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.

Oct. 18, 1831.

" appoint my cousin James Harper, Esq., of Morningfield near " Aberdeen, to be my sole and only executor and intromitter " with my means and estate, wherever situated, which may be- " long to me at the time of my death, subject always to the pay- " ment of my lawful debts, of every kind whatever, which may " be due by me, and subject also to the payment of such be- "quests as I may instruct him to pay, in a letter signed by me " of this date, to the several persons therein named; which " bequests or legacies I expressly will and declare are a real " and effectual burden upon my executry funds. (2.) I declare " that after these several persons therein named have been paid " and discharged their several legacies, the whole residue shall " belong exclusively to the said James Harper." This deed was duly tested; and at Mrs. Matheson's death, which happened two days after its execution, it was found in her repositories, and within it a letter of the same date with the will, the date of the month being written at length, and not in figures, and bearing to be signed by Mrs. Matheson, but not holograph nor tested. The letter was addressed to Harper, but not in the handwriting of the deceased. It was in these terms:—" Dear Cousin, Re- " ferring to my testament of this date, whereby you are named " and appointed my sole and only executor, under burden of " paying my just debts, and the following legacies which I desire " and require you to pay within three months after my death."— Then followed seven different bequests, all numbered succes- sively, and, inter alia, (1.) " To William Inglis, Esq. W. S., or " his heirs, 1,000*l.*" (3.) " To Miss Buchan, my cousin, 300*l.*;" and there was also a legacy of 1,000*l.* to a Mr. Barr, the writer of the will. This letter was written on two pages of the same leaf, and signed, according to the ordinary form of letters, on the last page only, the principal legacies being contained on the first page.

Founding on the will, and this letter as that therein referred to, Inglis and Miss Buchan raised separate actions against Harper for payment of their legacies. In addition to the cir- cumstances above mentioned they averred, that the letter was written by the same agent who wrote the will; that it was signed by the deceased simul ac semel with the will, and in pre- sence of the witnesses who attested the subscription of the de- ceased to that document; and that it was then put up by the deceased along with the will, and found " therein," (as stated in

Oct. 18, 1831.

the report of the commissary clerk,) at opening the repositories, which had been sealed up immediately on her death. These averments were offered to be proved comparatione literarum, and by parole.

The defender refused to admit that the letter was subscribed by Mrs. Matheson; and he pleaded, that, not being probative under the act 1681, it could not be received as evidence of the will of the deceased, and that this defect could not be supplied by parole evidence.

The action at the instance of Inglis having come before Lord Medwyn, his Lordship found "that the offer of proof "contained in the condescendence is not relevant in order to "supply the want of the statutory solemnities of writs," and assoilzied the defender, and issued the subjoined note.*

A reclaiming note was presented against the interlocutor, and Lord Mackenzie (before whom Miss Buchan's action had come) ordered Cases in that action to the Court.

The Court (27th May 1828) conjoined the actions "in respect "that both actions are founded on the same document," and in that at the instance of Inglis adhered to the Lord Ordinary's interlocutor, and in the other assoilzied, but found no expenses due.†

Inglis and Buchan appealed.

---

* "The Lord Ordinary cannot adopt the interpretation of the pursuer, that the "latter will constitutes the defender executor, under burden of paying such bequests "as the testatrix shall direct in a letter not written, but merely signed, by her; and "so the question does not arise, whether it be competent to provide that legacies may "be constituted in an informal or improbative writing. It seems quite impossible to "distinguish this case from the case of Dundas against Lowis, 12th May 1807."

† 6 Shaw and Dunlop, 864, where the opinions of the Judges will be found. The following notes of Lord Alloway's opinion, revised by him, were laid before the House of Lords:—

Lord Alloway.—"This is a very difficult question,—not so much in considering "what was the intention of the testator, as whether it is supported by such a legal "expression of that intention as can be enforced by a court of law. If I considered "the case of Dundas against Lowis, referred to by Lord Glenlee, as decisive of the "question, I would have no difficulty, as I am always inclined to follow decided cases. "But I conceive, that there are important distinctions betwixt that case and the "present. Mrs. Matheson executed a settlement in favour of the defender Harper, "as her universal executor and disponee, but subject to the payment of her debts, and "of such bequests 'as I may instruct him to pay, in a letter signed by me of this

Oct. 18, 1831.

