fact. It is unfortunate that the Sheriff-Substitute has disposed of these somewhat difficult questions by a bare finding that the defender has failed to establish his counterclaim. It is therefore necessary for us to try to ascertain from his opinion the grounds of law and of fact upon which he proceeded. All I can say, after giving the matter my best attention, is that I think that he has gone wrong both in law and in fact, and that I concur in the result reached by your Lordships and for the reasons stated, to which I do not think it necessary to add anything.

LORD CULLEN—In view of the parties' course of dealing I am of opinion that the use of the words "usual requirements" imported the local limit referred to in the defender's letters of January 1911 and December 1912, and did not introduce any separate quantitative limit into the contract. I am further of opinion that the 189 tons demanded by the defender in 1915 were *prima facie* the requirements of his business as so locally limited, and that no case has been presented by the pursuers of the defender having in that year engaged in any new and peculiar type of business not contemplated by the contract.

I also concur with your Lordships in the view that while there were difficulties in getting a supply of whiting in 1915, the pursuers have failed to show that these were sufficient to render them unable to give the defender the quantities he required.

The Court pronounced this interlocutor—

". . . Sustain the appeal: Recal the interlocutor of the Sheriff-Substitute dated 15th March 1918: Find in fact (1) that by letters produced passing between the pursuers and defender dated in December 1914 the pursuers agreed to supply the defender's usual requirements in pure linseed oil putty from 1st January 1915 to 31st December 1915 at 5s. 3d. per cwt., less 5 per cent. discount for delivery within a radius of four miles from Glasgow Royal Exchange, but subject, *inter alia*, to the condition that if work was interrupted by war or other exceptional cause the sellers should not be bound to make delivery at the time specified by the buyer; (2) that the pursuers delivered to the defender under and in terms of the said contract 81 tons, 1 cwt., 3 qrs., 11 lbs. of putty; (3) that the defender is due and owing to the pursuers therefor the sum of £260, 11s. 9d.; (4) that the defender's requirements of putty for the year 1915 amounted to 189 tons, 19 cwts., 2 qrs. and 12 lbs.; (5) that the pursuers refused to deliver to the defender the balance of his requirements for the year 1915 amounting to 108 tons, 17 cwts., 3 qrs. and 1 lb.; and (6) that the pursuers' failure to supply the said balance was not due to war or other exceptional cause as provided for in the said contract: Find in law that the pursuers committed a breach of said contract by their refusal to make delivery of putty to the defender in terms thereof, and are liable in damages accordingly: Assess the said damages at the sum of £234, 3s. 11d.: Decern against the defender for payment to the pursuers of the sum of £26, 7s. 10d., being the difference between the said sum of £260, 11s. 9d. and £234, 3s. 11d. . . ."

Counsel for the Pursuers (Respondents)—Constable, K.C.—C. H. Brown. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Defender (Appellant)—Wilson, K.C.—W. T. Watson. Agents—Crawford & Crawford, S.S.C.

Friday, November 22.

FIRST DIVISION.

(EXCHEQUER CAUSE.)

M'DOUGALL *v.* INLAND REVENUE.

Revenue — Income Tax — Relief — Earned Income — Business Carried on by Curator Bonis for Behoof of Lunatic Ward—Finance Act 1907 (*7 Edw. VII, cap.* 13), *sec.* 19, *sub-sec.* (7).

The *curator bonis* of an innkeeper who had become insane carried on the business of the ward. *Held* that the profits of the business were not "earned income" of the ward in the sense of the Finance Act 1907, section 19, sub-section (7), so as to entitle him to assessment at the earned rate applicable to his income.

Inland Revenue v. *Shiels' Trustees*, 1915 S.C. 159, 52 S.L.R. 103, *followed.*

The Finance Act 1907 (7 Edw. VII, cap. 13), section 19, sub-section 7, defines "earned income" as "(c) Any income which is charged under Schedules B or D in the Income Tax Act 1853, or the rules prescribed by Schedule D in the Income Tax Act 1842, and is immediately derived by the individual from the carrying on or exercise by him of his profession, trade, or vocation either as an individual or in the case of a partnership as a partner personally acting therein."

The Property Tax Act 1842 (5 and 6 Vict. cap. 35), section 41, enacts—"The . . . curator . . . of any person, being . . . lunatic, idiot, or insane, and having the direction, control, or management of the property or concern of such . . . lunatic, idiot, or insane person . . . shall be chargeable to the said duties in like manner and to the same amount as would be charged if such . . . lunatic, idiot, or insane person were capable of acting for himself. . . ."

