

[12th May 1835.<sup>1</sup>]

SAMUEL CATTERNS, Trustee on the Sequestrated Estate of Arthur Scott, Bleacher in Glasgow, Appellant.—  
*Pemberton—A. M'Niel.*

HUGH TENNENT, Respondent.—*Lushington—Parker.*

*Lease—Hypothec.*—A proprietor let premises for a manufactory, and bound himself to communicate to them a supply of steam-power by means of a shaft from an engine in adjoining premises belonging to him, and to furnish a supply of water, and the rent for the premises was fixed, but the amount of the consideration for the steam-power and water was left to the determination of arbiters: Held, (reversing the judgment of the Court of Session) that his right of hypothec over the *invecta et illata* in the premises let, was available in security for the whole consideration, including that for the power and water.

2D. DIVISION.  
Lord Medwyn.

12th May 1835.

IN the year 1830 the respondent entered into a contract with the appellant, which was expressed in the following missives:—

“ Mr. Arthur Scott.

Glasgow, 4th May 1830.

“ Sir,—I am willing to give you a lease, for fifteen  
“ years, of the ground and buildings pointed out to you  
“ at Wellpark, lately occupied as a brewery, at the  
“ yearly rent of 75*l.* sterling, rising every subsequent  
“ year 3*l.* during the lease; of which ground and  
“ buildings I shall furnish you with a plan, to be sub-  
“ scribed by each of us; also the garden, with the  
“ additional ground at and near the counting-house, at

<sup>1</sup> 12 S., D., & B. p. 686.

“ the further rent of 5*l.* per annum during the lease,  
 “ but with liberty to myself to take possession of said  
 “ garden-ground at the expiry of five years from this  
 “ date, upon giving you six months’ notice in writing,  
 “ when said rent of 5*l.* shall cease.

CATTERNS  
 v.  
 TENNENT.

12th May 1835.

“ I will allow you a private entry to these premises,  
 “ for your family only, from the road which leads to  
 “ the house occupied by myself, so long as I find it  
 “ agreeable; which private entry is to be shut up when-  
 “ ever I require you to do so; entry to the premises to  
 “ be given immediately, and the rent to commence from  
 “ Whitsunday first; which, together with the rent to  
 “ be charged for water, steam, and steam-power, is to  
 “ be paid at the usual terms of Martinmas and Whit-  
 “ sunday. The premises are not to be occupied for  
 “ any other purposes than those of bleaching, dyeing,  
 “ printing, singeing, calendering, or distilling of spirits,  
 “ without my permission in writing.

“ Whatever alterations you may require in the build-  
 “ ings for your operations are to be done at your own  
 “ expense, none of which are to be to the injury of the  
 “ houses as they at present stand. Said buildings are  
 “ to be kept and left by you in good tenantable condi-  
 “ tion, till the termination of the lease.

“ I also engage to furnish you, during the lease, with  
 “ the whole power of the said steam-engine at present  
 “ on my premises, and to put a shaft through the wall  
 “ into the premises to be occupied by you, to which  
 “ you will connect your machinery, which is to be fitted  
 “ up on the most improved principle, and that will,  
 “ in the opinion of the referees, be least hurtful to my  
 “ engine. The time of keeping the said power in  
 “ motion to be twelve working-hours per day, and to be

CATTERNS  
 v.  
 TENNENT.  
 12th<sup>o</sup> May 1835.

“ paid for according to the rent to be fixed upon by the  
 “ gentlemen afterwards named as referees, whether you  
 “ occupy it for the whole twelve hours or not. I am  
 “ not, however, to be liable for stoppages that may be  
 “ occasioned by necessary repairs, and in consequence  
 “ of any thing going wrong with the engine from which  
 “ you derive said power, except by making up lost  
 “ time. And, if need require, I am to have two weeks  
 “ per annum for repair of engine and boiler, without  
 “ any deduction from the rent to be charged for said  
 “ steam-power. Whatever extra time you require said  
 “ steam-power, an extra price to be charged accordingly.  
 “ Any odd time arising from stoppages of the engine,  
 “ beyond the specified time for repairs, to be settled for  
 “ at the end of the lease. I reserve to myself the power  
 “ of letting or using the extra power of the engine for  
 “ my own purposes, at any time which does not inter-  
 “ fere with the twelve hours above mentioned; it being,  
 “ however, understood, that I am to have liberty to use  
 “ the engine during these twelve hours, for a few  
 “ minutes only, occasionally to the extent of half a  
 “ horse-power, for pumping worts, &c.

“ I also engage to give you as much water as I can,  
 “ at a rent to be fixed upon by the referees afterwards  
 “ named, but from which rent fifteen per cent. is to be  
 “ deducted from the price charged by the Glasgow  
 “ Water Company; which water is to be pumped by you  
 “ out of the wooden cistern at your own expense; for  
 “ which purpose I will give you the use of the pumps  
 “ already on the premises, which you are to keep up.  
 “ I further engage not to charge you for the power  
 “ necessary to pump the water.

“ I farther agree to give you the injection water

“ from the engine, which you will conduct into your  
 “ premises, the rent for which injection water is also  
 “ to be fixed by the referees.

CATTERNS  
 v.  
 TENNENT.

12th May 1835.

“ It is understood that the minimum power of the  
 “ engine, for which you are to pay rent, is not to be less  
 “ than that of three-horse-power, from the commence-  
 “ ment till the termination of the eighth year of the  
 “ lease, and that, from the commencement of the ninth  
 “ year till the termination of the lease the minimum  
 “ power for which you are to pay rent shall not be  
 “ less than six-horse-power.

