or Webster, and being resident in Australia, sued along with a mandatory. Mrs Webster moved for a decree for *interim* aliment against the mandatory personally.

The Lord Ordinary (KINCAIRNEY) *refused* the motion.

Opinion.—"On considering the motion for the defender for decree against the pursuer's mandatory, I have come to the conclusion, contrary to my original impression, that it should be refused. I have come to think that I ought not to extend the liabilities of a mandatory beyond previous usage or pronounce a decree against him which is not warranted by decisions or judicial *dicta*, or the authority of institutional writers, or practice, and no such authority has been quoted to me in favour of this motion, and I have not been able, after some investigation, to find any. It is quite possible that the question has never been raised before. When I pronounced the interlocutor of 28th November my attention was not called to the fact, or at least I did not advert to it, that the pursuer sued along with a mandatory, and hence my judgment was pronounced against one pursuer only — that is, of course, the principal pursuer; but the form of that interlocutor does not preclude a second interlocutor including the mandatory also in the decree for *interim* aliment.

"The position of a judicial mandatory and the extent of his liability have more than once been defined and explained from the Bench. Lord Ivory in a note to Erskine, iii. 3, 32, says that 'the liability of a judicial mandatory does not go beyond the expenses of process.' But I think that all that was intended was to state that he was not liable to implement the merits of the action, for there is no doubt that the liability of a mandatory does go beyond liability for the expenses of process. Thus in *Renfrew & Brown* v. *Magistrates of Glasgow*, June 7, 1861, 23 D. 1003, the Lord Justice-Clerk (Inglis) says—'As regards the merits he is a mere representative, but he is personally answerable for all the other conditions of the contract of litiscontestation. He is liable to implement any order the Court may pronounce in regulating the conduct of the process; he is personally liable for fines and for expenses which may be found due in the course of the process, and he is personally liable for the whole expenses of the process.' In *Overbury* v. *Peak*, July 9, 1863, 1 Macph. 1058, Lord Deas expresses his view of the liability of a mandatory as follows—'One great object of having a mandatory is that there shall be a party responsible to the Court for the proper conduct of the litigation, which may be material, as regards personal liability for the consequence of any irregularity, as, for example, contempt of Court. The mandatory, in short, has to represent within the jurisdiction the party who is beyond it.' In *Gunn & Company* v. *Cooper*, November 22, 1871, 10 Macph. 116, Lord Kinloch said that the object of sisting a mandatory 'is not only to make the mandatory liable for expenses, but also to secure a party responsible for the proper conduct of the cause, and for the availability of every step taken in the Court;' a definition adopted by the Lord President (Inglis) in *Thoms* v. *Bain*, March 20, 1888, 15 R. 613. These judicial *dicta* do not suggest the liability of a mandatory for an *interim* award of aliment, or for any similar award, yet neither do they exclude it. As to the extent of the responsibilities of a mandatory beyond the expenses of process, these *dicta* have not received much, if they have received any, illustrations in judgments of the Court. The *dicta* of course are of too great authority to be questioned. But I do not know that they are supported by any decision. They afford, however, some ground for the defender's motion. It is contended that the award of aliment is nothing but an order for the due conduct of the cause, and that it is only to be justified and accounted for on that ground seeing it is not concluded for, and that the liability of a husband—pursuer in an action of divorce—to aliment his wife during the process is a condition of this special contract of litiscontestation. It is maintained that it is in the same position as an *interim* award of expenses. It has been decided, however, that an *interim* award of aliment and an *interim* award of expenses do not stand in precisely the same position. In *Dixon* v. *Bayne*, February 17, 1841, 3 D. 559, it was decided that an action of divorce against a wife might proceed though a sum of aliment awarded to her in the course of it against her husband had not been paid, but that the action could not proceed until the husband had paid the wife's expenses of process awarded against him, which comes near to saying that payment of the wife's expenses is a condition of the contract of such a litiscontestation, but that an award of *interim* aliment is not. The view of the defender has appeared to me to be plausible, but as it is not supported by a vestige of direct authority, I have thought that the liability of a mandatory as it has hitherto been understood cannot safely be extended."

Counsel for the Pursuer—Deas. Agents—Millar, Robson, & M'Lean, W.S.

