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.

The following are the facts of the case; — The late Alexander Anderson Miln, manufacturer, Pitalpin, Lochee, died upon the 15th of July 1873, intestate and without any marriage-settlement. He was survived by his widow, Mrs Eliza Paterson Dowall or Miln, and by two children—viz., Charles Dowall Miln and Eliza Dowall Miln, who were at the time of their father's death aged respectively eighteen months and three years. Mr Miln's estate consisted chiefly of the mill and works at Lochee, which belonged to him, and were in his own occupation at the time of his death, together with the machinery and stock in trade. The estate fell to his widow and children according to the rules of intestate succession, and in ascertaining the extent of the heritable succession difficulties arose as to what should, as in a question between heir and executor, be held to be heritable and what moveable. Appended to the Special Case laid before the Court there was an inventory of the whole machinery in the works of the late Mr Miln. Part of this inventory consisted of certain articles of machinery purchased by Mr Miln (who at the time of his death was extending his works) but not connected with the other machinery or used in any way. In these circumstances, the opinion and judgment of the Court was asked upon the following questions of law:—"(1) Whether any and which of the articles mentioned in the inventory hereto annexed fall to be held and treated as heritable property in the succession of the late Mr Miln? (2) Whether any and which of the articles mentioned in the inventory hereto annexed fall to be held and treated as moveable property in the succession of the late Mr Miln? (3) Whether, assuming it to be held that the machinery in use at Mr Miln's death, similar to that specified in Branch 11 of the inventory printed in the Appendix, is heritable, the machinery there described, and which had never been used or connected in any way with the driving gear, is heritable or moveable? "

Authorities—*Macniven* v. *Pitcairn*, March 6, 1823, F. C.; *Fisher* v. *Dixon*, 5 D. 575, 4 Bell's App. 285; *Heineccius*, Inst. 199; *Lawton* v. *Salmond*, 1 Black's T. 249; *Fraser*, 25 L. J., Ch. Cases 361, and Kay & Johnstone, 536; *Walmisley* v. *Mill*, 29 L. J., C. P. 97; *Holland* v. *Hodgson*, 7. L. R., Exch. Ch.; *D'Eynecourt*, 3 L. R., Eq. 382, Nov. 21, 1866; *Trapps* v. *Harcourt*, 2 C. and L. 153.

At advising—

Lord Justice-Clerk—My Lords, the questions raised in this case are of considerable importance. It has been very well and candidly presented to us, and the details and explanations given bring out the facts with perfect clearness. It was explained to us that the deceased, the proprietor of the mill and machinery in question, was a young man, who met his death by an accident, leaving a young family and dying intestate, so that his affairs have been left in a position different from what might have been expected under ordinary circumstances. The question whether the whole or part of the machinery is to go with the heritage to the heir, or is personal property, raises an important question in a category of law in which I cannot say the decisions have been either uniform or satisfactory. Some points have been clearly determined, but the questions put to us in this case in regard to the subjects enumerated in the appendix have never been the subject of direct decision. The result of the decisions in the matter I take to be as follows. The fundamental principle is simply that the accessory follows the principal; a subject personal in its own nature may become heritable if it is truly the accessory of real estate. In the earlier cases great favour was shown to the heir, and there was always a presumption in his favour. This has not been so of late years. Various subtle questions have been raised, and distinctions taken in applying the general principle to cases between landlord and tenant and heir and executor.

I take it to be settled that if the personal subject cannot be disjoined from a heritable subject without injury either to itself or to the heritable subject, it becomes heritable by accession. This principle is well settled by the case of *Fisher* v. *Dixon*, and others which followed upon it.

Again, the result may be the same when there is only a certain amount of fixture. (1) If the personal subject is essential or material to the use of the heritable. This point was also decided by the case of *Fisher* v. *Dixon*. (2) If there is a special adaptation in the construction of the personal subject to the use of the heritable subject which it would not have had if it had been placed elsewhere. The case of *D'Eynecourt* established this principle. (3) If there is an express declaration by the owner of his intention that the subject should be heritable. It is under this head that I think the English cases of mortgage which were cited to us must be placed. It has been held that a personal subject became real when it was the subject of direct mortgage along with real estate. I apprehend that these cases depend upon the principle that the owner has declared his intention. On the other hand, where the object of the annexation is not the benefit of the heritage, and where there is no intention of making the fixture an accessory of the heritage, the principles above laid down do not apply. Thus we have the whole category of trade fixtures. It has been said that the exceptions of trade fixtures from heritage in questions between landlord and tenant was established in favour of trade. I do not think this is the foundation of so important a class of decisions, but rather that the tenant cannot be presumed to have put in the fixtures for the benefit of the landlord's property.

