in vain into the papers in the Court below for it. He has put the case here on the only ground on which it was possible to put it, but I cannot trace a vestige of it there. The pleas in law do not raise that question; they proceed upon an argument, which, if it prevailed, would destroy the whole law of entail; but they do not say that this is a peculiar case; they do not say, when the cases are quoted on the other side, these are no cases of marriage settlement. This is not the argument relied on in the Court below nor in the appeal case; and as it is only from the respect I bear to the quarter from which this argument proceeds that I have stated the view I take of the case, I shall therefore certainly deem it my duty to recommend to your Lordships to visit the party appealing with costs. These he well deserves to pay, because it turns out that he is not brought here by bad advice, but chose to think that he saw a way of proceeding for reversing the judgment; and it appears from Mr. Fraser's statement that he gave instructions for this appeal. My Lords, I wish to give the real costs. I shall therefore follow the example of my learned predecessor, and suspend the mention of the sum of costs until Mr. Courteney shall have had an opportunity of ascertaining what they amount to. Oct. 6, 1831.

The House of Lords ordered and adjudged, That the interlocutors complained of, be affirmed, with costs, as reported by the clerk.

GEO. W. POOLE—A. M. MACRAE,—Solicitors.

Sir JAMES MONTGOMERIE and others, Executors of William Duke of Queensberry, Appellants. No. 59.

MACKILL MAXWELL, Respondent.

Lease — Title to Pursue — Warrandice.—A tack was granted to a tenant, "his heirs, assignees, and sub-tenants," with warrandice to him and "his foresaid;" the tenant granted a sub-tack with a clause of warrandice, but did not assign the warrandice in the tack; and the tack was reduced as ultra vires of the granter, and the sub-tenant thereupon removed: Held (reversing the judgment of the Court of Session), that the sub-tenant had no title to sue a direct action of damages founded on the warrandice in the tack against the landlord.

IN the month of February 1807 William Duke of Queensberry let by his commissioner, Mr. Crawfurd Tait, W. S., to "William Lorimer and his heirs, assignees, and sub-tenants," Oct. 12, 1831.

2D DIVISION.
Ld. Cringletie.

Oct. 12, 1831.

the farm of Ingleston, forming part of his entailed estate, for nineteen years, from and after Whitsunday 1806, on payment of a grassum of 51*l.* and an annual rent of 40*l.*, besides other prestations.

The deed of lease contained the following clause of warrandice:—" which tack the said Crawfurd Tait, as commissioner " aforesaid, binds and obliges the said William Duke of Queens- " berry, and his heirs and successors, to warrant to the said " Wm. Lorimer and his aforesaid, at all hands and against all " mortals, as law will."

Lorimer entered to possession, but in the month of June 1811 granted a sub-tack to Mackill Maxwell for the remaining years of the lease, on payment of a grassum of 25*l.* and an annual rent of 32*l.* No express assignation was granted by Lorimer of the obligation of warrandice undertaken by the Duke; but he himself granted an obligation to warrant the sub-lease.

On the death of the Duke, Sir James Montgomerie and others were confirmed as his executors; his successor in the entailed estate then brought actions of reduction of several of the leases, and among others of that granted to Lorimer, in respect that they had been made in violation of the entail. The tenants immediately intimated claims of relief against the executors, who alleged that they thereupon adopted proceedings in the Court of Chancery in England, in relation to these claims, and that appearance was there made by the tenants. As the executors had thus the chief interest to resist the actions of reduction, they sisted themselves as parties to them; and after a great deal of litigation decree of reduction was pronounced on the 22d of February 1822; and Maxwell, in consequence thereof and of a decree of removing against Lorimer, the principal tenant removed from his farm at Whitsunday of that year.

At this time there were still three years of his sub-lease to run, and Lorimer having died, Maxwell brought an action founding on the lease and sub-lease against the executors, Crawfurd Tait, as commissioner of Duke William, and against Lorimer's son as his father's representative, concluding, inter alia, " for pay- " ment of the sum of 150*l.* sterling per annum, or such other " sum, less or more, as our said Lords shall modify, for each of " those three years of the said sub-tack which remained unex- " pired at the pursuer's removal from the said lands, as above

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" mentioned, and that in name of damages for the loss sustained " by the pursuer in consequence of his being expelled from the " said lands before the expiry of the period stipulated by the " said sub-tack, with the periodical interest accruing upon the " said annual payments, from the several dates at which the same " ought to have been paid till payment thereof, calculating the " said payments to be made half-yearly, and at the terms at " which the sub-rents would have been payable, deducting there- " from such sums as the defenders can instruct that the pursuer " has already received to account of said damage;" besides solatium and expenses.

Preliminary defences were lodged by the executors maintaining, that as the contract of lease was not made between the Duke and Maxwell, but with Lorimer, and as Maxwell had no assignation to the obligation of warrandice, he could not insist in a direct action against the Duke or his representatives.

