because a contractor is not a workman within the meaning of the Workmen's Compensation Act. It was, however, explained to us by counsel for the respondents, and was not disputed, that at the time when the accident befell him the appellant was actually working as a miner with his tool in his hand, and accordingly that the respondents quite fairly and reasonably, as I think, admitted liability for the injury, and paid compensation in terms of the Workmen's Compensation Act 1906. That is the third finding in fact.

Now, taken in conjunction with the first finding in fact, that means, as I think, that waiving all objection to the appellant's claim on the ground that his occupation as a contractor disentitled him to the benefit of the Act the respondents admitted liability nevertheless, and were willing to treat the appellant on the same footing as if he were a workman within the meaning of the Act and entitled to its benefits—that is to say, *quoad* services rendered, duties performed, earnings gained, and compensation to be paid, this man was to be treated although a contractor exactly as if he was an ordinary miner. That appears to me to be the true meaning of the first and third findings taken in conjunction. I have a difficulty otherwise in reconciling these two findings.

But if the conclusion I have reached is correct, then the only remaining question is —What were this workman's earnings as a workman within the meaning of the statute? To that question we find an explicit answer in the ninth article of the Stated Case, where we are told that the earnings were £4, 4s. 6d. a-week, and that must be taken, I think, as the basis for awarding him compensation. It is said, no doubt, that as a contractor his income for the year preceding the accident was £281 odds, but that appears to me to be a wholly irrelevant consideration, because as a contractor he is, I think, entirely outside the scope of the Act of Parliament, and it signifies nothing what his income as a contractor was. It is only because by the admission of his employers he is to be regarded in this question as a workman—*de facto* he was working when the accident befell him—that he is entitled to the benefit of the Act. In short, I think he must be treated as a workman in all respects, including earnings.

For these reasons, although I do not differ from those given by the majority of your Lordships, I consider that the learned arbiter has rightly estimated the amount of this man's earnings and reached a correct conclusion in this arbitration. I move your Lordships that we should answer the question put to us in the affirmative.

The Court answered the question of law in the affirmative.

Counsel for the Appellant — Macphail, K.C.—Dods. Agents—Balfour & Manson, S.S.C.

Counsel for the Respondents—Sandeman, K.C.—Gentles. Agents—W. & J. Burness, W.S.

Wednesday, November 13.

FIRST DIVISION.

[Sheriff Court at Glasgow.

BLACKLOCK & MACARTHUR, LIMITED *v.* KIRK.

Contract—Construction—"Usual Requirements"—Course of Dealing.

A glazier, following similar contracts in the five previous years, contracted with putty manufacturers that the latter should supply his "usual requirements" in putty for the ensuing year at a certain price. In the five previous years the amount required fluctuated from 88 tons to 134, and the manufacturers supplied those varying amounts without demur. In the year in question the amount required for the *bona fide* purposes of the business was 189 tons, the increase being due to contracts for glazing munition works, and the manufacturers after supplying 81 tons refused to make further deliveries. There was no change in either the character or the *locus* of the buyer's business. In an action by the manufacturers for the price of the putty supplied, the buyer counter-claimed for the loss he had sustained in respect of his being obliged to buy elsewhere the remainder of the putty required by him. *Held*, after a proof, that "usual requirements" meant, in view of the previous course of dealing between the parties, the amount of putty *bona fide* required for the purposes of the business in the year in question, and that, the character of the business not having altered, the manufacturers were in breach of contract in failing to supply the whole 189 tons.

Contract — Suspensory Clause — "War or other Exceptional Cause."

A contract between a glazier and putty manufacturer provided that in the event of the work being interrupted by "war or other exceptional cause" the sellers should not be bound to deliver at the time specified. In an action between the parties in which the sellers founded on this clause in answer to a claim at the instance of the buyer for damages for failure to deliver the full amount contracted for, it was proved that while there was delay owing to the war there was no real difficulty in making delivery. *Held* that the manufacturers' failure to deliver was not due to "war or other exceptional cause," and that they were accordingly liable in damages for breach of contract.

