

in building contracts or to engineers in engineering contracts in which they had acted as architects or engineers to either of the parties to the contract. In cases such as the present, where the person named as arbiter in the contract is at the same time adviser to one of the parties to the contract, questions have sometimes arisen as to whether such a person is the one best fitted to act as arbiter. But on the whole it has been found most convenient that he should so act. Take the common case of a man having a house built under the orders and directions of the architect who has prepared the plans. When accounts are presented to the employer by those engaged in the building, he shows them to the architect in order to get his opinion as to whether they are correctly charged, and the fact that the architect prepared the plans does not prevent his giving fair and unbiassed advice as to the cost of carrying them out. The present case is exactly similar. The plans and specifications for the works in question were prepared by Messrs Stevenson, the engineers employed by the defenders for the work, and one of the partners of that firm was nominated to be the arbiter between the pursuer and the defenders in any disputes arising between the parties in connection with the contract between them. When the pursuer presented his account for work done the defenders took the advice of the engineers who had seen the work executed. In this they acted rightly, and the engineers who had been asked for their opinion were perfectly justified in giving it. Nor does the fact that they did so at all disqualify them from subsequently acting as arbiters between the parties, especially as, so far from consulting Messrs Stevenson privately and behind the back of the pursuer, the defenders at once communicated the engineers' opinion to the pursuer and gave him an opportunity of stating and explaining his own position. I quite recognise that objections may in certain cases be taken to the same person acting in the dual capacity of arbiter and private adviser, but I do not think that any such objections arise in the present case.

LORD TRAYNER—I am of the same opinion. I should certainly be disposed to exclude from the office of arbiter anyone who had put himself in the position of having already decided the question in dispute before the reference had been finally made, but in this case I think there is no reasonable ground whatever for excluding the Messrs Stevenson. I do not think that anything in their letters indicates a want of open mind on their part. They did not enter into the matter ultroneously; they were applied to by their employers for certain information regarding the pursuer's claim, which they gave. In so far as the letters before us are concerned I can find nothing to suggest that they are not prepared to deal with any question brought before them with a perfectly open mind—nothing to indicate that if they came to think that any opinion which they had expressed was wrong they would not decide accordingly.

LORD MONCREIFF concurred.

The Court adhered.

Counsel for the Pursuer and Reclaimer Campbell, K.C.—Hunter. Agents—Gill & Pringle, S.S.C.

Counsel for the Defenders and Respondents—Ure, K.C.—Cullen. Agents—Tods, Murray, & Jamieson, W.S.

Tuesday, June 2.

FIRST DIVISION.

MAGISTRATES OF EDINBURGH v. INLAND REVENUE.

Revenue—Inhabited-House Duty—Inhabited House—Fire Station—48 Geo. III. c. 55, Sched. B, Rule III.

A fire station consisted of a fire-master's house, houses for firemen, a gymnasium and duty room, a stable, and places for keeping the fire-engine and accessories. There was inter-communication between the whole buildings. *Held* that the fire station was assessable as an inhabited house under the provisions of Rule III. in Schedule B of 48 Geo. III. c. 55.

Revenue—Inhabited-House Duty—Exemptions—Building Occupied for Trade or Profit—Fire Station—Customs and Inland Revenue Act 1878 (41 Vict. c. 15), sec. 13.

The Customs and Inland Revenue Act 1878, sec. 13, exempts from inhabited house duty all houses and tenements occupied "solely for the purpose of any trade or business, or of any profession or calling by which the occupier seeks a livelihood or profit." *Held* that this exemption did not apply to a fire station in the occupation of a town council, in respect that the town council did not there carry on a trade or business by which they sought their livelihood or profit.

Revenue—Inhabited-House Duty—Exemptions—Houses with Rental of Less than £20—Houses in Fire Station Occupied by Firemen—Customs and Inland Revenue Act 1890 (53 Vict. c. 8), sec. 26 (2)—Customs and Inland Revenue Act 1891 (54 and 55 Vict. c. 25), sec. 4 (1).

