procedure will be followed, and that this decision has been reached by us after consultation with the judges of the other Division, and with their concurrence.

LORD MACKENZIE and LORD SKERRINGTON concurred.

LORD PRESIDENT—I desire to intimate that Lord Johnston, who is unable to be with us, also concurs.

The Court refused the pursuer's motion and remitted the case to the sheriff court for proof.

Counsel for Pursuer — R. MacGregor Mitchell. Agents — Paterson & Salmon, Solicitors.

Counsel for Defenders—Lippe. Agents — Erskine Dods & Rhind, S.S.C.

Wednesday, January 17.

FIRST DIVISION.

[Sheriff Court at Edinburgh.

EDINBURGH ALBERT BUILDINGS COMPANY LIMITED *v.* GENERAL GUARANTEE CORPORATION LIMITED.

Lease—Hypothec—Sequestration for Rent—Invecta et Illata — Mechanical Piano Hired by Tenant of Hall Let Furnished at a Rent Payable in Advance.

The proprietors of a hall let it furnished to a tenant at a rent payable weekly in advance, to be used as a cinematograph theatre. The tenant having hired a mechanical piano on the hire-purchase system, brought it into the hall for use in the theatre. The property in the piano remained in the hirers until the whole of the instalments of the price were paid. Before the whole of the instalments were paid the tenant failed to pay his rent, though he remained in possession, and the proprietors of the hall brought a sequestration for rent, and having obtained decree in absence attached the piano. The hirers of the piano appeared by minute and craved recal of the sequestration in so far as it included the piano. *Held* that in respect of the fact that the premises were let furnished, combined with the facts that (1) the rent was payable in advance, and (2) the piano was a single article brought in, the landlord's hypothec did not extend to the piano, and the sequestration *recalled* as craved.

The Edinburgh Albert Buildings Co. Ltd., *pursuers*, brought an action in the Sheriff Court at Edinburgh, against George Senior, Edinburgh, tenant of the Albert Hall, Edinburgh, *defender*, concluding as follows:—"To sequestrate and to grant warrant to officers of Court to inventory and secure the whole stock, fittings, furniture, goods and other effects, so far as subject to the pursuers' hypothec, which are or have been on the premises occupied by the defender at the Albert Hall, No. 24 Shandwick Place, Edinburgh, since 17th August 1915, in security and for payment to the pursuers of the sum of £153 sterling, being the rent thereof, at the rate of £9 per week, due and payable for the period from said 17th August 1915 to 14th December 1915, with interest thereon at the rate of five per centum per annum from the said last-mentioned date till payment, and expenses; and thereafter to grant warrant to sell by public roup the whole or so much of the sequestrated effects as will satisfy and pay to the pursuers the said rent, interest and expenses; and to appoint payment to be made to the pursuers of the rents, interest and expenses aforesaid out of the proceeds of any sale or sales, or out of any sums consigned to have the sequestration recalled, and to decern against the defender for said rent, interest and expenses in the event of no sale taking place, or for such balance as may remain due to the pursuers after sequestration and sale and payment of expenses and all preferable claims therefrom; and to grant warrant to arrest on the dependence." No appearance was entered for the defender, but the General Guarantee Corporation, Ltd., Glasgow, *compearers*, appeared by minute craving recal of the sequestration.

The *lease* entered into between the pursuers and defender was in the following terms:—"With reference to the note entered into between Messrs J. & J. Galletly, secretaries for and on behalf of the Edinburgh Albert Buildings Company, Ltd., and Mr George Senior, the present tenant of the Albert Hall, dated 28th March 1914, Mr Senior having represented to the directors of the company that he is unable to pay the rent of £10 weekly, stipulated by the said note, and the directors of the said company having agreed to reduce the rent of the hall as from the week commencing the 28th day of December 1914, to £9 per week, it is agreed between the parties as follows, namely:—1. The missive of let, dated 28th March 1914, is hereby cancelled. 2. The Albert Hall shall be let by the week, commencing as on Monday, 28th December 1914, by the company to the said George Senior. 3. The rent payable shall be £9 weekly, that rent to be paid in advance every Monday by 12 o'clock noon. 4. Either party may bring the let to an end on giving one week's notice. 5. The rent of £9 before referred to shall include the occupier's taxes. 6. Mr Senior accepts the hall and fittings, etc., as referred to in the note of 28th March 1914 as in perfect order, and undertakes to leave them in the same condition at the expiry of his tenancy. 7. The proprietors will keep the property wind and water tight. All other repairs, etc., shall be done by Mr Senior."