Blacklock & Macarthur, Limited, Clydesdale Paint, Colour, Varnish, and Oil Works, Glasgow, *pursuers*, brought an action in the Sheriff Court at Glasgow against George G. Kirk, glass merchant and glazier, Glasgow, *defender*, concluding for decree for payment of £260, 16s. 9d., being the price of goods supplied by the pursuers to the defenders.

The defender lodged a counter-claim for £234, 3s. 11d.

Proof was allowed and led.

The *averments* of the parties and the *import of the evidence* as stated in the opinions of the Judges, together with the correspondence constituting the contract, were to the following effect:—The pursuers were putty manufacturers, *i.e.*, they ground whiting and linseed oil together and so made putty, and they had for a number of years been in the habit of supplying putty to the defender for use in connection with his business. On 10th December 1914 the defender wrote to the pursuers asking them to give him their "lowest price for supplying" him "with his requirements in pure linseed oil putty for three months from January 1st," and also to state alternative prices for six months, nine months, or twelve months' contracts. On 14th December 1914 the pursuers sent the defender the following quotation:—"Dear Sir—As requested per yours of 10/12/14, we now submit quotations and shall be pleased to receive your order.—We are, Yours truly, for BLACKLOCK & MACARTHUR, LIMITED, J. S. MACARTHUR, *Director*. Your requirements in pure linseed oil putty, for delivery during the periods set out hereafter, in casks or drums as required by you. Delivery to be made promptly to your instructions within a radius of four miles from the Royal Exchange. The putty will be composed entirely of pure linseed oil and well-dried whiting, properly manufactured. Three months from 1st January 1915, £5, 10s. per ton; six do., £5, 10s. per ton; nine do., £5, 12s. 6d. per ton; twelve do., £5, 15s. per ton. Delivered Paisley, add 6d. per cwt. Terms.—Quarterly account, less 5 per cent. discount. Packages charged and credited on return. In the event of work being interrupted by strikes, fire, accidents to machinery, war, or other exceptional cause, the sellers shall not be bound to make delivery at the time specified."

On 15th December 1914 the defender wrote to the pursuers stating that he considered the price too high, and on 17th December 1914 the pursuers wrote to the defender as follows:—"Dear Sirs—We beg to confirm arrangement made by 'phone to-day between Mr Macarthur senior and Mr Kirk, that you supply our usual requirements in pure linseed oil putty from 1st January 1915 to 31st December 1915 at 5s. 3d. per cwt. Less 5 per cent. at settlement usual quarterly account. Usual extra for delivery Paisley. Putty to be made of pure linseed oil and well-dried whiting only, and to be packed in drums or casks and delivered promptly as required by us, and to be delivered within a radius of four miles from Royal Exchange."

On 17th December 1914 the defender wrote to the pursuers as follows:—"Dear Sirs—We beg to confirm arrangement made by 'phone to-day between Mr M'Arthur sen. and Mr Kirk, that you supply our usual requirements in pure linseed oil putty from 1st January 1915 to 31st December 1915, at 5s. 3d. per cwt. Less 5 per cent. at settlement, usual quarterly account. Usual extra for delivery Paisley. Putty to be made of pure linseed oil and well-dried whiting only, and to be packed in drums or casks and delivered promptly as required by us, and to be delivered within a radius of four miles from Royal Exchange."

The pursuers replied on 18th December 1914 as follows:—"Dear Sir—We are in receipt of your favour of yesterday, confirming arrangement between us as to supply of your requirements in pure linseed oil putty from 1st January to 31st December 1915, at 5s. 3d. per cwt., less 5 per cent. discount, usual quarterly account, for delivery within a radius of four miles from Glasgow Royal Exchange. Paisley delivery extra as hitherto. Packages returnable to us."

