Tuesday, December 12.

FIRST DIVISION.

[Lord Craighill, Ordinary.

ROBERTSON *v.* PLAYER.

Landlord and Tenant—Lease—Sub-lease—Obligation.

A sublet certain subjects of which he was tenant, and in the sub-lease bound himself, in the event of his getting his own lease renewed, to grant B, his sub-tenant, a renewal also, if he desired it, when the term of duration of the sub-lease expired. B and A granted another sub-lease to C of a portion of the subjects. In this lease there was no obligation to renew; but reference was made to the lease by A to B, the conditions of which were held to be repeated, and C was also given right to use a stair belonging to A, which explained why the latter was a party to the lease.—*Held* (*diss.* Lord Deas) that C had no ground of action against A to have him held bound to renew his sub-lease.

This was an action at the instance of Andrew Robertson, Edinburgh, against John Player, coach-hirer, Edinburgh, under the following circumstances:—

By tack, dated 9th and 20th January 1862, Robert Pringle, W.S., as factor for W. J. Little Gilmour of Liberton and Craigmillar, let to Player two pieces of ground in East Canonmills Meadow, having 45 feet of frontage, at a rental of £30 per annum for 15 years, and under certain stipulations.

By sub-lease, dated 14th March 1862, Player sublet to John Dunn, mason, a portion, being the one-half of the above-mentioned subject, and extending to 45 feet of frontage, on which Dunn was then erecting a house and shop. The rental was £4, 10s. per annum, and the duration fourteen and a-half years from Martinmas 1861. There was contained in it a declaration "that in the event of the said John Player obtaining a renewal of his said lease, he shall, in the option of the said John Dunn, grant a renewal of the present sub-lease to him and his foresaids, and in case of change of the rent of the said whole subjects, on payment of a proportional part thereof effeiring to the subjects hereby let."

A second sub-lease, dated 14th and 15th March 1862, ran, *inter alia*, as follows:—"It is contracted agreed, and ended between the parties following—John Dunn, mason, and John Player, on the one part, and Andrew Robertson, on the other part, in manner following—that is to say, the said John Dunn, in consideration of the sum of £137, hereby subsets, and in tack and assedation lets to the said Andrew Robertson, his heirs, assignees, and sub-tenants, All and whole that piece of ground, measuring 20 feet or thereby of frontage on the east side of Pitt Street, Edinburgh, and extending backwards or to the east 38 feet or thereby, and on which the said John Dunn is now erecting a brick tenement, and that for the space of fourteen years and two months from and after the 8th day of March 1862, the said piece of ground being part and portion of that piece of ground at Pitt Street aforesaid set and in tack and assedation let by Robert Pringle, Writer to the Signet, as factor for Walter James Little Gilmour, Esquire of Liberton and Craigmillar, heritable proprietor of the said piece of ground and others, to and in favour of the said John Player, conform to tack entered into between them, dated the 9th and 20th days of January 1862, to which lease reference is hereby expressly made; and the conditions and stipulations therein, in so far as applicable to this sub-tack, are hereby specially referred to and held as repeated *brevitatis causa.*" The rental was £2, 10s. There was, further, an obligation by Player to "give the said Andrew Robertson, and his foresaids and tenants, full right of the use of the stair leading from the pavement down to the ground part of the building, on their paying a proportion of the expense of upholding the same along with himself and any parties who may build on the stance belonging to him on the north of said stair should they require to use the same."

Robertson immediately entered into possession of the subjects, and continued to possess them during the term of his lease. On the termination of his lease Player obtained from Mr Little Gilmour a renewal of the lease of the subjects first above described, from Whitsunday 1846, for twelve years, with a break in favour of the proprietor at Martinmas 1879, or any subsequent term of Whitsunday or Martinmas, on one year's notice. Robertson demanded a renewal of his lease from Player, to which the latter declined, and this was an action of declarator, with an alternative conclusion for damages, brought by the former against the latter, to have it found that he was bound to grant it.

Robertson pleaded, *inter alia*—"The pursuer, in the circumstances set forth, and in terms of the foresaid lease and sub-tacks, is entitled to a renewal of the sub-tack in his favour, and should therefore obtain decree of declarator as concluded for; and the defender should further be ordained to grant said sub-lease."

The Lord Ordinary pronounced an interlocutor sustaining the defender's plea against the relevancy of the action, and dismissing it, and added the following note:—

"*Note.*—As the sub-lease by Dunn with the consent of the defender to the pursuer is read by the Lord Ordinary, it involves no obligation on the defender or on Dunn to renew that contract at or before its expiry—this sub-lease in so far being in marked contrast to the sub-lease by the defender to Dunn. The fact that Player, for a reason not explained, was a consenter to the sub-lease by Dunn to the pursuer, could not import into that sub-lease an obligation like that sought here to be declared, which otherwise could not have been incumbent. This being so, a new or separate contract entitling the pursuer to claim from the defender the sub-lease sued for, behoved to be averred. But no such contract has been set forth, and in fact it was not suggested at the debate that any such contract ever was concluded. For these reasons, the plea of the defender against the relevancy of the summons has been sustained."