The pursuers *averred*—"(Cond. 3) The defender paid the rent of said hall for the period from the date of his entry down to the week ending 17th August 1915. He has paid no rent in respect of his possession from that date to 14th December 1915, when the lease was brought to an end by him.

He is thus due to the pursuers arrears of rent amounting to £153, being seventeen weeks' rent at the rate of £9 per week."

They pleaded—"The defender being due to the pursuers the rent sued for, the pursuers are entitled to the warrants and decrees craved, with expenses."

The following *agreement* was entered into between the compearers and the defender:—"This agreement, made the 29th day of April 1914, between General Guarantee Corporation Limited, 142 Queen Street, Glasgow, hereinafter called the 'Owners' of the one part, and Mr George Senior, of the Albert Hall, Edinburgh, hereinafter called the 'Hirer,' of the other part, witnesseth that the owners agree, at the request of the hirer, to let on hire to the hirer a player piano, No. 5244/8021, maker 'Farrand Cecilian.' And in consideration thereof the *hirer* agrees as follows:—1. To pay to the owners on the 29th day of April 1914 the sum of seven pounds (£7) in consideration of the option to purchase contained herein, and for which credit will only be given in the event of a purchase being effected; and three pounds ten shillings (£3, 10s.) on the 29th day of each succeeding month so long as the hirer sees fit to continue the hiring. 2. To keep and preserve the said instrument from injury and take all risks (damage or loss by fire included). 3. To keep the said instrument in the hirer's own custody at the above-named address, and not remove the same (or permit or suffer the same to be removed) without the owner's previous consent in writing. 4. That if the hirer do not duly perform this agreement the owners may (without prejudice to their rights under this agreement) re-take possession of the said instrument, and for that purpose leave and licence is hereby given to the owners (or agent and servant, or any other person employed by owners) to enter any premises occupied by the hirer, or of which the hirer is tenant, to re-take possession of the said instrument, without being liable to any suit, action, or indictment, or other proceeding by the hirer, or anyone claiming under the said hirer. 5. If and when the owners are entitled to re-take the said instrument under clause 4 hereof, or should they fail from any cause, or not see fit, to re-take the same thereunder, or should the hirer fail to pay punctually the rent of the premises on which the said instrument may be, or fail to produce the receipt for the last periodical payment thereof when demanded by the owners or by their agents or servants, the owners, their agents, or servants, may at any time thereafter give notice forthwith to the hirer to terminate this agreement, such notice to be sufficient whether given verbally or otherwise. If in writing such notice to be sufficient if sent by post or otherwise, addressed to or delivered at the last known place of abode or business of the hirer whether such premises be occupied or not, or by delivering the same to any person on the premises where the said instrument may be, and this agreement shall thereupon absolutely determine and end, but the hirer shall remain liable for any past breach, and the hirer in event of such absolute determination of this agreement shall have no right of redemption or otherwise under clause (*d*) hereof. . . . The *owners* agree 9. . . . (*b*) If the hirer shall punctually pay the full amount of one hundred and thirty-six pounds, ten shillings (£136, 10s.) by £7 at the date of signing, and by such monthly payments as aforesaid, the said instrument shall become the sole and absolute property of the hirer. (*c*) Unless and until the full amount of £136, 10s. be paid the said instrument shall be and continue to be the sole property of the owners. . . ."

