in the sale is not well alleged. No fact is stated to sustain a charge of fraud in the sale. But separately, it is not said that the sale was induced by any fraud or misrepresentation on the part of the defender Kennedy. Then a subsequent transaction is alleged between Scott and the defender, and that is alleged to have been fraudulent. But that was after the first sale by the pursuers to Scott, and fraud in the second sale or transference of the hops to the defenders after delivery to Scott will not sustain the claims here made. That was a fraud against Scotts' creditors.

I do not think that the general averments of fraud in article 5 are sufficient, for it is not alleged that the fraud there set out was practised on the pursuers, and no concert or conspiracy between Scott and the defender, prior to delivery of the hops to Scott, has been averred. I am of the same opinion as your Lordship in regard to the plea in bar. I concur in the view taken by the Lord Ordinary.

The other Judges concurred.

The Court pronounced the following interlocutor;—

"The Lords having heard counsel on the reclaiming-note for the pursuers against Lord Young's interlocutor of 14th May 1874, Adhere to the said interlocutor, and refuse the reclaiming-note; find the pursuers liable in additional expenses, and remit to the Auditor to tax the account of said expenses and report."

Counsel for the Pursuers—Watson and Trayner. Agents—Boyd, Macdonald, & Lowson, S.S.C.

Counsel for the Defenders—Dean of Faculty (Clark) Q.C., and M'Kechnie. Agents—Finlay & Wilson, S.S.C.

Friday, July 10.

FIRST DIVISION.

[Lord Shand, Ordinary.

CLARK *v.* HUNTER.

(*Ante, p.* 620.)

Process—Pauper—Caution.

The pursuer in an action was, with her family, in receipt of parochial relief to the extent of 7s. a-week. She obtained counsel and agent to conduct her case, and refused to apply for the benefit of the poor roll, although the Court sisted procedure for ten days to enable her to do so.—*Held* that she must find caution.

Counsel for Pursuer—Solicitor-General (Millar), and Grant. Agent—James Barton, S.S.C.

Counsel for Defenders—C. Smith and J. A. Reid. Agents—Keegan & Welsh, S.S.C.

Thursday, July 16.

SECOND DIVISION.

[Sheriff of Aberdeen.

ROBERT LAMB *v.* SIR ARCHIBALD GRANT.

Landlord's Hypothec—Pledge—Accession.

A landlord obtained authority, in virtue of his hypothec, to sequestrate and sell his tenant's effects. In an inventory of these effects, made out for the landlord, there was included a cow which calved some weeks after the date of the sequestration and inventory. *Held* that the calf was subject to the landlord's hypothec, and that the tenant's trustee could not claim it.

This was an appeal from a decision of the Sheriff of Aberdeen, on a petition at the instance of Sir Archibald Grant, of Monymusk, against Robert Lamb, advocate, in Aberdeen, as trustee on the sequestrated estate of James and William Farquhar. This petition set forth that the petitioner was landlord of the Messrs Farquhar, and that as they were in arrear with their rent he had obtained warrant for sequestration in virtue of his right of hypothec, —that an inventory of their effects had been made out, and a warrant to sell the effects obtained. That in this inventory there was included a cow, which had calved a few weeks after the date of the sequestration, and that the respondent, as trustee upon the sequestrated estate of the tenants, had now advertised this calf for sale. The petition concluded with a prayer for interdict against this intended sale. Upon this petition the Sheriff-Substitute (Comrie Thomson) pronounced the following interlocutor:—

"*Aberdeen, 7th February* 1874.—Having considered the cause, sustains the defence, recalls the interim interdict, refuses the prayer of the petition, and decerns: Finds the respondent entitled to expenses of process: Allows an account thereof to be given in, and when lodged, remits the same to the auditor of court to tax and report.

"*Note.*—The petitioner is the proprietor of farms occupied by the Messrs Farquhar. He exercised his right of hypothec for rent by sequestrating their stock. Among the animals sequestrated was a cow, and subsequent to sequestration she bore a calf. But the Messrs Farquhar had taken out sequestration under the Bankruptcy Statutes; a trustee had been appointed, the present respondent, and in him was vested all that the bankrupts possessed. The calf was claimed by the landlord as forming part of the subjects which he had attached in virtue of his right of hypothec. It was also claimed by the trustee under the mercantile sequestration, as forming part of the effects of the bankrupt.

"The question thus raised is curious. There can be no doubt of the soundness of the rule of law, that the offspring of animals are an accessory of the mother. *Partus sequitur ventrem*, accordingly the calf in question became, as soon as it appeared in the world, the property of the owner of the cow, its mother. At the date of its birth, to whom did the mother belong? Plainly to the respondent as trustee for the creditors of the Farquhars. To him, therefore, by natural accession belonged also the calf. But his ownership of the cow was limited by the fact that she was held in pledge by the

landlord, as part security for his rent. The point which thus emerges for decision is, whether the property in the calf was subject to the same right of security.

