No. 15.

II. *As to the property.*

Though it would have been more regular to have named all the disponees in the disposition, yet this was not essential. It may be done by reference; and there was here, by implication, a sufficient reference to the contract of co-partnery, which was registered in the books of Council and Session before the date of the disposition. But, *Secondly*, If the other partners of the Company were not effectually invested by this disposition, at least the disponers were wholly divested, and therefore the full right has passed into Gillies, who was named and designed. Whether he was made a trustee or not, is of no consequence. If he was invested, the title offered to the defender is sufficient; and if no right passed to the other disponees, he must have been fully invested.

The Court thought that there was nothing in the objections to the lease.

And that the second answer to the objection to the disposition was sufficient, especially as all parties interested in the subject were ready to concur in the disposition; and accordingly 'Adhered to the interlocutor reclaimed against.'

Lord Ordinary, *Polkemmet*. Act. *Connell*. Alt. *Fletcher*.
Agents, *David Wemyss*, W. S. and *John Dillon*. *Pringle*, Clerk.

M. *Fac. Coll. No.* 31. *p.* 109.

1808. *February* 19. JOHN FORRESTER *against* JAMES WRIGHT.

No. 16.

An outgoing tenant being bound to consume the whole fodder on the lands, and lay the whole dung thereon the last year of his tack, having withheld part of it from the lands at the last crop, is obliged, without payment, to leave to the incoming tenant the quantity so withheld. To that part of the dung made after

THE defender held a lease under Mr. Hogg of Newliston, wherein he was, *inter alia*, 'bound to eat and consume the whole straw growing on the said 'lands with his bestial, and lay the whole dung thereon the last year of the 'tack, at bear seed time.' When this lease was on the point of expiring, the pursuer acquired a lease of the lands.

The defender having failed to apply, in terms of his lease, the dung made at the bear seed time of 1806, the pursuer petitioned the Sheriff to find, 'That 'the said James Wright has forfeited all right to the said dung, in and through 'his having not laid the same upon the lands at last bear seed time, in terms 'of his tack, and that the said dung is the property of the petitioner.'

On this application, the Sheriff pronounced the following interlocutor, (20th March 1807.)

'Finds that the latter part of the clause in the defender's tack, relative to 'the straw and dung of the farm, imports a limitation in the tenant's favour, 'as to his penult crop, of the obligation set down in the former part of 'said clause, and applicable to the fodder and dung of all former years; and 'that, in terms of the same, he was only obliged to lay upon the lands, at bear 'seed time of the last year of his tack, such dung made from the fodder of 'crop 1805, or otherwise, as was then ready, or, in course of fair and equi-

No. 16. the bear seed time, the incoming tenant has a preferable right, on payment of the value.

'table management, should have been then ready for manure, and ought to 'have been on the lands towards raising crop 1806; and that the defender 'has right to payment from the pursuer, the incoming tenant, and at an equal 'fair rate, for the dung made after bear seed time 1806, and not unduly de-'layed in the making till after that seed time: Therefore nominates and ap-'points Mr. Stenhouse Hood, Mr. William Wilson, and Mr. Gideon Pitloh, 'or any two of them, to visit and inspect the several dunghills on the lands 'in question, and to report in writing, and on oath, respecting the number of 'cart-loads or cubic yards of dung contained in the said several dunghills, and 'the value of the same per cart-load or cubic yard; and whether, in their opi-'nion, the dung from crop 1805, and other dung on the farm, has or has not 'been unduly withheld by the defender from crop 1806; and, if it was so 'withheld, to what number of cart-loads or cubic yards the abstraction seems 'to have been; and for this purpose authorises the said visitors to call in and 'employ a proper person to measure the said dunghills in their presence; ap-'points the said visitation to take place in presence of parties, or of persons 'authorised to act for them; and grants commission to the procurator for 'either party to take the visitors' oath on their report; and appoints the said 'petition, answers, and replies, to be laid before them.'