In the five previous years the defender had taken from the pursuers for the purpose of his business in Scotland 127, 118, 96, 88, and 134 tons of putty. In 1915 he required 189 tons. In 1915 the defender had secured contracts for the glazing of munition works and additions and extensions thereto, and part of the 189 tons was required for that work. The pursuers averred that the putty required to execute these contracts, being in excess of defender's usual requirements, did not fall within the contract between the parties. In 1915 they delivered 81 tons of putty in all to the defender, the price of which was the sum sued for, and they refused to supply him with further putty. He was compelled in consequence to buy elsewhere, and he had to pay in all £234, 3s. 11d. for the remainder of the putty required by him in excess of the price at which the pursuers had agreed to supply him.

The pursuers also founded upon the *force majeure* clause in their contract, and averred that owing to the war the scarcity and insufficiency of labour, which had resulted in the shutting down of the quarries in Ireland from which they obtained their supplies of whiting and the commandeering by the Government of the steamers which carried the whiting, and other exceptional conditions brought about by the war, and over which they had no control, they were unable to supply or to purchase supplies for the defender's requirements. It appeared from evidence led at the proof that the defender was able to procure the putty which he required over and above what was supplied by the pursuers by purchase in the open market in Glasgow, and that while there was some delay there was no real difficulty in getting ships to carry the whiting from Ireland, where it was quarried and from which it was coming over all the time. The pursuers agreed to supply putty to other customers at the time when they were withholding delivery to the defender, and it appeared from their books that during the second half of 1915 they manufactured 392 tons of putty and disposed of 277 tons, leaving a balance of 115 tons unaccounted for. From certain correspondence produced at the proof it appeared that defender put a local limit on the contract. In particular, the following two letters from defender, written in answer to a

letter of pursuers, agreeing to supply defender's total requirements in putty, were founded on :—

"*January 12th* 1911.—Messrs Blacklock & Macarthur. Dear Sirs,—We duly received your confirmation of putty contract, which is in order with the exception that you mention this time 'all our total requirements,' but we would point out to you that you have never supplied our total requirements, and that for jobs at a distance we are often supplied by local manufacturers or merchants. We merely mention this to keep things quite clear.—Yours truly, *pro* GEORGE G. KIRK. W. B. B."

"*Glasgow, Decr.* 23*rd* 1912.—Messrs Blacklock & Macarthur. Dear Sirs, — We are surprised at your letter of the 20th December, and would again point out to you that we pointed out to you in our letter of January 12th, 1911, that you have never supplied all our requirements, and that for jobs at a distance we are often supplied by local manufacturers or merchants. . . . —Yours faithfully, *pro* GEORGE G. KIRK, W. B. B.

The defender pleaded, *inter alia*—"3. The defender having sustained loss and damage through the pursuer's breach of said contract to the extent of the sum of £234, 3s. 11d., said claim should be set off against the sum . . . due to the pursuers, and decree granted in defender's favour . . ., with expenses. 4. The averments of pursuers as to the alleged *force majeure* clause and the restriction of the contract in quantity are irrelevant."

On 15th March 1918 the Sheriff-Substitute (FYFE), after a proof, found that the defender was owing the pursuers £260, 11s. 9d., and that the defender had failed to establish his counter-claim, repelled the defender's counter-claim, and decerned against the defender for payment to the pursuers of £260, 11s. 9d., with interest.

The defender appealed, and argued—(1) The term "usual requirements" did not refer to quantity. The Sheriff-Substitute was wrong in regarding those words as referring to the average quantity required by the defenders over a number of years. Those words, both in their ordinary meaning and as shown by the course of dealing beween the parties, referred to the quality and nature of the defender's business. So long as the defender's business remained the same as regards its geographical *locus* and in its general character, the pursuers were bound to supply what was required by the defender for that business. If the defender's business increased the pursuers would have to supply more than formerly; if it diminished the pursuers could not compel the defender to take the same quantity as formerly. There was no averment and no evidence that the defender's business had altered in kind or *locus*. In this respect *Von Mehren & Company* v. *Edinburgh Roperie and Sailcloth Company, Limited*, 1901, 4 F. 232, 39 S.L.R. 181, founded on by the pursuers, was distinguishable. (2) The averments as to impossibility of performance were extremely vague, but in any event the proof disclosed that at the utmost there was only a temporary delay in forwarding the whiting, but no impossibility in making delivery.

