[*27th July* 1840.]

(No. 8.) Messrs. WALKER, GRANT, and Company, Distillers, Aberlour, Appellants.[1]

[*Lord Advocate* (*Rutherfurd*).]

ALEXANDER GRANT of Aberlour, Respondent.

[*Sir F. Pollock—John Stuart.*]

Tack—Part and Pertinent.—Certain distillery premises were let by articles and condition of tack, and the extent of ground and premises and other pertinents to which the tacksmen had right was made the subject of arbitration. It having been found by the award that the tacksmen were entitled to a definite portion of ground as a stance for a straw-yard as a pertinent to a piggery, and which was "awarded for that purpose accordingly," and that they were also entitled to possession of a certain space of ground as a roadway:—Held (affirming the judgment of the Court of Session), that the landlord was entitled to interdict the erection of any buildings on the two pieces of ground so awarded, and the using the said pieces of ground in any manner different from the purposes for which they were respectively allotted by the said award.

1st DIVISION.

Lord Ordinary Cockburn.

Statement.

THE trustee on the sequestrated estate of James Gordon, late of Aberlour, let the Aberlour distillery premises to the appellants, for seven years from 10th October 1833, conform to articles and conditions of tack, dated the 30th day of October 1833, which thus describe the subjects:—The company to have the use of the following premises, viz. the distillery

[1] 1 D., B., & M. (new series).

house as occupied by Mr. Gordon; the water and water-wheel used for driving the thrashing and malt mill, to be at command for the distillery operations at all times when required, but the proprietor for the time to have right to thrash with the thrashing-mill three times a week, at an hour to be agreed on with the company; also to have the malt-barn, grain-loft above, with steep and cauch; also the use of the kiln, malt store-room, with every thing thereto attached, necessary for carrying on the malting and distillery operation: second, the two vaulted cellars, the bonded warehouse, and carpenter and smithy shop, pigsties, poultry and draff houses.

Statement.

It was also provided, that if any difference should arise regarding the meaning and intent of these articles, the parties "agree to submit the same to two persons, "to be mutually chosen, whose award shall be final and "binding."

The appellants commenced business as distillers, and soon after the lands of Aberlour were purchased by the respondent, who agreed with the appellants to submit to arbiters, mutually chosen, "the extent of ground and "premises, and other pertinents, to which they (the "appellants) had right in virtue of the said lease," with power to the referees to name an oversman, whose award should be final. The referees differed, and therefore devolved the matters in the submission to the determination of Mr. Cameron.[1]

[1] The chief subject of difference was as to whether the appellants were entitled to a stance for a straw-yard on premises of the respondent adjoining the piggery, and it was determined by an award that they were so entitled, and also to a roadway to the same. The terms of the award will be found set forth in the Lord Ordinary's note, p. 157.

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Statement.

The appellants subsequently erected on the ground so allowed by the oversman for the above purpose a building chiefly of wood, but partly of stone and bricks and mortar, and which was in part occupied as a dwelling-house; they also placed two wooden sheds on part of the ground allowed for a roadway, fourteen feet wide.

The respondent presented a petition to the sheriff of Banffshire, craving an interdict against the appellants "from erecting any dwelling-house or other houses or "buildings on any part of the foresaid piece of ground "awarded for a stance for a straw-stack, or on any part "of the foresaid space of ground awarded as a road-"way, and from using or occupying the said two pieces "of ground in any manner different from the purposes "for which they were respectively allotted by the said "award."

The sheriff-substitute at first granted the interdict, but after considering a closed record, as advised by the sheriff, recalled that interdict, and dismissed the petition, with expenses, subject to modification.

The respondent advocated to the Court of Session, where the Lord Ordinary, having closed the record upon additional pleas in law, pronounced the following interlocutor, accompanied with the subjoined note:—

"(9th June 1838.) The Lord Ordinary having heard "the counsel for the parties, and considered the record, "advocates the cause; recals the interlocutor of the "sheriff of the 1st December 1836; grants the prayer "of the original petition, and decerns in terms thereof: "Finds the advocator entitled to expenses both in this "Court and in the inferior Court, those in the inferior

" Court subject to modification; appoints an account " thereof to be given in, and, when lodged, remits the " same to the auditor to tax and report." [1]

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Statement.

[1] " There are two points here—1st. What was referred? 2d. Whether the award has been fulfilled?

" The chief difference between the parties was, whether the respondents as tenants were entitled to a place for a straw-stack for their " piggery, and what they referred was the extent of ground and premises, and other pertinents ' to which we have right in virtue of the " lease,' &c. The respondents say, that this only gave the arbiters power " to determine the mere superficial extent, and not to specify any particular use to which any portion of this surface was to be applied. The " Lord Ordinary cannot agree with this. The extent of a pertinent does " not, either in the language of this reference or in ordinary speech or " sense, necessarily denote the mere size of the space over which the " pertinent reaches. It includes the use as a part of the pertinent. The " two are, or at least often are, inseparable. If it were put to an arbiter to " define the extent of the pertinents of a property, would he be exceeding his powers if, besides specifying a road of certain dimensions, he " were to add, that this road, however, was only to be used by a particular description of passengers, or only at a particular period, or only " for a particular purpose.