Counsel for the Defender — Findlay. Agents—Patrick & James, S.S.C.

Wednesday, February 5.

SECOND DIVISION.

[Sheriff of Lanarkshire.

STEVENSON, LAUDER, & GILCHRIST *v.* MACBRAYNE AND OTHERS.

Retention—House-Factor's Lien—Assignation to Rents in Bond—Bankruptcy—Retrocessed Bankrupt.

Three days after a petition had been presented for sequestration of the owner of certain house property, a firm of house-factors employed by him collected the rents of the property.

Sequestration was afterwards granted, and subsequently the bankrupt was discharged and retrocessed in his estates.

Held that the house-factors were entitled to retain the rents so collected to meet a debt due to them by the owner in a question either (1) with the holders of bonds containing assignations to rents, duly recorded, but who were not in possession under decree of mails and duties, or (2) with the retrocessed bankrupt claiming as coming in place of the trustee.

Opinion (*per* Lord Young) that even if the rents had been given up to the trustee, the house-factors would have had a good claim in the sequestration to rank preferably for the amount of their debt.

Michael Douglas Dawson, brewer in Glasgow, was the owner of heritable subjects situated at 361-369 Argyle Street, and 80-84 James Watt Street, Glasgow. Miss Elizabeth Liddell MacBrayne, Mr John Burns MacBrayne, and Mrs Dawson, wife of Michael Douglas Dawson, held bonds over this property for £9500, £3900, and £2500 respectively, ranking in the order named, all dated 19th and recorded 30th December 1892, and all containing assignations to rents in common form. Stevenson, Lauder, & Gilchrist, house-factors, Glasgow, were the factors of the property. When the property was purchased by Mr Dawson in September 1892, to enable the transaction to be carried through, a sum of £196, 12s. was advanced to him by Messrs Stevenson & Lauder, a firm which was dissolved in August 1893 by the death of Mr Stevenson, and whose business was carried on subsequently by the firm of Stevenson, Lauder, & Gilchrist. This sum was the nett proceeds of a bill drawn by Stevenson & Lauder, accepted by Dawson, and discounted with the Union Bank. The debt was reduced to £100 by a payment withheld out of the rents due at Whitsunday 1893, and a new bill for that amount was drawn, accepted, and discounted in the same way as the original bill. This bill was due on 26th November 1893. After the dissolution of the firm of Stevenson & Lauder, Stevenson, Lauder, & Gilchrist continued to act as factors of the property without demur from Mr Dawson.

On 8th November an application was presented for the sequestration of Michael Douglas Dawson's estates, and thereafter on 22nd November Mr John Berrie Brown, accountant, Glasgow, was appointed trustee. On 11th November Stevenson, Lauder, & Gilchrist collected the Martinmas rents. While they still held them, the agents for Miss MacBrayne and Mr MacBrayne wrote requiring them to pay the rents to the bondholders, and meantime to place them in bank. The rents were placed in bank accordingly. At this date the bondholders were not in possession under decree of mails and duties. A multiplepoinding was then brought in the Sheriff Court of Lanarkshire at Glasgow in name of Stevenson, Lauder, & Gilchrist as nominal raisers, John Burns MacBrayne being a defender and real raiser, and Miss MacBrayne, Dawson's trustee, and Mrs Dawson being defenders. The pursuers and nominal raisers lodged a condescendence of the fund *in medio* in which they stated that the balance due by the pursuers amounted to £129, 14s. 8d. This sum was consigned in Court, less consignation dues, on 20th December 1893. A statement was produced by the nominal raisers from which it appeared that £419, 5s. of rents had been collected, which, with a return on gas deposit and a balance brought down from last account, amounted to £436, 17s. 11d. Rates, repairs, and sundries brought down, and factorage, reduced this sum to £260, 16s. 8d. Deducting from that amount £31, 1s. 11½d. due for repairs during the current year, and £100 due on the bill above referred to, there remained £129, 14s. 8d., the sum consigned. The trustee admitted that this was the true fund *in medio*, but the bondholders denied that this was so.

