

The Court pronounced the following interlocutor:—

“The Lords having heard counsel on the reclaiming-note for the pursuer against Lord Mure’s interlocutor, dated 12th May 1874, Recall the said interlocutor, repel the defences, and decern in terms of the whole conclusions of the libel; find no expenses due to or by either party.”

Counsel for Pursuer—Dean of Faculty (Clark) Q.C., and Gloag. Agents—M’Kenzie & Kermack, W.S.

Counsel for Defender—Fraser and Mackintosh. Agents—J. B. Douglas & Smith, W.S.

Thursday, July 10.

FIRST DIVISION.

[Lord Young, Ordinary.

EHRENBACHER & CO. v. FREDERICK KENNEDY.

Sale—Fraud.

A foreign firm sold goods to a Scotch firm who were insolvent; the latter granted a bill in payment, and transferred the goods to one of their creditors, and shortly after were sequestrated,—the foreign firm ranking on the estate and receiving a first dividend. *Held* that the foreign firm had no ground of action against the creditor who received the goods, and that an allegation of fraud against him was irrelevant.

The pursuers in this case were hop growers and merchants, carrying on business at Nurnberg in Bavaria, and in Liverpool; and the defender, Frederick Kennedy, was a wholesale hop merchant in Edinburgh. The defender was also a partner of the firm of Thornton, Kennedy, & Hey, hop merchants in London. In or about September 1869 a firm of J. & W. Scott began business as hop and seed merchants at Greenside Place, Edinburgh. The firm consisted of two brothers, James and William Scott, and their business in the hop trade was the purchasing of hops wholesale, and retailing the same to country brewers, bakers, and small dealers. The defender Frederick Kennedy was upon intimate terms with the brothers Scott, and his firm of Thornton, Kennedy, & Hey was one of the wholesale houses from which the said J. & W. Scott were in use to purchase hops for re-sale. In or about the month of August 1872, the said firm of J. & W. Scott became insolvent. In the course of the month of August, and in the beginning of September following, they dishonoured several of their acceptances, among others an acceptance of theirs to Thornton, Kennedy, & Hey. It was further alleged by the pursuers that the defender Frederick Kennedy, and his firm, were well aware of the insolvent condition of the Scotts, and in consequence thereof had in the beginning of August 1872 stopped deliveries of hops under an existing contract with them.

The case for the pursuers was that Frederick Kennedy formed a fraudulent scheme to obtain payment or satisfaction of his firm’s claim, by holding over his firm’s dishonoured bills upon J. & W. Scott, and inducing others to do so, and appropriating towards satisfaction of his own firm’s claims such goods, or the proceeds of such goods, as J. &

W. Scott might be able to induce other traders, unaware of their insolvent condition, and of the dishonour of their bills, to sell to them. Accordingly, no proceedings were taken by the defender or his firm for the recovery of the amounts of said dishonoured bills, and the existence thereof was not in any way published; while, on the contrary, the defender represented J. & W. Scott as solvent. In September 1872 the pursuers received an order from the Scotts for a quantity of Bavarian hops of the value of about £500, which order was executed, and on the arrival of the hops the Scotts took delivery and transferred them to the defenders. The pursuers maintained that this transaction was fraudulent, and intended to satisfy in part the defender’s unsatisfied claims against the Scotts, and they accordingly raised this action against the defenders for the price of the hops. The Scotts were sequestrated in April 1873, and the pursuers accepted a first dividend but refused a second.

The Lord Ordinary pronounced the following interlocutor:—

“14th May 1874.—The Lord Ordinary having heard counsel and considered the record, Finds that the pursuers’ averments are irrelevant and insufficient in law to support the action: Therefore dismisses the action, and finds the pursuers liable in expenses, as the same shall be taxed, and decerns.

