£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

the heir was *lucratus* by taking up the lease, this case would require to be sent to proof on that point; but it seems to me that it is also essential to the doctrine of passive representation that the property or asset which is taken up by the heir is one which the predecessor's creditors could have adjudged or attached had the heir abandoned it. The terms of a lease, including the destination, depend on a contract in which the landlord is one of the parties interested, and therefore apart from statutory provisions conferring power to bequeath a lease, which do not apply to urban subjects, the same rules cannot be applied to the transmission of a lease as apply to succession to other kinds of property. Where assignees and sub-tenants are excluded, the creditors of the tenant have no power to adjudge the lease. If, on the death of the tenant, his heir abandons the lease, the creditors of the tenant cannot compel the landlord to receive them. The lease is in no way available to them should the landlord not consent. It seems to follow that when in such a case the heir of a tenant takes up the lease, he does so, not as representing his predecessor, but more as an heir of provision or heir of entail, although his position is not precisely analogous.

"It appears from a note in 1 Bell's Comm. (5th ed.) p. 82—(p. 78, note 5, 7th ed.)—that the question was raised in the unreported case of *Campbell of Melford* v. *Gallanach*, 11th July 1806. Lord Newton, in the Bill Chamber, decided in favour of the present pursuer's contention, viz., that the heir incurred a passive title by taking up a lease under which assignees and sub-tenants were excluded. A petition was presented to the Court but refused on a point of form, 'the Court regretting that the merits of the question could not be tried.' I gather from Mr Bell's observations that he doubts the soundness of Lord Newton's judgment. He says—'It may be questioned whether the heir who succeeds to the lease under such a clause does not take it without incurring any passive title, further than as he can be shown to have taken up a subject which, as properly belonging to the predecessor, his creditors could attach. The stocking of the farm is, indeed, the fund of the creditors, so are all arrears due by sub-tenants, but with regard to future and accruing profits, have the creditors right to them — their debtor's right having expired with his life, like that of an heir of entail?' I find the law stated to the same effect in Bell's Prin., section 1922 (4).

"I also find the same doubt expressed in More's Notes to Stair, 364, in which he says:—'And here, by the way, it may be observed, that it has never been decided whether an heir succeeding to such a lease will incur a passive title so as to be liable for his father's debts. The principle upon which liability for such debts may be maintained in the ordinary case does not apply here. The heir takes the subject destined to him by a third party, like an heir of entail, and he does not deprive the creditors of his ancestor of any property which they could attach, or make responsible for the payment of their debts'; and then he mentions the case of *Campbell* v. *Gallanach*.

"Professor Rankine on Leases, p. 151 (1st edit.—p. 159, 2d edit.) says:—'It seems the better opinion . . . and to result especially from the fact that the heir to a lease takes as heir of provision (as in entails) and takes nothing of which his predecessor's creditors could make use in the event of his renouncing, that he incurs no passive title by entering, and that these creditors cannot attach the profits of the subject let, so far as accruing subsequently to the death of their debtor.'

"On the other hand, Mr Hunter, in his work on Landlord and Tenant, vol. i., p. 231, expresses an opinion to the opposite effect. He says:—'Although opinions against the heir's liability have been indicated, the view more consonant to principle appears to be in favour of the ordinary rule of representation. The analogy between an exclusive destination in a lease and succession under an entail so far holds good as to cut off the right of the heir of line, and to bar alteration by the lessee. But there are no *data* for so extending the analogy as to alter the effects of representation as known to the common law. In almost every description of lease, agricultural, mineral, or manufacturing, the predecessor must have invested capital, the profits of which are to be reaped during its currency, and accrue to the successor, who thereby becomes *lucratus*, which is of the essence of representation. The exemption from liability, in the case of feudal property, is the creature of statute, and is repugnant to the common law, which therefore will not give it an analogical or constructive extension.'