The following *averments* by the compearers and answers thereto by the pursuers were made—". . . (Cond. 2) The compearers on 29th April 1914 let on hire to the said George Senior, who was then tenant of the pursuers' premises, the said player piano under the conditions specified in an agreement entered into between the parties of same date. . . . (Cond. 3) The said George Senior made various payments under said agreement, amounting in all to £32, the last payment being made on 26th October 1915, but in respect of his failure to continue said payments the owners on 10th December 1915 terminated said agreement. During the continuance of said agreement and until the date of the sequestration aftermentioned said player piano remained in the premises of said Albert Hall. Said player piano throughout remained the property of the compearers, and at no time belonged to the defender Senior. (*Ans.* 3) Admitted that until the date of the sequestration the said player piano remained in the premises of the Albert Hall. Not known and not admitted that payments were made by the defender to the minuters. *Quoad ultra* denied. (Cond. 4) On the 20th January 1916 the pursuers brought a sequestration for rent against the said George Senior, and pretended to sequestrate the hypothec of the said George Senior in said Albert Hall. The inventory and appraisement following thereon includes nothing but the said player piano, there being no hypothec whatever. The present application has become necessary for the compearers to obtain possession of their property. (*Ans.* 4) Admitted that on the 19th day of January 1916 the pursuers brought a sequestration for rent against the defender and sequestrated said player piano, which was the only article in said Hall subject to pursuers' hypothec. *Quoad ultra* denied. (Cond. 5) The said Albert Hall was let by pursuers to defender by the week, the rent payable being £9 weekly in advance, with right to either party to bring the let to an end on giving one week's notice. Said hall was let furnished and the whole fittings and furnishings therein with the exception of said player piano belonged to the proprietors and were included in the let, and the rent of £9 was partly in respect of the hire of said furnishings. Pursuers were not entitled to, and in point of fact did not, require their tenant to plenish or furnish the premises let. There is therefore no applicability under such a let for the landlords' hypothec. The pursuers as landlords

in effecting said let relied entirely on the personal credit of their tenant. The lease of said premises came to an end on 4th December 1915, when the pursuers relet same to another tenant on similar terms. (*Ans.* 5) . . . Admitted that the whole fittings and furnishings in said hall with the exception of the said player piano were the property of the pursuers. Admitted that to a small extent the rent of £9 per week, which was a single and indivisible rent, was payable in respect of the fittings in the hall. The lease came to an end on 11th December 1915, when the premises were let to another tenant on similar terms. *Quoad ultra* denied. (Cond. 6) Said premises were let by pursuers to defender for the purpose of a picture house. It is a well-known and recognised practice for the lessee of such premises to hire player pianos, and the pursuers were all along aware that said instrument was not the property of their tenant. They were not entitled to rely, and as a matter of fact did not rely, on said article as being liable for payment of their rent. The player piano is of the value of at least £60. (*Ans.* 6) Admitted that said premises were let by pursuers to defender as a picture house. The said player piano was used by defender in connection with the cinematograph entertainments given in the hall. *Quoad ultra* denied."

The compearers *pleaded*—"3. The pursuers having no right of hypothec whatever, and having relied entirely on the personal credit of their tenant, are not entitled to sequestrate said player piano, and the same should be released from said sequestration."

The pursuers pleaded—"2. The minuters' averments being irrelevant, the minute should be dismissed. 3. The player piano referred to being subject to pursuers' hypothec, the crave of the minuters to have the sequestration recalled should be refused with expenses."

On 15th March 1916 the Sheriff-Substitute (GUY) sustained the second and third pleas-in-law for the pursuers, refused the crave of the minute for the compearers, and granted warrant to sell the player piano for payment to the pursuers of the rent due.