“ The price to be paid by you yearly, from the com-  
 “ mencement, and during the continuance of the  
 “ lease, for the steam, steam-power, and water, together  
 “ with any difference of any kind, should any un-  
 “ fortunately arise between us, as well as any increased  
 “ supply of water which you may require from time to  
 “ time, to be referred to the decision and final determi-  
 “ nation of Mr. Rolland of the Glasgow Water Com-  
 “ pany, and Mr. James Allan of the house of Messrs.  
 “ Peter Brown and Company, merchants in Glasgow,  
 “ with liberty to them, in case of need, to appoint an  
 “ umpire, whose decision shall be binding upon us; and  
 “ in case of death, or unwillingness of any of these  
 “ gentlemen to act, that we shall name other gentlemen  
 “ to act in their place, whose award, or their umpire,  
 “ shall be equally binding on us. I am, Sir, your  
 “ obedient servant,

HUGH TENNENT.

“ I omitted to mention, that I reserve the water of  
 “ the well on the premises to be let to you entirely to  
 “ myself, and that I shall have liberty at all times to  
 “ clear it, as well as to repair the drains from the  
 “ brewery, which pass through said premises. It is  
 “ understood that nothing is to be removed from

CATTERNS  
v.  
TENNENT.

12th May 1835.

“ the premises that was there at the time of your  
“ entry.”

“ Hugh Tennent, Esq.                      Glasgow, 3d July 1830.  
“ Sir,—I have received your letter of offer, dated  
“ 4th May, of which the annexed is a copy, which offer  
“ I hereby accept; and have the honour to be, Sir,  
“ your most obedient servant,              ARTHUR SCOTT.”

It was alleged by the respondent, that in consequence of Mr. Rolland's death Mr. John Stephen was appointed to act along with Mr. Allan in fixing the rent of the steam-power and water; but that these parties having differed in opinion, Mr. James Cook, engineer, was appointed by them to fix the rent of the steam-power, and Alexander Anderson to fix the rent of the said water. That this was done by a written minute, subscribed by parties which had fallen aside; that the rent of the steam-power was fixed by Mr. Cook, for the first year at 90*l.*; and that Mr. Anderson had also issued an award, settling the principles on which the water-rent was to be calculated. The appellant denied that any such minute had been agreed to, and that Messrs. Cook and Anderson had any authority to issue the awards which they had done; but it was admitted that Scott had engaged the use of the steam-power and of the water.

Founding on these missives, the respondent, on 1st April 1831, presented a petition to the sheriff of Lanarkshire, setting forth, “ That the half-year's rent  
“ due at Martinmas last, amounting, for the house and  
“ garden, to 40*l.* sterling, for the steam-power, to 45*l.*  
“ sterling, and for the water, at least, to 50*l.*, are wholly  
“ unpaid. And the said Arthur Scott, who has failed  
“ in his circumstances, and is now in jail, has caused  
“ his household furniture and other effects, and in par-

“ ticular the several articles thereof specified in the  
 “ inventory which is herewith produced, to be removed  
 “ to the house of Robert M’Culloch, founder, residing  
 “ at Govanhaugh, for the purpose of defeating the just  
 “ claims of the petitioner and his other creditors there-  
 “ upon ; he therefore prayed for warrant to officers of  
 “ Court to pass to the house of the said Robert M’Cul-  
 “ loch, and there to take possession of the household  
 “ furniture and other effects belonging to the said  
 “ Arthur Scott, and which were removed as aforesaid  
 “ from the premises possessed by the said Arthur Scott  
 “ under the petitioner ; to carry back the said articles of  
 “ household furniture to the said premises, and there to  
 “ inventory, sequestrate, and secure the same, with such  
 “ other articles of household furniture, machinery,  
 “ utensils, and others as may be found upon the said  
 “ premises, and also to sell the whole of the said articles  
 “ by public roup, in payment and satisfaction to the  
 “ petitioner of the half-year’s rent before specified, due  
 “ at the term of Martinmas last, of the interest accruing  
 “ thereon, and of the expenses of this application and  
 “ procedure to follow hereon, and in security of the  
 “ half-year’s rent to become due at the term of Whit-  
 “ sunday next.” Warrant was granted accordingly ;  
 but before carrying the warrant to sell into execution  
 the respondent presented a memorial, stating, that since  
 the warrant was granted the estates of Scott had been  
 sequestered, and Samuel Catterns, the appellant, elected  
 trustee ; that Mr. Catterns had sold those articles belong-  
 ing to the bankrupt, which had been carried back to the  
 premises, and sequestered ; that there had also become  
 due the Whitsunday rent for the premises, amounting  
 to 135*l.*, thus making the whole rent for the year amount

CATTERNS  
 v.  
 TENNENT.  
 12th May 1835.

CATTERNS  
 v.  
 TENNENT.  
 ———  
 12th May 1835.

to 270*l.* sterling; that, in the expectation that Mr. Catterns would satisfy the rent, the respondent had delayed executing the warrant of sequestration granted against any of the effects, excepting those which were clandestinely removed by the bankrupt; but as he did not intend to do so the respondent prayed for a renewal of the warrant to sequestrate the machinery, utensils, and other articles upon the premises, and thereafter to sell them in satisfaction of the year's rent due at Whitsunday last, and to ordain Mr. Catterns to consign in the hands of the clerk of Court the proceeds of the subjects carried back to the premises, and sequestered there, and which Mr. Catterns, while they were still under sequestration, disposed of in manner already mentioned. This memorial having been served on Mr. Catterns, he lodged answers, in which he maintained, first, that the price or rent of the steam-power and water had never been fixed; and, second, that no warrant to sell in satisfaction of such price or rent could be granted, as it was not covered by the landlord's hypothec. The sheriff allowed proof prout de jure, and in particular as to the alleged minute constituting Messrs. Cook and Anderson referees. The appellant having been allowed to advocate, which he did, and the case having come before Lord Medwyn, he pronounced this interlocutor:

“ In respect it is averred by the respondent, both in  
 “ the inferior Court and in this Court, that on the death  
 “ of Mr. Rolland ‘ a written minute was subscribed by  
 “ ‘ the tenant Scott and the respondent, appointing  
 “ ‘ Mr. Stephen to act as the new referee in room of  
 “ ‘ Mr. Rolland, but this written minute has been mis-  
 “ ‘ laid,’ remits to the sheriff, with instructions to recall  
 “ his interlocutor in so far as it disposes of the objections

“ (No. 36 of process), but to allow the respondent to  
 “ establish the above allegation by the examination of  
 “ havers and witnesses, and thereafter to proceed further  
 “ with the proof prout de jure; remits to the sheriff  
 “ also to dispose of the expenses in this Court at the  
 “ issue of the cause. Note.—The Lord Ordinary can-  
 “ not agree with the rationes in the sheriff’s interlocutor,  
 “ although in the circumstances he sees no objection to  
 “ the latitude of the proof allowed. A proof prout de  
 “ jure implies that the proof is not to be confined to  
 “ written evidence, but that parole proof is allowed of  
 “ those facts which, by our law, may be competently  
 “ established in that way. Accordingly, in every inter-  
 “ locutor allowing such a proof, diligence is granted  
 “ against havers and witnesses. Neither can the Lord  
 “ Ordinary agree with the sheriff in thinking that the  
 “ appointment of Mr. Stephen is a devolution to be  
 “ proved rebus ipsis et factis. It is in fact a new  
 “ nomination of an arbiter; and in a matter of such  
 “ importance, requiring a written minute to that effect,  
 “ it may not be possible to recover the minute of ap-  
 “ pointment, but it will be sufficient to prove that it  
 “ once existed; and that it was acted upon by the parties,  
 “ particularly by Scott, as is averred by the respondent,  
 “ will greatly strengthen the proof that it once existed.”  
 Both parties acquiesced in the judgment; and the case  
 being returned to the sheriff, a proof was taken according-  
 ly; and after a great deal of litigation in the course of it,  
 the sheriff ultimately pronounced this interlocutor:—  
 “ Finds it admitted that the rent of the premises in question  
 “ was 80*l.* per annum, as fixed by the missive (No. 12  
 “ of process), and that the rent of the steam-power and  
 “ of the water supplied to the tenant, Arthur Scott,  
 “ were to be ascertained by the award of arbiters;

CATTERNS  
 v.  
 TENNENT.  
 12th May 1835.



CATTERNS  
 v.  
 TENNENT.  
 12th May 1835.

“ finds it proved that the referees (Messrs. Allan and  
 “ Stephen), having differed in opinion, devolved the  
 “ disputed rent of the steam-power upon Mr. James  
 “ Cook, whose award forms No. 14 of process, and the  
 “ question of water-rent upon Mr. Anderson, whose  
 “ award is No. 13 of process; finds no proof of the  
 “ defender’s averment that the supply of water was  
 “ deficient in quality or quantity agreeably to the mis-  
 “ sive; and having considered the memorial and report  
 “ for the pursuer (No. 83 of process), approves thereof,  
 “ authorizes the Royal Bank to pay to the pursuer the  
 “ contents of the deposit receipt for 190*l.* 14*s.* 6*d.* in  
 “ extinction pro tanto of his claim of rent; finds the  
 “ pursuer entitled to demand and apply in a similar  
 “ manner the sum of 38*l.* 13*s.* 3*d.*, being the proceeds,  
 “ including interest, of the sale of part of the hypothec  
 “ carried off from the premises and sold by the defender  
 “ Catterns; and after deducting 20*l.* paid to ———  
 “ M’Culloch, as a compromise of his claim to said arti-  
 “ cles, ordains Samuel Catterns, defender, to pay said  
 “ sum of 38*l.* 13*s.* 2*d.* to the pursuer, to be applied  
 “ accordingly; and finds, that after applying these two  
 “ sums of 190*l.* 14*s.* 6*d.* and 38*l.* 13*s.* 2*d.*, when recovered,  
 “ towards payment pro tanto of the rent for which seques-  
 “ tration was originally awarded, there will remain a  
 “ balance of 87*l.* 7*s.* due to the pursuer, for recovery  
 “ whereof reserves all competent procedure at the pur-  
 “ suer’s instance; and finds Samuel Catterns, defender,  
 “ liable in expenses.” And on an appeal to the sheriff  
 he pronounced this judgment: “ Having particularly  
 “ adverted to the terms and import of the paper (No. 12  
 “ of process), entitled ‘ Missives of Set,’ finds that  
 “ the contract, as embraced in said missive, is wholly of  
 “ lease, and not partially of sale, as contended by the

“ defender; finds that the subject matters of said lease  
 “ are the premises and works therein described, with the  
 “ steam-power and supply of water; finds that there  
 “ are no grounds in the special circumstances of the  
 “ case, or in general law or practice, for holding that  
 “ the right of hypothec does not attach to that part of  
 “ the rent effeiring to the steam and water-power, but,  
 “ on the contrary, finds that the premises, with the  
 “ accessories of steam and water-power, must be viewed  
 “ (to use the ordinary language) as a public work, to the  
 “ rents of which as a whole the right of hypothec does  
 “ attach; therefore, and for the reasons assigned in  
 “ the interlocutor complained of, refuses the prayer of  
 “ said petition, and adheres to the interlocutor reclaimed  
 “ against.” The question was then brought under the  
 consideration of the Court of Session by advocacy, and  
 having again come before Lord Medwyn, he pronounced  
 this judgment :—

“ (11th March 1834).—The Lord Ordinary having  
 “ resumed consideration of the debate, and advised the  
 “ process, advocates the cause; finds, in the circum-  
 “ stances of this case, that the landlord’s right of hypo-  
 “ thec does not give him a preference for the rent or  
 “ sum paid for the power of the steam-engine which he  
 “ undertook to furnish, and for the water which he  
 “ engaged to give to the tenant of the ground and houses  
 “ let, but that it only covers the separate rent paid for  
 “ the said premises; therefore recalls the interlocutor  
 “ submitted to review; finds that the rent, for which  
 “ the hypothec is available, amounts to 80*l.*, with interest  
 “ since Whitsunday 1831 and till paid, for which, and  
 “ for the expense of sequestration, authorizes the Royal  
 “ Bank at Glasgow to make payment to the pursuer and

CATTERNS  
 v.  
 TENNENT.