Ronald M'Dougall, *curator bonis* of Alastair A. M'Dougall, *appellant*, being dissatisfied with an assessment to income tax made upon him by the Commissioners for the General Purposes of the Income Tax Acts for the district of Cunninghame in the county of Ayr, took a Case in which S. C. H. Smith, surveyor of taxes, was *respondent.*

The appellant was assessed to income tax under Schedule D, for the year ending 5th April 1918, on the sum of £550, in

respect of the profits of the business carried on by him at Kilbirnie, the said assessment being at the rate of 3s. 6d. per £, which was the unearned rate applicable to incomes exceeding £500 and not exceeding £1000.

The Case stated — "The appellant claimed a reduction of the assessment to the earned rate of 2s. 6d. per £ applicable to the amount. The following *facts* were admitted or proved:—(1) The said business originally belonged to Mr Alastair A. M'Dougall, who on or about April 1916 became incapable of managing his own affairs and was sent to an asylum, Mr Ronald M'Dougall being appointed *curator bonis* to him on 15th December 1916. (2) The profits assessed were earned in the business which was carried on by the appellant as curator foresaid. No objection was taken to the amount of the profits assessed, the only dispute being in regard to the rate. . . .

"The Commissioners were of opinion that the case of *Fry* v. *Shiels' Trustees* ruled the appeal, as in the words of the Lord President, 'Though the profits of the business were in the sense of the statute earned profits, they were earned by individuals to whom they did not belong, and they belonged to an individual who certainly did not earn them.' They accordingly dismissed the appeal and confirmed the assessment."

Argued for the appellant—The income in question was *de facto* earned, and further, it was earned income of the ward. A *curator bonis* was *eadem persona* with his ward. It was immaterial that the management and control of the business was in the appellant. *Inland Revenue* v. *Shiels' Trustees*, 1915 S.C. 159, 52 S.L.R. 103, was distinguishable, for there the income was that of a business managed by trustees for beneficiaries. The Property Tax Act 1842 (5 and 6 Vict. cap. 35), section 41, and the Finance Act 1907 (7 Edw. VII, cap. 13), section 19 (7), applied. *Rex* v. *Newmarket Income Tax Commissioners*, [1916] 1 K.B. 788, *per* Cozens-Hardy, M.R., at p. 797, was referred to.

Counsel for respondent were not called upon.

LORD PRESIDENT—The business the profits of which we are concerned with in this case belonged to a person who was incapable of managing his own affairs. The profits which the business earned were earned, we are expressly told, by the curator. The ward is in a lunatic asylum and a *curator bonis* was appointed. If we were to sustain this appeal it appears to me we would be going directly in the face of section 19, subsection (7), of the Finance Act of 1907. The terms of that section seem to me to be very plain. The object is to exempt from a larger scale of tax all those who earn profits by their own personal exertions, care, skill, and work. In every instance it appears to me to be a question of fact whether or not the person whose profits are sought to be assessed did manage his own business—did by the exercise by him of his own profession, trade, or vocation earn those profits. In the present case it is common ground that the person who is incapable of managing his own affairs did not earn the profits and was not engaged in business in any way. Therefore it appears to me the Commissioners came to a right conclusion. I am quite unable to see what the forty-first section of the Statute of 1842 has to do with this case. I agree with my brother Lord Johnston in the comments he made on that section in the authority which has been cited to us—*Inland Revenue* v. *Shiels' Trustees*, 1915 S.C. 159, 52 S.L.R. 103.

I am for refusing this appeal and for confirming the decision of the Commissioners.

LORD MACKENZIE — I am of the same opinion. I think the decision in this case turns entirely upon the question of fact, and the question of fact appears to me to be concluded against the appellant in two lines in the Stated Case, namely, "The profits assessed were earned in the business which was carried on by the appellant as curator foresaid." I do not understand that by coming to this decision we are laying down any general principle which may determine other cases in which the facts are different.

LORD SKERRINGTON — The profits with which we are concerned in the present case were derived by the gentleman under curatory from the exercise of a certain trade, and he is an individual within the meaning of section 19, sub-section (7), of the Finance Act 1907. On the other hand, although he derived those profits from the carrying on of this trade, the trade was not carried on by him—that is, by the same individual. It was carried on by some one entirely different, namely, his *curator bonis*. It is true that for many purposes a judicial agent or a voluntary agent is identified with the principal, but for the purposes of section 19 I think that the word "individual" is used in contrast to the more common word "person." Accordingly the statute excludes the argument that what was done by the agent was done by the individual.

LORD CULLEN—I am of the same opinion. The ward, being a lunatic, not merely abstains from personal activity in the carrying on of the business; he has not even the capacity to carry it on. That being so, it seems to me impossible to say that the income to be taxed here is immediately derived from the carrying on or the exercise by him of his vocation of innkeeper.

The Court refused the appeal.

Counsel for Appellant—Constable, K.C.—Leadbetter. Agents — W. B. Rankin & Nimmo, W.S.

Counsel for Respondent — The Solicitor-General (Morison, K.C.)—R. C. Henderson. Agent — Sir Philip J. Hamilton Grierson, Solicitor of Inland Revenue.