The Customs and Inland Revenue Act 1890, sec. 26 (2), as amended by the Customs and Inland Revenue Act 1891, sec. 4, provides for the exemption from inhabited-house duty of "any house originally built or adapted by additions or alterations and used for the sole purpose of providing separate dwellings, where the annual value of each dwelling shall not amount to twenty pounds." *Held* that the exemption did not apply to houses under £20 annual value forming part of a building designed for and used as a fire station, and occupied by the firemen in connection with their duties.

Rule III. of Schedule B of 48 Geo. III., c. 55 (providing for duties on inhabited houses) enacts—"All shops and warehouses which are attached to the dwelling-house, or have any communication therewith, shall in charging the said duties be valued together with the dwelling-house and the household or other offices aforesaid thereunto belonging (except such warehouses and buildings upon or near adjoining to wharfs which are occupied by persons who carry on the business of wharfingers, and who have dwelling-houses on the said wharf for the residence of themselves or servants employed upon the said wharfs)."

The Customs and Inland Revenue Act 1878 enacts—sec. 13, sub-sec. 1—"Where any house, being one property, shall be divided into and let in different tenements, and any of such tenements are occupied solely for the purposes of any trade or business, or of any profession or calling by which the occupier seeks a livelihood or profit, . . . the commissioners acting in the execution of the Acts relating to the inhabited-house duties shall, upon proof of the facts to their satisfaction, grant relief from the amount of duty charged on the assessment." . . . Sub-section 2—"Every house or tenement which is occupied solely for the purposes of any trade or business, or of any profession or calling by which the occupier seeks a livelihood or profit shall be exempted from the duties by the said commissioners." . . .

The Customs and Inland Revenue Act 1890 (53 Vict. cap. 8), sec. 26 (2), as amended by the Customs and Inland Revenue Act 1891 (54 and 55 Vict. cap. 25), sec. 4 (1), enacts:—"The assessment to inhabited-house duty of any house originally built, or adapted by additions or alterations and used for the sole purpose of providing separate dwellings where the annual value of each dwelling shall not amount to £20 shall be discharged by the Commissioners, provided that a certificate of the Medical Officer of Health for the district in which the house is situated, or other medical practitioner appointed as hereinafter provided, shall be produced to them to the effect that the house is so constructed as to afford suitable accommodation for each of the families or persons inhabiting it, and that due provision is made for their sanitary requirements."

At a meeting of the Commissioners for executing the Acts relating to the inhabited-house duties for the county of Edinburgh, the Lord Provost, Magistrates, and Town Council of Edinburgh appealed against the assessment upon them for the year 1901-2 of £53, 8s. 9d., being inhabited-house duty at the rate of 9d. per £ on £1425, the annual value for that year of houses and fire station at 76 Lauriston Place, Edinburgh.

The following facts were admitted or proved:—1. The premises in respect of which the assessment in question is made consist of the chief fire station of the city of Edinburgh. They are erected upon a piece of ground which is bounded on the north-east by the Cattle Market, on the