Appellants.—(1.) The respondent succeeded to the deceased only by virtue of the will, and in such case a testator may im-

---

" date to the several persons therein named ;' which bequests or legacies she expressly " delares are a real and effectual burden upon her executor. This settlement was " written by a regular man of business, and is perfectly probative. But the letter " which is written by him, and subscribed by her before witnesses, and not tested by " them, is not probative. Amongst the legacies there was one of 300*l*. to the " pursuer, her cousin. In a former settlement she also left a legacy to the same " person, and of the same description. There could be little doubt, therefore, of the " intention. But was this a valid legacy, and supported by sufficient written evi- " dence? No nuncupative legacy, not supported by any regular deed or holograph " writing, can be effectual beyond 100*l*. Scots, even supposing that the intention of " the testator were demonstrated by the most complete parole evidence. No evidence " but writing can be received, and this written evidence must be probative. Thus, in " the case of Dundas, it was declared, that the trustees should hold any additional " directions which the testator should give them by writing under her hand as part " of the trust-deed. In a codicil she appointed a legacy of 50*l*. to be paid to " Mr. Forrester, and by another codicil she directed her bank stock to be paid to " Mr. Dundas. She subscribed both of these codicils, which were not holograph, " nor signed before witnesses. An objection was taken to these legacies as not being " effectual, and the Court sustained the objection. If this case were exactly similar, " a contrary judgment could hardly be expected from this Court. But there is a " distinction, which may fairly admit of a different interpretation. 1. In the " present case, the whole property of Mrs. Matheson is vested in Harper as her ex- " ecutor and residuary legatee, subject to one condition, viz.—the payment of the " legacies which she should direct him to pay by letter of that date. He could not, " therefore, accept of the settlement, from which he has derived so great a benefit, " without also being liable to the condition to which she had subjected him. He was " quite a stranger to the succession, and could not claim the benefit of it by that " deed without being subject to all its conditions. A letter does not mean in general " a holograph deed, nor a probative one; and, therefore, as the letter by which " these directions were given falls under the precise description of that mentioned in " her settlement, by which her exeeutor was to be bound, there seems to be the fairest " reason for giving it effect. He could not approbate and reprobate the same deed. " He must be bound by the conditions which the party had attached to it. There " was nothing unlawful in stipulating that her executor should be bound by her " letter of that date. The meaning and description of a letter is perfectly understood. " Although the testator's subscription to that letter was not admitted, yet it is not " seriously or distinctly denied; and, therefore, it must be held to be admitted, unless " a reduction shall be brought on the head of forgery. In short, Mr. Harper, if he " makes his election to take the benefit of the deed, must be bound by it, and must " take it under all its conditions, and must be bound by the letter to which it refers. " This is quite different from the case of Dundas against Lowis. There the trustees " were to follow any directions which the testator might give them by a writing under " her hand. But a writing, by the law of Scotland, must always mean a formal and " probative writing, whereas a letter never bears that meaning, and not one letter in " a thousand is probative. It is not necessary that the deed referred to in a trust " deed shall be probative according to the law of Scotland.—See the case of Brack,

pose any burden, even that of paying legacies to be bequeathed by an improbative deed. Granting, therefore, that the will here implies nothing more than a power to declare legacies by a letter signed by the testator of the same date with the will, that power has been executed strictly in terms of the will. By using the term "letter" the idea of a tested deed is excluded; and by using the term "signed" merely it is plain that even a holograph letter

Oct. 18, 1831.