“*Note.*—The general aspect of this case is very unfavourable to the defender; but, on a careful consideration of the record, I am of opinion that the action cannot be maintained. The pursuers sold and delivered hops to J. & W. Scott. They allege that it was dishonest on the part of J. & W. Scott to order them, and to take delivery, instead of rejecting them when they arrived. But they nevertheless stood by the sale, and claimed the price in Scott’s sequestration, and received a dividend, which, with respect to the bankrupt estate, is equivalent to payment. The trustee then raised action against the defender for the value of the hops, on the ground that he had obtained them from the bankrupts fraudulently, to the prejudice of the creditors, and recovered a sum of money (£260) on a compromise. The trustee, in admitting and paying a dividend on the pursuers’ claim for the price, and in prosecuting the defender for the alleged fraud which he committed on the creditors with respect to the goods in question, necessarily proceeded on the footing that the sale and delivery by the pursuers were valid to divest them and to transfer the property to the bankrupts, and the pursuers having claimed the price and drawn a dividend cannot maintain the contrary either against the trustee or the defender, who satisfied the trustee’s claim against him on that footing.

“The pursuers don’t allege that the defender was a party to the sale by them to the Scotts, that he made any representation to them, or by any fraud or device induced them to sell or deliver the goods. A fraudulent intention on his part to obtain possession of any goods which the Scotts might be able to procure from sellers ignorant of their insolvency is imputed. But I think this insufficient to found an action. I do not omit to join it to the defender’s subsequent conduct as averred, in acquiring the goods from the bankrupts, and in respect of which he was prosecuted by the trustee as for a fraud on the bankrupt estate. But I think the whole averments, taken together, are insufficient.

“I give no opinion upon a question which naturally occurs though not raised by this action, and is

now probably incapable of being raised, viz., whether the pursuers might not have challenged the sale and delivery to the bankrupts on the head of fraud, and thereupon followed their goods into the hands of the defender, who certainly had not, according to the averments, any honest or defensible title. Upon these media, they might possibly have recovered the goods, or, if the defender had parted with them, their value. But after claiming and receiving the price (or a dividend) from the trustee on the footing that the goods had passed to the bankrupts, and after the defender had settled with the trustee on that footing, and paid his money to him to recompense the estate for the loss of the goods, I think the pursuers cannot be allowed to maintain action against the defender. They have got their price from the trustee, and the trustee has got from the defender the value of the goods which he improperly acquired. This may not have been the right arrangement to make, but having been made, the matter seems to be concluded.

"The record was closed on summons and defences without answers to the defender's statement, the pursuers not having desired or been required to answer the same. I have therefore been under the necessity of proceeding on the answers given at the bar to the two averments which I thought material—viz., the averment in Statement 5, which was admitted, with the qualification that, when the pursuers claimed and received the dividend they were ignorant of the fraud that had been practiced; and the averment in Statement 4, which, so far as consisting of matter of fact, the pursuers' counsel stated he was not instructed either to admit or deny. The qualification of the admission of Statement 5 does not appear to me to avoid the effect of it in this action, although it may open some other remedy to the pursuers. On that I give no opinion. With respect to Statement 4, I regard the answer as tantamount to an admission, considering the nature of the fact averred and that the averment has been on record for three months."

The pursuers reclaimed, and pleaded:—“(1) The foresaid transaction between the defender and J. & W. Scott having been a fraudulent transaction, to the prejudice of the pursuers, the defender is not entitled to take any advantage thereby. (2) The defender having, in the circumstances stated, fraudulently obtained possession and appropriated the said hops, is liable in the price or value thereof to the pursuers. (3) In the whole circumstances, the pursuers are entitled to decree as libelled, with expenses.”

Argued for them—The Lord Ordinary had decided the case not so much on relevancy as on the averments of parties. The pursuers accepted the first dividend in ignorance of the fraud which had been practiced on them, and when they discovered it they refused a second, which had been declared, and were willing to return the first. What they complained of was a special fraud against them perpetrated in pursuance of a general scheme to defraud the body of creditors. The intention was left, that Scotts' position might be retrieved—it was irretrievable—but that they might be kept going long enough to pay the defenders to the injury of the general body of creditors. In any view, the plea in bar ought not to be sustained without enquiry.

Authority—*Morton v. Abercromby & Co.*, Jan. 7, 1858, 20 D. 362 (Ld. Pres. opin. 369.)