12th May 1835.

CATTERNS  
 v.  
 TENNENT.  
 12th May 1835.

“ respondent from the deposit receipt for 190*l.* 14*s.* 6*d.*,  
 “ reserving to the pursuer and respondent his other  
 “ claims against the advocator, and to him his defences,  
 “ as accords ; finds the advocator liable in the expenses  
 “ incurred in the inferior Court, including the former  
 “ advocacy ; but finds the respondent liable in the  
 “ expenses in this Court of the present advocacy, and  
 “ decerns, &c. Note.—The circumstances of this case  
 “ are so peculiar, that its decision will not affect any  
 “ general rule or practice by which it may be established,  
 “ that, where a manufactory is let with the use of  
 “ steam-power at a slump rent, the whole rent may be  
 “ recovered in virtue of the right of hypothec. But here  
 “ there is a separate rent for the real subject, the natural  
 “ object of the landlord’s hypothec, and a separate rent  
 “ or price for the steam-power and water supplied,  
 “ and these are not even situated on the premises let, but  
 “ only introduced into them from the adjoining subject,  
 “ which might not even be the property of the proprietor  
 “ of the manufactory. Under these circumstances  
 “ the Lord Ordinary knows of no decision which  
 “ authorizes the application of the law of hypothec to  
 “ such a case, and cannot see any principle for its exten-  
 “ sion to such subjects of contract.

“ The summary application being only for securing  
 “ the benefit of the hypothec, what is not secured  
 “ thereby cannot fall within the petition. Seeing how  
 “ much litigation there has been, and the keenness with  
 “ which every plea in defence has been urged, the Lord  
 “ Ordinary regrets that, according to his view of the  
 “ case, it is incompetent for him to proceed farther, and  
 “ exhaust the matters in dispute between the parties.  
 “ However, having considered the proof, he thinks it

“ right to indicate his opinion, that it has been proved  
 “ that Scott proposed to substitute Mr. Stephen in the  
 “ room of Mr. Rolland, and that Mr. Tennent agreed  
 “ to this proposal; that this proposal and agreement  
 “ were both written instruments; that the devolution on  
 “ Mr. Anderson and Mr. Cook, by the arbiters, has  
 “ also been established; and although these writings,  
 “ with the exception of the devolution on Anderson,  
 “ have not been recovered, their existence and contents  
 “ are sufficiently established; and farther, that the par-  
 “ ties, and particularly Scott, acquiesced in and com-  
 “ municated with the referees. Under these circum-  
 “ stances, if this had been a competent process, the  
 “ Lord Ordinary would have sustained the awards.

“ As to expenses, the Lord Ordinary cannot help  
 “ thinking, that although the advocator has been suc-  
 “ cessful in the action on a ground of law, his conduct  
 “ of the cause must make him liable for the expenses in  
 “ the inferior Court. The proceedings in that Court he  
 “ has examined with attention. If the advocator had  
 “ confined his objections solely to the question of law,  
 “ and craved the opinion of the Court thereon, probably  
 “ the expense would not have been great; but, by the  
 “ innumerable objections taken during the proof, the  
 “ advocacy, and the numerous reclaiming petitions in  
 “ the inferior Court, in almost all of which he was un-  
 “ successful, he must have occasioned a very great  
 “ expense. Even in the former advocacy he was sub-  
 “ stantially unsuccessful also, his main plea being, that  
 “ the reference could only be proved by writ or oath of  
 “ party. No doubt the respondent, on the other hand,  
 “ has pleaded incompetent pleas in this process of  
 “ sequestration. But after the interlocutor of the sheriff,  
 “ referring so strongly to the practice, the Lord Ordi-

CATTERNS

v.

TENNENT.

12th May 1835.

CATTERNS

v.

TENNENT.

12th May 1835.

“ nary is not inclined to hold that he was so much to  
 “ blame in bringing forward his plea, in a matter where,  
 “ as yet, there is little authority to be a guide, as to  
 “ cancel his right to expenses incurred by the conduct  
 “ of the cause in the inferior Court. But the successful  
 “ party must, of course, be entitled to the expenses in  
 “ this Court.”

The appellant having presented a reclaiming note to the Second Division against the interlocutor of the Lord Ordinary, in so far as it found him liable in expenses, and did not find him entitled to expenses; and the respondent having also reclaimed in so far as it found that his right of hypothec did not give him a preference for the price of the steam-power and water, and found him liable in the expenses incurred in the second advocacy; their Lordships pronounced this interlocutor:—

“ (6th June 1834).—The Lords having advised the  
 “ cause, and heard counsel for the parties, alter the  
 “ interlocutor of the Lord Ordinary submitted to re-  
 “ view; repel the reasons of advocacy; remit the  
 “ cause simpliciter to the Sheriff of Lanark; find ex-  
 “ penses due; allow an account thereof to be given  
 “ in, &c.”

Catterns appealed.

*Appellant.*—1. The landlord’s hypothec is a right which belongs to him as proprietor of the heritable subject let, and gives him a preference over the effects of the tenant found upon the premises, to the effect only of securing the rent of that heritable subject; but a person supplying or letting by contract steam-power or water, for an annual payment, has no hypothec, and no such preference.