By interlocutor dated 15th January the Sheriff-Substitute (GUTHRIE) reserved all questions as to the condescendence of the fund *in medio*, and meantime allowed claims and answers thereto to be lodged. Claims were lodged for the trustee and for the bondholders, the latter claiming to be ranked preferably according to the priority of their bonds for the interest due thereon. The Sheriff-Substitute, by interlocutor dated 10th March 1894, held the fund *in medio* correctly stated in the condescendence of the fund, exonered and discharged the nominal raisers, and preferred the trustee to the fund *in medio*. The bondholders appealed to the Sheriff, who on 29th June 1894 recalled the interlocutor appealed against, preferred the bondholders to the fund *in medio* as it might be ascertained, and in respect the bondholders did not admit the fund to be correctly stated, remitted to the Sheriff-Substitute to ascertain the amount of the fund.

Meantime the property had been sold, and the claims of Miss MacBrayne and Mr MacBrayne satisfied out of the proceeds, and they accordingly assigned their rights to Mrs Dawson.

Mr Dawson's sequestration was brought to an end, and he was discharged and retrocessed in his estates, on 19th November 1894.

Thereafter objections to the condescendence of the fund were put in by Mrs Dawson, and answers thereto by the nominal raisers. By interlocutor dated 27th February 1895 the Sheriff-Substitute allowed a proof before answer.

The bondholders appealed to the Sheriff, but on 8th April 1895 he adhered. The proof was taken, and on 24th July the Sheriff - Substitute issued the following interlocutor : — "Having heard parties' procurators on objections to the condescendence of the fund *in medio*, and answers, proof, and productions, Finds that the nominal raisers are not entitled to retain against the objectors any part of the rents collected by them as factors at Martinmas 1893, in respect of the advances

made by them to the proprietor of the subjects over which the objectors held bonds and dispositions in security, but that the nominal raisers were liable to tradesmen employed by them or their predecessors, Stevenson & Lauder, for accounts for work on the property in question, amounting to £31, 1s. 11d., which they are entitled to be repaid before parting with the rents in their hands: Finds that the fund *in medio* properly consists of the sum consigned by the nominal raisers, and in addition thereto the sum of £100 collected by them and retained in respect of the alleged advances set forth in the answers to objections, and in the statement No. 8 of process: Therefore sustains the objections No. 21 of process to this extent, and finds that the fund *in medio* consists of the sum of £229, 14s. 8d.: On the nominal raisers consigning the additional sum of £100 above mentioned in the hands of the Clerk of Court within eight days from this date, exoners and discharges the nominal raisers of all claims under this action, and decerns: Finds the nominal raisers liable to the parties, Elizabeth Liddell MacBrayne, John Burns MacBrayne, and Mrs Jessie Anne Hutcheson or Dawson, in expenses since the 20th day of December 1894," &c.

Note.—"There is no doubt as to the right of the bondholders to be preferred to the factors for the rents collected at Martinmas 1893, of which only £131, 1s. 11d. is now in dispute. The factor's right of retention or of security, if it exists, was subject in its very inception to the assignation of rents already made in the bonds, the law as to which will be found in Bell's Comm. vol. i. p. 757 (793 ed. M'L.)

"With regard to the tradesmen's accounts I do not think that a general rule can be laid down that a house factor ordering work to be done on a house which he manages is personally liable to the tradesman; but where it appears, as it does here, and very often is the case, that the tradesmen know nothing of the proprietor, and take the employment solely on the credit of the factor, it is not doubtful that they may proceed against him for their accounts, unless they have accepted the landlord as their debtor and liberated the factor. So far as the evidence goes, the factors here must pay these tradesmen, and I think must be allowed to recoup themselves in the usual course out of the rents in their hands."

The pursuers and nominal raisers appealed to the Sheriff, who on 12th November adhered, appending to his interlocutor the following note.

Note.—"I agree in the view expressed by the Sheriff-Substitute that any right of retention on the part of the factors is subordinate to the rights of the bondholders in virtue of their bonds. In the present case the appellants, Messrs Stevenson, Lauder & Gilchrist, have to face the difficulty that they are a different firm from the previous firm of Stevenson & Lauder, against whose liability as the drawers of a bill for £100 it is claimed that the appellants are entitled to retain that amount. But apart from that speciality, I am of opinion that the claim, which is founded on an arrangement said to have been made in December 1892, to cover liability undertaken in connection with the purchase of the property, cannot prevail against the bondholders, and that the fund *in medio* is properly stated at the sum mentioned in the Sheriff-Substitute's note."