The defenders pleaded—“(1) The pursuers' statements and pleas are not relevant, or sufficient to support the conclusions of the action. (2) The said J. & W. Scott having accepted delivery of the said goods, and disposed of the same, the defender is not liable to restore the price thereof to the pursuers. (3) Any right of challenge, or claim for repetition of the price, was vested, by the sequestration of J. & W. Scott, in the trustee on the sequestrated estates. (4) The said hops having been purchased from the said J. & W. Scott, and paid for in the *bona fide* belief that they were then solvent, the pursuers' claim is unfounded and untenable. (5) The pursuers having lodged a claim, and having been ranked and accepted payment of a dividend from the estates of the said J. & W. Scott in respect of the same debt as is claimed in the present action, are barred from insisting therein. (6) The pursuers' averments being unfounded in fact, and his pleas untenable in law, the defender is entitled to absolvitor, with expenses.”

Argued for them—The affidavit of the pursuers in the sequestration, sworn on the 9th April 1873, was to the effect that they “Hold no one liable for their debt besides Messrs Scott except Frederick Kennedy.” On what grounds could they hold him liable then, when, as they now say, they did not know the nature of the transaction between him and the Scotts till some months later?

Where the seller is not induced by fraudulent misrepresentation to part with his goods, or where the insolvent buyer has not resolved *cedere foro*, or ordered the goods so nearly before bankruptcy as to set up a presumption of fraud, the transaction is not reducible. Even if the Scotts were bound to reject the goods, Kennedy was not bound to do so. The real question was whether the pursuers would have been entitled to vindicate the goods in the hands of the trustee on the sequestration if they had been still extant and not transferred to the defenders. The pursuers' case must be that every creditor who dealt with the bankrupts at this time was entitled to have the goods ordered from and supplied by him struck out of the sequestration. There were not sufficient averments on record to found a claim for damages against the defenders on the ground of fraud. Conspiracy was not averred, but merely that the defenders held over their dishonoured bills with the object of fraudulently obtaining possession of goods from the bankrupts. The fraud alleged against the latter was that they fraudulently obtained goods, knowing themselves to be hopelessly insolvent. The two charges of fraud were quite different; the action was not for damages but for debt; it was *rei vindicatio*.

Authorities—Bell's Comm. (M'Laren) i, 264; *Allan & Stewart v. Dean*, M. 4945.

At advising—

LORD PRESIDENT—This action is brought to recover a sum of £377. 12s., being the price or value of certain hops which the pursuers allege were fraudulently obtained and appropriated by the defender when they were the property of the pursuers.

The Lord Ordinary found the pursuers' averments irrelevant and insufficient in law to support the action.

The first and second articles of the condensation set out the relations of the parties. The pursuers are hop-growers and merchants in Nurn-

berg, and the defender Kennedy is a wholesale hop merchant in Edinburgh. There is a third party connected with the action, the firm of J. & W. Scott, hop and seed merchants in Edinburgh, carrying on a retail business—Kennedy being a wholesale dealer in hops. The 3d and 4th articles of the condescence may be summarised thus—It is averred that in the months of August and September J. & W. Scott were insolvent, and knew themselves to be insolvent, and that the defender Kennedy was also aware of their insolvency, there being bills due to him by them which stood over dishonoured, and also bills due to other parties in a similar position.

The 5th article sets forth that in this position of matters Kennedy formed a fraudulent scheme to obtain payment or satisfaction of his debt, by holding over his bills, though dishonoured, and inducing others to do the same, with a view to appropriating, to evade the satisfaction of his and their debts, such goods as the Scotts could induce other traders, not aware of their insolvency, to sell to them; and in pursuance of this scheme no proceedings were taken against the Scotts on these dishonoured bills; but, on the contrary, they were represented by Kennedy to be solvent. Now there is here imputed to the defender a fraudulent purpose and intention; it is called a scheme, but it seems rather to be a purpose or intention to get his own claim against J. & W. Scott settled or provided for by taking over goods from J. & W. Scott. But it is not alleged or even insinuated that there was any conspiracy between the Scotts and him, or even any concert between them, or that the Scotts were aware of the fraudulent scheme formed by Kennedy.

