No. 15. And on advising a reclaiming petition, and answers, the Lords adhered, 17th November 1807.

Lord Ordinary, *Glenlee.* Act. *John A. Murray, John Clerk,* and *Henry Erskine.* Alt *J. H. Forbes, Mat. Ross,* and Dean of Faculty, *Blair.* *C. Tait,* W. S. and *J. Anderson,* W. S. Agents. *Scott,* Clerk.

J. W. *Fac. Coll. No. 3. p. 14.*

1807. *November* 17.

KEITH TURNER of Turnerhall, and ANDREW TURNER, *against* ROBERT TURNER and JAMES WATSON.

No. 16.

A lease for a thousand years was reduced, under a prohibition to alienate.

The contravener, granter of the lease, being dead, an action of reduction, at the joint instance of the son of the contravener and the next substitute, was competent, altho' by the entail the contravener was to forfeit for himself and his descendants.

ON the 17th July 1688, John Turner, merchant in Dantzic, by his testament, directed his trustees to invest so much of his property in the purchase of lands in Scotland, as might yield fifty chalders of victual yearly, and directed these lands to be entailed on a certain series of heirs.

The trustees on the 13th November 1693, and on the 18th May 1694, purchased the lands of Rosehill, Newark, and Tipperty, in the shire of Aberdeen, and disponed them to the different heirs substituted, under the fetters of a strict entail. *Inter alia*, the deed of entail contains the following clauses:

'Providing, likeas it is hereby provided and appointed to be contained in 'the infeftments to follow hereupon, that it shall nowise be lawful to the said 'Robert and John Turner and the other heirs of tailzie foresaid, to sell, an-'nalzie, and dispone the lands and others above written, or any part thereof, 'heritably or irredeemably, or under reversions ane or mair, nor to grant in-'feftments of annualrent, or yearly duties, greater or smaller, forth thereof; 'nor to set tacks of the same in diminution of the true worth and rental may 'be paid for said tacks, without being obliged, nevertheless, to raise the rental 'in manner after provided, nor to contract debt, or burden the said lands; 'nor do any other deed whereby the samen may be evicted, apprised, or ad-'judged from them, or anywise impaired to their prejudice.'

Then follows a clause forfeiting and resolving the right of the contravener, and of the *descendants* of his body. The deed afterward provides, 'That the 'said Robert and John Turner, or their heirs of tailzie aforesaid, shall noways 'have power to heighten, raise, or augment the rents of the said lands, as the 'same is presently paid, nor remove the tenants forth thereof, sua long as 'they punctually and pleasantly pay the same;—the said tenants, and each of 'them, always yearly planting upon the ground of the said lands possessed by 'them, an oak-tree, or fir-tree, or some other commodious tree, in some con-'venient place of the said lands possessed by them, which may serve either for 'present decorment of the said lands, or use to the said heirs in time coming.'

No. 16.

The entail was in every respect regular and effectual, and the successive heirs possessed the estate under it. On the 23d September 1763, John Turner, the heir in possession, granted a lease of the tailzied estate to George Turner of Menzie, a remote substitute, for the space of a thousand years. John Turner died in the year 1802; and in the course of that year his son Keith Turner, who did not in any way represent him, except as heir of tailzie, raised an action of reduction of the lease on the following grounds: 1*st*, 'The said tack or feu-tack, and right of infeftment, is so very far beyond 'and different from the usual nature and duration of leases, that it is to all in-'tents and purposes an absolute alienation of the said lands, mills, and others, 'themselves. 2*do*, The said tack and right of infeftment was granted in de-'fraud of the subsequent heirs of tailzie to the said estate, for a far less rent 'than the value of the lands, or even the actual rent thereof at the date of the 'same, and since. 3*tio*, With the same view it was also granted before the 'expiration of the then subsisting leases of the said lands, mills, and others, 'and as such is directly contrary to the said deed of entail of the said lands 'and others, under which the said deceased John Turner held the same.' But the deliberation of the Court was solely occupied with the first ground of reduction.