Argued for the pursuers—(1) The increase in the defender's business was due to entirely new conditions arising out of the war. Such an increase could not fairly be held to have been in the contemplation of the parties when the contract was entered into, and hence could not be covered by the term "usual requirements." That was more than a mere difference in quantity. *Von Mehren's* case (*cit.*) applied. *North British Oil and Candle Company* v. *Swann*, 1868, 6 Macph. 835, 5 S.L.R. 541, was to the same effect. (2) The pursuers were protected by the *force majeure* clause, for the fulfilment of their contract had been substantially interfered with apart from the rise in the price of raw material—*Ebbw Vale Company* v. *M'Leod*, 1917, 33 T.L.R. 268, 54 S.L.R. 636; *Tennants (Lancashire), Limited* v. *C. S. Wilson & Company, Limited*, [1917] A.C. 495, 55 S.L.R. 523.

LORD PRESIDENT—The pursuers in this action have, I think, committed a breach of contract and are liable in damages to the defender. I am quite unable to agree with the construction placed by the Sheriff-Substitute upon the contract or with the interpretation given by him to the evidence laid before him. The Sheriff-Substitute has, I think, palpably erred both in law and in fact.

The pursuers are manufacturers of putty. The defender is a glazier who requires putty in his business. And not for the first time by letters passing in December 1914 the pursuers contracted to supply the defender with his "usual requirements" of putty for the year 1915. In the ordinary prosecution of his business the defender required material, putty, to the extent of 189 tons in the year 1915. It is not disputed on the record or in the correspondence that his business was conducted as usual and was a *bona fide* honest business, not as I ventured to characterise it in the course of the discussion a factitious business made for the purpose of securing the disposal of goods which he had obtained on exceptionally favourable terms. The pursuers intimated that they would not supply his wants beyond 81 tons. They said that was as much as he was entitled to have under his contract and they point blank refused to deliver the remainder.

The question which has arisen therefore is—Were the pursuers entitled to refuse delivery of the remainder of the putty ordered by the defender on the ground that they had contracted to supply only the "usual requirements" of his business for the year 1915? It is certain, I think, that his "usual requirements" were not 81 tons. It is equally certain that they were not the total of his requirements for three years anterior to the contract divided by three, and equally clear that they were not five years' requirements anterior to the contract divided by five. In my opinion it is equally clear that they were not his maximum requirements during any preceding year, or his minimum requirements during any preceding year, or any middle figure between these two. What then were his

"usual requirements"? I answer that the expression has no direct relation to quantity but has reference to the character of the defender's business. And in my opinion the expression means just what he needed to carry on his business in Scotland during that year—I mean his honest *bona fide* business; that might be an expanding business, or a contracting business, or a stationary business. The seller deliberately took his chance. If the business expanded he was bound to supply the defender's needs, if it contracted he could not force upon the defender a larger quantity than the defender needed for his business, and if it was stationary the same result followed. The seller deliberately refrained from inserting in the contract any clause to the effect that there was to be a maximum quantity or a minimum quantity taken, and there was no clause for spreading deliveries over any particular periods throughout the year. In these circumstances it seems to me that what the pursuers undertook to supply was just the ordinary requirements of the defender in the ordinary prosecution of his business as a glazier in Scotland.

What might have been said by the pursuers if they had deliberately fastened upon an operation of the business as being exceptional and unusual and outwith the expectations of both parties when they entered into the contract I do not say, for no such case is made here. The pursuers did not refuse to supply the defender's requirements because he was glazing the roofs of munition works. The excess in the requirements of the pursuers during the year in question was mainly due to the defender glazing the roofs of a large number of engineering and shipbuilding works and largely increased works of that description. If it had been clearly shown that the increase was due to such an exceptional cause as I have figured, then the case might have been different, because I agree with the proposition laid down by counsel on both sides that we must have in view the circumstances existing at the time when the contract was made as known to both parties.