It may be true that there may be cases in which the consideration given for a supply of steam-power or water may be so blended with or merged in the rent of the premises that the whole would fall under the operation of the landlord's right of hypothec. For example, if valuable premises are let with the advantages of steam-power, or of water conducted into them, and if the rent stipulated be a slump rent for the premises with these advantages, then the steam-power or water may be regarded as accessories or benefits, and it would generally be impracticable, and always inexpedient, to attempt to separate the consideration given for the steam-power or water from the proper rent of the premises. The proper subject of the lease in such a case is the premises; but it is the premises, with these benefits, which may, to a certain extent, have increased the rent, just in the same way as an obligation to keep a house heated with air, or lighted with gas, or supplied with water, would have its effect in increasing the rent. In such a case the rent for these benefits would not be separable from the rent of the premises in a question as to the landlord's hypothec.

There is first a lease of the premises, which is the only proper lease; and then there is a contract to supply steam-power, and a contract to sell water. It is true that the respondent, who is the landlord of the premises let, is also the contractor to furnish the desired supply of steam-power and the desired supply of water. But this circumstance does not alter the case. He happens to possess these different characters, but it is only in one of them, viz. the character of landlord, that he has any right of hypothec. He has no such right in his character of contractor to supply steam-power, or to supply water. Let it be supposed that these contracts, though between

CATTERNS  
v.  
TENNENT.  

---

12th May 1835.

CATTERNS  
v.  
TENNENT.

12th May 1835.

the same parties, had not been in the same writing with the missive of lease; that there had been separate missives; a missive of lease of the premises, a separate missive relative to the supply of steam-power, and a separate missive relative to the supply of water; there would, in such a case, be no pretence for extending the right of hypothec beyond the rent of the premises, so as to give a preference over the tenant's effects, for the contract price of the steam-power or water.

It is true that the three offers are here made by one letter written, and are all accepted at the same time; but that circumstance cannot affect the question. The premises which formed the subject of the lease are separately stated and described, and the rent of them is separately stated. It is only in regard to these that the respondent possesses the character of landlord, or that the right of hypothec consequently is applicable. The parties themselves have separated the rent of the premises from the consideration to be given for the supply of steam-power, and from the consideration to be given for the supply of water. They are not blended together as in the case of a slump rent. The steam-power and water cannot be regarded as mere benefits or adjuncts of the premises, for the consideration given for them is not included in the rent of the premises, but is carefully separated and distinguished from it, and is in amount much more than double the rent of the premises. The premises are let at a fair rent, according to their value, independent of the steam-power and water. They had been let to the previous tenant at a similar rent, without steam-power; and they might have been used by the bankrupt without steam-power. But he chose to have steam-power, and the respondent was willing to furnish him with a supply of steam-power; he also chose to

have water, and the respondent was willing to furnish him with a supply of water, at a rate fifteen per cent? lower than the charges of the Glasgow Water Company, from whom it might have been got. It suited the convenience of both parties that the bankrupt should take his supply of steam-power and water from the respondent; but for these he was to pay, separately, the full value according to the quantity supplied. The sum to be paid for steam-power or for water did not affect the rent of the premises, and although the offer of the lease of the premises was contained in the same letter with the offer to supply steam-power and the offer to supply water, yet the rent of the premises was kept as separate and distinct from the price of the steam-power or of the water as it would have been if the offer of lease had been contained in a separate letter.

CATTERNS  
v.  
TENNENT.  
12th May 1835.

In the Court below much stress was laid on the circumstance, that in the missive letter the consideration to be given for the steam-power is sometimes called rent; and, in like manner, that the consideration to be given for the water is sometimes called rent. But the term "rent" is there used inaccurately, and is not the only term used; the term "price" is sometimes used, and with greater accuracy. Thus: "Whatever extra time you require said steam-power an extra price to be paid accordingly."

It was also maintained in the Court below that the premises and the steam-power and water must be regarded as an unum quid, because they were all to be employed for carrying on one manufacture. The force of this argument is not apparent. The premises, the steam, and the water were all to be used by the bankrupt for the manufacture which he intended to carry on; but that observation would have applied equally if these several requisites had been contracted for by different



CATTERNS  
v.  
TENNENT.  

---

12th May 1835.

writings, or even with different persons. It would also have applied to any of the other commodities, such as coals, soda, vitriol, &c., without which the manufacture could not have been carried on. But the considerations to be given for these several requisites of the manufacture are totally distinct from the rent of the premises and from each other. The right of hypothec is a peculiar right—a privilege which belongs to the landlord as proprietor of heritable premises for securing the rent of these premises, but which does not belong to him in his character of contractor to supply water or steam; and if the rent of the premises payable to him, as landlord, be kept by the parties quite separate and clearly distinguishable from every thing else, the right of hypothec will apply to that rent, and to it alone.

There is no precedent for extending the right of hypothec in the manner contended for by the respondent, and there is no expediency in stretching it to such an extreme length, especially in a case of bankruptcy. The equalizing principles of the bankrupt law are against such unfair preferences. The common fund for division among the creditors is sufficiently encroached upon by allowing the landlord to draw out of it, in the first place, the full amount of the rent of the premises, without allowing the contractor for steam-power, and the contractor for water, also to draw out of it the debts due to them.

2. On the point of expenses, as the appellant was successful in the first advocacy, he ought not to have been subjected in the expenses of that advocacy, but ought to have been found entitled to the expenses incurred by him in that advocacy, and in the inferior Court.

*Respondent.*—The subject let was one subject, an unum quid, and it is impossible to separate the water

and steam let along with the premises from the buildings in which the process of manufacture is to be carried on.

CATTERNS  
v.  
TENNENT.

12th May 1835.

The subject let was not the buildings merely, or the water merely, or the steam merely, but the buildings, steam, and water, all equally the property of the landlord, and all equally indispensable to the use to be made by the tenant of the subject. If any one had been withheld by the landlord it would have afforded a good ground to the tenant for withholding, not merely the rent applicable to that particular subject, but the whole rent. Suppose that the landlord had withheld the buildings,—he could not have demanded the rent for the steam and water. Suppose he had withheld the steam which constituted the moving power of the machinery, or the water whose refrigeratory qualities were essential to the success of the dye-work,—he could not have demanded the rent for the buildings standing by themselves. The subjects being complex, and the joint operation of all required for enjoyment by the tenant, the joint concession of all could alone be held due implement of his part of the contract by the landlord.

