

I do not think we are called upon to give an opinion on this state of matters, which has not yet arisen. What would happen if all the minerals within the county were worked out before those within the burgh had been reached would probably depend upon circumstances and considerations which we cannot now foresee. As matters stand, the Valuation Act leaves us no option but to sustain the entry in the roll made by the Burgh Assessor.

LORD DUNDAS—I concur. This is a hard case for the appellants, for it appears that owing to a change of attitude on the part of the Assessor of the county they are liable to over-assessment for this year. But I entertain no doubt that the Assessor for Musselburgh was entitled and bound to make the entry in the roll which is appealed against. That is sufficient for the disposal of this case. I am not prepared to consider other and different cases which are not before us, nor to attempt to lay down equitable rules for application to these cases if and when they may arise.

The Court were of opinion that the Magistrates were right, and that the entry in the valuation roll was correct.

Counsel for the Appellants—M. Millan.
Agents—Dundas & Wilson, C.S.

Counsel for the Respondent—D. Anderson.
Agent—John Richardson, Solicitor.

Wednesday, February 7.

(Before Lord Low and Lord Dundas.)

THOMAS USHER & SONS, LIMITED v.
ASSESSOR FOR EDINBURGH.

Valuation Cases—Consideration other than the Rent—“Yearly Rent Conditioned as the Fair Annual Value”—Public-House—“Tied” House—Premises Occupied without Lease—Valuation of Lands (Scotland) Act 1854 (17 and 18 Vict. cap. 91), sec. 6.

A firm of brewers, owners of a public-house, had a tenant for many years originally holding in virtue of a lease but subsequently by tacit relocation. Owing to improvements carried out by the local authority, the buildings in which the public-house was, were taken down and new buildings substituted. In the new buildings the brewers erected a new public-house, more advantageous for business, but allowed their old tenant the occupation at the old rent, there being, however, no proved agreement. The tenant was under no obligation to take beer from the proprietors, but as matter of fact he did receive a good deal of beer from them and the tenancy was admitted to be terminable at the end of any year. *Held* that the rent of the premises was not the “yearly rent conditioned as the fair annual value,” and that the magistrates were justified

in disregarding it in arriving at the valuation.

At a Court of the Magistrates of the City of Edinburgh, held at Edinburgh on 21st September 1905 to dispose of appeals against valuations made by the Burgh Assessor for the year ending Whitsunday 1906, Thomas Usher & Sons, Limited, brewers, Edinburgh, appealed against an entry whereby a public-house let by them to Duncan M'Diarmid was entered in the valuation roll as of a yearly value of £95. The appellants contended that the true yearly value of the subjects was £49, the rent payable by the tenant under a verbal lease.

The Magistrates repelled the contention of the appellants but reduced the entry in the roll to £80. The appellants took a case.

The facts stated were as follows:—“(1) The subjects in question form part of a tenement recently erected by the appellants at the corner of Nicolson Street and West Crosscauseway. The said tenement has frontages both to Nicolson Street and West Crosscauseway.

“(2) The street of West Crosscauseway has recently been widened by the Corporation of Edinburgh under compulsory powers. Prior to the said widening, the appellants were proprietors of an old tenement occupying the corner stance at the junction of the foresaid two streets. That tenement and several other old tenements immediately to the west thereof have been demolished, and the building line of that side of the said street of West Crosscauseway has been set back a distance of 14 feet or thereby. The street has thereby been widened from 26 feet (its previous width) to 40 feet (its present width).

“(3) Prior to said demolitions the shop in West Crosscauseway immediately adjacent to the appellants' property was occupied as a public-house. In consequence of the alterations for the street widening, that public-house has been done away with.

“(4) Mr Duncan M'Diarmid was tenant of the public-house in the foresaid old tenement at the corner of Nicolson Street and West Crosscauseway from 1883 until it was demolished recently. From 1883 to 1895 the proprietors of said public-house were Messrs James and Thomas Usher, brewers. In 1895 the appellants' company was incorporated, and the said property was then conveyed to them. Mr M'Diarmid occupied the said public-house during the whole of the said period on a verbal lease at a rent of £49 per annum.

“(5) The premises now in question consist of a public-house in the new tenement erected by the appellants. The said public-house replaced the old public-house near the same site formerly occupied by Mr M'Diarmid, and belonging to the appellants as above mentioned. Mr M'Diarmid entered into possession of the premises now in question shortly before Whitsunday 1905, and the current year is the first year of his occupancy of these premises. No written lease of these premises has been entered into. The appellants made an averment that a verbal lease of the said

premises for a year had been entered into between them and Mr M'Diarmid, under which the rent was to be £49 per annum; but that averment was not proved. The period of Mr M'Diarmid's occupancy of the premises is indefinite. The appellants are entitled to eject him at any time.