Now they were not drawing the bow at a venture or embarking upon an unknown sea. This was the fifth apparently of a series of similar contracts entered into between the parties. And we see quite clearly from the history of these prior contracts that the defender's requirements fluctuated from year to year. There were increases of no less than 46 tons between one year and another, and it seems to me to be nothing to the purpose to say that the increase is somewhat greater in the year in question. That was just one of the chances the seller had to face when he made the contract in the terms we find before us.

It may be difficult to define the meaning of the expression "usual requirements," but I think the Court will never find any difficulty in distinguishing between honest business and factitious business. We have an excellent example of the latter in the case of *Von Mehren & Co.* v. *Edinburgh Roperie and Sailcloth Co.*, 1901, 4 F. 232, 39 S.L.R. 181. In this case I come to the conclusion that "usual requirements" means just the ordinary needs of the defender as a tradesman in the use of the material he was compelled to employ in his business, and that it has no direct relation to quantity; further, that the 189 tons which he certainly needed for carrying on his business was the measure of his "usual requirements" for the year 1915, and that the pursuers were under their contract bound to supply that quantity.

But even if this be so, it is alleged by the pursuers that they are entitled to excuse themselves for their failure to deliver because of exceptional causes due to the war, and they point to that clause in their contract by which it is provided that in the event of work being interrupted the sellers are not to be bound to make delivery at the time specified. In the argument it was a little forgotten, I think, that this clause was not a clause which absolutely excused non-delivery. It provided for a case where delays were caused by war or other exceptional conditions and gave the pursuers a right if they were impeded in their manufacture to postpone delivery to a later date than that specified. It was, however, apparently treated by the pursuers as a clause which gave them a right absolutely to refuse delivery—not, I may say, in correspondence, not anterior to the case, but in the case as set forth on the record, because on the record they say—"Owing to the war the scarcity and insufficiency of labour resulting in the shutting down of the quarries from which pursuers were dependent for the supply of whiting, the commandeering by the Government of the small steamers usually employed for the transport of whiting from Ireland, and other exceptional conditions brought about by the war and over which the pursuers had no control, the pursuers were unable to supply or to purchase supplies for defender's requirements."

Now I need scarcely remind your Lordships that there was no evidence worthy of the name given in support of these averments. There was no attempt to show that the quarries in Ireland had been closed and that the small coasters had been commandeered. On the contrary, it appears quite clearly from the evidence that there were throughout the period ample supplies of raw material, whiting, in the Glasgow market available to the pursuers had they chosen to pay the price. I think the whole evidence on this subject is very accurately summarised in a passage in the evidence of the defender's witness Mr M'Taggart, who says—"The quantity left in Glasgow was quite sufficient to supply Glasgow's requirements, subject to what I told you about the difficulties. These difficulties were simply difficulties of delay, not of the cutting off of supplies"—difficulties against which, in short, if they had existed to a material extent, the pursuers had protected themselves in this contract. And in the evidence of the succeeding witness Mr Pollock, the manager of a large glass and glazing business in Glasgow, we find—"It was just a question of delay in deliveries. There was never any question about getting the article. We

were never stopped by want of the article." He is asked what the delay would amount to in 1915, and his answer is—"In 1915 we would place our orders a week or possibly a fortnight earlier than we would have done in ordinary times." The fair result, I think, of the whole evidence is to show that ample supplies of whiting were available to the pursuers in the Glasgow market had they chosen to buy at the price then current, no doubt materially larger than when this contract was effected.

There is further evidence, I think, to the effect that the pursuers were throughout the year supplying other customers, who certainly came after the defender, with supplies of putty requisite to carry on their business. Nor have we had any sufficient explanation of the fact, apparent from their books, that during the second half of the year 1915 they seem to have manufactured 392 tons of putty and to have disposed of 277 tons, leaving a balance of 115 tons. I know not how that large balance was disposed of. That is left in the dark.