"determined unanimously last Session, where a Jamaica settlement, executed accord-
"ing to the law of that country, but not probative by the law of Scotland, was
"held to contain sufficient instructions to trustees to settle a large estate in terms of
"it. That case is not precisely the same with the present, but it depends upon a
"similar principle. 2. There is another point. When her repositories, which were
"regularly sealed up, were opened, this letter was found within the settlement. This
"is a connection betwixt the letter and the settlement by the deceased herself.
"Several cases have occurred, with regard to pinning bills to settlements, which
"strongly support the pursuer's view of the case. See the case of Miss Panton,
"Shaw and Dunlop, vol. ii. p. 632, with regard to the direction as to a bill. She
"had given directions to her trustees to pay certain sums out of certain bills.—'The
"bill within this paper you will give, 100*l.* to Miss Panton, 50*l.* to Janet Martin,
"my servant, and 5*l.* to my girl, Kitty Martin, after my death.' This document was
"holograph, and was found put up with her settlement, but there was no bill within
"the paper. But in another document she says,—'September 15, 1820.—The
"bill within this paper you will give, Miss Panton 100*l.*, Janet Martin, my servant,
"100*l.*, to Kitty, my girly, 5*l.* Theis more, if Miss Mackies serve be with at
"time, let have the remaining 3*l.* St. L. DUNCAN. Bellfield, October 26, 1821.'
"The Court were unanimous in sustaining the list which was put up with the set-
"tlement, and the bill within it, although a part of it was not holograph. See the
"case of Melvin against Nicol, 20th May 1824; Shaw and Dunlop, iii. 31. That
"case bears a strong affinity to the present, in one respect. There the testator had
"bound his executor to pay any sums that he should direct, 'by a writing under my
"hand, however informal.' He addressed a letter to his executor, empowering her,
"at his death, to uplift 100*l.* sterling, which he had lodged in the branch of the
"Glasgow bank at Kirkaldy. At the date of the letter he had no money in the
"bank, but he afterwards deposited several sums which were in that bank at his
"death. The Lord Ordinary found, that the executor was liable to pay any legacy,
"however informal; but then, as he desired the legacy to be paid out of 100*l.* which
"he had lying in the Kirkaldy branch of the Glasgow bank, he conceived that it
"could not be carried into effect. The Court however unanimously altered that
"decision, and gave effect to the legacy. As that case occurred in the First Divi-
"sion, I have not read the papers, and I do not know whether the writing, con-
"stituting the legacy, was probative or not. But no part of the argument, as re-
"ported, turns upon that. On the contrary, the Lord Ordinary found, that any
"writing, however informal, was binding on the trustee. The question, in the pre-
"sent case, is this, whether this letter was not executed simul et semel; whether it
"was not pars ejusdem negotii? and whether this person, who had no rights what-
"ever, but under the testament, could take the whole 6,000*l.* or 7,000*l.*, without
"implementing the positive condition which was attached to it?"

Oct. 18, 1831. was not intended as the only mode by which the legacies should be declared. The respondent, therefore, cannot challenge this exercise of the power, without approbating and reprobating the will of the deceased. Further, the will and the letter do truly import, not merely a power to declare legacies at a period future to the execution of the will, but an instant constitution of legacy. The obligation is constituted by the will, which is a regularly tested deed; and reference is made, by certain clear distinctive marks, to a letter which, from the terms of the will, must necessarily have been already prepared, and which it is offered to be proved was executed unico contextu with it. This was intended, not to constitute, but only to specify the measure of the obligation. To the complete specification of a legacy, however, it is not essential that either the name of the person or the sum should appear within the tested deed itself. If there be any certain means provided in it for ascertaining the measure of the legacy, it is competent to expiscate this by extrinsic evidence. Thus a legacy is good to a person who shall hold a certain office at the testator's death, or of a sum which shall at that period be at the testator's credit in a certain bank; or, what is very common in the wills of persons of rank, where neither the persons nor the sums are specified, viz. a declaration by the testator that all persons who shall be in his service at his death shall receive a term's wages. In all these cases proof prout de jure is received to establish that these persons were those intended, and that the balance in the bank books, or the wages, were of a certain amount, or who the servants were. So, also, if legacies be left by reference to the will of another party, they would be valid, though neither the names of the legatees nor the sums bequeathed were mentioned in the testator's will: and the third party's testament would be received as evidence of what the will truly was, although, quoad the testator, the third party's will is not tested. On the same principle, diligence for large sums of money has been sustained under cash credit bonds, which provide that the amount due shall be ascertained by a certificate of the cashier of the bank, although in no respect a probative writing. The will of a testator, therefore, may be sufficiently declared in a probative deed by a reference for the measure of it to a separate writing, which, if it can be established to be the writing referred to, does not require the formalities of the act 1681 as a solemnity. It comes thus

Oct. 18, 1831.

to be a mere question of identification, which may be established prout de jure; and if the circumstances already made out in this case do not prove the identity of the letter founded on with that referred to in the will, proof of the circumstances averred in the condescendence ought to be allowed,—parole proof to supply defects in a will having been permitted, in much less favourable circumstances, in the cases of Pollock, and of Norvel v. Ramsay. The case of Dundas v. Lowis, mainly founded on by the respondent, differs from the present in two important particulars. In that case the power to give additional instructions, was made in order to provide for a change of will, whereas here there is an instant declaration of will, and the letter is referred to merely as containing the specification of that will; and the testator, in the case of Lowis, reserved power to give additional instructions "by a writing under my hand;" a technical phrase, held to imply a writing probative in law; while here the writing referred to is described as a "letter" which is never tested, and is "signed,"—which expression implies a dispensation with the letter being even holograph.

