The Lords adhered, (18th February 1808.) No. 16.

Lord Ordinary, *Polkemmet.* Act. *J. Gordon.* Alt. *David Cathcart.*
*A. Milne*, W. S. and *Rich. Cowan*, W. S. Agents. *W.* Clerk.

*J. W.* *Fac. Coll. No. 32. p.* 112.

1808. *May* 20. FORD *against* HILLOCKS.

No. 17.
The tenant of a mill and lands cannot, without consent of his landlord, establish thereon a manufactory or machinery foreign to the purposes of his lease.

HILLOCKS possessed the corn-mill and mill-lands of Finhaven under a lease, containing, *inter alia*, the following clause: 'And at all times the said David 'Hillocks is at liberty to have three or four cottars or small subtenants on the 'said possession, including a miller, but never more.' Further, the proprietor of this estate had established a system of regulations which all the tenants, and among the rest Hillocks, subscribed on receiving their leases. By these regulations the landlord 'and his foresaids reserve to themselves the unlimited use 'and exercise of all roads, mosses, marked stances, mill-dams, and mill-leads 'presently used, and the liberty of making such alterations upon them as may 'be thought necessary for the public good, without any allowance or abatement to the tenant whatever.'

The defender proceeded to cut an aqueduct, for the purpose of erecting, immediately adjacent to his corn-mill, a plash-mill, from which he was to derive a rent of £35 *per annum*. Whereupon Ford applied to the Sheriff of Forfarshire for an interdict, who pronounced the following interlocutor: 'Finds a tenant's right in lands is limited to the fruits which spring from them; 'and that he has no right to break up ground for the purposes of erecting or 'conveying water to a plash or yarn-mill unconnected with the purposes of a 'farm.'

Of this interlocutor the defender pursued an advocation, which was discussed before Lord Meadowbank, Ordinary. In consequence of an order by his Lordship, 'to condescend on the precise nature of the construction he wishes 'to erect below his corn-mill, the quantity of water to be made use of, and 'the alteration of the stream (if any) it may require;' the defender condescended, 1*st*, That the machinery was to be extremely simple, and to consist of little more than a single mill-wheel, and the pieces of wood which are made to move by the operation of that wheel and wash the yarn; that the whole strength to be employed was not to amount to more than one half of a horse's power; and that there would not be more than two or three roods of masonwork: 2*d*, That the plash-mill was to be placed beside the corn-mill, and was to be supplied by a small cut from the lead of the corn-mill, of no more than two feet three inches depth of water; and that the supply of water to the corn-

No. 17. mill would not thereby be perceptibly affected: *3d*, That no alteration would be made on the dam-dyke of the stream, or in any respect on the stream itself from which the corn-mill was supplied. A sketch, illustrating these statements was at the same time produced.

The Lord Ordinary then pronounced the following interlocutor:

'Having considered this condescendence, with the answers thereto, and the 'proceedings; and being of opinion that the operation proposed in the con- 'descendence, and delineated on the sketch, is within the powers competent to 'the advocator under his lease, he always constructing such a sluice on the in- 'tended lead to the plash-mill as to stop the issuing of water from the corn- 'mill lead, as often as the service of the sucken shall require it, advocates the 'cause; and on his finding caution to remove the construction at the issue of 'the lease, and place every thing *in statu quo*, if so required, recals the inter- 'dict; and authorises him to carry the intended operation into execution at 'the sight of who is hereby directed to report to the Lord 'Ordinary, when the same is finished, agreeably to the condescendence and 'sketch.'

The case then came before the Court by petition and answers.

The pursuer, besides an argument on the amount and nature of the inconvenience or nuisance which the proposed mill would create on his property, maintained, that he could not by law be compelled to enter into a discussion with his tenant respecting the degree or extent of the innovation which the latter intended to make on the subject let to him. The subject let was a corn-mill and mill-lands; and the defender is not entitled to make any alteration on it, unconnected either with the grinding of corn or the cultivation of land. It might even be questioned how far the tenant can, without the landlord's consent, make any great alteration for the obvious improvement of either of these objects. But, *a fortiori*, the tenant is not entitled to change the nature of the subject let, and to create a new one, altogether foreign to the purposes of the lease, and inconsistent with the meaning and object of the contract between the parties.

While the tenant is entitled to derive from the lands all the advantages from increasing skill and improvement in cultivation, he cannot render them subservient to other and opposite purposes. He cannot break them up to form aqueducts, nor cover them partially or totally by constructing houses for machinery or workmen. Further, the tenant is not entitled by his lease to use, for any purpose but that of his corn-mill, the water already drawn from the river. Much less is he entitled to draw, for such foreign purpose, any additional quantity,—otherwise he would be using a subject which is not let to him. If these general principles of law required any aid, it might be further pleaded, that the landlord, by the clause in the regulations, had reserved to himself the exclusive power of making mill-dams, &c.

In a word, the right of a tenant is of an inferior description to that of an usufructuary, who cannot make any material alteration on the subject, *L.* 44. *D. De Usufructu.* No. 17.

On the other hand, the defender did not dispute the general doctrine, that the tenant was not entitled to change the nature of the subject let, and altogether invert the object and purpose of the lease; but maintained, that a tenant cannot be prevented from accomplishing by machinery any work which he is entitled to carry on by the hand-work of his servants. He might, without consent of his landlord, erect a thrashing-mill, or a corn-mill for his own use. He might sow flax on his lands, and carry on, by the work of his servants, the process from its original production to its fabrication into cloth. It would be absurd, therefore, to prevent him from availing himself of machinery to accomplish what he would be entitled to do by other means. The tenant being thus entitled to construct a mill, it would be impossible to inquire into or discriminate the property of the different parcels of yarn which were put into it; and the landlord being thus compelled to admit the erection of the mill, can qualify no interest or title to prevent it from being constantly used.