"The question undoubtedly is one of difficulty; but I incline to the opinion indicated by Professor Bell, and the other writers to whom I have referred, who seem to agree with him, namely, that a lease with such a destination, being a subject which the creditors could not attach, an element is awanting which is essential to the existence of passive representation, and that it is immaterial whether the heir, if he takes up the lease, is *lucratus* or not."

The pursuer reclaimed, and argued—The Lord Ordinary was wrong. The original principle of the law was that an heir incurred universal liability—Ersk. Inst. iii. 8, 50. That had been modified by the introduction of the *beneficium inventarii* — Ersk. iii. 8, 68— which had been given effect to in legislation, *e.g.*, the Conveyancing Act 1874, sec. 12. So that, though a general service implied a universal passive title—*Ayton's Creditors* v. *Ayton*, 9732, the test was, Is the heir *lucratus*?—*Baird* v. *Earl of Rosebery*, M. 14,019. There was no doubt that the defender took in the character of heir—*Sinclair* v. *Dunbar*, July 18, 1845, 7 D. 1085; *Leslie* v. *Macleod*, February 21, 1868, 6 Macph. 445, June 20, 1870, 8 Macph. (H.L.) 99. The only case in which the question had been raised under a lease had been

decided in favour of the pursuer's contention—*Campbell* v. *Gallanach*, 1806, *apud* 1 Bell's Com. p. 78, note 5. It was not necessary to infer passive representation that there must be an estate which creditors could attach; and here if the proprietors had given their consent to the assignation by the defender's father, there would have been something attachable by the creditors in the assignee's possession. Clauses excluding assignees without the landlord's consent were conceived, not in the interest of the tenant's heirs, but solely in that of the landlord — *Dobie, &c.* v. *Marquis of Lothian*, March 2, 1864, 2 Macph. 788.

Argued for the defender — The Lord Ordinary was right. Mr Bell had questioned the correctness of the decision in *Gallanach*, 1 Com. p. 78, Prin. 1922 (4), and so had Mr More, *apud* Stair, p. 364. The debtor's right had expired with his life, and the heir had taken nothing which his ancestor could have sold. The heir might have renounced, and in that case the creditors could have attached nothing. Why should they be in a better position because he had not renounced? What the heir had taken, he had taken from the landlord, and not as representing his ancestor. His position was analogous to that of an heir of provision under an entail.

At advising—

LORD ADAM—[*After stating the facts as quoted above*]—The question is, whether by so taking possession of the subjects the defender has rendered himself liable for his father's debts on any of the passive titles known to the law. It is not specified on record which of the passive titles the defender is said to have incurred, but I suppose it is that known as *gestio pro hærede*.

The question raised in this case appears never to have been decided except by Lord Newton in the case of *Gallanach* v. *Newton*, and that case, as appears from the Lord Ordinary's opinion, has never been regarded as an authoritative decision.

For present purposes we must assume that the defender was *lucratus* by taking up the lease, but whether that will make him liable or not depends upon the nature of his own and his father's rights under the lease. Now, as I have said, the lease was granted to the father and his heirs, excluding assignees and sub-tenants. It appears to me that under this destination the rights of the father under the lease were temporary, and limited to his own lifetime. He could not of his own motion effectually assign it, or otherwise dispose of it, to the prejudice of his son, as appears indeed clearly from the assignation which he attempted to grant in favour of his wife. On the other hand I think the defender succeeded to the lease not as representing his father, but in his own right by force of the destination in the lease granted by the proprietors.

In the next place it is clear that the position of the creditors of his father was in no way affected by the defenders taking up the lease. If he had renounced it, it would have lapsed to the landlord, and the creditors could in no way have affected it for payment of their debts. That being so, it is difficult to see on what principle the fact that the defender took it up should accrue to their advantage. If in order to acquire a right to the lease the defender had required to serve to or represent his father, that might have followed as a legal consequence. But that is not in my opinion the position of the matter, as I think the right to the unexpired portion of the lease never was the property of the defender's father, but belonged to the defender in his own right.