Respondent.—A testator cannot reserve a power, contrary to the statutory law, of leaving legacies by an improbative deed. Indeed there are no legal means of identifying a writing of importance, such as a letter bestowing legacies of the amount here in question, except by observing the solemnities of the act 1681. Besides, the reservation to appoint legacies in a letter "signed" by the testator must be construed as accordant with law, and as meaning a letter duly signed; and so the rule of approbate and reprobate does not apply, as the testator left no letter signed in terms of law. Neither do the terms of the testament, according to their true construction, import an instant declaration of will, as if the mind of the testator had been then fully made up; it merely provides for the declaration of a will to be formed at a future period, though within the same day. It is incompetent, and would be attended with the most dangerous consequences, if writings imposing burdens on executors were allowed to be reared up by parole, or by any proof except that provided by the statute 1681. The case of Dundas v. Lowis clearly rules the present. In that case, as in the present, there was merely a power to declare a future will; and on the same principles on which the words "a

Oct. 18, 1831.

"writing under my hand" were construed to mean a probative writing under my hand, so must a "letter signed by me" be held to mean a letter duly signed according to the forms of law.

LORD WYNFORD.—My Lords, when your Lordships perceive that the judges in the Court below, whose minds are constantly engaged in the consideration of Scotch law, differed in opinion upon this case, you will not expect that I should be immediately prepared to deliver an instant opinion upon that on which they have doubted. This is a case certainly also, in itself and in its consequences, of importance. The point will ultimately come, in the first instance, to this —whether or not, though an instrument cannot stand as a probative will, as a will per se, it can receive that kind of support from another instrument which is duly executed, to give it the effect contended on the part of the appellants. My Lords, as the decision on this question may tend to the establishment of principles of great importance in other cases, and it is fit also to look into those decisions to which we have been referred in the Scotch law, I should move your Lordships that the further consideration of this case be adjourned.

EARL OF ELDON.—My Lords, the nature and importance of the case, as well as the fact of the difference of opinion among the judges in the Court below, makes it, in my judgment, extremely fit that we should concur in the motion which has been submitted to your Lordships, that this judgment should be postponed. One or two circumstances I will just mention, for the purpose of throwing them out of the case. In the first place some suspicion of fraud has been stated at the bar, with respect to the conduct of one of those persons, who is mentioned in the second paper as a legatee. I throw that entirely out of the question; because, unless I mistake the nature of the proceedings, no such question can be said fairly to be before us; it is not properly brought before us. With respect to another question, my Lords—I mean, what is the effect of this paper with respect to the executor taking the whole of those sums which are called legacies and bequests? It does not appear to me that we can now decide what the effect is of making a person sole executor and intromitter, where there is afterwards an express bequest to that sole executor and intromitter of so much of the property as he is required to pay in discharge of other sums intended to be given. That, I think, is not a question now before us, according to the form in which this case is presented to us. All that I wish to state upon those two questions is, that I can at present give no opinion upon either of them. But the question, whether this paper, by reason of the reference to it, is a paper which can or cannot be claimed upon by these legatees, is a point on which I shall be able fully to deliver my opinion when this case is resumed.

The case was then adjourned. Oct. 18, 1831.

LORD WYNFORD.—This case comes before your Lordships by appeal from a decision of the Court of Session in Scotland. A noble and learned friend of mine, who for many years assisted in the decision of Scots appeals, was present when this case was argued, and concurs with me in the judgment I shall recommend your Lordships to pronounce. The questions for your Lordships to decide will be, whether, although a paper be not by the law of Scotland per se probative if it be referred to by a will regularly proved, and that will declares that the person to whom the will, in the first place, entrusts her property, shall dispose of it in the manner directed by that paper, such paper is not to be received to ascertain the trusts on which the estate is given; and whether the person who takes under the will is not bound to execute the trusts so ascertained. Your Lordships will perceive, that if such a paper cannot, under these circumstances, be received in evidence, and have the effect of directing the distribution of a deceased's estate, the intention of such deceased must be defeated; and a person who is only a trustee for others may take the whole beneficial interest to himself, to the prejudice of those for whom the deceased intended it. Your Lordships will find that such will be the case in the present instance, with regard to a very considerable part of the property of the testatrix. This may be hard: it may be unjust; but if it be according to the law of Scotland, I would not advise your Lordships, sitting judicially for the purpose of doing what you may consider justice, to decide against the law. But I have great satisfaction in saying, that, although the Court below determined that such was the law of Scotland, that Court was not unanimous. One very learned judge (Lord Alloway) differed with his brethren; and so far from this decision under appeal being in accordance with any settled rule of law, the balance of authority is against it.