north-west and south-east by the Cattle Market and approaches to it, and on the south-west and south by Lady Lawson Street and Lauriston Place respectively, and are correctly shown on the plans. 2. The premises were erected with a view to the purposes for which they are at present occupied. They form one large building, which has a frontage to Lauriston Place of 57 feet 10 inches, and to Lady Lawson Street of about 200 feet. Between the portion of the building facing Lady Lawson Street and that street there is a narrow strip of ground separated from the street by a wall surmounted by railings. In this wall are three gateways. A continuation of this wall encloses the yard referred to in statement 3. In this case the portion of the building facing Lauriston Place is hereinafter referred to as Block A, the portion in Lady Lawson Street next to block A is hereinafter referred to as block B, and the portion in Lady Lawson Street furthest from Block A is hereinafter referred to as block C. 3. Behind the building is a yard in which are out-houses used in connection with the Fire Station. They consist of a fire-escape shed, two coal cellars, a van-house, harness-room, stable, loose-box, and urinal. Between the urinal and the wall of block C there is a gate which is kept unlocked. There are other coal cellars which are not in use. The yard is enclosed by the wall referred to in statement 2. Access is obtained to it either from the Cattle Market by a gate and door in the south-east wall, or through the building itself as afterwards explained. Access can also be obtained to it by passing through the westmost gate in the wall fronting, and from thence round the north-west end of the building. 4. Block A consists of four storeys. The ground floor, which contains engine-house, washing-place, and stable, is entered from Lauriston Place. Access is obtained from the engine-house to the yard behind through the stable and through the wash-place. There is also a door from the engine-house into the lobby on the ground floor of block B to enable the firemen who live in the upper floors of the building to get access to the engine-house. Access is obtained by means of the first stair of block B to the first floor of block A, which is occupied by the firemaster as his dwelling-house. This stair forms the only access to the firemaster's dwelling-house; it is used exclusively as such access, and it provides internal communication between that house and the duty-room, and through it to other parts of the building. There is a steel pole at the head of the staircase to the firemaster's house, down which he can slide when called to duty. The second floor of block A consists of a lobby and two houses opening off it. The lobby is reached by a second stair within block B. Of these houses one is occupied by an officer of the Fire Brigade, and the other is occupied by the keeper of the cattle market, who is in the employment of the Lord Provost, Magistrates, and Council. The value of the house last mentioned is not included in

the assessment under appeal, but is separately assessed. Each of these houses has a separate outer door. The third floor of block A is reached by a stair from the lobby of the second floor. It contains two houses, each of which has a separate outer door. These houses are occupied by members of the Fire Brigade. 5. In block B there is a small basement used as a boiler-house, and entered by a stair within block B. There is also another basement under the part of block B nearest to block C, which is entered by a stair from the ground floor of block C. It has also an entrance from Lady Lawson Street. There are three entrances on the ground floor of block B from the street. Of these one gives access to the stair to the firemaster's house, another gives direct access to the duty-room, and another gives access to a lobby leading to the firemaster's room and office. From the duty-room access is obtained to the lobby, from which a stair descends to the boiler-house on the basement, and ascends to the upper flats of block B and to the second floor of block A. The firemaster's room and office are connected internally with the duty-room. The ground floor of block B is occupied exclusively for purposes of the fire brigade, and contains the firemaster's room and office, a recreation-room, gymnasium, a store, a lavatory, and a duty-room. The duty-room is for the accommodation of the men who are on duty for the time being. In case of a fire in any part of the city they summon the required firemen from their houses on the upper floors of the building by means of alarm-bells. Of these there is one in each fireman's house connected with the duty-room. If the alarm is at night those in the duty-room can switch on the electric light in each fireman's house. In the well of the staircase, which ascends to the upper flats of block B and to the second flat of block A, there are steel poles running up to the topmost flat, down which the firemen can slide when called to duty. From the lobby from which this stair springs there is direct communication with the yard behind the building. The first floor of block B consists, with the exception of the kitchen of the firemaster's house, entirely of houses occupied by the firemen. Of these houses one is entered from a landing on the stair, and the others from a balcony running along the back of blocks B and C, and communicating with the said landing. The second floor of block B also consists of houses occupied by the firemen. Of these houses one is entered from a landing on the stair and the others from a balcony running along the back of blocks B and C, and communicating with the said landing. In the part of block B nearest to block C there is a third floor used as a laundry, with drying-horses and a cistern-room. Access to it is obtained from the stair in block C. 6. The ground floor of block C is occupied exclusively by workshops in connection with the Fire Brigade, by a stair leading down to the basement aforesaid used as a store in block B, and by a stair leading to the upper floors of block C and to the