"*Note.*—The compearers claim that the player piano in question should be taken out of the sequestration (first) because they are the owners of it; (second) because it is a single article belonging to a third party in the premises occupied by the tenant; (third) because these premises are occupied as furnished premises by the tenant; and (fourth) because the tenant's rent is stipulated to be payable in advance. To deal with the last two points first. I do not know that it has ever been determined that there is no landlord's hypothec for premises let furnished or for premises where the rent is stipulated to be payable in advance. I can see no reason why it should be so decided unless such reason be an argument for the complete abolition of the law of landlord's hypothec. Some little difficulty arises from the case of *Gow & Shepherd* v. *Anderson*, February 13, 1808, Hume's decisions, 517. That was a very special case, but the important facts in it were that the article there in question, though a hired-out article, was not in the possession of the person to whom it was hired. Further, the premises in question there were a dwelling-house let furnished. To revert to the first two points. It is no doubt true that the law of hypothec proceeds upon the footing that moveables in the tenanted premises are presumably the property of the tenant. But as Lord President Inglis said in *Bell* v. *Andrews*, (1885) 12 R. 961, 22 S.L.R. 640, 'Although the right of property of such articles may be in another there are certain cases in which these will nevertheless fall under the hypothec. One is the case of hired furniture. Mr Bell says that the principle for this is that the risk is contemplated when the furniture is delivered on hire.' And again he says 'No case has yet been decided to the effect that a single article belonging to a third party and not hired falls under the hypothec.' Reference may be made to the case decided in this Court—*Smith Premier Typewriter Company* v. *Cotton*, 1906, 14 S.L.T. 764. In that case the very question I am now considering was involved. No doubt it was an action for delivery brought by the owners of a hired article, but the principles upon which it was decided are those which I am now seeking to apply in the present case. It is quite clear that in the present case the compearers had in view the possibility of their player piano falling under the hirer's landlord's right of hypothec, because they stipulate in the hire-purchase agreement that 'should the hirer fail to pay punctually the rent of the premises on which the said instrument may be, or fail to produce the receipt for the last periodical payment thereof when demanded by the owners or by their agents or servants, the owners, their agents or servants, may at any time thereafter give notice forthwith to the hirer to terminate this agreement.' The contract to which I have referred is a contract of hire purchase, and it seems to me that all that has been said in previous cases with regard to hired articles falling within landlord's hypothec applies *a fortiori* to cases of articles given out under a hire-purchase agreement. The option to become the proprietor of the article is to my mind a very important consideration."

The compearers appealed, and argued—The landlords' hypothec in urban tenements was based upon his right to call upon his tenant to furnish the premises let, in security of the rent—Bell's Principles, section 1276; *Bell* v. *Andrews*, 1885, 12 R. 961, *per* Lord President Inglis at p. 962, 22 S.L.R. 640. Accordingly there was no room for the hypothec when such premises were let furnished, for in that case the landlord was held by his own lease to have fully plenished the subjects and consequently had waived any right to call upon the tenant to plenish. Consequently where lodgings were let furnished a piano brought in did not fall under the hypothec—*Gow & Shepherd* v. *Anderson*, 1808, Hume's Dec. 517. *Nelmes & Company* v. *Ewing*, 1883, 11 R. 193, *per* Lord President Inglis at p. 196, 21 S.L.R. 134, illustrated the converse case. But, apart

from the matter of furnishing, the extension of the landlord's hypothec to the goods of third parties did not always apply to single articles brought into the premises. Thus it did not apply to a single article belonging to a third party and not hired—*Bell* v. *Andrews* (*cit.*); *Pulsometer Engineering Company, Limited* v. *Gracie*, 1887, 14 R. 316, *per* Sheriff Guthrie at p. 317, 24 S.L.R. 239; *Böttger* v. *Globe Furnishing Company*, 1906, 14 S.L.T. 117, at p. 118. Here the premises were let furnished, and the article in question was a single article belonging to a third party and owned by the compearers. Further, the hypothec was a security for rent not yet paid—Bell's Prins. 1234; *Preston* v. *Gregor*, 1845, 7 D. 942—and could not therefore apply when the rent was, as here, payable in advance. Further, the hypothec did not apply to arrears of rent—Gloag and Irvine, Rights in Security, p. 417; *Horn* v. *M'Lean*, 1830, 8 S. 454; *Stewart* v. *Rose*, 1816, Hume's Dec. 229.