On 3rd December the nominal raisers consigned in Court £100, less consignation dues, and thereafter a claim in the multiplepoinding was lodged for Stevenson & Lauder and answers thereto for the bondholders and Mr Dawson. These claimants claimed to be ranked and preferred to the sum of £92, 9s. 10d., being £100 less a dividend of £7, 10s. 2d. paid to the bank as holders of the bill out of Dawson's estate. Dawson had also meantime put in a claim in which he stated that he was willing that the bondholders should be ranked and preferred to the whole fund, but that in the event of their not being found entitled to the whole sum, he claimed the whole or balance thereof in respect that he was now entitled to take up his estate unburdened by any debts due by him at the date of his sequestration.

Upon these claims and answers the Sheriff-Substitute pronounced an interlocutor preferring the bondholders to the whole fund *in medio*, and added the following note:—"There has been a very able and careful debate on both sides on the merits, but I think the points raised are practically excluded, so far as I am concerned, by the previous judgments in the case. If these judgments contain errors they must be corrected elsewhere."

The nominal raisers, pursuers, and the claimants Stevenson & Lauder, appealed to the Court of Session, and argued — The appellants collected the rents in due course of business under their mandate from Dawson, which was not revoked by his sequestration—Bell's Prin. 228 (*h*); *Broughton* v. *Stewart, Primrose, & Company*, F.C., December 17, 1814, and they were entitled to retain them to meet the bankrupt's debt to them in a question either (1) with Dawson, now retrocessed, or (2) with the bondholders. For (1) as against Dawson, the sequestration did not affect their rights, because if it took effect on 8th November 1893, they held for the trustee, who was content that they should retain the amount of their debt, and a retrocessed bankrupt could not be heard to repugn the actings of the trustee in his sequestration; if, on the other hand, it did not, then it could have no effect on the question whatever. Apart from the specialty of sequestration, there could be no doubt that the house factors were entitled to retain as against their debtor. (2) As in a question with the bondholders—The assignation to rents in their bonds, without decree of maills and duties following thereon, was not sufficient to give them any preference over the rents collected—Duff's Feudal Conveyancing, 274; Bell's Prin. 561; see also the interpretation of the clause of assignation to rents in a bond and disposition in security in the Titles to Land Consolidation (Scotland) Act 1868, section 119. The case

of *Brown* v. *Virtue*, January 19, 1893, 20 R. 257, must be considered along with *Elmslie* v. *Grant*, December 15, 1830, 9 S. 200, from which it appeared that there was a distinction as regards right to set off a debt against rent between rents due before and after action of maills and duties was brought.

Argued for the respondents—(1) For the bondholders. They had a preferable claim over the rents in virtue of the assignation to rents in their bonds recorded. The creditor in an annual rent had been held entitled to obtain payment of arrears of annual rent from any intromitter with the rents—*Guthrie* v. *Earl of Galloway*, M. 567. It might be that bondholders had no right without decree of maills and duties to obtain a second payment of rent from a tenant who had paid *in bona fide* to his landlord, and this was all that Duff, *loc. cit.*, had said, but before payment they could demand that the tenant should pay to them, and their right was preferable to that of any other assignee—Bell's Com. i. 757 (ed. M'L. 793); *Brown* v. *Virtue*, *cit.* In that case the debt due to the tenant was incurred before action of maills and duties was brought, and therefore the case of the bondholders rested not on the action of maills and duties but on the assignation to rents. In *Elmslie* v. *Grant*, *cit.*, the question was whether a special stipulation in a lease was to transmit against a singular successor. Under the Bankruptcy Act 1856, section 111, all Acts done after sequestration with the effect of creating a preference were null and void, and consequently the collection of the rents by the factors could not give them any preference over the rents collected. (2) For the retrocessed bankrupt. He was not barred by anything which his trustee had done in this matter, because the trustee had never formally decided the question on a claim in the sequestration. The factors were not entitled to retain the rents as against the trustee, and they were not now entitled to retain them as against Dawson, who came now in the trustee's place.