third floor of block B. There is no door or opening from the stair in block C into the workshops on the ground floor of the block. The ordinary access to them is from the yard behind the building. It is also possible to enter them from Lady Lawson Street through the cellar in the basement of block B. The upper floors of block C consist wholly of houses occupied by firemen. On each of these flats one house is entered from the landing of a stair. The others are entered from the balconies referred to in the preceding paragraph. 7. Each of the firemen's houses has an outer door. Any fireman desiring to leave the premises must obtain special leave and return at an hour specified. The occupation by the firemen of their houses is in virtue of their employment by the Lord Provost, Magistrates, and Council."

The Commissioners restricted the assessment to £1, 10s., being inhabited-house duty at the rate of 6d. per £ on £60, the annual value of that part of the premises occupied as a dwelling-house by the firemaster.

The Surveyor of Taxes appealed.

Argued for the appellant — This fire station was an inhabited house, as the building was a *unum quid*, in one occupation, and with complete internal communication—*Scottish Widows Fund v. Inland Revenue*, January 22, 1880, 7 R. 491, 17 S.L.R. 314. It did not fall under the exemption in section 13 of the Customs and Inland Revenue Act 1878. In order to let in the exemption in the first sub-section, quoted *supra*, the building in question must be in separate parts without intercommunication, and must be let—*Russell v. Coultts*, December 4, 1881, 9 R. 261, 19 S.L.R. 197; *Grant v. Langston*, May 28, 1900, 2 F. (H.L.) 49, 37 S.L.R. 691; *Yorkshire Fire and Life Assurance Company v. Clayton*, 1881, 8 Q.B.D. 421; *Union Bank of Scotland v. Inland Revenue*, March 20, 1901, 3 F. 771, 38 S.L.R. 464; *London and Westminster Bank v. Smith*, 1902, 87 L.T. 244. Neither of these conditions were fulfilled here. The exemption in the second sub-section (quoted *supra*) did not apply unless the building was occupied for business by which the occupier sought his livelihood or profit—*London Library v. Carter*, 1890, 62 L.T. 466. The Town Council did not carry on any trade or business at the fire station, nor did they thereby seek their livelihood or profit. The words "by which the occupier seeks a livelihood or profit" applied to the words "trade or business" as well as to the words "profession or calling"—*Muat v. Shaw-Stewart*, January 27, 1890, 17 R. 371, 27 S.L.R. 294. As there was intercommunication between the several parts of the building it was all assessable as one house, and therefore the provisions of the Customs and Inland Revenue Act 1890, whereby houses under £20 rental obtained exemption, were not applicable — *Browne v. Fustado* [1903], 1 K.B. 273. Besides, the fire station was not built solely for the purpose of being used for separate dwellings under £20 annual value.

Argued for the respondent—(1) The building here did not fall under the description of an inhabited house. (2) Even if it was an inhabited house, it fell within the exemptions—*Smiles v. Crooke*, March 6, 1886, 13 R. 730, 23 S.L.R. 489. The Town Council here carried on a trade or business. It was not necessary to show that they did so for their livelihood or profit; these words applied to a “profession or calling,” not to “a trade or business.” The firemen’s houses having each an annual value under £20 were exempt under the Acts of 1890 and 1891.

LORD PRESIDENT—The question in this case is whether the building described as the chief fire station of the City of Edinburgh is assessable to inhabited-house duty either as to the whole or as to any, and if to any to what, part of it. The Commissioners took the view that so far as the building consists of the dwelling-house of the firemaster it is so assessable, but that as to the rest it is not assessable. It appears to me to be clear both upon the language of the statutes and upon the decisions that this building is a unit; there is internal communication between all the parts of it, and that not accidentally but necessarily, in view of the purposes for which it was constructed and for which it is used. It is therefore, in my judgment, such a building as to be assessable to inhabited-house duty, unless it can be shown that it falls within any of the exemptions allowed by the statute. We have had a very careful examination by the counsel on both sides of the statutory provisions and also of the decided cases relative to this matter. I think it is quite unnecessary, after these statutes and decisions have been so frequently examined and commented on both in England and in Scotland, to go through them again. Therefore I content myself with saying that my opinion is that the Commissioners have erred in restricting the assessment to the annual value of the part of the premises occupied as a dwelling-house by the firemaster, and that I consider that the duty should be levied on the whole building as a unit.