" Now when this oversman comes to that part of the dispute which " relates ' to a stance for a straw-stack,' he disposes of it thus:—' I find " ' that the proprietor must furnish them (the respondents) with a stance " ' for a straw-stack, and as the trustee has already given them, or at " ' least allowed them to occupy, such a stance close to the piggery, I find " ' that they are entitled to retain such as a pertinent; and the parties " ' have agreed that the space from the south end of the piggery to the " ' dyke, being about thirty-three paces, is sufficient, with breadth of " ' half that length, which I award for that purpose.' The Lord Ordinary thinks, that in settling the extent of the pertinent under the lease, " he was fully entitled, not only to give this piece of ground, but to prescribe the exact use to which it was to be applied, and he does so by " limiting its application to keeping straw.

" If this was within his province, and if this be his meaning, it is " admitted by the respondents that they have not adhered to the award. " They have erected or were erecting a dwelling-house on this ground; " and they insist that they are entitled to do so. The Lord Ordinary " thinks that they are not. The landlord avers that this is hurtful to " him, in reference to an intended mansion-house. This is denied, and " it is not proved. The Lord Ordinary has not thought it necessary " to allow any proof, because, assuming it not to be injurious in this way, " he thinks that the landlord is entitled to prevent the space from being " used otherwise than in the limited way for which the oversman gave

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The appellants reclaimed, but the Court (20th November 1838) adhered, finding additional expenses.

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Statement.

The appellants appealed.

Appellants Argument.

Appellants. — The matter referred, and alone sub judice of the oversman, was the extent of the premises and their pertinents, and not the uses to which those pertinents might be applied; and although the necessity of a straw-yard might afford a good reason for the oversman allowing the use of the ground in dispute, it was ultra vires, and obviously not his intention, to limit the appellants to the use of the ground as a straw-yard merely, but to allow it to be used for any purpose that apertinent of the sort might not improperly be applied to. If the appellants chose to keep a piggery, a straw-yard was the most likely purpose to which the ground would be turned; but if they chose, instead of doing so, to use the ground more appropriately for providing accommodation to those engaged in the distillery, or to use their own roadway usefully, and undertook to remove the erections at the end of the lease, they could not be held as doing so in emulationem vicini, or contrary to the stipulations and purposes of the tack.

The respondent's counsel were not called upon.

" it. Whether either or both of the parties be quite reasonable and " accommodating, is not the question. Nor is it conclusive, as the " tenants seem to suppose, that the house is used for the purposes of the " distillery. If the oversman had been asked to give this piece of " ground for such a house, though for the distillery, it is plain from his " award that he would not. Having got it for depositing straw, the " tenants have no right to employ it for a quite different purpose; at " least not for one, without the landlord's consent, which may be of " material importance to him at the end of the lease, which is for only " seven years."

LORD CHANCELLOR.—Your Lordships time has certainly been uselessly occupied in the hearing of this case; and it is to be regretted that parties should come to your Lordships bar upon a subject like this, and in a case so clear as the present. The whole subject matter of contest is as to the title to a piece of land of thirty-three paces one way, and about fifteen the other, and the right of using it as a stack-yard for pigs.

The question arises under an agreement for a lease, which describes the property as property held by a former tenant. There are no metes or boundaries of any description given, but it enumerates a pigsty among the subjects let; and the question arising, whether the tenant had a right to use a piece of land adjoining the pigsty for the purpose of putting the straw upon it, it became the subject of reference, and the oversman found — (here his Lordship quoted the finding as to the stance for the straw-yard, and the access by a road). Now I do not understand the arbiter by that to intend to say, that he is of opinion that the site of the straw-yard is included in the description of the premises comprised in the agreement; but that he means to say that, inasmuch as there is a pigsty there, the landlord is bound to give the tenant the means of enjoying that which is let, and therefore that he thinks the landlord is bound to permit his tenant to put his straw-stack upon a piece of land,—not the tenant's ground, but the landlord's ground,—contiguous to the tenant's pigsty; in short, that the landlord is bound to afford that accommodation out of his own ground which will enable the tenant to enjoy the thing let; and the arbiter says, that the landlord must permit him to do so "for that purpose." But for that purpose the tenant has not claimed the use of it;

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Ld. Chancellor's Speech.

but having permission to use it for that purpose, he endeavours to apply it to another not within the award, not within the agreement, and not within the intention of the parties with whom he is dealing.

In the same way he has a right of road awarded to him over land not his, but the landlord's; he has the right, for enjoying the part decerned to him, of going over that piece of land. That does not satisfy him, but he is desirous of converting that into his own property during the period of his lease, by erecting some sort of building upon it. That is converting an easement of land into a right of possession of the land itself, which is a totally different thing. When it is said that the land is a pertinent, it does not mean that the tenant is to have the right to such land, but that he is to have the right to use such contiguous land as an easement, or to enable him to occupy the land let to him. The right of the tenant is founded upon the award; the title he claims is under the award, and not under the original lease. Now if he founds his title upon that, he must take it as he finds it, and use it for the purpose for which the arbiter found he had a right to use it, and not for any other. I was never before called on to adjudicate in so small a matter as a pertinent to a pigsty, and I hope I shall never be again.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutor therein complained of be and the same is hereby affirmed: And it is further ordered, That the appellants do pay or cause to be paid to the respondent the costs incurred in respect of the appeal, the amount thereof to be certified by the clerk assistant: And it is also further ordered, That unless

the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be and is hereby remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

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MACDOUGALL and UPTON — SPOTTISWOODE and ROBERTSON, Solicitors.