To this it was answered, that the lease was granted to Lorimer and his sub-tenants, and the Duke bound himself to warrant it to him " and his aforesaid," meaning thereby sub-tenants, and as Maxwell was a sub-tenant he was entitled to enforce that obligation.

The Lord Ordinary, after ordering Cases on this preliminary defence, repelled it, found the executors liable in expenses, and stated his opinion in the subjoined note.* Against this

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* " In this case Mr. Tait, as commissioner for the late Duke of Queensberry, let " in 1807, for nineteen years, the farm of Ingleston to William Lorimer, and his " heirs, assignees, and sub-tenants, for a certain rent, the amount of which is of no " importance to the question now at issue. The clause of warrandice in that lease is " absolute, viz. to warrant the lease to the said William Lorimer and his foresaids at " all hands.

" Lorimer sub-let parts of the subject to the pursuer by a regular sub-lease in 1810, " which latter entered to, and continued in the possession of the subject of the sub- " lease. The Duke of Buccleuch obtained a decree of this Court against Lorimer, " setting aside the principal lease, and ordaining him to remove as at Whitsunday " 1822; and although the pursuer Mackill Maxwell was not a party to that reduc- " tion and removing, and therefore, if the decree had been unduly or illegally " obtained, might have retained possession; yet, knowing that the principle on which " his lease might have been supported had in the case of Hyslop of Halscar been " discussed, both in this Court and in the House of Lords, and decided against " him, he, with great propriety, gave up the possession to the Duke of Buccleuch, " knowing well that the consequence of his declining so to to do would be that his " Grace would raise a reduction and removing against him, in which he must prevail;

Oct. 12, 1831. interlocutor the executors reclaimed, and on advising the cause on the 18th of November, 1826, the Judges were

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" and the only result would have been the incurring of unnecessary and idle expense,
" which the Lord Ordinary thinks was wisely avoided.

" Such being the case, Mr. Maxwell has brought this action against the heirs of " Lorimer, the principal tacksman, and also against the executors of the late Duke " of Queensberry, concluding for damages on account of the sub-lease having been " brought to an end before the period of its natural expiry. There is no dispute " that the heirs of Lorimer are liable to the pursuer; but a question is here raised " by the executors, whether they are directly liable to the pursuer or not.

" The Lord Ordinary trusts that these defenders will forgive him for observing, " that in using this plea (even supposing it to be well founded, of which immediately) " their conduct is not a little contradictory. Being Lord Ordinary in all these " Queensberry cases, the Lord Ordinary knows that these executors have appeared " in various cases in which they have not been called as parties, for the best reason " in the world, that they alone, and not the defenders called, have the real interest " in the matter at issue. For instance, in the case of all the tenants of the Queens- " berry estate, the period at which their bonâ fide possession was found to cease was " Martinmas 1819; and as they did not remove till Whitsunday 1822, his Grace of " Buccleuch claimed violent profits for the period between these two terms of Mar- " tinmas 1819 and Whitsunday 1822. It being obvious that the tenants had little " interest to oppose the Duke, because whatever his Grace obtained from them they " were entitled to draw back from the executors of the Duke of Queensberry, the " latter desired leave to sist themselves as parties, that they might resist any improper " claim; and accordingly in many of these cases they are voluntarily parties, though " not called in the action. Now, in this case the heirs of Lorimer are called; they " have little interest to resist the pursuer's claim of damages; because in the same " way they will obtain relief from the executors; and yet these defenders, though " made parties—though having the real interest to defend the cause—though sisting " themselves as parties where they are not called, because they have the same interest " that arises in this action, refuse to plead in it, because, as they say, they are not " directly liable to the pursuer. The Lord Ordinary must confess that this conduct " appears to him to be not a little inconsistent, even if it were well founded.

" But the Lord Ordinary considers that they are directly liable to the pursuer. " The lease was granted to William Lorimer, his heirs, assignees, and sub-tenants. " The Lord Ordinary thinks that the true import of this is, that the landlord gave " power to his tenant to name a sub-tenant; that when a sub-tenant was named, the " landlord granted the lease to him, and bound himself to warrant that sub-lease to " the sub-tenant at all hands. The lease was granted as much to a sub-tenant as to " the principal tacksman; and of course no assignation to the clause of warrandice " was necessary, because the principal lease warranted the sub-lease the moment that " it existed.

" As to Mr. Tait being called as a defender, that was done for sake of having all " parties concerned in the transaction brought into Court; but when the executors " acknowledge Mr. Tait's powers to grant the lease, he, of course, drops out of the " field, and the pursuers do not insist for any decree against him.

" The Lord Ordinary can figure a case in which the landlord would not be liable " to the sub-tenant for breach of the contract, ex. gr., if the principal tenant have in

equally divided in opinion.* The case was again advised (6th March 1827), when the Judges delivered the subjoined

Oct 12, 1831.