The persons, to whom the remit was made, reported, that one-half of the dung had been unduly withheld from the lands at crop 1806.

Two of the reporters gave in an additional report, stating, 'That from 'every information we can learn, in similar cases, the waygoing tenant is al-'lowed half price for any quantity of dung not used by him, which he ought 'to have laid on at bear seed time.'

On these reports, the Sheriff pronounced the following interlocutor, (12th January 1807.)

'Finds that the defender is entitled to full payment from the pursuer for 'one moiety of the dung presently on the farm, and amounting to 450 cubic 'yards, and estimated by the reporters at £90; and that the pursuer, the 'incoming tenant, has preferable right to said moiety of the dung, upon pay-'ment of said estimated value, or sufficient caution found to the defender for 'the same: Finds it sufficiently instructed, that in preparing the ground of 'this farm for his waygoing crop 1806, the defender did unduly withhold the 'fodder and dung of 1805, to the amount of 450 cubic yards of dung, which, 'in course of fair and equitable management, he was bound to have laid on 'the lands, towards raising crop 1806; and being of opinion that the defender 'would have benefited in his waygoing crop by the application of said dung 'thereto, yet he suffers this damage by his own deliberate and wrongful act, 'and that the same does not turn to the benefit of the pursuer, the incoming 'tenant, who, by receiving the said quantity of dung now, wherewith to re-'cruit the wasted land, is not so well off as he would have been by the season-'able application of the dung in 1806, towards maintaining the land in good

No. 16. 'heart and condition: Therefore finds, that the pursuer has right to the said '450 cubic yards of dung, without payment; and that there is no just ground 'for making any allowance to the defender on account of the same: Finds the 'defender liable in expenses, and allows an account of the same to be given in.' And the following note was subjoined:

'The tenant's claim to half value, or any value, for the dung abstracted, 'the reporters found on an alleged custom; but it is impossible there can be 'any custom of the county referable only to the case of a plain wrong done 'by the tenant, and which, if allowed, would be a constant temptation to him 'to do such wrong; and, for the reasons assigned in the interlocutor, the new 'tenant cannot justly be found liable in any such allowance.'

A bill of advocation against this judgment was refused; and the case came by petition and answers before the Inner-House.

Argument of the defender.

1*st*, With regard to the dung withheld from the farm. Although the defender may have transgressed his lease in withholding part of the dung from the land, yet it does not follow that the pursuer is entitled to it without payment or consideration. If the whole quantity of manure had been laid on the lands, the defender would have reaped a greater crop, and the pursuer would have lost the benefit of it to the same extent, because it would have been so far exhausted by that year's crop. The pursuer, therefore, by getting the unexhausted manure, receives a greater advantage than if the terms of the lease had been strictly complied with. *Nemo debet locupletari aliena jactura;* but the pursuer, by the Sheriff's interlocutor, is about to derive a direct advantage from a loss no less direct to the defender, in consequence of an innocent misconstruction of his lease. On the supposition that manure remains three years in the ground, and that the first year's crop exhausts as much of it as the two subsequent, it is fair and equal that the pursuer should pay one half of the value of the dung. In the opinion of two of the reporters, such is the general practice of the country.

2*d*, With respect to the 450 cubic yards of dung to which the pursuer has been preferred on paying the estimated price, there is nothing in the terms of the lease, nor in the common law, which compels the defender to dispose of it to the incoming tenant. It is as much his property as the way-going crop, and he is entitled to sell it to any purchaser, and in any manner that may be most agreeable to himself.

Argument for the pursuer.

By the *rationes decidendi* contained in the Sheriff's interlocutor and note, the pursuer is relieved from the necessity of any argument. The point, besides, has been already solemnly determined by the Court, 27th January 1767, Finnie against Mitchell, No. 143. p. 15260; 16th June 1801, Earl of Wemyss against Wright, (APPENDIX, PART I. No. 7. *h. t.*)

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-