"(6) The appellants are brewers, and Mr M'Diarmid is one of their customers. Mr M'Diarmid is under no obligation to take his supplies of beer from the appellants, but in point of fact he does obtain a good deal of beer from them.

"(7) The Assessor disregarded the alleged verbal lease, and made up his valuation by comparison with the rents of other premises in the neighbourhood.

"The Magistrates were of opinion (1) that the verbal arrangement between the appellants and Mr M'Diarmid ought to be disregarded in respect that it did not amount to a lease of the premises for a year, or alternatively, that it was not a *bona fide* lease; (2) that although Mr M'Diarmid was not under any written obligation to take his supplies of beer from the appellants, he was liable to be turned out of the premises at any time in the event of his ceasing to take such supplies from them; (3) that the Assessor was right in arriving at his valuation by comparison with the rents of other premises in the neighbourhood, but that the amount which he had taken was too high. They accordingly reduced the valuation to £80."

The Lands Valuation (Scotland) Act 1854 (17 and 18 Vict. cap. 91), sec. 6, enacts—"In estimating the yearly value of lands and heritages under this Act, the same shall be taken to be the rent at which, one year with another, such lands and heritages might in their actual state be reasonably expected to let from year to year, . . . and where such lands and heritages are *bona fide* let for a yearly rent conditional as the fair annual value thereof, without grassum or consideration other than the rent, such rent shall be deemed and taken to be the yearly rent or value of such lands and heritages in terms of this Act. . . ."

The only witness called by the appellants was Mr Thomas L. Usher, managing director, who gave the following evidence before the Magistrates:—"M'Diarmid has this shop under a verbal lease. He held the shop for twelve years under Messrs James and Thomas Usher under a similar lease. In 1895 our company was incorporated, and he was holding the lease for one year. That lease was continued and the rent was continued at the same figure, £49, but there is no obligation on M'Diarmid outside that lease and outside the rent; he can do what he likes. M'Diarmid receives a good deal of beer from our firm. That is as matter of fact; as a matter of law he is not bound to receive it. He receives the beer on ordinary trade terms, and subject to ordinary trade discounts. *By the Chairman*—(Q) Can M'Diarmid be turned out at the end of any year?—(A) I suppose he can. He has been there for twenty-two years. (Q) But not having a lease he can be turned out at the end of a year?—(A) At any time.

Cross—... (Q) What are the conditions of the lease?—(A) He pays me £49. (Q) And you give him the place?—(A) Yes. (Q) Is there nothing about getting beer from you?—(A) No. (Q) In point of fact does not he get all his beer from you?—(A) No. (Q) Is there keen competition for the place?—(A) I do not know. (Q) Did you ever try to get another tenant?—(A) No, I do not want one. (Q) So if you put the premises on the market you have no idea what a tenant would give?—(A) No, probably he would give more. The licence is not endorsed to me. *By the Chairman*.—(Q) Is it not out of the bounds of ordinary commercial transactions if you can get more rent that you do not take it?—(A) No, you must take into consideration that we have got a good tenant. He has been there for twenty-two years. (Q) You think that is an asset to be taken into consideration?—(A) Certainly."

Argued for the appellants—The Assessor was not justified in disregarding the formal rent. The evidence conclusively proved that the new premises were *bona fide* let on a verbal lease at the old rent and that there was no consideration other than rent.

Argued for the respondent—No lease had been proved; in any event the old rent could not be taken as a fair criterion as the premises were not the same. The house was in reality tied, and, on the evidence, the rent of £49 was not a *bona fide* rent "conditioned as the fair annual value" of the premises—*Annan v. Assessor for Leith*, February 16, 1899, 1 F. 586, 36 S.L.R. 600; *Bruce v. Assessor for Zetland*, March 1, 1882, 10 R. 34, 19 S.L.R. 590.

At advising—

LORD LOW—The circumstances of this case are as follows:—The appellants and their predecessors Messrs James & Thomas Usher were for many years proprietors of a public-house situated at the corner of Nicolson Street and West Crosscauseway, and Duncan M'Diarmid was tenant of the shop for a period of some twenty-two years. It appears that he had at first a lease of the premises for twelve years at a yearly rent of £49, and that when the lease expired he was allowed to continue as tenant from year to year at the same rent. West Crosscauseway Street has recently been widened by the Magistrates under statutory authority, and in carrying out that operation the old public-house was taken down. The appellants, however, have erected a new public-house in the same situation as the old one—that is to say, at the corner of Nicolson Street and West Crosscauseway Street as widened—and they have allowed M'Diarmid to occupy the new public-house as tenant at the same yearly rent as the old house, namely, £49. The terms upon which M'Diarmid was to occupy the new house were not reduced to writing, but it was simply agreed verbally that he should occupy the new house at the same rent as that which he had paid for the old.