At advising—

LORD YOUNG—This is a multiplepoinding brought by the real raiser MacBrayne regarding certain rents which were collected by house factors, Stevenson, Lauder, & Gilchrist, at the term of Martinmas 1893. Stevenson, Lauder, & Gilchrist gave an account of the rents which they thus collected showing the amount, reduced, as they thought it ought to be reduced, by £100 due to them on a bill and certain accounts which they paid, leaving £129 odds in their hands; and in this multiplepoinding they put in a statement to that effect, the result of which is very distinctly averred in article 2 of the condescendence of the fund *in medio*. They say—"The balance due by the pursuers as shown by said statement amounts to £129, 14s. 8d., which sum they have consigned in Court." The details are in the statement produced. The Sheriff was of opinion that they could not, except for the tradesmen's accounts they paid, retain any of these rents which they had collected, as in a question with the bondholders upon the property. Whether that is a right view or not is really the only question which was argued. The facts are simply these. Mr Dawson was the owner of house property, which he had bought as a speculation without having money to pay for it, and which when he bought it was bonded to his relatives and friends who advanced money to the extent of nearly its value. These house factors, Messrs Stevenson, Lauder, & Gilchrist, were employed by him, regularly employed by him, to collect the rents and pay the interest due upon the bonds, and also to pay a sum of, I think, £200 which he had got from them. This had been effected in a not uncommon way. They gave him the benefit of their bill, the bill was discounted, and he got the money. £100 of that was paid and £100 was still due at the term of Martinmas 1893, when they collected the rents, to which I have referred, and which are now in dispute. The bondholders had taken no proceedings by maills and duties or otherwise to attach the rents or to compel the tenants to pay to them, and lawfully and regularly, in the ordinary course of business, the house factors at the term when the rents became due, in pursuance of their employment and in discharge of their duty, collected the rents. Now, the Sheriff's judgment—that the bondholders having an assignation of the rents in their bonds which were recorded, could object to that payment—I do not appreciate. We are familiar—and we must take judicial cognisance of it as a known fact—with the practice as regards landed proprietors in Scotland having bonds upon their estates. In these bonds there are assignations of the rents, and the bonds are recorded and so the assignations are intimated, yet notwithstanding the proprietors collect their rents either personally, or more frequently in the case of large proprietors, invariably in the case of very large proprietors, by means of their factors or men of business, the bondholders not interfering in any way whatever, although it may be in the power of any bondholder, or any number of bondholders, to interfere to prevent tenants from paying their rents in the ordinary way to their landlords, or to the landlords' agents or factors. But if there is no such interference, and the rents are paid in the ordinary way by the tenants to the landlord himself, or to the landlord's agent or factor, I do not understand the view that the bondholders can complain of any wrong or injury having been done to them. But the view that they can is the only view upon which the Sheriff proceeds in the judgment which he pronounced—that the bondholders are entitled to interfere to prevent the factors from applying these rents, which they lawfully, regularly, and in the ordinary course of business collected, in payment of the legal debt due to them by the party to whom the rents belonged, and upon whose employment they had collected the rents. It was said there was a specialty here because a day or two before the term application had been made

for sequestration. It does not appear to me that makes any difference. Sequestration might be awarded or might not be awarded. If it were awarded it would bring in the trustee in bankruptcy. If it were not awarded, then the fact of the application having been made before the rents were collected would have no effect whatever. I think the factors, as in a question with the proprietor, who had an absolute right to collect the rents himself, were entitled to retain them, and to retain them against any debt which was due by him, and if the trustee in bankruptcy here had insisted in a claim to that effect I am by no means satisfied that he would have been entitled to get that money out of the hands of the factors. But assuming that he would, or that they did not choose to raise any question with him as to putting the money into his hands, any more than they raised the question here as to putting it into the hands of the Court, I think their claim in the sequestration would have been well founded upon their legitimate right of retention for a debt justly due to them by the owner of the property upon whose authority they had collected the money. That would have led precisely to the same result and it is quite unnecessary for us to consider whether they might not have said to the trustee effectually and conclusively "We have a right to retain, and we will not hand over the money to you." They acted judiciously in depositing the money in Court without any order, for in their statement of the fund *in medio* they state they have put it into Court, of course reserving any claim which they might have, and when the Court ordered the deposit of the additional £100 which they had retained they put it in too without prejudice to their claim; and the legitimacy of their claim—the legal view respecting it—depends entirely upon the right of retention, for it is that which gives them a preference over any of the other creditors. Upon these grounds I am of opinion that the judgment of the Sheriff ought to be altered, and that Messrs Stevenson, Lauder, & Gilchrist are entitled to have an order of the Court for repayment to them of this £100 which they consigned in December last, subject, it is explained to us, to the deduction of a certain sum—about £7—which was recovered upon their bill. As regards the question of expenses, I think that both in the Sheriff Court and here, Stevenson, Lauder, & Gilchrist having been the successful parties are entitled to their costs.