The pursuer reclaimed.

Authorities—Hunter on Landlord and Tenant, i. 237; *M'Guffog* v. *Agnew*, February 22, 1822, 1 S. 342.

At advising—

Lord President—Under the sub-lease by Player, dated 14th March 1862, I do not think Dunn was entitled to demand anything more than a renewal in the event of Player getting his lease renewed, and of the same subject, and at the same rent, unless there was a change in the rent which Player himself had to pay. I think, further, that under the terms of the lease no one but Dunn himself would have had a right to exercise the option it gives.

But Dunn gave a sub-lease of a portion of what he got from Player, and for certain reasons Player was made a party to it. The contracting parties were Player and Dunn on the one hand and Robertson on the other. But under that sub-lease Player is not a lessor, and he is not in the position of landlord as regards Robertson. Dunn is the party entitled to the rent, and bound to the sub-lessee in the usual warrandice. Player was made a party because he comes under an obligation with reference to a stair in a later part of the deed. Dunn does not assign to the sub-lessee the option which he had from Player to get a renewal on demand. I think he does so neither expressly nor by implication. It would have been awkward and somewhat anomalous if he had assigned it. But it is needless to speculate how, if there had been such an assignation, it could have been worked out, because I think no right to a renewal was given.

But supposing Dunn were in the field, I think Robertson has acquired no right to compel him to ask Player for a renewal, and still less is it possible to entertain the claim of Robertson to come against Player to renew a lease which Player never granted. To talk of a renewal is out of the question.

But further, what is asked is that Player should grant a sub-lease to Robertson of what was held of Dunn. It is quite possible that Player might have been willing to renew the sub-lease to Dunn and yet unwilling to renew it as regards one portion of the subject. And yet that is what is asked in this action.

In these circumstances, I think the interlocutor of the Lord Ordinary is quite right, and I adopt it.

Lord Deas—I think that when by the sub-lease granted by Dunn and Player the former sublet a portion of the subjects held by him to Robertson, he also made over to Robertson the option which he had, to ask or insist upon a renewal of his own lease.

It is true that in the lease there is no assignation in favour of Robertson, but I take it that a sub-lease imports an assignation of the rights and obligations of the principal lease, with the exception that the previous tenant remains bound for the rent. Accordingly, I cannot doubt that Robertson would have had a right to obtain a renewal of the lease of the whole subjects as let to Dunn.

That leaves for consideration the question, whether the fact that a portion only was sub-let to Robertson would found a good objection on the part of Player. My difficulty is, whether Player is not excluded from pleading it by the fact of his being a party to the sub-lease along with Dunn. A receipt by him would discharge the debt under it. So it appears to me, and I think that Dunn and Player were both granters of the sub-lease. But that is not necessary to decide that question, because Player by becoming a party, whether he was a granter or not, put himself in a position by which he is prevented from taking this objection.

If I am right in this view, then the interlocutor of the Lord Ordinary is erroneous.

Lord Mure—I concur in the interlocutor of the Lord Ordinary. At the same time, with the grant by Player to Dunn the latter sublet to the pursuer a portion of the subjects held by him, and in that sub-lease no obligation was undertaken by Dunn to give a renewal in the event contemplated in Player's sub-lease to him. In these circumstances I cannot see any ground on which the pursuer can demand a renewal from Player now. I see no obligation which gives him the right to demand it.

But further, if the whole subject enjoyed by Dunn had been sublet, and the question was with reference to it, I doubt whether there would be an obligation on Dunn to renew it, and much less upon Player.

Lord Shand—I concur with those of your Lordships who think that the interlocutor of the Lord Ordinary should be adhered to.

When Player granted on 14th March 1862 the sub-lease in favour of Dunn, the sole obligation he undertook was to renew the sub-lease as a whole, provided he got a renewal of his own lease. There was no obligation to renew a sub-lease of a part. The question is, whether, when he signed the sub-lease by Dunn to Robertson on the next day, he enlarged his obligations or (as I should prefer to put it) he made a new obligation. I can find nothing in that second sub-lease to support that contention. There is enough to show why Player became a party, because special rights were given with reference to a stair which otherwise would not have been given to Robertson. That is the reason why Player was a consenter.

It has been argued that the fact of Player's signature being appended to the sub-lease is an objection to his answer here. But the obligation now insisted on is not to be found in the original lease, neither is it to be found in the sublease.

I agree with the view which Lord Mure has stated, that even if the sub-lease to Robertson had been of the whole subject given to Dunn I see no reason why I should have come to different conclusions.

The Court adhered.

Counsel for Pursuer—Nevay—J. A. Reid. Agents—Richardson & Johnston, W.S.

Counsel for Defender—Solicitor General (Macdonald)—Rhind. Agent—Robert Menzies, S.S.C.