In the present case the question is raised whether in the case of a manufactory where the building, so far from being the principal subject, is a mere accessory, and the most important thing is the machinery, which is not the fruits or for the benefit of the heritable subject, but only under the shelter of its roof, whether the subject, being moveable, becomes heritable by accessory. It certainly does not do so in a question between landlord and tenant. I cannot state the question better than in the words of Baron Parke in the case of *Hellawell* v. *Eastwood* (6 Exch. Rep 312). I read that passage, not so much as authority, but rather as the result of my own opinion, because I am aware that Mr Justice Blackburn in a later case has expressed a doubt—though I am unable to see upon what is founded,—whether Baron Parke was dealing with the subjects in question as things fixed to the floor. That was a case of landlord and tenant. But if the principle of decision was that the building was not the object of the attachment, and that the owner never intended to attach the machinery to the building, it carries us a long way. Take the case of a manu-

facturer who first rented his building and afterwards bought it, or suppose he rented another along side of his own, and moved the machinery backwards and forwards between them, how would the rights of heirs and executors be extricated? Would they change with each of these changes of circumstances? I think not, where there is no attachment so strong as to be supposed permanent, and no indication of intention, there will be no change in the character of the subject.

Applying these principles, I propose that we should hold numbers 1, 2, 3, 4, 9, the circular saws under 10, and the hydraulic press under 12, to be heritable. They fall under the first principle, being so attached that they cannot be removed easily, readily, and without injury.

The other objects are implements of trade which were never so fixed, and were not placed there for the purpose of adding to the value of the heritable subject. They were mere implements of trade, which remained personal, and therefore to be divided among the personal representatives.

Lord Neaves—Various elements must be taken into consideration and distinguished from each other in deciding questions of this kind. The element of trade may predominate, as in questions between landlord and tenant, or, as in the present case, the matter may relate to the mere domestic administration of estates. The intention of the deceased is often an important feature in determining the right of his successors. The subjects may be *in cursu* of being dedicated to the soil—materials, for example, collected for the purpose of repairing a building; such a distinction will receive effect. Similarly also, if the machinery is brought to a place for the purpose of working out the fruits of the lands, such as minerals. The result, however, is different when the machinery is placed in a heritable subject only for the purpose of making it the scene or *locus* of a trade—that is what was done in this spinning mill.

Under the old law, by which the style of conveyance of heritable moveable property was different, I cannot doubt that if a man bequeathed the machinery in this mill by his testament it would have received effect, and I think the same principle applies though this gentleman has left no written declaration of his intention, and that this property, with the exception proposed by your Lordship, should be distributed in executry. They have been brought into the mill for the purposes of the trade—that is for a temporary purpose—and they can be detached without injury.

The other Judges concurred.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the Special Case, are of opinion and find that the articles under the following numbers in the inventory attached to this case, that is to say, Nos. 1, 2, 3, 4, and 9, and also the circular saws under No. 10, and the hydraulic packing cases under No. 12, are heritable, and that all the other articles in the said inventory are moveable, and that the same are to be held and treated as such respectively, and decern; find that the expenses of each party must be paid out of their share of the succession, and remit to the Auditor to tax the same and to report."

Counsel for First Party. Watson and Kinnear. Agents—Webster & Will, S.S.C.

Counsel for Second Parties—Balfour. Agents—Maclachlan & Rodger, W.S.

Thursday, July 16.

FIRST DIVISION.

[Sheriff of Lanarkshire

ROBERT ROBERTSON AND ALEXANDER M'CASLAND *v.* NORTH BRITISH RAILWAY COMPANY.

Feu—Restriction—Title.

Two parties as singular successors held adjacent feus, forming parts of one subject originally given off by the superior. The one was admittedly subject to a restriction in the nature of a servitude which had been from the first inserted in his title. In the title of the other party there was a reference to the stipulations in the original feu-contract applicable to the whole subjects, but the said restriction was not expressly inserted therein. *Held* (*diss.* Lord President) that the latter party had a sufficient interest to enforce the restriction against the former.

The main object of this action, as stated in the prayer of the petition, was "to interdict, prohibit, and discharge the respondents, jointly and severally, or severally, from using their said lands, or any part thereof, for depositing dunghills, and from laying any dung upon the same (except while collecting the fulzie thereof in dunghills in the back ground belonging to the houses thereon till the same can be carried off, or for the purpose of being consumed on and being manure to the said ground) and from depositing and loading or discharging dung or manure at said depot or lye, or at any depot or lye formed or erected, or to be formed or erected, on said lands, and to ordain them, jointly and severally, or severally, to remove said depot or lye for the deposit or for the loading or discharging of dung or manure not collected as aforesaid, and to interdict, prohibit, and discharge them, jointly and severally, or severally, from afterwards forming a depot or lye for depositing and loading or discharging dung and manure not collected as aforesaid."

The Sheriff-Substitute found, *inter alia*:—"That under the original feu contract to M'Kechnie and Ross it is provided that it shall not be lawful for them to let or use any part of the ground 'for depositing dunghills, or to lay any dung upon the same, except while collecting the fulzie thereof in dunghills in the back ground belonging to the houses thereon till the same can be carried off, or for the purpose of being consumed in and being manure to the said ground:' That the respondents, the North British Railway Company, have been loading at these sidings, *inter alia*, the city manure, which is brought out in carts, and which, after having been for a day or two at the first placed in a heap, has been since then loaded direct from the carts into trucks, which generally remain over night and are taken away next day: That the petition is partly directed against the use of the ground by the railway company for their manure traffic as an