Argued for the pursuers—The right to hypothec was based on the landlords' right to have the premises furnished, and also in the case of articles hired by a third party and taken into the premises upon the presumed consent of the hirer to submit his goods to that right—Bell's Prins. (*cit.*). Here the consent of the hirer must be presumed. He knew nothing of the terms of the bargain between the pursuers and defender, and he must be held to be aware that the landlord had a right of hypothec, and could not be said to have only parted with his goods knowing that no hypothec might apply to them. The hypothec covered everything brought into the premises—Stair, iv, 25, 3; Ersk. Inst. ii, 6, 64—and it was not limited to what was sufficient to cover the rent—Rankine on Leases, p. 391. The rule with reference to furnished premises was not in point, for the premises in question bore no analogy to a furnished house, and in any event they were not fully furnished, for they did not contain the article in question which was necessary for the defender's business. *Nelmes'* case (*cit.*) applied. *Bell* v. *Andrews* (*cit.*) was not in point, for the facts were different. *Gow & Shepherd's* case (*cit.*) was not a decision to the effect that there was no hypothec when premises were let furnished, for that case was decided upon the owner's right to a *rei vindicatio*. *Catterns* v. *Tennent*, 1835, 1 Sh. and M'L. 694, *per* Lord Brougham at p. 717, showed that there might be a hypothec in the case of premises let furnished. The fact that the article in question was a single article brought into the premises made no difference—*Penson* v. *Robertson*, June 6, 1820, F.C.; *M'Intosh* v. *Potts*, 1905, 7 F. 765, 42 S.L.R. 576; *Smith Premier Typewriter Company* v. *Cotton*, 1906, 14 S.L.T. 764. Further, the fact that the rent was payable in advance was irrelevant. The compearers could not be held to have allowed the piano to be taken into the premises, because there was a bargain of a certain kind to which they were not parties. As the hypothec only became operative where there was a breach of contract, the tenant could not plead that the right of hypothec had been waived by the stipulation for rent in advance. He was in breach of his contract and could not appeal to it, consequently his authors the compearers could not do so. Further, it was settled that the terms of the contract of let did not affect the right of hypothec—Rankine on Leases, p. 385. Thus the hypothec continued though the landlord had a cautioner bound with the tenant for the rent—*Stewart* v. *Bell*, May 31, 1814, F.C. 499. The hypothec was not excluded in the case of a forehand rent—*Taylor* v. *Davidson*, 1740, M. 6197—and the common law as therein laid down was embodied in the Hypothec Amendment (Scotland) Act 1867 (30 and 31 Vict. cap. 42), section 4. Bell's Comms. pp. 29 and 33; *Hepburn* v. *Richardson*, 1726, M. 6205, were also referred to.

At advising—

LORD PRESIDENT—We have here before us a petition for sequestration for rent presented at the instance of the proprietors of the Albert Hall in Shandwick Place. The inventory and appraisement following thereon includes only a player-piano. This instrument is the property of the minuters who crave that it should be released from the sequestration on the ground that it is their property, that it was let to the tenant on the hire-purchase system in terms of an agreement set out on record.

I am of opinion that in the circumstances disclosed in the conditions of let, which are expressed in writing, the landlord's hypothec does not extend to this piano, and that the minuters' crave ought to be given effect to. For the Albert Hall, it appears, was let with its furnishings and fittings to the tenant at the rent of £9 per week payable in advance, and that rent was payable in respect both of the hire of the premises and of the hire of the fittings. It is obvious therefore that the landlords relied on the personal security of the tenant alone. Nor can it be said that the owners of the piano can have contemplated that their property would be taken as security for the rent. They were entitled to assume that the landlord's hypothec would not extend to their property.

Now there can be no question, as Lord Moncreiff pointed out in the case of *Jaffray* v. *Carrick*, (1826) 15 S. 43, that "abstractedly and on general principles the rule of law is that a man cannot pledge property which is not his own. . . . All the cases in which either express pledge or tacit hypothec is admitted are exceptions from that rule, and proceed on a presumption of the consent of the real owner." Here it is impossible, I think, to presume the consent of the real owner. It was conceded that there is not a case in the books which supports the landlords' claim, that the right of landlord's hypothec in urban subjects has never been extended to the point to which it is sought to be extended in this case, and that if the landlords were to prevail here it would be carrying the doctrine of *invecta et illata* further than it has ever been carried before. I am not disposed to carry it further than precedent warrants, for I agree with a

remark made by Lord Deas in the case of *Nelmes & Company* v. *Ewing*, (1883) 11 R. 193, 21 S.L.R. 134, where he said—"I am more than ever satisfied that it is not safe to decide any of these questions relating to the landlord's hypothec on the general rule that what is brought into the house of another always becomes liable to the hypothec."