Now the *onus* here, I think, was upon the pursuers to excuse themselves if they could under the shelter provided by the *force majeure* clause to which our attention has been called. If then they have failed to show that they are entitled to the protection of the clause, it is plain that they are liable in damages for breach of contract. They have short-delivered to the extent of the difference between the 81 tons which they gave and the 189 tons which they were asked to give—the difference which the defender had to supply himself with from elsewhere. The very fact that he was able to obtain that quantity in the Glasgow market from a man who entered the business for the first time, apparently for the purpose of supplying the defender's needs, is almost conclusive upon the question whether or no there was any real defence available to the pursuers on the ground of shortness of supply.

I understand there is no difference between the parties in regard to the amount of damage due if the contract has been broken. The sum is £234, 3s. 11d. I think. There has been no challenge of the finding by the Sheriff-Substitute to the effect that the defender is due under this contract the sum of £260, 11s. 9d. For the difference between these two sums the pursuers will be entitled to have decree against the defender, and we shall of course pronounce findings in fact in the case, which I observe with regret that the Sheriff-Substitute has not done although under the statute it was his duty to make findings in fact in this case.

I propose to your Lordships that we should recal his judgment and find that the pursuers have broken their contract and are liable in damages to the defender in the amount I have stated.

LORD MACKENZIE—There is no question that the unpaid balance due by the defender to the pursuers amounted to the sum concluded for, £260, 11s. 9d. The only question that we were asked to consider is whether the defender has established the counter-claim which is set out in statement 6. The way in which that counter-claim arises is this—that during the year 1915 he in point of fact received under the contract 81 tons—he says he was entitled to receive 189 tons—that there was short delivery to the extent of 108 tons, that he was compelled to go into the market and buy at an increased price, with the result that the excess price amounted in total to the sum of £234, 3s. 11d. I am of opinion, agreeing with your Lordship, that the defender has established that counter-claim, and that therefore to that extent the figure brought out in statement 6 is to be set against the balance of the unpaid price.

The contract under which the deliveries were to be made was for the supply of the defender's "usual requirements" in pure linseed oil putty from 1st January 1915 to 31st December 1915 at a fixed price, subject to the usual terms in regard to settlement. Now it is quite apparent that the term "usual requirements" requires construction, and the meaning attached to it will depend on the whole circumstances of the case. One finds it difficult to suppose that a contract in those terms could possibly be entered into by a man who was beginning business for the first time. It postulates a previous course of business, it may be with the person with whom he is contracting, or it may have been in the past with other people, but it certainly postulates some experience in the past to apply as the rule for the future. The term may mean usual in the sense of business of a particular class or business in a particular geographical area. It may also have reference to the amount of the business, the extent of the business done, and I can well imagine that in a case where the supply of the commodity is limited or may be limited that a quantitative limitation may be very necessary.

In the present case we are not left without sufficient light, because there were contracts in five previous years between the same buyer and the same seller. In 1910 the amount of the business was 127 tons, in 1911 118 tons, in 1912 96 tons, in 1913 88 tons, in 1914 134 tons, and in 1915 189 tons. Now the only case which is made on record and the only case which is made in evidence relates entirely to quantity. No doubt in answer 6 the pursuers make an averment which relates to the glazing of munition works. And I can well understand that if a pointed averment had been made to this effect, that in the year 1915 in consequence of the defender having gone into an entirely different line of business his requirements as regards that new line of business—glazing munition works—were not to be classed as "usual requirements," it might have been possible if the facts were strong enough to present a case which would have been well worthy of our consideration. But no such case is made here, because the glazing of munition works is only introduced into the record in connection with a statement that the putty required to execute these contracts being in excess of the defender's usual requirements does not fall within the contract between the parties—

that is to say, the point made is entirely in regard to the quantity and not in regard to the character of the work at all.