A Mrs. Matheson by her will, regularly attested according to the law of Scotland, gave all her property to the respondent, to which bequest those words were added: "Subject always to the payment of "such bequests as I may instruct him to pay, in a letter signed by me, "of this date (that is, the date of her will,) to the several persons "therein named, which bequests or legacies I expressly will and de- "clare are a real and effectual burden upon my executry funds: "second, I declare that after these several persons therein named "have been paid and discharged their several legacies, the whole "residue shall belong exclusively to the said James Harper." Your Lorships perceive that the respondent's share of her property is not to become vested until after the payment of those legacies.

Oct. 18, 1831.

You can find nothing in the will to show what is the amount of the legacies given by it, or who were the objects of the testatrix's bounty. To ascertain those things you are referred to her letter, and without looking at that letter this will cannot be carried into execution. If I had found that I could not look at the letter, I should have been disposed to hold the will inoperative; I should rather have thought that the property should have been divided amongst the testatrix's kindred, than that it should be kept by a person who might not be beneficially entitled to one shilling of it, for the testatrix might have intended that all of it should be paid over by the respondent to other persons.

The appellant offered to prove that a letter of the date of the will was signed by the testatrix at the time that the will was executed, was then wrapped up in the will, was kept by the testatrix until her death, and was, at her death, found wrapped up in the will. This letter refers to the will, and directs the respondent to pay several legacies to different persons; and amongst those legacies, one of 1,000*l.* to the appellant. The Court of Session say, by their judgment, that this paper not being executed as a will, they cannot look at it; they reject the proof offered, and allow the respondent to keep the property bequeathed without performing any of the conditions upon which it was given to him.

If a paper, which is not per se probative, be referred to and effect given it by one that is so, why should it not be received and acted upon? The danger of acting on an improbative paper is removed by its genuineness being acknowledged by a probative one. The law which requires the attestation of wills is satisfied. The intention of a testator, which must, if that course be not taken, be defeated, is effectuated, and great injustice prevented.

The case relied on in the Court below is that of Dundas v. Lowis. Lord Alloway distinguished that case from the present. His Lordship says, in Dundas v. Lowis the trustees were to follow the directions given them by a "writing," and that writing, by the law of Scotland, meant a formal and probative writing. In this case the trustee is to follow the directions given by a "letter;" and that not one letter in a thousand is probative. I must observe to your Lordships that, in Dundas v. Lowis, the paper proving the legacy disputed was not written until some time after the making of the will; and that in the intermediate time the testatrix had given two legacies by a paper regularly attested. This confirms Lord Alloway's observations, and shows that by paper was meant a probative paper. The testatrix in the present case left no testamentary paper behind her but her will and the unattested letter.

But the case of Dundas v. Lowis is met by that of Melvin v. Nicol. A settlement was made in favour of a daughter, on the condition of

paying such legacies as the settlor had bequeathed, or might thereafter bequeath, by any writing under his hand, however informal. The Court decreed the payment of a legacy contained in a holograph letter of the testator. The principle established by that decision is, that a regular instrument gives effect to one that is irregular; so, in the present case, the probative will gives effect to the improbative letter. I cannot, on principle, distinguish this case from that now under your Lordships consideration. I therefore humbly submit to your Lordships, that the Court below should have received the evidence offered. How far that evidence will satisfy a jury that this is the paper referred to by the will is another question. With respect to one of the legacies, there are circumstances that a jury will look at with great jealousy: I allude to that which is given to the person who wrote the letter. In England, a jury would require cogent evidence before they would affirm a legacy given to the framer of a will. But this is not the case now before your Lordships. I advise your Lordships to reverse the interlocutors complained of, and remit this case with directions to submit it to a jury. Oct. 18, 1831.

The House of Lords ordered and adjudged, That the interlocutors complained of be reversed: And it is further ordered, That the case be remitted back to the Lords of Session of the Second Division in Scotland, with directions to submit to a jury to consider whether the letter bearing date, "Edinburgh, 15th May 1826," and purporting to be a letter from Margaret Matheson to James Harper, Esq., and by which the said James Harper is directed to pay to William Inglis, Esquire, W. S., or his heirs, 1,000*l.* sterling, was signed by Margaret Matheson on that day, and is the letter referred to by the will of Margaret Matheson.

MONCRIEFF, WEBSTER, and THOMSON,—Solicitors.