The question is, whether in these circumstances the premises can be regarded as being "*bona fide* let for a yearly rent conditioned as the fair annual value thereof

without grassum or consideration other than the rent?"

Now, we have been given no information in regard to the character of the new house as compared with the old, but I think that we may assume (nothing to the contrary being stated) that it is in no way inferior to the old house, and the fact that a public-house which, prior to the widening of the street, was carried on next door to the appellants' premises, has now disappeared, presumably justifies the inference that the latter premises must have increased in value. Indeed, I do not think that it was seriously disputed that a rent considerably higher than that which is being paid by M'Diarmid might have been obtained. That, however, is not conclusive, because, I apprehend, a rent may be the fair yearly value of the subjects within the meaning of the Valuation Act although it is not the highest rent which might have been obtained. The question therefore is whether in a reasonable sense the appellants can be said to have let the premises to M'Diarmid "for a yearly rent conditioned as the fair annual value thereof."

Now, Mr Usher, the managing director of the appellant company, has stated in his evidence, with perfect frankness, the circumstances under which M'Diarmid was continued as tenant at the old rent.

Mr Usher's evidence is to the effect that he did not consider what rent might be obtained for the premises, but that he continued M'Diarmid as tenant because the latter had been tenant for twenty-two years and had proved himself to be a good tenant. He further said that although M'Diarmid was in no way "tied" to the appellants he had in fact been in the habit of taking "a good deal of beer" from them.

It seems to me that that evidence amounts to an admission that the rent of £49 was not conditioned as the fair annual value of the premises, but that the appellants were, by reason of other and perfectly intelligible considerations, willing to allow M'Diarmid to occupy the premises at that rent whatever the true yearly value might be. In these circumstances I am of opinion that the verbal lease to M'Diarmid cannot be held as fixing, for the purposes of the Valuation Act, the yearly rent or value of the premises.

In questions of this kind what has been decided in one case can seldom be regarded as an authority in another case where the circumstances are different. I may, however, refer to a case, the leading feature in which was very much what we have here. I refer to the case of *Kerr's Trustees*, which is reported in 11 Macph. 983. There the proprietor of a farm which it was proved might have been let for £71 a-year, let it to an old servant whom he favoured, and to whose son he bequeathed the farm by his will, at a rent of £50 a-year. The Court held that the lease was not conditioned as the fair annual value of the farm. That decision confirms me in the view which I take that the Assessor and the Magistrates were justified in disregarding the verbal lease to M'Diarmid.

I am accordingly of opinion that the appeal should be dismissed and the determination of the Magistrates affirmed.

LORD DUNDAS—I am of the same opinion. The proof and the findings in this case have been somewhat loosely gone about, which is unfortunate. But taking them as they stand, I do not think that we are in a position to hold that the heritage in question was "bona fide let for a yearly rent" (viz., £49), "conditioned as the fair annual value thereof." There is, of course, no hint or suggestion in this case of *mala fides* on the part of the appellants. The question is whether or not £49 truly represents, in the circumstances, the fair annual value of the subjects. For the reasons which your Lordship has stated I answer this question in the negative. The determination of the Magistrates is, in my opinion, a reasonable and right one, and ought not to be interfered with.

The Court were of opinion that the determination of the Magistrates was right and dismissed the appeal.

Counsel for the Appellants—C. D. Murray. Agents—Simpson & Marwick, W.S.

Counsel for the Respondent—Spens. Agents—Wishart & Sanderson, W.S.

COURT OF SESSION.

Thursday, January 18.

SECOND DIVISION.

(Before Seven Judges.)

[Sheriff Court of the Lothians and Peebles at Linlithgow.]

BINNING v. EASTON & SONS.

Process—Appeal from Sheriff—Competency—Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), Sched. ii (8)—A.S. 3rd June 1898, sec. 7 (a)—Application for Warrant to have Memorandum Recorded.

Held (per the Lord President, Lord Justice Clerk, Lord Kyllachy, and Lord Stormonth Darling; diss. Lord McLaren and Lord Kinneair; abs. Lord Kincairney, who resigned before advising) that the judgment of the Sheriff in an application for special warrant to have an alleged agreement, under the Workmen's Compensation Act 1897, recorded, is final, and appeal therefrom dismissed as incompetent.

The Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), Schedule ii, sec. 8, provides—"Where the amount of compensation under this Act shall have been ascertained, or any weekly payment varied, or any other matter decided, under this Act, either by a committee or by an arbitrator or by agreement, a memorandum thereof shall be sent in manner prescribed by [Act of Sederunt] by the said com-