" the sub-lease bound himself to give advantages to the sub-tenant which were not " given to himself in the principal lease. But when the matter turns (as it does " here) on the right of the landlord to give the lease at all, and it has been found " that he had no power to grant it, the Lord Ordinary thinks that the warrandice " granted to the principal tenant and his sub-tenants renders the landlord directly " liable to the one as well as to the other, and that it was proper to make both parties " to this action, that the landlord's representatives, who do not so much as pretend " that they are not ultimately liable, should have an opportunity of seeing that no " undue advantage is taken of them. Nor can the Lord Ordinary discover any pos- " sible benefit that can arise to the defenders by their present plea being sustained; " for the only consequence must be, that the defender, the principal tenant, would " raise an action of relief against them; and as they do not deny their liability to " relieve, the result is the occasioning of unnecessary trouble and expense, and " nothing else."

* The following opinions were laid before the House:—

Lord Glenlee.—There are many things stated in Lord Cringletie's interlocutor which I would entirely throw out of view. The question is, whether the sub-lease is the same as if there had been a conveyance by assignation to the warrandice in the principal lease; that is, whether the principal tack is so worded as to supersede the necessity of an assignation? The landlord by this tack authorises a sub-tack to sub-tenants. He lets to the principal tenant, and to his heirs, assignees, and sub-tenants. The consequence of that is, that the word "aforesaid," in the clause of warrandice, applies to all the persons mentioned in the leasing clause, viz. heirs, assignees, and sub-tenants; that is to say, he warrants the sub-tack when it should be granted. If the sub-tack had contained a clause binding and obliging the tenant to assign his right of warrandice, it is clear that the sub-tenant might have come against the landlord; and I do not see that there ought to be any difference in the present case.

Lord Pitmilly.—I confess that I read these papers not without considerable doubt how far the interlocutor of the Lord Ordinary was founded in law. The interest of the parties may very properly be stated, but must not rule us in deciding this point of law. The landlord made no bargain with the sub-tenant; he contracted with the tenant, who again contracted with the sub-tenant. The landlord must fulfil his contract with Lorimer, and Lorimer with the sub-tenant. The puzzle arises from a very incorrect expression in the lease. A landlord cannot be said to let to sub-tenants. The expression can only be construed as a power to sub-set; when taken literally it is inexplicable. No doubt Lorimer might have assigned his lease, but he has not done so; therefore the landlord is only liable to Lorimer, and Lorimer is liable to the sub-tenant. It may be unimportant in the present case, whether the recourse be taken directly or indirectly; but it is a point of law which I am bound to decide without reference to the interest of the parties.

Lord Alloway.—I am not surprised that this point arose. The question is, whether, from the words of this lease, the sub-tenant is entitled to call on the landlord directly. My opinion coincides with that of Lord Glenlee, that he is so entitled. Supposing an assignation had been granted, where is the question? None. Now, the warrandice runs to heirs, assignees, and sub-tenants. Would it not have been considered an unnecessary expense to grant an assignation, when the Duke warrants expressly to sub-tenants? It is said, and has not been contradicted, that this clause

Oct. 12, 1831. opinions.* The opinions of the Judges of the First Division, and

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was in every lease upon the estate. It could not, then, have been inserted by mistake; and I see the reason of its insertion. It was to induce people to take sub-leases. If the lease is so warranted, what is the use of assigning? I was at first puzzled with this case; but, on consideration, I am satisfied that the Lord Ordinary is right. I cannot see the interest of the petitioners to object; but, at all events, the law of the case appears to me as I have stated.

Lord Justice Clerk.—My doubts are not removed by the very able answer in this case, nor by the opinions I have just heard; and I may take notice, that when a case is first presented to us, if we are equally divided in opinion, it is not to be considered that we finally dispose of the case, but that we will deliberate farther and more maturely upon it. I read with great care the notes of the Lord Ordinary, upon which this very short interlocutor is founded; and I must say that there is much matter in these notes which I cannot see the force of. The Queensberry cases are just to be dealt with as every other set of causes. His lordship says, that it will be a matter of indifference ultimately to the executors. He proceeds to make a number of statements as to the proceedings of the executors in other cases, and puts it ad verecundiam to them, that they maintain this defence. All this I think should be laid aside, and the point decided as in any common case; but, in fact, a great interest does arise to the executors to have this point decided, and a danger has been stated as likely to occur, which I think it was their duty to state, as responsible executors taking charge of this great estate. Nor has their statement as to that danger been contradicted. But the question here is, whether the sub-tenant has a right to come directly against the representatives of the landlord? It is not pretended that he had any contract directly with the landlord. Why then pass by Lorimer, who is directly liable to him?

Moncrieff for Maxwell.—He is called.

