sold, unless he be registered under the Act. All that this shows, however, is that the appellants cannot be said to belong to the learned profession of medicine. But they belong, so it appears, to a trade union, known as the Australasian Union of Herbalists, the objects of which are to encourage the study of botanic pharmacy, and to obtain a better legal recognition and higher status for herbalists, and also to protect its members in the honourable practice of their profession (as the rules of the Union describe their vocation). And they obtained, after examination,

(1) (1919) 1 K.B., at p. 657.
(2) (1896) 163 U.S., 258, at p. 266.
(3) (1919) 36 T.L.R., 164.
(4) (1921) 2 K.B., 332.

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a diploma of membership, which, in the case of the appellant William Ernest Robbins, is in the following terms: "These presents are to all to certify that W. E. Robbins having applied himself to the acquisition of knowledge in the science of Organic Medicine and complied with the requirements of this Union and because he sustains a reputable character professionally and otherwise we admit him to membership." The Australasian Union of Herbalists is not, however, a recognized seat of learning such as a University or a School of Medicine: and its certificate therefore proves nothing. No proof has been given of the nature of the qualification in organic medicine required by this Union or of the standard of knowledge necessary to secure its diploma. So far as the appellant William Ernest Robbins is concerned, he says that his father (who was a building contractor) and his mother taught him, as a boy, the use of herbs and the diagnosis of diseases. In addition, he studied various books, some of which he named and produced; but he utterly failed to convince me that he had that special knowledge of medical botany and its application to the diseases of mankind which one associates with professional attainments or rank. And the position of his wife is rather worse. The appellants, nevertheless, prescribe for their clients, and keep a staff of nurses and dispensers upon their premises to aid them in their calling. The nurses, it was sworn, were trained nurses, but the dispensers were without any recognized qualifications, though they dispense the prescriptions which the appellants prepare. It was a boast of the appellants that 100,000 prescriptions had been prepared, and that during the last twelve months a gross income of £12,000 had been earned. For the purpose of making up these prescriptions a stock of herbs, &c., is kept, which, it was sworn, never exceeded £200 or £300 at any one time. But there is no method of checking this statement, and I do not accept it. I incline to the view that the stock was considerably larger. Thus, the appellants' income tax returns 1915-1916 to 1921-1922 show a yearly expenditure on herbs, &c., ranging from about £1,500 to over £2,000. They are largely procured from American or Chinese agencies, and cannot at the particular times they are required be obtained locally, from either wholesale or retail houses. The charges made by the appellants for their services are usually a named sum

per month, which includes the herbal remedies supplied to their clients. Some suggestion was made during the course of the case that the appellants did not charge for their herbal prescriptions but only for their personal advice; but I do not accept the suggestion, and the appellants' ledgers do not support it. The charge was made as a whole, and cannot be attributed in part to personal attention and in part to herbs, &c., supplied. The case was compared to that of a medical practitioner who dispenses his own medicines. But, while I quite agree that a medical practitioner who dispensed his own medicines would not cease to be regarded as a professional man or as carrying on a profession, it is nevertheless, in my opinion, a far cry from the special knowledge of medicine and chemistry possessed by medical men to that possessed by the appellants, and it is this special knowledge which lifts the calling of the medical man to the rank of a profession. Otherwise,we must debase the meaning of the word "profession." Indeed, as the *Oxford Dictionary* reminds us, the "grandiose title" of "professor" is now assumed "by professional teachers and exponents of various popular arts and sciences, such as dancing, juggling, phrenology, &c." It is, of course, a misuse of the term to describe these callings as "professions."

The Commissioner referred to some other facts in support of his view that the appellants did not practise a profession, and that their profits did not depend mainly on their personal qualifications. Thus, in some cases, the appellants advise their clients to undergo a course of massage, or to have vapour baths, and they make special charges for this treatment. And, substantially, neither the massage nor the vapour baths are given or supervised by the appellants personally, but by attendants whom they employ. Again, from 13th March 1920 to 20th January 1921, though the appellants were absent from Queensland on a visit to England, treatment of clients by the Institute continued. And, while the earnings during this period certainly fell away, they were admitted to amount to a gross sum of no less than £1,550. As the Institute was conducted mainly on a cash basis, a great proportion of this sum must be attributed to the herbal remedies supplied by the Institute during the period in question, but made up, apparently, from prescriptions formerly given by one of the appellants. Now, these facts would satisfy me,

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if I thought the appellants exercised a profession, that they also carried on the business of a masseur and of a vendor of herbs, &c. (see *Commissioners of Inland Revenue* v. *Maxse* (1)), but I do not think that they are otherwise important in connection with the case.

On the whole, I find, in point of fact, for the reasons already appearing, that the appellants do not exercise or carry on any profession, despite the high sounding titles by which they describe themselves and their Institute.

One other matter I ought, perhaps, to mention, in view of the possibility of the case going to appeal. Is the calling of the appellants—assuming it to be a profession—one " in which comparatively little or no capital expenditure is required " ? I assent to the view of *Sankey* J. in *Commissioners of Inland Revenue* v. *North and Ingram* (2), that these words " do not refer to capital actually being used, but refer generally to the capital expenditure required for a profession of the kind " excepted from tax. Therefore, the fact that the appellants own the freehold of the premises upon which they conduct their Institute can be disregarded. The amount of stock which they have to carry for the conduct of the Institute, however, demands more critical consideration. I have no doubt that a stock, and a considerable stock, is essential to their calling. But the appellants have left me in the dark as to the quantity required, and certainly do not satisfy me that the business required only from £200 to £300 worth of stock, or any sum approximating to those sums. Thus, in 1916-1917 their gross returns for income tax purposes was £6,670, and a stock valued at £200 to £300 would as a fact, I should say, be but little as compared with that return. I do not know, however, that I should so find if the stock required amounted to (say) £1,000, in a business earning £6,000 to £7,000 per annum.

Strictly the onus is upon the appellants to satisfy the Court, but the Commissioner's case closed without the income tax returns from 1915-1916 to 1921-1922 being put in evidence, and they were allowed by me to be put in evidence on a subsequent day. The appellant William Ernest Robbins was then absent from Brisbane; and, though I granted an adjournment and gave an opportunity of calling

(1) (1919) 1 K.B., 647. (2) (1918) 2 K.B., at p. 707.

further evidence—which was availed of—William Ernest Robbins was still absent and unable himself to give further evidence. Under these circumstances a further investigation of the capital required for the appellants' calling—if it be a profession—is necessary, and justice would be better served by a remission of the case to me, or some other Justice, for that purpose, than by a determination of the appeal upon the mere question of the burden of proof.

The appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants, *McNab, Dowling & Wilson.*

Solicitors for the respondent, *Chambers, McNab & McNab* for *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

J. L. W.

[HIGH COURT OF AUSTRALIA.]

GORDON & GOTCH (AUSTRALASIA) LIMITED APPELLANT;

AND

COX . . . . . RESPONDENT.

Practice—High Court—Costs—Taxation—Costs of appeal—Costs of opposing motion for special leave.

Costs of a motion for special leave to appeal to the High Court are costs of the appeal.

Upon an appeal to the High Court by special leave an order was made that the respondent's costs of the appeal should be taxed, and paid by the appellant. The respondent had voluntarily appeared upon the motion for special leave and unsuccessfully opposed it, but no order had been made as to the costs of the motion.