To the title of Keith Turner to pursue, an objection was stated, on the ground of his being the descendant of the contravener, whose right fell to be irritated and forfeited, if the contravention was proved. Andrew Turner, the next heir of entail to Keith Turner, then appeared; and on the 31st October 1804, a new summons of reduction was executed at the joint instance of Keith and Andrew Turner.

The case was reported to the Court by Lord Glenlee, Ordinary.

Argument of the defender.

The action originally brought by Keith Turner was irregular and inept. He had no title to pursue the reduction of the lease, because he is the descendant of the person by whom it was granted. If the lease be a contravention of the entail, the decree which reduces it must also forfeit and resolve the right of the granter, and his descendants. It is declared in the entail, that the contravener shall forfeit the estate both for himself and the descendants of his body, but without any such provisions the law would either have inferred this conclusion, or sustained the lease. 8th Feb. 1758, Hepburn of Humbie, No. 86. p. 15507.

It is now a settled point that if by the conception of the entail, the person contravening forfeits for himself and his descendants, it is not competent to the son of the alleged contravener to object to the acts of contravention. 14th November 1749, Gordon of Carelton, No. 23. p. 15384; 6th March 1801, Gilmour against Hunter, No. 9. *supra*.

The first action being incompetent and void, the second is obnoxious to two objections. 1*st*, The summons was not signeted till the 31st October, nor

No. 16. executed till the 5th November 1804. The period of forty years, therefore, had elapsed, before the act of contravention was challenged; and the right of the substitute heirs to reduce was barred by prescription. *2d*, The object of the second action is to reduce the lease without forfeiting the right of the contravener. Andrew Turner, therefore, has no interest to pursue, and can derive no advantage from success. If it be the purpose of Andrew Turner *bona fide* to reduce the lease and preserve the entail, he must insist in an action, concluding at the same time for an irritancy and forfeiture of Keith Turner's right, and in which Keith Turner must appear as defender, and cannot concur as pursuer. Andrew Turner, therefore, having no interest, has no title to pursue, and his concurrence cannot cure the defect in that of Keith Turner.

Argument of the pursuer.

1. To supersede the necessity of entering into any legal argument on the validity of Keith Turner's title to pursue, an action was raised in the joint names of Keith and Andrew Turner; whether, therefore, the son of a contravener can insist to reduce the deeds of his ancestor, is a question which it is unnecessary to discuss, although it may be considered as *triti juris*, that a declarator of irritancy, after the death of the contravener, cannot have the effect of forfeiting the rights of his descendants. See case of Hamilton of Bargeny, No. 361. p. 11171. The case of Little Gilmour against Hunter, 6th March 1801, No. 9. *supra*, contained circumstances different from those in the present case; and even if it could be considered as hostile to the plea now maintained, yet it might be questioned how far one decision should have the effect of settling so important a point of law.

The title and interest of Andrew Turner however are beyond challenge. His title is the deed of entail, and his interest the preservation of the estate. The nearness or the remoteness of his interest does not affect the legality of his title, neither is it relevant to enquire into his motive for availing himself of it.

It is impossible now to dispute, after the discussion in the Bargeny cause, that where an heir of entail, not the descendant, and after the death of the contravener, insists for reduction of the deed of contravention, the right of the descendants is not irritated. But although it is impossible in the present case to insist for forfeiture of Keith Turner's right, it does not follow that it is incompetent to challenge the lease granted to the defenders, otherwise this inadmissible conclusion would follow, that the death of the contravener secured the contravention from all challenge.

2. To the plea of prescription, it is sufficient to answer, that after deduction of the minority of Andrew Turner, this action would be brought within the forty years. But at any rate the citation in the former action would have been sufficient interruption. Ersk. B. 3. Tit. 7. § 41.

3. On the merits of the question, the argument was the same with that in the case between the Duke of Queensberry and Earl of Wemyss, No. 15. *supra*.

No. 16.

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 Monypenny.*
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.

No. 17.

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

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

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 men-'tioned, nor contract debt, nor grant heritable bonds or other rights and se-'curities 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 speci-'fied; 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 life-'rents, 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.