The foundation of the landlord's right of hypothec is, that he is proprietor of the subject let to the tenant, and therefore it is that he has by immemorial usage been entitled to extraordinary securities for the payment of his rent above any other class of creditors. As it is the circumstance of being the owner of the soil which constitutes the foundation of his right, so it follows that whatever he lets as owner of the soil, and which is locally situated on the soil, becomes subject to the extraordinary privileges which he enjoys. Of these the most valuable are, that the fruits of the soil in agricultural subjects, the *invecta et illata* in a manufactory or urban tenement, or

CATTERNS

v.

TENNENT.

12th May 1835.

all the moveable subjects brought by the tenant within the subjects let, become the subject of security for the rent. So far is this carried in the Scotch law that it has long been a settled point that the landlord of a dwelling-house or manufactory, which yields no natural fruits, is entitled to retain in security of his rent, and to sell for its payment within the time allowed for that purpose by law, not only the moveables or furniture belonging to his tenant brought within the subject, but even the furniture hired by him for its temporary occupation.

This being the general law on the subject, there is no ground for doubting that the privilege of hypothec extends to that which is paid for steam and water belonging to him brought into the subject, as well as that which is paid for the buildings in which those elements are to be used. Cases frequently occur in which the rent paid to the landlord is a complex rent, composed partly of what is paid for the buildings themselves, and partly for other adventitious qualities or advantages furnished by the landlord, or pertaining to his property. Suppose that a mill is let by a landlord, who also at the same time furnishes the stream of water by which its machinery is to be turned, and which are both placed on the landlord's property,—it never was contended in such a case that the rent paid for the mill alone was the subject of hypothec, and not also that paid for the use of the stream by which alone it could be brought to yield a rent in the hands of the tenant.

The circumstance of the rent being here fixed in money for the buildings, and not for the steam and water, can make no difference. That happened merely because the means of fixing in money the rent of the steam and water were not at the moment accessible. If the rent to be paid in money for the whole had been ascer-

tained at the moment there would not have been three rents, but one rent for the buildings, steam, and water. As the rent, however, of the two last depended upon a reference, it was not inserted at the moment in the missive, but left for ulterior determination; and from the circumstance of one of the proposed arbiters having died, and of the bankruptcy of the tenant having supervened soon after he entered into the premises, no lease was drawn out fixing one rent in money for the whole three. But there can be no doubt that if the lease had been drawn out after the award of the arbiters had been given, there would not have been three separate sums for the buildings, water, and steam, but one rent for the whole three.

It appears a very narrow ground of decision in such a case, to lay hold, as the Lord Ordinary has done, of the mere circumstance of the rent for the buildings, steam, and water being not contained in one sum, as a ground for holding that a distinction is to be drawn between them, and that the privilege of the landlord's hypothec is to be applied to the one and not to the other. Even looking to the form of the writing which passed between the parties, there seems no ground for such a distinction; for no proposition is better fixed in law than that where the means of fixing and ascertaining a sum are given in a deed it is the same thing as if the ascertainment itself had taken place; and still more, where the subject matter of the agreement is considered, when it is recollected that the subjects let were let for one joint purpose, and that towards the due enjoyment of the subject by the tenant all three were equally requisite, no doubt can exist, that all three form the subject of one indivisible agreement, and that to all three the common law of landlord and tenant is applicable.

In regard to expenses, the interlocutors are well founded

CATTERNS  
v.  
TENNENT.

12th May 1835.

CATTERNS  
 v.  
 TENNENT.  
 —  
 12th May 1835.

because nearly the whole was occasioned by the pertinacity with which the appellant contested the validity of the awards,—a line of defence which totally failed.

LORD BROUGHAM.—My Lords, this cause began before the sheriff of Lanarkshire, on a question of competition between the respondent, Mr. Tennent, and the other creditors of Arthur Scott, a bankrupt, represented by the trustee and assignee, Catterns, the appellant. Mr. Tennent claimed a preference, in virtue of a lien or right of hypothec which he set up on account of rent in arrear; and the rent arose thus:—He was the owner of the premises where Scott's trade was carried on, and Scott occupied it under an agreement, or missive of tack, to which it is material that we should closely attend. Mr. Tennent first agrees to let the ground for fifteen years at 80*l.*, called in one place 75*l.* a year rent, increasing 3*l.* yearly, and the garden at 5*l.* more, with a break at the end of five years. After various conditions as to the occupation, Mr. Tennent goes on further to agree respecting steam and water power. He is to furnish the surplus steam-power of his engine, situated on the contiguous premises not demised, for twelve hours a day, and at a sum which is called rent, to be fixed by persons named as referees,—and more hours, if convenient to him (the lessee), for an extra sum; and he engages to fix a beam through the wall, in order to communicate this power. He further engages to furnish, at a rent to be also fixed by the same referees, as much water as he can from his reservoir, situated on the premises not demised;—the water to be pumped up by the lessee, who is not to be charged for the power required for the pumping. The lessee is likewise to have the injection water from the lessor's engine, at a rent to be

fixed by the same referees. This agreement for steam-power and water is to continue during the currency of the lease. The referees fixed the rent for the steam-power at 90*l.*, and that for the water at 108*l.* 8*s.* The sheriff held that this agreement gave the lessor a right of hypothec, in respect of the whole rent or whole sums, as well the 198*l.* 8*s.* for the power and water as the 80*l.* or 75*l.* rent for the premises, holding the whole contract, as he states in his interlocutor, to be one of lease, and not partially of sale; and this judgment having been brought by advocacy before the Court of Session was reversed by the Lord Medwyn, Ordinary, who considered that the hypothec only enured for the rent of 80*l.* or 75*l.*, and not for the price of the steam-power and water supplied. From this interlocutor the lessor reclaimed to the Lords of the First Division, who unanimously altered the Lord Ordinary's interlocutor, repelling the reasons of advocacy from the sheriff, and remitting to that judge, with expenses. I have omitted all reference to a great deal of intermediate or preliminary procedure which took place before the sheriff, because the judgment on the merits must first be considered, and then that on the costs, which alone makes it necessary to consider the other proceedings. It is admitted that a question is here raised of the first impression; there is no decision which at all governs the case in terms; and we can only have recourse to plain legal principle. But that, I think, is sufficiently clear to carry us through the argument, and to that I therefore proceed. Now, it is quite manifest, that if there had been no lease of the brewery premises, there could have been no pretext for treating the price paid for the steam-power and water as rent, and consequently no right of hypothec, in respect of any part of that price remaining