Lord Justice Clerk.—Why not exhaust him? There might have been a hundred transactions with different sub-tenants under the same lease, all of whom, it is said, may come directly against the landlord. In the first place, then, there is no direct bargain with the landlord. In the second place, there is no direct assignation of the obligation in the principal lease. There is a considerable analogy between the principle applied to the question of violent profits and the present case; and I expected Mr. Jeffrey (for the executors) to notice that point, as he did. The heir of entail got a decree in the March cases directly against the tenants and the executors conjunctly and severally. This was the judgment of the First Division, and it was reversed upon appeal. In our Division the judgment was not so given, and it was affirmed. The Lord Ordinary seems to be aware, that if there be any thing in the sub-lease which is not in the principal lease, this remedy would not apply. If so, it shews that the sub-tenant is not entitled to maintain, on the words of the lease, that the landlord has come under a direct obligation to him. The plain meaning is just a complete power to sub-set. Supposing that there had been an assignation, an assignee may grant a sub-tack; can it be maintained that the assignee's sub-tenant would have had direct recourse against the landlord? We shall reconsider this case. We shall be happy to receive any other authorities, or any other light the bar may have to throw on the question.

* *Lord Justice Clerk.*—I have again considered this case; but though the matter really appears to me of no great significance, my opinion with regard to the point of form remains unaltered. I still think the action must be brought against the prin-

of the permanent Lords Ordinary, were thereupon required, Oct. 12, 1831.

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cipal tenant in the first instance. We cannot here deal with the sub-tenant in the same way as with an heir, or even with an assignee, who step into the place of the principal tenant, and are substituted in all his rights and liabilities. Not so the sub-tenant; he is not connected with the landlord, like an assignee. I can read in the principal tack, that the landlord "lets to the said William Lorimer, and his heirs "and assignees and sub-tenants;" and no doubt under this clause the tenant is entitled to assign, and also to sub-set. But these are very different things; when he sub-sets he does not assign, nor is the sub-tenant placed, with respect to the landlord, in the same situation as an assignee. The words I have quoted cannot be understood as conveying a direct lease to the sub-tenant. The transaction is with the principal alone; and the clause, so far as it refers to sub-tenants, must just be considered as a short form of expressing the leave which it gives to the principal tenant to sub-set. If a sub-set afterwards takes place, that is merely a private transaction, in which the landlord is no party. The counsel for the Duke of Queensberry's trustees supposes the case of a sub-lease at a reduced rent; and very justly points out the hardship that might attend in certain circumstances,—an action of repetition directly against the landlord. But suppose another case:—Lorimer sub-lets for a rent of 100*l.*, the same as under the principal tack, but he takes a grassum of 5*l.* The lease is reduced, and the sub-tenant, in order to be satisfied for his damages and loss, is entitled, no doubt, to a repetition of the grassum. But from whom? Not certainly from the landlord. If this practice were allowed, it is clear that it might enable the principal tenant to pocket enormous grassums to the landlord's prejudice. In short, I think the sub-lease a mere private contract betwixt the principal and sub-tenant; as such it is directly obligatory on the one and the other, but not on the landlord. I cannot regard it as equivalent to an assignation, but merely as an exercise of the power to sub-let; for when I look at the sub-lease, I do not find in it the terms by which an assignation is effected, and without such an assignation no direct obligation is created against the landlord. With these views I cannot concur in the judgment of the Lord Ordinary. In the reasonings of the note which accompanies that judgment there is a great deal said in reference to the trustees; but with this, as it is merely argumentum ad hominem, I conceive we have nothing whatever to do. We have to decide only on a pure question of law.

Lord Alloway.—I have only to repeat what I have said before. The principal tack contains a clause of warrandice to Lorimer and his foresaids, sub-tenants among the rest. Now what does Lorimer do? He grants a sub-lease by virtue of the clause in the original tack, which, as I conceive, was meant for enabling the principal tenant to sub-let without the necessity of the sub-tenant going to the landlord; and the warrandice contained in the original tack is at the same time granted in favour of the sub-tenant. Well, the tacks are reduced, and an action for damages is brought by the sub-tenant directly against the trustees acting for the landlord. The whole question is, Whether he is entitled to call the trustees as parties immediately liable? I think he is. I see no reason at all why the arrangement which the landlord made for sub-letting, by putting this in the power of the principal tenant, should have the effect of prohibiting him from calling the trustees directly in his action of damages. If any question should arise, as suggested by the counsel for the trustees, in consequence of the different interests of parties, there is an easy and obvious remedy. The sub-tenant may bring all concerned into the field,—the principal tenant along with the trustees; and may leave these parties to adjust the matter betwixt themselves accord-

Oct. 12, 1831. which being returned*, the Court (11th July 1827) adhered to the interlocutor of the Lord Ordinary.†

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ing to their respective interests. I shall only add, that this man might, if he had chosen, not have allowed the decree of reduction to have any effect against him; but if he had resisted, would have been altogether inexcusable, because that would only have had the effect of putting the trustees to additional expenses; so that, I think, nothing can be inferred against his rights from his acquiescence in the decree. I retain my former opinion.