"The Sheriff-Substitute is of opinion that it was not. The sequestration or inventory of a tenant's effects does no more than this; it changes a previously existing security, held without possession, into a security with possession. The extent of the possession is limited by the inventory of the effects made up at the time when sequestration is put on. The mother of the calf in question was included in that inventory, and in a certain sense, which need not be more particularly defined, the calf with which the cow was then pregnant was also included; but not in a legal sense. The law takes no cognizance in such a question as this of the *foetus in utero*.

"When it came to have an independent existence, a new exercise of the right of hypothec became necessary in order to include it within the effects specifically pledged to the landlord in security of his rent.

"It is not difficult to figure cases in which, if an opposite view were entertained, serious consequences would follow to the general creditors of a farmer. For example, in the instance of a large flock of sheep sequestrated by the landlord shortly before the lambing season."

Upon appeal, the Sheriff (GUTHRIE SMITH), pronounced the following judgment, now brought under review:—

"*Edinburgh, 17th March* 1874.—The Sheriff having heard parties' procurators on the petitioner's appeal against the interlocutor of 17th February last, and considered the record and whole process—Recals the said interlocutor: Finds that in virtue of a warrant by the Sheriff, dated the 13th May 1873, the crop and stocking on a farm of Blairdaff, belonging to the petitioner, and then in the occupation of James and William Farquhar, now represented by the respondent Robert Lamb, as their trustee, were sequestrated, and the inventory included a certain cow which was then in calf, and calved some weeks after: Finds that the calf fell under the sequestration, and was not removable by the said tenants, or any one in their right: Therefore repels the defences, declares the interdict formerly granted perpetual, finds the respondent liable in expenses, to be taxed on the lowest scale, allows an account to be given in, and remits the same when lodged for taxation, and decerns.

"*Note.*—As a matter of legal principle it does not admit of controversy that to the owner, vendee, or any one having a *jus in re* in the cow in question, the calf, when born, would fall as an incident of the possession, agreeably to the text—'In pecudum fructu etiam fetus est sicut lac et pilus et lana; itaque agni et haedi et vituli statim pleno jure sunt bonae fidei possessoris et fructuarii.'—*Digest*, 22, 1, 28.

"If, therefore, in inventorying the stocking, the officer had described the cow in question with due regard to its condition as a cow 'in calf,' it could hardly be disputed that the calf would have come into the world subject to the landlord's diligence, and liable to be sold along with the mother for his satisfaction. The object of a sequestration is to give the landlord a real right in each of the things mentioned in the inventory. His general hypothec has to be converted into a special lien, so as to give him a title to keep the goods on the farm, and sell them if necessary for his rent, and this is effected by a mark being, as it were, put on each of the cattle or the other goods of the tenant which may be enumerated in the inventory. The Sheriff is of opinion that in this case this requirement of the law has been sufficiently attended to. It is the same cow, and if no mention has been made of the calf, the officer and his employer are not to blame for the omission if the tenant said nothing about it at the time. Having acquired a real right in the animal, if not equal to, at least of the same character as, the title of a purchaser, the landlord acquired right to the calf also, without being obliged to bring a fresh sequestration."

The respondent appealed.

Authorities cited—Digest, 22, 1, 28, and 20, 1, 13.

At advising—

LORD JUSTICE-CLERK—The texts quoted from the civil law are quite in point, and deal with a similar pledge. The case which the learned Sheriff-Substitute puts as alarming I cannot but conceive to be within the natural extent of the security given to a landlord by his right of hypothec. I have no doubt but that a creditor taking possession under an assignation of the stock, though only in security, would have a similar right to the produce.

LORD BENHOLME—I was afraid that my opinion was founded on a legal instinct, but am glad to find that that instinct stands on strong ground.

LORD NEAVES—I am of the same opinion. This is a question with which common sense has a good deal to do, and common sense is abundant in the civil law. It is quite plain that an unborn animal can be sequestrated. But then it is said you must do this *per expressum*—but I do not think it would do to rest upon that.

LORD ORMIDALE—I have only to say that it appears to me that the authorities, the analogies, and the reason of the thing, all combine to support the judgment of the Sheriff Principal.

The Court refused the appeal.

Counsel for Appellant — M'Laren. Agent—William Officer, S.S.C.

Counsel for Respondent—Watson and Jameson Agent—Jas. Somerville, S.S.C.

Saturday, July 11.

SECOND DIVISION.

SPECIAL CASE—DOWALL AND OTHERS.

Heritable and Moveable—Fixtures.

Held that certain articles of machinery which could not be removed from a building readily and without injury were heritable, while others, never so fixed, and not placed there to add to the value of the heritage, were personal and passed to the executors.

This was a Special Case, brought by Mr Charles Dowall, as factor *loco tutoris* to the son of the late Mr Alexander Anderson Miln, manufacturer at Pitalpin, Lochee, on the one part, and the widow and factor *loco tutoris* to the daughter of Mr Miln, on the other part.