CATTERNS  
v.  
TENNENT.  
12th May 1835.

CATTERNS  
v.  
TENNENT.  

---

12th May 1835.

unpaid. This proposition seems to require no proof, and no authority; nevertheless, it was decided expressly in the case of *Auld v. Baird*, 31st January 1829. Auld being a snuff manufacturer, with a steam-power, Baird erected on the next close a power-loom, and made a contract with Auld to be supplied for ten years (break at the end of five) with the surplus of steam-power at 10*l.* a horse. Auld maintained that this was a lease, and claimed his right of hypothec as for rent. The Lord Ordinary directed Cases, and the Court clearly decided on these arguments against the claim, holding the contract to be no lease. This case will be found in 5 *Shaw and Dunlop*.<sup>1</sup> If, then, the present decision stood upon the footing of the 108*l.* 8*s.*, and the 90*l.* being rent, and if these payments, and the matters for which they are the consideration, were unconnected with any other sum, properly speaking a rent, and any other thing, the proper subject of demise, no doubt whatever could be entertained on the question. Rent, in fact, is something reserved, or supposed to be reserved, out of the fruits or value of the thing demised, and the tenant is only supposed to take and occupy what is over and above the portion reserved by the landlord or owner. The very phrase of rent reserved shows it; and this was the origin of the right of hypothec, which accordingly is only for one year. Lord Kaimes gives the same account of it in an ingenious essay, forming the tenth of his *Elucidations*. This shows that land, or real property, is the proper subject of leasehold tenures, and of the contract of lease, and that to rent due on such property alone the doctrine of hypothec is applicable. Indeed, the earliest leases were more like charters than contracts, being

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<sup>1</sup> 5 *S. & D.*, p. 264; new ed., p. 246.

of one part only, and a grant from the owner; and so Lord Stair and Lord Bankton both state—2 Stair, 9, 3; 2 Bankton, 9, 20. So, too, Mr. Erskine (2, 6, 27) says, that by construction the statutory protection of lessees, by the Act 1449, was extended to mills and fisheries as fundo annexa. But when there is not one, but two contracts, and the different matters of those two contracts are complicated together, a different view of the subject may arise. For, then, there being a proper subject of demise, and a rent reserved, strictly and properly so called, with the rent there may be mixed up the fruits of another contract,—the consideration of another thing given or lent during the currency of the proper lease, and that may follow the rent, as an accessory does the principal, so as to be confounded with, or lost in it. The common case of a furnished house at once occurs, and affords an example of this mixture; there is one rent received for both house and furniture; and although the furniture alone could not be the subject of a demise, and its consideration never could be separately held to be rent, yet when it forms part of the same contract, and is confounded or mixed up with the rent, it follows its fate, and the whole becomes rent together. This question was decided in the Common Pleas, not many years ago, in the case of Newman v. Anderton, 2 New Reports, upon great consideration; and the Chief Justice, referring to the well-known case in the fifth report, (Spence's case, 5 Co. Rep. 15 *a.*) seems to admit that the rule would not apply if the things were severable, and the agreement as to part was collateral to the other agreement as to the rent; for the ground of decision is, that the rent all arises from the house, and none from the furniture. So, in Smith v. Mapleback, 2 Term Reports, 641, the assignee of the

CATTĒRNS

v.

TENNENT.

12th May 1835.



CATTERNS  
v.  
TENNENT.

12th May 1835.

lessee made a contract with the lessor, whereby the lessee was bound to pay, over and above the rent, a part of the sum paid for goodwill; this was held a surrender of the term, and that there was no distress competent to him at all, the assignee's remedy being by assumpsit on the contract. The case referred to in *Newman v. Anderson* has always been considered to give the law upon the subject of covenants in leases,—I mean *Spence's case*. A part of the third resolution is material to our present purpose: “If a man demise a house and land for  
“ years with a stock or sum of money, receiving rent,  
“ and the covenantee consents to deliver the stock or  
“ sum of money at the end of the term, yet the assignee  
“ shall not be charged with this covenant; for, although  
“ the rent received was increased, in respect of the stock  
“ or sum, yet the rent did not issue out of the stock or  
“ sum, but out of the land only, and therefore, as to  
“ the stock or sum, the covenant is personal.” Upon this plain ground, the rent separately received for the steam-power and water cannot be said to issue from the brewery premises, but from the running water. In like manner, if a landlord demises two closes for one rent, it is entire, although he afterwards in the lease explains that part is in respect of one and part of the other: but if part is reserved for one and part for the other close, though the whole is in one lease, the rents are separate. It is true that there is a case in the Court of King's Bench, decided some years ago, apparently on no great consideration, which seems in conflict with these principles,—I mean that of *Jardine v. Wilson*, 4 *Barnewall and Alderson*,—where a covenant to supply with water a house demised, for a separate but fixed rent, was held to run with the land. I cannot agree with that decision. The argument that