Lord Glenlee.—I also adhere to what I said before. The principal tack authorises the tenant to relet by a second deed, and grants warrandice to the sub-tenant in the same way and to the same extent as the principal. There is virtually but one transaction; for all sub-tacks refer to the terms and conditions of the original, which proves the connection subsisting and meant to subsist between the sub-tenant and the landlord. The case is just such a one as this:—I receive a commission from a friend to sell an estate, which commission contains an obligation of warrandice on his part. If the warrandice fail, will you say that the party who granted me the commission cannot be called directly by the purchaser? No doubt it was I who sold the estate under the commission, but it was upon the faith of the obligations contained in it that the estate was bought. The case is similar to the present. If a farm is evicted, and altogether taken out of the tenant's hands, notwithstanding of the warrandice, I think the sub-tenant has a direct action for damages against the landlord, who gave a sort of commission by the principal tack to the tenant to sub-let.

Lord Pitmilly.—The point here in dispute is so narrow, it had been better perhaps could the parties have made some private arrangement. It relates entirely to the form of proceeding, by which the sub-tenant may enforce his claim against the executors; for there is no doubt that they are ultimately liable in whatever may be claimed by the sub-tenant from the principal. On this there is no dispute,—none, at least, in this particular case. The question here is, Whether the executors are directly liable in damages to the sub-tenant, they being admitted to be liable to the principal in relief? This is the shape of the case; and I see no reason for altering the opinion which I formerly expressed. I think that the executors, in strictness, did not contract with the sub-tenant. The clause in the original lease only declares, in an awkward way, the power which was meant to be given to the tenant to sub-let. Therefore I think it was a contract only betwixt the landlord and the principal tenant, and that the sub-tenant was no party at all. It may be perhaps as well that this action should be sisted until Lorimer brings his action.

Moncrieff.—He has done so already.

Jeffrey.—But there would be nothing to prevent his coming again.

Moncrieff.—He is now a bankrupt.

Lord Pitmilly.—If we must decide at present, I adhere to my former opinion.

Lord Justice Clerk.—As the Judges of this Division remain equally divided in opinion, we must take the opinions of the other Judges.

† 5 S. D. No. 464.

* *Lords President, Craigie, Balgray, Gillies, Cringletie, Meadowbank, Mackenzie, Eldin, and Corehouse.*—" We are of opinion that the interlocutor of the Lord Ordinary ought to be adhered to. Cases may perhaps be figured, in which, from special circumstances, a sub-tenant would not have a direct claim against his landlord.

The Executors appealed. Oct. 12, 1831.

Appellants.—1. Although at first sight it may not be apparent that the appellants have a material interest in defence of the

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But in all cases, such as this, where the tack is expressly given to the principal tenant, his heirs, assignees, and sub-tenants, and where the warrandice is granted to the principal tenant and his foresaids, we are of opinion that the sub-tenant acquires every right competent to the principal, and can sue his landlord accordingly."

Lords Medwyn and Newton.—In 1807 a lease of the lands of Ingleston is granted by the commissioner of the late Duke of Queensberry to William Lorimer, for payment of 40*l.* yearly and a grassum of 51*l.* In 1811 Lorimer sub-sets a part of this farm to Mackill Maxwell, for payment of a rent of 32*l.* and a grassum of 25*l.* To this sub-tack the landlord was not a party; but by the principal lease the power of sub-setting was allowed, the lease having been granted to Lorimer, "and his heirs, "assignees, and sub-tenants." The lease having been set aside by the heir of entail, the sub-tenant has brought a summons of relief and damages, calling both the executors of the Duke and the heir of Lorimer as defenders. We are of opinion, that the Duke of Queensberry, not having been a party to the contract by which the relation of sub-tenant was constituted, the sub-tenant has no direct action against the landlord or his representatives, but can only claim damages from the principal tenant with whom he contracted, who, again, will be entitled to claim damages from the landlord in virtue of the lease granted to him. For a lease is a bilateral contract, in which the contracting parties are the landlord and tenant, and it seems to us that none but those contracting parties, or their representatives, can maintain any action for implement of this contract. In like manner, the parties to a sub-lease are the tenant and sub-tenant, and it imposes obligations on them alone. The landlord is no party to this contract: the sub-tenant is the tenant, not of the landlord, but of the principal tenant. The landlord could not bring any action against the sub-tenant in virtue of the sub-lease, and to compel implement of it; and if the sub-tenant has discharged the obligations incumbent upon him to the tenant, he is secured from all further demand, however much the rent due to the landlord may be in arrear. On the other hand, the sub-tenant can make no direct claim against the landlord, who is no party to his contract—his recourse lies against the tenant, under the warrandice, expressed or implied, in the sub-lease. But it is said, that the lease here is granted to Lorimer, "his heirs, assignees, and sub-tenants," and that the clause of warrandice being to "the tenant and his aforesaids," this necessarily includes sub-tenants, and makes them parties to the original contract of lease, giving them a direct right of action against the landlord under the clause of warrandice. We cannot view the introduction of the word "sub-tenants" into the leasing clause, as being any thing else than an abbreviated form of giving the power of sub-setting, which the tenant otherwise would not have had, nor as intended or calculated to serve any other purpose. For it is absurd to say that the landlord lets to the sub-tenants, and that they are thus directly bound to each other. The sub-lease is a distinct contract between the tenant and sub-tenant, which in this case the landlord permits, but to which he is no party; the sub-tenant does not hold directly under the landlord, nor does he become the lessee under the landlord. For the tenant sub-setting does not in any respect divest himself of his right under the principal tack; he is still the person, and the