LORD ADAM—I am of the same opinion. The building which we are dealing with here is a building which consists of one dwelling-house for the firemaster and other dwelling-houses for the firemen, and besides that there is attached to it a place for keeping the engines and for these accessories necessary for the purposes that this house is put to, namely, a place for fire protection purposes. Now, it is to be observed that there is internal communication through every part of this house, and to every room in the house, and to every office in the house. That is so, and I think is not in dispute. If that is so, then I am of opinion that that part of it which Mr Cooper wishes to treat as a separate tenement, namely those parts which are not actually used as dwelling-houses but used more directly for fire purposes, namely the engine-house and stables and so on, cannot be treated as a separate tenement in the

sense of this Act. I think the whole of that tenement, in respect of the inter-communication and in respect of the purposes, is a dwelling-house in the sense of the Inhabited House Taxation Acts. If that be so, the only question remaining is, does it fall within the exemptions? Now, the exemptions apply to a house or tenement which is occupied solely for the purpose of any trade or business. This house or tenement certainly is not occupied solely for the purpose of a trade or business. No trade is carried on in it, and no business in the proper sense in which the words are used in this Act, and it is not used for any professional calling by which the occupier (that is the City of Edinburgh) seeks a livelihood or profit. It falls under none of these exemptions, and these are the only exemptions, and I agree with your Lordship that it is unnecessary to go through the numerous cases that are decided on this question, because I think it is quite clear on the decisions that the decision of the Commissioners was wrong, and that the whole tenement is assessable.

LORD M'LAREN—I agree with your Lordships that in the position of this particular case we do not get much light from the previous decisions, excepting in so far as those decisions state principles that we have to apply. The circumstances of the present case are peculiar, because the building which is in question is the fire establishment of the City of Edinburgh. That includes a complete system of residences for the staff who are required for working the fire engines, and also a residence for the firemaster. It also includes stables for the horses that are to horse the fire engines, and a shed for storing the fire engines, and stores, which I suppose are either for feeding the horses or connected with the use of the mechanism. I need hardly refer to the other rooms on the ground floor, which are described as recreation rooms and gymnasium and duty rooms, because these are all rooms intended to be occupied by the men not singly but in common, and as part of the scheme by which these men are housed in the same building as the fire engines, so that they may be ready for their work at a moment's notice. Here we have undoubtedly apartments in the occupation of the Corporation of Edinburgh through their servants, and that would, *prima facie*, constitute the whole building with its appurtenances an inhabited house. According to the principle running through all the decisions it is of no consequence to consider whether the fire engine establishment, that is to say the coach-house and the stables, are the primary and principal part of the building, and the residences of the men accessory to it, or whether the residences are primary and the other secondary. In this case I do not think you can put either in front of the other. They are equally necessary to the complete fire establishment of the city, and it is perfectly immaterial to consider which of them is the more important of the two. Now, in such a case, and there being

