

it to be delivered up; or, if an action was brought upon it, to order a perpetual injunction to restrain that action. He could not see why, if it was improper to act on this agreement in equity, it should be acted on at law. His opinion therefore was, that the decree ought to be affirmed, and he was authorised to state, that a noble and learned Lord, (*Carlton*,) not now present, but who had attended at the hearing, concurred in that opinion.

May 13, 1814.

AGREEMENT.

Decree *affirmed*.

Judgment.

Agent for Appellant, WHITTON.

Agent for Respondent, _____

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

HENDERSON and BROWN—*Appellants*.

SIR JOHN MALCOLM—*Respondent*.

LEASE for 99 years falls under the prohibition against alienation in a strict entail. Points of form. Remit for review in *Macdonell v. Macdonald*, 66 *ante*, ought not to have been made.

May 18, 1814.

ENTAIL.—
RES JUDICATA.

THE Respondent's father held the estate of Balbedie under a strict entail executed in 1725, with prohibition against alienation, &c. In 1754 he

Balbedie entail.

May 18, 1814.

ENTAIL.—
RES JUDI-
CATA.

Leases for 99
years.

Action to re-
duce the
leases, and
grounds of it.

granted to his second wife, by virtue of a reserved power to that effect in the entail, a life-rent locality over one of the farms of the estate called Craigend. In 1773 she granted a lease of the locality lands during her life to James Malcolm, Respondent's elder brother, and her husband's son by his first marriage, who succeeded his father as heir of entail. James Malcolm agreed with one Henderson, who was represented by the Appellants, for three leases to the latter, comprehending the farm of Craigend, and the whole estate, except the mansion house, garden, and some small enclosures in the neighbourhood, for 99 years, at low rents and grassums.

In consequence of Henderson's neglect to perform conditions, actions were raised to compel him to execute regular leases, which was done. In 1797 James Malcolm died, leaving his step-mother surviving. The Respondent succeeded to the estate as heir of entail, and he, or rather his creditors in his name, raised an action to reduce the leases upon three grounds, as stated in the summons. 1st, The length of time. 2d, Facility and weakness in James Malcolm, and enormous lesion. 3d, (Applicable only to Craigend,) James Malcolm being in possession only as lessee of his step-mother, and not as proprietor, could give no possession to his sub-lessee; and the lease not having been clothed with possession in the life-time of the grantor, was void as against the Respondent, a singular successor.

The Lord Ordinary, by interlocutor, May 16, 1804, ordered Respondent to say whether he insisted on the ground of facility and lesion, and if he did, to give in a condescendance. But his cre-

ditors, confident of success on the third ground, applicable to Craigend only, and as success so far would afford them the full means of satisfying their debts, refused to give in the condescendance, and Respondent was from poverty unable to do so. The Lord Ordinary, by interlocutor, June, 1804, reduced the lease of Craigend on the third ground, "but in respect the Pursuer has not lodged a condescendance, in terms of the last interlocutor, of facility and lesion," assoilzied the Defenders from the conclusions of the action *quoad* the other leases. The Respondent had not the means of representing or reclaiming against this interlocutor within the time limited by the rules of Court; but a petition having been presented by the now Appellants against the first branch of the interlocutor reducing the lease of Craigend, the Court, after answers, remitted to the Lord Ordinary to hear parties on the ground of *duration*, and other points of the cause, and the Lord Ordinary ordered informations to the Court accordingly. The Appellants pleaded, that the interlocutor of the Lord Ordinary, assoilzieing them from the conclusions of the action as to all the leases except that of Craigend, had become final, and that the general question as to the powers of the lessor under the entail must be considered as a *res judicata*. The Court repelled the *res judicata* plea, and reduced all the leases on the ground of long *duration*. The Appellants appealed from these interlocutors of the Court, and Respondent lodged a cross appeal against the latter part of the Lord Ordinary's interlocutor, June 1, 1804.

May 18, 1814.

ENTAIL.—
RES JUDI-
CATA.

June 1, 1804,
Lord Ordinary's interlocutor, which formed the foundation of a question as to a point of form.

May 14, 1806,
remit to the Lord Ordinary to hear parties as to the ground of *duration*.

May 17, 18,
1807.

In answer to the plea of *res judicata*, it was con-

May 18, 1814.

ENTAIL.—
RES JUDI-
CATA.

tended,—1st, That the Lord Ordinary's interlocutor had become final only as to the ground there stated,—viz. facility and lesion; and that the remit as to a distinct ground,—that of duration,—was competent and proper. 2d, Suppose the Court of Session ought to have listened to the objection, then the Lord Ordinary's interlocutor must be considered a final decree, against which Respondent had appealed; so that the question was open to their Lordships.

The Lord Chancellor considered the general question as to the powers of the heir of entail to make a lease of this duration as settled by the decision in the Queensberry case, (*vide ante*, 90.) The only question here was as to the point of form, and particular caution was requisite in interfering with the notions of the Court below on such points. The House had, in the early part of this session, remitted interlocutors of the Court below for review as to a remit made by that Court to the Lord Advocate in a case of assault. From information which he had since received, he was now satisfied that he ought never to have consented to that remit.

Nidpath and
Roxburghe
entails, *ante*
90. 149.

Macdonell v.
Macdonald,
66 *ante*.

Judgment.

Judgment *affirmed*.

Agent for Appellant, _____.

Agent for Respondent, CHALMER.