Oct. 12, 1831. estate confided to their care to maintain their present plea, yet in fact they have so. It is true that they may be reached cir-

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only person, bound to the landlord; and although he has constituted with a third party a new relation between himself and that third party, there is no transference to that other of any of the landlord's obligations; so that he can claim nothing but from the person who has bound himself to him, that is the tenant. The tenant pays the rent stipulated in his lease to the landlord, and the sub-tenant again pays what he has agreed to do to the tenant. The sub-tenant stands precisely in the same relation to the tenant that the tenant does to the landlord, and vice versâ. If the sub-tenant falls into arrear, the tenant pursues him for payment, and uses the right of hypothec, or irritates the sub-lease. If the tenant fails in fulfilling any of the obligations incumbent on him, which may be quite different from those in the principal lease, the sub-tenant has his remedy by an action upon the sub-lease against the tenant. If then the introduction of the word "sub-tenants" into the leasing clause cannot have been with the view of altering entirely the character of sub-tenant in relation to the landlord, the clause of warrandice, "to the tenant and his aforesaids," must be construed in conformity with the real meaning of the parties, so as to import nothing but that the landlord warrants the lease to the tenant, or his successors in the lease. But it is further said that an assignee to the lease would be entitled to claim fulfilment directly from the landlord, and that a sub-tenant should have the same right. This, however, entirely overlooks the distinction between an assignee and a sub-tenant. A tenant having the power of assigning his lease may assign or make over his right in it to another, without the concurrence of the other contracting party; the assignee is substituted in the place of the cedent; he becomes in effect a party to the original contract, the obligations in which are made over to him, and they come to be directly prestable to him, the cedent being entirely divested, (Skene against Greenhill, 20th May 1825,) and of course no longer having any power or right to enforce them. If Lorimer had assigned his lease to the present pursuer, then he would have had right to enforce against the landlord all the obligations incumbent upon him by the lease, instead of Lorimer, who could no longer have enforced any such. Any action at the instance of the assignee would have been an action in fulfilment of the lease, now transferred into his person, and to which no other person had right. The assignee, in fact, comes into the place of the tenant in all respects, and displaces him in the relation originally constituted between the landlord and him. A sub-tenant, as already observed, does not come in the place of the tenant, nor does he take up his character. He is not the representative of the tenant, nor his successor in the lease. Originally it was not even competent to give a sub-lease of a whole farm. Bowack v. Croll, 22d June 1748. Kilk. *voce* Tack.—And a power to sub-set imported only a power to sub-set a part, the tenant still occupying the situation of tacksman of the whole under the landlord, and that of occupier of some part of it himself. Now that a sub-set of the whole is not objectionable in point of law, although as to possession the two are assimilated; yet so different in character are assignees and sub-tenants still considered, that an exclusion of the one does not import any exclusion of the other. When a sub-tenant's possession has been cut off through any defect in the landlord's right, and if a claim of damages be brought by him against the landlord, it may sometimes be of no consequence to the landlord whether this question be settled with him or with the principal tenant. But it may often be otherwise. If the obligations stipulated in the sub-lease by the

Oct. 12, 1832.

"cuitously; the sub-tenant may perhaps take decree against the principal tenant, and the latter may thereupon raise his action of relief against the appellants; but it is important to the