The 6th article of the condescence proceeds: "On or about 23d September 1872, the pursuers, on the occasion of a visit of Mr Jacob Ehrenbacher, partner of the pursuers' firm, to this country, received an order from the said J. & W. Scott for a quantity of foreign hops, of the value of about £500 sterling. The pursuers were unaware at the time when said order was given that the said J. & W. Scott were insolvent and had dishonoured their bills, and the said J. & W. Scott fraudulently and unduly concealed the said facts from the pursuers. Induced by said fraud, the pursuers shipped the said hops to Leith for delivery under said order, and the hops arrived at Leith in or about the beginning of November 1872." Then the first sentence of the 7th article must be taken along with this—"On the arrival of the said hops, the said J. & W. Scott, notwithstanding their insolvency, failed to reject the hops, as they were bound to have done." There is the use of the words fraudulently and fraud in these averments, but it is necessary to see whether beyond these words there are elements to introduce the question of fraud between the pursuers and the Scotts. The Scotts had not come by this time to any resolution *cedere foro*,—they were not in contemplation of bankruptcy. No sequestration followed until March 1873, four months afterwards, during which time it must be presumed that they carried on business. It is not fraud for persons in such a position to go on with their business, and to purchase goods with the purpose and intention of recovering their commercial position. I therefore think that the use of the words fraud and fraudulently has no meaning here, because the Scotts were merely carrying on their business in the ordinary way when they

ordered these hops. As regards this contract of sale, there was on the part of the Scotts no *dolus dans causam contractui*. But, then, when the hops arrived in the month of November, it is said they ought to have rejected them. The pursuers say they were bound to reject them. But why? Supposing they were even in contemplation of bankruptcy, I should hesitate to affirm that they were bound to reject. I think they would have been entitled to do so, as we held in the case of *Hooker & Co. v. Milne*, but that is a very different thing from being bound to reject. It is not alleged that they were in any worse position in November than they were in September, when they entered into the contract of sale, and if they were bound to reject then they were bound not to enter into that contract. It appears to me that, so far as the pursuer's averments go there is no relevant averment of fraud against the Scotts, and accordingly these hops became their property. I take it that the hops were delivered as soon as they were put on board the vessel for conveyance to this country, and although prior to actual delivery upon the order of the Scotts they were liable to stoppage *in transitu*, yet, as soon as they were delivered they became the property of the Scotts. It appears to me that all interest in these hops on the part of the pursuers ceased after delivery. They had no longer any claim for anything except their price, for which they received a bill. Therefore what follows in the 7th article, though a very good averment as regards Kennedy in connection with the Scotts' creditors, has no bearing as between the pursuers and the Scotts. The averment is that "in pursuance of a fraudulent arrangement betwixt the said J. & W. Scott and the defenders, and in pursuance of the fraudulent scheme formed by the defender as aforesaid, the said J. & W. Scott went through the form of invoicing the said hops to the defender to the extent of £377, 12s. or thereby, at the rate of the pursuers' invoice, although the market price and value of said hops had risen by that time nearly 75 per cent. The hops so invoiced were transferred at the defender's request direct from the ship in which they had been brought to Leith, to the defender's warehouse, and have since been retained by him." Then it is further averred that the transaction was not one in the ordinary course of business, the Scotts being retail dealers and Kennedy a wholesale dealer. I admit that that would be a good averment by the Scotts' creditors, but it is of no value in support of the pursuers' action.

I therefore agree with the Lord Ordinary that the pursuers' averments are irrelevant. I do not, however, base my judgment at all on the plea in law stated for the defender, and I greatly doubt whether that is a good plea. At all events it would necessitate more proof.

LORD ARDMILLAN—I think the question of relevancy in this case is attended with some difficulty. It is not enough for disposal of the question that the conduct and proceedings of the defender are unsatisfactory and suspicious. The pursuers must support their demand by relevant and sufficient averment. The Lord Ordinary has found that the averments are not relevant. After careful consideration I have formed the same opinion.

The sale of hops by the pursuers to Messrs Scott on 23d September is rather singularly averred to support a charge of fraud. Fraud

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 Scott's 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 McKechnie. 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 sequester 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 sequestered 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