LORD TRAYNER—The interlocutors appealed against dispose of both questions usually raised in a multiplepoinding, namely, (1) the question, what is the amount of the fund *in medio* to be distributed, and (2) in what order are the claims upon it to be ranked? The question discussed before us has reference only to the amount of the fund *in medio*, and with regard to it I am of opinion that the Sheriff-Substitute was right when he pronounced the interlocutor of 10th March 1894 fixing the fund *in medio* at £129, 14s. 8d. To that sum there now falls to be added the amount of the dividend (£7, 10s. 2d.) paid under Mr Dawson's sequestration upon the bill in question since this action was raised. It seems to me that this is the necessary result from one or two considerations which I shall state with great brevity. The question as to the award of the fund *in medio* is here in dispute between the nominal raisers and Mr Dawson, the retrocessed bankrupt, on the one hand, and between the nominal raisers and the assignee of the bondholders on the other. Now, between Mr Dawson and the pursuers there can be, I venture to think, no question. The effect of the retrocession of Mr Dawson was to put him exactly in the same position as if his estates had never been sequestrated. The sequestration then being out of the way, matters stand thus between the nominal raisers and Mr Dawson. He was the proprietor of certain subjects in regard to which the nominal raisers acted as his factors. They had as factors uplifted the rents of the property as they became due. They had, however, advanced money to Mr Dawson, and I think it is not open to question that at any time when they were accounting to Mr Dawson for the money they had collected for him, they were entitled out of that money to repay themselves what Mr Dawson owed them. Therefore in a question with Mr Dawson the proper fund *in medio* was the amount collected by the nominal raisers as his factors, less the amount which Mr Dawson owed them, and that is the sum the Sheriff-Substitute fixed. With regard to the question between the nominal raisers and the bondholders' assignee, I am satisfied that the latter, in the position in which she stood, had no right over the rents collected giving her priority to the nominal raiser's claim. The factors legitimately had retained out of the rents received by them the amount of their advances to Mr Dawson. A bond and disposition in security containing an assignation to rents in common form, but with no diligence proceeding upon it, gives the bondholder no preferable right to the rents in a question either against the tenant or against the factor who has received the rents for the landlord. In these circumstances we should revert to the interlocutor of the Sheriff-Substitute fixing the amount of the fund *in medio* at £129, 14s. 8d., plus the dividend I have mentioned. The amount consigned by the nominal raisers in excess of the amount of the fund *in medio* so fixed should be repaid to them.

The LORD JUSTICE-CLERK concurred.

LORD RUTHERFURD CLARK was absent.

The Court pronounced the following interlocutor:—

"Recal the interlocutors of 10th March 1894, 29th June 1894, 24th July 1895, 12th November 1895, and 12th and 27th December 1895: Find that at the date when this action was raised the fund *in medio* consisted of the sum of £129, 14s. 8d., to which the sum of

£7, 10s. 2d. now falls to be added, being the amount of the dividend paid out of Michael Douglas Dawson's sequestrated estates in respect of his bill to the nominal raisers for £100: Find that the fund *in medio* amounts to the sum of £137, 4s. 10d. sterling, and that the nominal raisers are liable in once and single payment of that sum: Find that the nominal raisers have consigned in the hands of the Sheriff-Clerk of Lanarkshire the sum of £229, 14s. 8d. (less 13s. of consignation dues): Find that the sum so consigned is in excess of the fund *in medio* to the extent of £92, 9s. 10d. sterling, and that the nominal raisers are entitled to repayment of such excess: Grant warrant to and authorise the said Sheriff-Clerk to repay to the nominal raisers out of the sum contained in his hands the said sum of £92, 9s. 10d. with any interest that may have accrued thereon, and in respect of such consignation exoner and discharge the said nominal raisers in terms of the prayer of the petition and decern: Find the real raisers entitled to payment out of the fund *in medio* of the expenses of bringing this action: And find the claimants Michael Douglas Dawson and Mrs Anne Hutchison or Dawson jointly and severally liable to the said nominal raisers in the expenses of process, both in this and in the Inferior Court: Remit the accounts," &c.