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two contracting parties to each other are different from those in which the landlord and tenant are bound to each other in the principal lease, it is quite clear that the sub-tenant can only obtain the fulfilment of the obligations in the contract to which he is a party, and the landlord (who is liable to the tenant for the damages sustained by him, which must be established in a separate action at the instance of the tenant,) ought not to be involved in the trouble and expense of ascertaining and adjusting also the separate and distinct claim of damages which the sub-tenant is entitled to recover under his contract with the tenant, arising no doubt out of the same fact, the want of power in the landlord, but founded on a different contract, and embracing totally different elements of calculation. Although a tenant is not now restricted to sub-set only a part of a farm, he may do so (in fact, in the present case, only a part has been sub-set); he may sub-set different portions to ten or twelve sub-tenants under different contracts. On the reduction of his own lease, each sub-tenant will have a separate claim of damages arising out of the particular obligations of each sub-lease, greater or smaller, in proportion as the terms of each were more or less favourable to the sub-tenant. Would it be reasonable to make the landlord a party in each of these separate actions, and, where he had entered only into one contract, oblige him to become a defender in ten or twelve actions, by different pursuers, claiming each a portion of the single claim of damage due from him to the tenant? It might perfectly well be conceived, that the whole amount of the claims of the various sub-tenants against the tenant should exceed the claims of the tenant against the landlord, and it would thus be impossible to give decree in such actions against both tenant and landlord conjunctly and severally; for while each sub-tenant would be entitled to decree against the tenant for his full claim he could only have right to a rateable decree along with the other sub-tenants, against the landlord, in proportion to the damage each has proved to the extent of what it is ascertained the landlord had incurred to the tenant. But no such ranking as this was ever heard of. Nay, farther, suppose the sub-tenant again to sub-set, (and it will be observed, the sub-tack in this case is to Maxwell, his heirs, assignees, or sub-tenants,) and thus to divide his possession into other smaller portions with varying obligations, would each of these sub-tenants of the sub-tenant be entitled to maintain an action directly against the landlord? The same argument which makes such an action competent to the sub-tenant would equally entitle the sub-tenants under the sub-tenant to institute similar actions. This would lead to great embarrassment, and very intricate questions, in adjusting the damages arising out of each separate contract; it is directly contrary to principle that any person should be called on to pay damages for non-implement of a contract to which he is not a party; and such a procedure is quite unnecessary for the ends of justice, as the damage can be much more easily and equitably adjusted, when the parties claim each under their own contract and against the party with whom they contracted, the sub-tenants against the tenant, and the tenant against the landlord; while no authority has been adduced sanctioning any different mode of procedure, for the only analogy which has been brought in support of such an attempt entirely fails; the assignee to a lease coming directly in place of the cedent, the lessee, and sustaining his character in the enforcement alike of the obligations incumbent by him, as in those stipulated in his favour.

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estate that this mode of proceeding should be adopted, because the number of actions against the appellants will be thereby much more limited than if they were raised at the instance of sub-tenants, whose numbers may be as great as there are acres in the estate. Besides, the appellants have good grounds of compensation and other defences personal to the principal tenant, which they cannot plead against a sub-tenant.

2. It does not seem to be disputed that in the general case no action of damages arising out of a breach of contract can be maintained, except as between the contracting parties, or their heirs and assignees. In the present case it is admitted that the respondent was not one of the contracting parties, and that he holds no assignation to the contract or to the obligation of warrandice, on which his claim is founded. It is said, however, that because the lease was granted in ordinary form to the tenant and his sub-tenants, accompanied by a relative obligation of warrandice, this confers a title on the respondent to demand damages. But two things which are essentially distinct are here confounded—the right or title to the land, and the title to sue for damages. The lease is granted with reference to the land; and indeed, unless a power to sub-let had been conferred the tenant could not have given a sub-lease. But this is altogether different from the right or title to sue for damages in respect of breach of contract. In the case of any ordinary contract it is not pretended that any one, except a party to the contract, or his heir or assignee, can maintain an action in respect of a breach of it. But that is precisely the case here; and the opinions which have been delivered rest on confounding this question with that as to the title to the land, which is one of an entirely different nature. Accordingly a judgment adverse to that complained of was pronounced by this House in the case between the appellants and the Earl of Wemyss, on the 10th of March 1824.*

Respondent.—1. The appellants have no substantial or legal interest to maintain their present plea, because they admit that so soon as decree is pronounced against the principal tenant, action may be competently raised against them; and it is

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* 2 Shaw's App. Ca. 70.

not alleged that in this case they have any available defence against the tenant.

2. But they are precluded by the terms of the obligation from maintaining the plea, because they thereby expressly bound themselves to warrant the lease, not only to Lorimer, but also to those who might be his sub-tenants. Now it is not disputed that the respondent is a sub-tenant, and the fact is proved by production of his sub-lease. It might as well be contended, if an action were brought by an heir, who proved his character by production of his service, that he was not entitled to sue because he was not a direct contracting party, as that the appellant is not entitled to insist. If there had been no obligation in favour of heirs there might have been some plausibility in such a plea; but where it is expressly in favour of heirs, it is obviously not tenable. The two cases are precisely similar, for here the obligation is granted directly in favour of sub-tenants, and the respondent produces his title to that character.

Lord Lyndhurst.—My Lords, in this case a lease was granted by the late Duke of Queensberry, (whose name has been very familiar to this House in consequence of suits arising out of leases granted by that nobleman, but which he had no right to grant,) to a person of the name of Lorimer. Lorimer underlet a part of the premises to Maxwell, who is the respondent in this appeal, and in that underletting the terms of the lease were these: "The said Craufurd Tait, "the Duke's agent, has set, and for and in consideration of the grassum "and yearly real or tack-duty, and other payments and prestations, "does hereby set, and in tack and assedation, let to the said William "Lorimer, and his heirs, assignees, and sub-tenants," the premises in question. Then there was a warranty of the tack "to the said William "Lorimer and his aforesaid." Such were the terms of the original lease, as far as it is necessary to refer to them for the purpose of this argument. After several years of the under-lease to Maxwell had run out, and after the death of the Duke of Queensberry, proceedings were instituted for the purpose of setting aside the lease to Lorimer. An action of reduction was instituted, and the result was that the lease by the Duke to Lorimer (being a lease which the Duke had no power to grant) was set aside. No proceedings, however, were instituted for the purpose of setting aside the under-lease from Lorimer to Maxwell, nor do I apprehend that it was necessary such proceedings should have been instituted. Maxwell acquiesced in the decision against Lorimer, and it was not necessary that he should hold out and