this water might have been supplied by carrying it in buckets as well as by laying pipes seems unanswerable, and I am quite unable to reconcile the decision either to principle or to other cases, such as the Mayor of Congleton v. Briten, in 10 East, 130. But even if Jardine v. Wilson be law, it by no means follows that, in respect of distress, the water rent, or rather the consideration for the water, being separately reserved, and not forming part of the reddendum for the house, could have been distrained for. I think they clearly could not, even if we admit that the covenant ran with the land. I can see nothing in the principle of our law, as I state it here, to make it inapplicable to the Scotch law of lease-holding; and it is decisive of the question: for, once make the consideration paid for the steam-power and water separate from the rent, and there is no longer any ground whatever to hold that consideration any thing like a rent, or the subject of distress or of hypothec. It must not, therefore, be supposed that I proceed upon any other than a principle of Scotch law, when I profess my very decided opinion that the sums agreed by Scott to be paid for steam-power and water were separate from the rent in his lease, and formed no part of that rent; there can be no principle of Scotch law upon which these two sums may be regarded as parcel of the rent. They were stipulated for separately by the lessor in his missive of tack,—the only leasehold contract in the case. He first lets the land and buildings, the proper subject of a demise, for a certain sum,—80*l.* a year, which is, properly speaking, rent: he then lets, as it is called, but I call it contracts to furnish a steam-power and supply of water to his lessee of the ground. But the terms on which he is to furnish both are not even

CATTERYS

v.

TENNENT.

12th May 1835.

CATTERNS  
v.  
TENNENT.

12th May 1835.

stated in the missive,—they were not ascertained between the parties at the time when the 80% rent was reserved for the premises; for the sums to be paid were left to be ascertained afterwards by the award of referees. It is impossible to conceive a more plain case of separate demises, and several rents reserved, if the steam and the water could be made the subject of demise, and the consideration of rent; and it is therefore impossible to conceive a clearer case of the rent for the land and buildings being separate from whatever you choose to call that consideration which is stipulated for the steam-power and the water supplied. But if the rent, properly so called, is separate from that which they, by a kind of comparison or analogy, call rent for steam and water, past all doubt the case is gone; for it is admitted, and if not admitted, it is proved by *Auld v. Baird*, that the contract for a steam-power cannot be likened to a lease.

As for the water being different in respect of this argument from the steam-power, the fact does not bear this view out. Mr. Tennent had a tank or reservoir, and agreed to let Mr. Scott have water out of it, on terms to be fixed afterwards. Suppose he had agreed to send it in buckets, or to allow Mr. Scott to send for it in this manner, nobody could maintain such an agreement to be any thing like an agreement for a lease; it is a mere collateral agreement, an agreement for something in gross, unconnected with the subject of the demise, and forming no part of it, any more than its consideration, when liquidated by the award of the referees, forms part of the rent.

I therefore am of opinion, that the sheriff was wrong in his view of the merits, that the Lord Ordinary was right, and that the Court was wrong in reversing his Lordship's decision, and restoring that of the sheriff.

The question of costs remains. The Lord Ordinary gave the respondent his costs of the first advocacy, when he remitted to the sheriff with instructions; the effect of which was, in a material respect, to reverse the interlocutor of the sheriff, and to give the appellant the benefit of having appealed. It is clear that this never can be; the appellant must not merely not pay his costs of the advocacy at all, he having to some extent prevailed, but he must also have his costs of whatever proceedings before the sheriff the Lord Ordinary directed, in order that the sheriff might decide in his favour. As for the other proceedings before the sheriff, wherein he decided against the appellant, and the Lord Ordinary did not alter his interlocutor, the costs of these must still be paid by him, the appellant. But he is to pay none of the costs of the first advocacy.

CATTERNS  
v.  
TENNENT.  
12th May 1835.

Of the second advocacy, wherein the Lord Ordinary reversed the sheriff's interlocutor, no costs were awarded against the appellant, nor ought he to receive any costs from the respondent in that advocacy.

But the Court of Session has made the appellant pay the costs of the application to them against the Lord Ordinary's interlocutor; and of those costs he must of course be freed. But he is to receive no costs from the respondent for that application.

The question of costs, therefore, is now disposed of here, with the exception of the costs of the process before the sheriff, prior to the first advocacy; those costs must go back to the auditor, with this instruction, that he is to allow the appellant his costs of such proceedings before the sheriff, as the Lord Ordinary found by his first remit ought to have terminated before the sheriff in the appellant's favour; and that he is to allow the respondent his costs of such proceedings before the

CATTERNS

v.

TENNENT.

12th May 1835.

sheriff, as were, according to the Lord Ordinary's first interlocutor, considered to have terminated properly in the respondent's favour.

The House of Lords ordered and adjudged, That the said interlocutors, so far as complained of, be and the same are hereby reversed: And it is further ordered, That the said cause be remitted back to the said Court of Session, with instructions, first, to find and decern in terms of the said interlocutor of the Lord Ordinary of date the 11th March 1834, excepting in so far as is hereby reversed, and that the right of the landlord's hypothec, claimed by the said Hugh Tennent, respondent, does not attach to the rent or price for the steam-power and supply of water in question, but only to the separate rent for the buildings and grounds leased; and, second, to find that the said appellant is not liable in the expenses of the first and second advocations, nor of the reclaiming note to the Inner House in the said appeal mentioned, and that he is not entitled to the expense of such proceedings from the said respondent, but that the said appellant is entitled to the expenses from the said respondent of such proceedings before the Sheriff Court of Lanarkshire, as by the Lord Ordinary's interlocutor and remit in the first avocation was found ought to have terminated before the sheriff in the appellant's favour, and that the said respondent is entitled from the said appellant to the expenses of such proceedings before the sheriff as were according to the Lord Ordinary's said interlocutor and remit in the said first avocation considered to have terminated in the respondent's favour; and with instructions to the said Court of Session to remit to the auditor to fix and allow such expenses before the sheriff accordingly: And it is further ordered, That the said Court of Session do proceed further in the said cause as may be just, and consistent with this judgment.

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