The state of the authorities applicable is this—*Bell* v. *Andrews*, (1885) 12 R. 961, 22 S.L.R. 640, decides that a single article not hired belonging to a third party does not fall under the hypothec where the remainder of the furnishing does fall under the hypothec. *Penson* v. *Robertson*, June 6, 1820, F.C., decides that a single article which is hired does fall within the hypothec where the remainder of the furniture falls under the hypothec—that is to say, is either the tenant's property or is hired by the tenant. But there is no case so far as I am aware deciding that a single article whether hired or not hired falls within the hypothec where the remainder of the furnishing does not fall within the hypothec and where the rent is payable in advance.

The case of *Gow and Shepherd* v. *Anderson*, 1808, Hume's Decisions 517, may have decided that question. I cannot upon examination of the report say whether it did or not, but the reporter observes—and I think everyone will agree with him—that "with respect to a right of hypothec, though by a very ample construction this sort of lien has been applied to hired furniture in the case of a dwelling-house let unfurnished, it does not follow that the like law is good for single articles brought into a house which has been let furnished on the personal credit of the tenant."

On principle therefore, if we can apply principle to such a question as the present, I think the landlords' claim fails. But my ground of judgment is that there is no decided case which supports a landlord's claim to extend his hypothec to a case where a single article is hired in a house where all the other articles are free from the hypothec and where the rent is payable in advance.

The authority of the case of *Penson* v. *Robertson* (*cit.*), it is said, has been questioned, but it has never been overruled, and in my opinion must now be regarded as sound law. But if the ground of judgment there is as contained in the report it appears to be unassailable, for the report bears that the reasoning on which the judgment proceeded was this, that there was no distinction as to the landlord's right of hypothec between a musical instrument and hired furniture. In other words, if a single article is hired and brought into a house where all the rest of the furniture is liable to hypothec it too falls under the hypothec. Obviously that decision has no application to the present case. Accordingly I am of opinion that the Sheriff-Substitute's interlocutor ought to be recalled, that we should find that the landlords' hypothec does not extend to this piano, and that the minuters' crave ought to receive effect.

I have to intimate that Lord Johnston concurs in this judgment.

LORD MACKENZIE—It is doubtful whether a case such as the present which involves specialties can be decided upon any general principle. This remark would apply to many cases involving the application of the law of hypothec. For, as the leading text writer on the subject points out, the safest course is to follow as closely as possible the decided cases without too close a scrutiny into principles—Rankine, Leases, p. 375. If this view be adopted, there does not appear to be any case which carries the law so far as was contended for by the landlord. The premises here were let furnished, the rent was payable in advance, and the piano in question is a single article hired by the tenant. The position of a single article of this character was considered in *Penson*, June 6, 1820, F.C., but in the later case of *Bell* v. *Andrews*, 12 R. 964, 22 S.L.R. 640, Lord Shand doubted its soundness. The fact that the premises were let furnished prevents the landlord successfully putting forward a principle upon which his hypothec is said to rest, viz., that he is entitled to have the subjects plenished with articles which may be subject to his hypothec, and the stipulation in the lease that the rent was to be payable in advance is an indication that the landlord relied on the tenant's credit, not upon any plenishing he might bring. It is the combination of these features in the case which in my opinion makes the general rule, that the landlord's hypothec in urban subjects extends to *invecta et illata*, inapplicable.

LORD JOHNSTON was not present at the advising, but his concurrence in the judgment was intimated by the Lord President.

LORD SKERRINGTON did not hear the case and delivered no opinion.

The Court pronounced this interlocutor—

"Sustain the appeal: Recal the interlocutor of the Sheriff-Substitute, dated 15th March 1916: Find that the player piano which belongs to the compearers is not liable to the pursuers' right of hypothec and was wrongfully included in the sequestration: Sustain the second and third pleas-in-law for the compearers: Therefore grant the crave of the minute of compearance No. 5 of process, and decern. . . ."

Counsel for the Compearers (Appellants)—Ingram. Agents—Mackenzie & Fortune, S.S.C.

Counsel for the Pursuers (Respondents)—Anderson, K.C.—Wark. Agent—Alex. Wylie, S.S.C.