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put the parties to the necessity of instituting a suit to reduce his lease; for all defence on his part must have been clearly unavailing. He stands therefore, I apprehend, in the same situation as if his lease had been declared void; and the sole question is, whether Maxwell has a right to maintain a suit against the representatives of the Duke of Queensberry, by reason of the damage he has sustained by the loss of his under-lease? Now, according to the general law, it is clear that no such action could be brought. The landlord has nothing to do with the under-tenant. The landlord lets to his immediate tenant, and if such tenant lets to an under-tenant, and the original lessee is ejected, the under-tenant can bring no action, nor institute any proceedings against the landlord. The contract is between the first lessee and his sub-lessee. The landlord has nothing to do with that contract. No action can be brought upon it by the under-tenant against the landlord. He must bring his action against the party with whom he contracted; and if he recovers damages against him, then the immediate tenant may bring his action over against the landlord; that is the regular course of proceeding. The only question is, whether, under the terms of this lease, there is any thing to táke it out of the general rule? Reliance is, for this purpose, placed on the terms of the lease to Lorimer. The demise is to Lorimer, his heirs, assignees, and sub-tenants. This cannot be interpreted according to the ordinary import of the words. The demise cannot be to the sub-tenants; that would be to make them tenants of the original landlord, and not tenants of his lessee, which is their true situation and character. The contract of the sub-tenants is, as I have already said, with the lessee. There is no privity of contract (to use an English expression) between the sub-tenant and the original landlord. He has nothing to do with the landlord. How, then, are these words to be interpreted? The only reasonable interpretation to be put upon them, as it appears to me, is, that they were intended to convey a permission to underlet; but this, when acted upon by the lessee, will not create any contract or privity between the original landlord and the sub-tenant. We are then referred to the warranty. The original lessor warrants the tack (that is, Lorimer's tack—the whole tack) to the lessee and his aforesaid. The word "aforesaid" includes, it is said, the sub-tenant. If the word "aforesaid" is to be considered as including the sub-tenants, the only reasonable interpretation to be put upon it is, I think, this, that the original lessor contracts with his immediate lessee for the quiet enjoyment of the lessee's sub-tenants. But this is a contract with the lessee, and not with the sub-tenant, and upon which no right of action can accrue to the sub-tenant. It is otherwise as to the heirs and assignees of the original lessor. They are substituted for the lessee, both as to the estate and as to the contract.

But in the case of a sub-tenant it is different. The estate of the first lessee continues, and there is no transfer of the estate or of the contract. The contract remains between the original lessee and his landlord, and supports his estate. It does not appear to me, therefore, that the sub-tenant has, in the event of eviction, any immediate remedy against the superior landlord. The remedy is against his own lessor, who will, in his turn, have a right, upon the warranty, to compensation from the original landlord. The respondent must therefore look to Lorimer, and Lorimer will then have his remedy over against the persons representing the Duke. Under these circumstances, therefore, I should propose to your Lordships, that the judgment of the Court below be reversed. Oct. 12, 1831.

The House of Lords ordered and adjudged, That the interlocutors complained of be reversed.

Appellants' Authorities.—Queensberry's Executors, March 10, 1824 (2 Shaw's App. Ca. 70.); Ronaldson, Dec. 18, 1812. (F.C.)

Respondent's Authorities.—1 Bell on Leases, 470; 2 Stair 9, 22; Downie, Jan. 31, 1815. (F.C.)

J. CHALMER—MONCRIEFF, WEBSTER, and THOMSON,—Solicitors.

WILLIAM INGLIS and others, Appellants.—*Jeffrey—Ivory.* No. 60.

JAMES HARPER, Respondent.

Testament—Legacy—Proof.—A party by a probative testament appointed a person, who would not otherwise have succeeded, to be her executor, "subject to the "payment of such bequests as I may instruct him to pay, in a letter signed "by me of this date, to the several persons therein named;" declaring, that "after these several persons therein named have been paid and discharged their "several legacies," the whole residue should belong to the executor; and the testator died two days thereafter, leaving this will in her repositories, with a letter within it containing directions to the executor to pay certain legacies, and bearing the same date, and to be signed by her, but not holograph nor tested; which letter, it was offered to be proved, had been signed by the testator simul ac semel with the testament—Held (reversing the judgment of the Court of Session), that it was competent to prove the identity of the letter with that referred to in the will; and the case remitted, with an issue to that effect.

MRS. MARGARET MATHESON, on the 15th of May 1826, executed a deed of settlement in the following terms:—"I, Mrs. Mar- "garet Matheson, &c., hereby declare my intentions respecting the "disposal of my moveable estate in case of my death. (1.) I Oct. 18, 1831.

2D DIVISION.
Lds. Mackenzie and Medwyn.