Confining oneself therefore to the question of quantity, I am unable to take the view, reading the contract in a fair sense with reference to the course of dealing, that it is impossible to say that the amount of putty required was for the usual business of the defender. It is to be noted that the ground taken up by the sellers in the case—that what they are entitled to point to is the average for three years—was only taken up after this dispute arose. Young Mr Macarthur, although he says in his evidence that he was always going upon that basis, that is to say, the three years' average, quite frankly says that they never required to bring into play at all their three years' average with the defender until 1915. He is asked—"Did you ever make him aware of this supposed rule of yours prior to July 1915?" and the answer is "No." Accordingly I do not think it possible for the sellers to have recourse to that figure now. The truth is that the requirements which commenced at 127 tons in 1910 fell to the lowest figure of 88 tons, which is approximately a decrease of 50 per cent., in 1913, and then between 1913 and 1914 they mounted up by 50 per cent., and the same rate of progression occurred in the last year when the 134 tons mounted up to 189 tons. Accordingly I think, on a consideration of the whole facts as bearing upon the contract in this case, that the defender is entitled to say that he was in a position under the contract to demand deliveries of 189 tons.

The question of the date of the deliveries might if pointedly raised have caused some difficulty, but the seller took up the position "You are to get no more." He delivered all told 81 tons in the year 1915. Of the total he delivered about 39 tons in the first three months, about 34 tons in the second three months, in the third three months something under 8 tons, and then in the last three months nothing at all. I think he was under obligation to deliver unless he can bring himself under the *force majeure* clause, and that is the next part of the case.

The sellers say that they were unable on account of the war to supply themselves with the whiting necessary in order to manufacture the putty—they were manufacturers of putty not merchants—and that they are therefore excused because they could not get the raw material out of which to manufacture the article which they contracted to sell to the defender. There is a singular want of precision in the evidence in regard to this point. It is abundantly clear that the defender got without difficulty in Glasgow the balance of 108 tons of which he was short, and he supplied himself from a man who up to 1915 had never made putty before. That particular manufacturer put up plant to meet the defender's requirements, and appears to have got all his whiting in Glasgow by purchase from a dealer who could equally well have supplied the pursuers in this case.

When one turns to the evidence of what was going on in Ireland there is no one who was brought from Ireland to say there was any shortage of labour there. There is evidence that there was whiting coming over all the time from the Irish quarry which it was suggested had been shut down. There is no shipowner or charterer who says that tonnage was short for this particular trade. The evidence about the ship "Glenarm" having been commandeered appears to be hearsay, and even if she were commandeered the evidence shows that another vessel was prepared to take her place in the trade. At most the evidence shows some little delay in delivery but not really of shortage in amount.

Another point which appears from the proof is this, that after the contract was entered into between the pursuers and the defender, the pursuers appear to have taken on other contracts for the supply of putty, which it is only fair to infer was made out of the whiting which they ought to have applied for the purpose of implementing their contract with the defender. The reason assigned for their entering into these subsequent and entirely optional contracts was that the customers with whom they were dealing were old customers. I notice that in one of the letters the position is taken up by the pursuers that they would be prepared to supply the defender with putty, but that that would not be at the contract rate but at the market price ruling for the day.

That, I think, is sufficient to lead one to a conclusion which differs from that of the Sheriff-Substitute. I am not able to understand the position that the pursuers take up in regard to the excessive demands of the defender, because as I followed the figures the amount which was delivered to the defender during six months in 1915 was 73 tons odds, and that has to be compared with the figure for the same period in 1914 of 64 tons, an excess of only 9 tons. Yet the pursuers apparently thought that the demands of the defender were so excessive that they were entitled to break off altogether. I concur with your Lordship that the pursuers were not entitled to take up that position, with the result that the defender ought to be allowed credit for the amount of his counter-claim.

LORD SKERRINGTON—The validity of the defender's counter-claim depends upon the answer which ought to be given to two questions. The first question is whether the defender has proved that the pursuers failed to supply him with his "usual requirements" of putty within the meaning of the contract. Upon that question the burden of proof is upon the defender. The second question arises only if the first is answered in favour of the defender, and it is this—Have the pursuers succeeded in excusing themselves for this failure by bringing themselves within the war clause of the contract? Upon that question the burden of proof is upon the pursuers. Under each head there are mixed questions of law and

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