Some of the Judges agreed in opinion with the Lord Ordinary, and thought that the principle of the Sheriff's interlocutor was too broad and unqualified for the law to sanction; that there were rights of inhabitancy, and consequently of manufacture, which seemed to be struck at by it; that the operation in question, if accomplished *bona fide*, was *innocuae utilitatis*, and might be sanctioned; and that, in law, the tenant has right to every use of the subject let, which shall not invert its nature, and render it less valuable.

On the other hand, a great majority of the Judges were of a different opinion; and thought that a tenant was not entitled, either partially or totally, to change the nature of the subject let, or to create a new one by the erection of the mill; that the tenant in this case must restrict himself to those uses of the subject connected with the grinding of corn, and the cultivation of the land; that it would be contrary to the *bona fides* of the contract to permit a tenant to convert the subject of the lease to a purpose different and altogether unconnected with that for which rent was stipulated; and that he had no right to the stream of water, excepting for the use of the corn mill. A case too was noticed, where the tenant was found not at liberty, without the landlord's consent, to improve the subject by additional building, 22d July 1778, Inglis against Balfour, (See Note *infra.*) One of the Judges rested his opinion both upon these general principles adopted by the majority, and upon that clause of the regulations by which the landlord had reserved to himself '*the unlimited use and exercise of all roads, and mill-dams, and mill-leads.*'

The Lords altered, and remitted simpliciter to the Sheriff.

Lord Ordinary, *Meadowbank.* Act. *Ad. Gillies.* Alt. *J. W. Murray:*
*Robinson & Ainslie* and *Tho. Renny*, W. S. Agents. *W.* Clerk.

*J. W.* *Fac. Coll. No.* 41. *p.* 146.

No. 17. *** The case Inglis against Balfour, 22d July 1778, is somewhat involved in specialties, and has not been reported. But as it was noticed on the Bench, and as there are few decided cases on this subject, it may not be improper to state the circumstances.

In the year 1757, Gavin Hamilton, bookseller in Edinburgh, obtained from Mr. Inglis of Redhall a lease for 57 years of a paper-mill, with about six acres of ground, and a house adjacent to the mill, containing some accommodation requisite for the manufacture, as well as for his family, and for those whose business it was to overlook the workmen. In this lease was contained, *inter alia*, a prohibition on the tenant, '*to break or open the ground for any other purpose than that of tillage, or pasture, or building houses or other conveniences thereon.*'

In the year 1761, Mr. Hamilton obtained from Mr. Inglis, under a lease to expire at the same time with the former, another dwelling-house, '*with a little plot of ground, consisting of about* 48 *square yards, on the east side of, and adjacent to the said house, intended as a flower-plot.*' This was all the ground which adjoined to the house; but the lease contained likewise a field of about 16 acres, at a short distance from it.—This house and field were altogether detached from the house and mill held under the former lease; and it was provided, 'that the tenant shall not be at liberty to break open the ground for any other purpose than that of tillage or pasture, nor set up nor use any brick-kiln or lime-kiln within the grounds of the said lands, without licence had and obtained from said George Inglis or his foresaids for that effect.'

To these leases Mr. Balfour obtained right by assignation, after the death of Mr. Hamilton; and as, from the extension of the manufactory, the accommodations of his dwelling-houses were insufficient, he resolved to enlarge that dwelling-house which was detached from the mill, and held under the separate lease already mentioned. The only area, however, on which the proposed addition could be placed, was that which was described in the lease as *consisting of* 48 *square yards, on the east side of and adjoining to the said house, intended as a flower-plot.*

Mr. Balfour having taken measures to commence the building, Mr. Inglis applied to the Sheriff for an interdict; and, after some procedure, the case came before the Court of Session by advocation. The Lord Ankerville, Ordinary, after inspecting the premises, found, 'That the defender, Mr. Balfour, has a right to proceed in carrying on his intended building, according to the plan and account of dimensions now given into process.'

The pursuer reclaimed, and pleaded; 1*st*, That, the area on which the addition was to be placed, was, by the terms of the lease, and the understanding of parties, set apart for a flower plot, and could not be converted to any other purpose; 2*d*, That, independently of this special provision of the lease, a tenant cannot change the nature of the subject let under a lease of lands: The

tenant must cultivate according to the rules of husbandry, and the practice of other tenants, but he has no right to any other thing that is *pars soli*, to growing timber or minerals. He has the right *utendi non abutendi*. He cannot do any thing which may impair the value, or alter the nature of the subject. Under the lease of a house in like manner, he has right to all the accommodation which it affords, but he cannot change its specification, or, in any degree, alter its nature and description, by enlarging or diminishing it. This is a power which a proprietor only can exercise. L. 44. D. *De Usufructu*. The Court altered the interlocutor of the Lord Ordinary; and found that, 'The 'defender, John Balfour, has no right to change the nature of the subjects in 'dispute; and that he is not entitled to carry on the buildings in question, but that 'he must possess the piece of ground in dispute in the same manner as it was 'possessed by Gavin Hamilton his author, and according to the original under-'standing of the parties.' And on advising a reclaiming petition with answers, the Lords adhered. No. 17.

*J. W.*