internal communication through every part of the building, it seems to follow that the whole building is assessable as an inhabited dwelling-house, unless any part of it can be brought under a statutory exception. I agree with your Lordships that it is impossible to hold that the exemptions established in favour of trades have any bearing on this case, because even if Mr Cooper's observations were well founded that the words "seek a livelihood" only applied to professions and do not apply to trade, yet that is only because it was not necessary to qualify the word "trade," the idea of seeking a profit or a livelihood being inherent in the conception of a trade and not being necessary to be expressed in the statute. This is not a trade. The mere fact that the Council may have given the use of the engines and the services of the men to the county, and that they make a small charge for it, could never alter the fundamental character of this establishment, which is a thing provided and paid for out of the rates, and intended for the gratuitous benefit of the community. Then the other exemption, and the one which seems to weigh with the Commissioners, is the exemption under the recent statute on artisans' dwellings. My opinion upon that is that it is a clause intended to promote the building of commodious and suitable artisans' dwellings by giving the owners a certain relief from imperial taxation. The provisions requiring that the houses should be certified as suitable in sanitary and other respects before the exemption is conceded make this perfectly clear. It does not appear to me that the mere fact that the value of the portions of this residence occupied by the firemen comes under the amount covered by this exempting statute can bring the case within the scope of the exemptions, because these are not artisans' dwellings built for separate occupation in the sense of the Act, but are servants' apartments in a residence provided by the Corporation of Edinburgh for municipal purposes. I am not aware of any other exemption that has been pleaded, and on the whole matter my opinion is that this is an inhabited dwelling-house in its entirety, and that no exception has been established entitling any part of it to exemption.

LORD KINNEAR concurred.

The Court reversed the determination of the Commissioners and sustained the assessment.

Counsel for the Appellants—Solicitor-General (Dickson, K.C.)—A. J. Young. Agent—P. J. Hamilton Grierson, Solicitor of Inland Revenue.

Counsel for the Respondents—D. -F. Asher, K.C.—Cooper. Agent—Thomas Hunter, W.S.

Wednesday, June 3.

SECOND DIVISION.

[Lord Kincairney, Ordinary.]

AGNEW v. FERGUSON.

Revenue—Income-Tax—Deduction—Omission to Deduct when Paying Royalties—Right to Repayment—Income-Tax Act 1853 (16 and 17 Vict. c. 34), sec. 40—Condictio indebiti.

The lessee of a certain mineral field, who had paid income-tax on the amount of the royalties due by him under his lease, in making payment of the royalties to his landlord paid them in full without deducting the amount of income-tax due in respect of them. *Held* (rev. judgment of Lord Kincairney, *diss.* Lord Young) that although the lessee had omitted to exercise the privilege of deduction conferred upon him by section 40 of the Income-Tax Act 1853 he was not thereby debarred from recovering payment of the income-tax from the landlord.

The Income-Tax Act 1853 (16 and 17 Vict. cap. 34) enacts, section 40—"Every person who shall be liable to the payment of any rent, or any yearly interest of money, or any annuity or other annual payment, either as a charge on any property, or as a personal debt or obligation by virtue of any contract, whether the same shall be received or payable half-yearly or at any shorter or more distant periods, shall be entitled and is hereby authorised, on making such payment to deduct and retain thereout the amount of the rate of duty which at the time when such payment becomes due shall be payable for every twenty shillings of such payment; and the person liable to such payment shall be acquitted and discharged of so much money as such deduction shall amount unto, as if the amount thereof had actually been paid unto the person to whom such payment shall have been due and payable; and the person to whom such payment as aforesaid is to be made shall allow such deduction upon the receipt of the residue of such money, under pain of forfeiting the sum of fifty pounds for any refusal so to do."

This was an action at the instance of John Agnew, Viewfield, Carluke, as lessee of certain collieries on the estate of Cleland, Lanarkshire, against Alexander Ferguson, wine and spirit merchant, 108 West Regent Street, Glasgow, the proprietor of the estate of Cleland. The pursuer sought to recover from the defender income-tax which he had paid on the royalties payable by him to the defender under his lease.

The pursuer averred—" (Cond. 3) The pursuer was called upon by the Inland Revenue authorities to make payment of the property and income-tax due in respect of the royalties payable by him to the defender, and of his profits during the financial year from 5th April 1898 to 5th April 1899. The amount of the assessment was £76, 4s. This duty was calculated at the rate of 8d.