Counsel for the Appellants—Henry Johnston—Dundas. Agent—David Turnbull, W.S.

Counsel for the Respondents—N. J. D. Kennedy — W. Thomson. Agents — J. Douglas Gardiner & Mill, S.S.C.

Wednesday, February 19.

FIRST DIVISION.

[Lord Moncreiff, Ordinary.

BAIN *v.* MACKENZIE.

Succession — Passive Title — Heir — Lease Excluding Assignees.

A nineteen years' lease of certain urban subjects was granted to a tenant and his heirs, excluding assignees and sub-tenants, except with the consent of the lessor. On the death of the tenant his heir took up the lease and entered into possession of the subjects.

Held (*aff.* judgment of Lord Moncreiff) that there was no passive representation, and that the heir was not liable for any of the debts of his ancestor, on the ground that he took the lease, not by inheritance from his predecessor, but in his own right under contract with the lessor.

Campbell v. *Gallanach*, 1806, 1 Bell's Comm., p. 78, note 5, *over-ruled*. *Leslie* v. *Macleod*, June 20, 1870, 8 Macph. (H. of L.) 99, and *Macalister* v. *Macalister*, February 22, 1850, 21 D. 560, *commented on*.

William Bain, accountant, Edinburgh, *curator bonis* to the late Donald Mackenzie senior, tenant of the Trevelyan Hotel, Leith Street, Edinburgh, raised an action against Donald Mackenzie junior, the son of his ward, carrying on business at the said Trevelyan Hotel, for payment of £298, 17s. 2d., being the sum due and resting-owing to the pursuer in connection with his intromissions with the curatory estate.

The circumstances in which the action was brought are thus narrated in Lord Adam's opinion:—"The defender's father was tenant of certain subjects called the Trevelyan Hotel, under a lease for nineteen years from Whitsunday 1886, entered into between him and the proprietors Misses Alice and Helen Bell. This lease was granted to them by him and his heirs, but expressly excluding assignees and subtenants, without the consent in writing of the Misses Bell or their heirs or successors.

"The defender's father died on 30th November 1894. He left a disposition and settlement by which he disponed and assigned to his wife in liferent and certain persons in fee his whole estate, including expressly the unexpired portion of the lease of the said subjects.

"The proprietors do not appear to have given their consent to this proposed assignation of the lease. It was therefore ineffectual to exclude the defender from the benefit of the lease, and he is accordingly, as heir of his father, in possession of the subjects—no writ or other service being needed to give him a title thereto."

The pursuer pleaded—"(1) The sum of £298, 17s. 2d. first sued for being due and resting-owing to the pursuer in connection with his intromissions as *curator bonis* to the late Donald Mackenzie senior, or alternatively the same, so far as undischarged, forming proper charges against the curatory estate, and the defender, as heir of the said Donald Mackenzie senior, being *lucratus* to the amount thereof, the pursuer is entitled to decree in terms of one or other alternative of the first conclusion of the summons, with expenses."

The defender pleaded — "(3) The lease referred to not being available to the deceased's creditors, the defender incurred no liability to them by taking up the same. (4) The defender not being *lucratus* by his father's death, is not liable for his father's debts, and ought to be assoilzied from the first conclusions of the summons."

On the 19th December 1895 the Lord Ordinary (MONCREIFF) pronounced an interlocutor sustaining the third plea-in-law for the defender, and assoilzieing him.

Opinion.—. . . "By terms of the lease in question assignees and sub-tenants are excluded, the lease passing on the death of the tenant to his heir. The question which, strangely enough, has not been definitely settled by decision is, whether the heir of a tenant who takes up a lease in such circumstances incurs passive representation for his predecessor's debts? If passive representation depended solely upon whether