

The Court pronounced the following interlocutor (14th and 15th May 1806:): ‘Sustain the right of Keith Turner, and Thomas Andrew Turner, to pursue in the present action; Repel the defences pleaded for Robert Turner, and his subtenant; and find that the tack under reduction is an alienation of the estate, and contrary to the entail, therefore reduce, decern, and declare in terms of the rescissory conclusion of the conjoined libels of reduction; and, *quoad ultra*, remit to the Lord Ordinary to hear parties procurators, and to do therein as he shall see cause: Find the said Robert Turner liable in expenses, and appoint the pursuers account therefore to be given in to the Court.’

And on advising a petition and answers, the Lords adhered, 17th November 1807.

Lord Ordinary, *Glenlee*. Act. *Arch. Campbell*. Alt. *David Monyhenny*.
John Morison, W. S. and Wm. Mackenzie, W. S. Agents. *Buchanan, Clerk.*

J. W.

Fac. Coll. No. 4. p. 17.

1807. November 17.

SIR JOHN MALCOLM of Balbedie, against GEORGE HENDERSON and PATRICK BROWN.

THE estate of Balbedie was held under a strict entail, executed in the year 1725; and containing, *inter alia*, the following clause: ‘And further, it is hereby expressly provided and declared, that it shall not be in the power of the said Margaret Malcolm, (the institute,) nor any of the heirs of tailzie, to sell, annalzie, wadset, delapidate, nor put away any of the lands above mentioned, nor contract debt, nor grant heritable bonds or other rights and securities therefor, whereby the said lands, or any part thereof, may be evicted or adjudged from them, in defraud of the other heirs of tailzie above specified; nor yet to alter this present tailzie and order of succession above mentioned.’

The entail contained the following provisions respecting settlements on spouses.

But reserving always, ‘notwithstanding of the prohibitory clauses above written, power and liberty to the said Margaret Malcolm, and the other heirs of tailzie above specified, to provide their husbands and wives suitable liferents, by way of locality, not exceeding the half of the present rent of the estate for the time,’ but was entirely silent with respect to leases.

In the exercise of this faculty, the pursuer’s father, the heir of entail then in possession, granted a liferent locality of one of the farms, called Easter Balbedie, to his second wife, the pursuer’s mother.

No. 17.

Lease for 99 years was reduced under a prohibition in an entail against alienations.

Circumstances in which a decree of absolver did not authorise an exception of *res judicata*.

No. 17. Mr. Malcolm died in the year 1754, and was succeeded by James Malcolm, a son of his first marriage. In the year 1773, Mrs. Malcolm granted to James Malcolm a lease of her locality lands to endure for her life.

In the year 1771, James Malcolm granted a lease of one of the farms of the estate to George Henderson, for the space of 99 years, and at the rent payable by a lease current at the time which had commenced in the year 1752. For this lease a grassum of £300 was paid.

In the year 1782, James Malcolm granted to the same tenant, and for the same duration, a lease of another farm, and received a grassum of £50. And, in the year 1782, he granted to the same tenant, and for the same duration, a lease of almost the whole remainder of the estate, including the locality lands which he held by a lease from Mrs. Malcolm, and he received a grassum of £350.

James Malcolm died in the year 1797, and before his mother-in-law Mrs. Malcolm, and he never, therefore, had any title to the possession of the locality lands, but what arose from the lease which he held from Mrs. Malcolm.

Of all these leases Sir John Malcolm, the next heir of entail, pursued an action of reduction; concluding against the representatives of Henderson, 1st, That from the duration of the leases, they amounted to alienations of the property, and it was therefore *ultra vires* of an heir of entail to grant them; 2^d, That James Malcolm was of a weak and facile disposition, and had suffered enorm lesion by granting them; 3^d, That during the lifetime of Mrs. Malcolm, and during the subsistence of her locality, the heir could not grant a lease on which he could authorise the tenant to possess. The lease of Easter Balbedie, therefore, fell to be reduced both on the general and on this special ground.

The cause was discussed before Lord Craig, Ordinary, who pronounced the following interlocutor: ‘ Before answer appoints the pursuer to say whether ‘ or not he insists on, and will undertake a proof of his alledgances of facility ‘ and lesion; and if he does, ordains him to give in a condescendence thereof, ‘ in terms of the act of sederunt, betwixt and first calling of the cause, with ‘ certification.’ The pursuer failed to lodge the condescendence; and the following interlocutor was pronounced, (1st June 1804:) ‘ Having again con- ‘ sidered the foregoing condescendence for John Malcolm, pursuer, with the ‘ answers thereto for George Henderson and Patrick Brown, defenders, re- ‘ plies, duplies, and whole process, sustains the reasons of reduction, and re- ‘ duces and sets aside the lease of the farm of Craigend or Easter Balbedie ‘ under challenge, in so far as the same extends beyond the lifetime of the ‘ pursuer’s mother, and decerns; but in respect the pursuer has not lodged a ‘ condescendence, in terms of last interlocutor, of facility and lesion, assoilzies ‘ the defenders from the conclusions of the action, *quoad* the other leases

‘sought to be reduced, and decerns.’ In this interlocutor the pursuer acquiesced*.

No. 17.

But the defenders reclaimed to the Court, and their petition was followed with answers.

In the meantime, however, the question between the Duke of Queensberry and the Earl of Wemyss, respecting the power of an heir of entail to let leases, had been agitated, and a hearing in presence in that cause had been appointed. The Court pronounced this interlocutor, (23d May 1805 :)

‘The Lords having resumed consideration of this petition, with the answers thereto, they supersede advising the same until the question between the Duke of Queensberry and the Earl of Wemyss, in which a hearing in presence is appointed, comes to be advised.’ And, on the 18th November 1806, the Court remitted the cause to the Lord Ordinary to hear parties on the length of the leases, and on the other points in the cause. The Lord Ordinary reported the cause to the Court.

The first point agitated between the parties was, whether the acquiescence by the pursuer in the decree of absolvitor amounted to a *res judicata*, in consequence of which any debate on the point of law, with respect to the duration of the leases, was precluded. On this point the same argument was maintained with that in the case, 27th Nov. 1801, Millie against Millie, No. 318. p. 12176.

2. On the merits, the argument was the same with that in the case, Queensberry against Earl of Wemyss, No. 15. *supra*.

17th Nov. 1807.—The Court pronounced the following interlocutor :
‘Repel the plea of *res judicata* ; find that it was *ultra vires* of the deceased James Malcolm, the pursuer’s brother, to grant the leases in question, in respect of the entail and long duration of these leases ; therefore sustain the reasons of reduction of the whole leases libelled, and reduce, decern, and declare in terms of the declaratory conclusions of the libel, reserving to the defenders their claim for meliorations upon the lands contained in the said leases, and to the pursuer his objections thereto, as accords.’

Lord Ordinary, *Craig*.Act. *David Douglas*.Alt. *Tho. W. Baird*;*M. Sandilands*, W. S. and *Tho. Martin*, W. S. Agents.*Walker*, Clerk.*J. W.**Fac. Coll. No. 5. n. 20.*

* He alleged that he was in embarrassed circumstances, and that the process was carried on by his creditors, for whose purpose the reduction of the lease of Easter Balbedie was sufficient. But of this there was no evidence except his own assertion, and the Court did not consider the fact to be of any importance.