Mr Erskine in treating of these passive titles, says (iii. 8, 92)—"The only reason for introducing passive titles was that the creditors might not suffer by the devices of heirs, who wilfully stood off from entering; and, therefore if the heir who incurs a passive title be made liable as if he had entered, the creditors of the deceased can demand no more." In this case it is clear that the creditors of the deceased have suffered no prejudice at all by the act of defender, and I fail to see why he should be made liable to pay the creditors of his father.

I therefore concur in the interlocutor of the Lord Ordinary.

LORD M'LAREN — This action raises a curious conflict between principle and practice. If we suppose the case of a long lease, extending to ninety-nine or even nine hundred and ninety-nine years (of which examples are known in our practice), granted to a person and his heirs, I am unable to see why in principle any different consequences should be deduced from such a right and the right under a grant in feu to the same person and his heirs. In the latter case no doubt the heir takes his inheritance as heir and represents his ancestor, the representation being limited to the value of the estate which he takes. This principle of the law would appear to me to lead to the recognition of a corresponding liability where the subject is let on lease for a term of years to a party and his heirs. But then, with the exception of a decision by a single Judge, the authority of which has been questioned, there is no authority for extending the principle of representation to an heir taking up a lease; and the fact that in the three centuries during which the decisions of this Court have been reported no decision seems to have been given upon the question, is good evidence that the profession, and the public as represented by the profession, have acquiesced in the view that representation does not apply under leases of ordinary duration and in favour of heirs only. Such constant practice in one direction is just what establishes a rule of common law. On that ground I agree with Lord Adam that this case must be treated as exceptional, and that the heir is to be considered as taking in the character of conditional institute or substitute under the destination and not by inheritance, and consequently that he is not liable, even to the extent of the interest which he takes, for his ancestor's debts.

In this decision we only consider the case of a lease in favour of heirs and excluding assignees. It may be that when a lease is of such duration that it amounts in law to an alienation, the exclusion of assignees would be ineffectual, and so the question of representation would not arise in its present form.

LORD KINNEAR—I have come to the same conclusion. I think that the defender cannot be made liable for his father's debts by reason of his taking up an interest under the lease which did not belong to the father, and which the creditors of the father could not have attached by diligence or reached in any way whatever. The father's right of tenancy determined with his life. He had no power to assign the lease; he had no power to nominate an heir, because it has been decided and cannot now be disputed, that where assignees are excluded and the heir is admitted by the terms of the lease, it must be taken by the heir of line. And therefore there was nothing in the father under this contract of lease at any time except the interest which it gave him during his own life.

It appears to me therefore that the heir does not take as representing his father, but takes directly under a contract which contains an offer to him upon the termination of his father's interest, if he chose to avail himself of it. The practical ground upon which it would be unjust and unreasonable to subject the son to liability for his father's debts is just that stated by Professor Bell, that he has taken nothing from the creditors which they could possibly have reached but for him, and therefore his taking under a contract which is open to himself, and himself only, not to the creditors of his father or to anyone deriving right from the act of his father, ought not to subject him to obligations with which he has otherwise no concern.

Taking that view, I should desire to confine my opinion to the case of such a lease as we have to consider here; that is to say, a lease of such duration as to make the exclusion of assignees both reasonable and effectual. I do not know that the same considerations would apply at all to a lease of so long duration as to be equivalent to a right of property, because in such a case the exclusion of assignees might be ineffectual, and of course my opinion would not be applicable to cases of feu which, both in form and substance, confer rights of property transmissible from one feuar to another, but applies solely to the particular case with which we are here concerned, which is that of a son taking up the remainder of a lease for a short duration by direct contract with the lessor, and not through or as representing his father.

If these views be sound, I am unable to assent to the view expressed or sanctioned by the Lord Ordinary when he says that the heir of the lessee is to be considered as an heir of provision, although I am quite aware that that view has the very high authority of Professor Bell. But then, an heir of provision represents the deceased, and as representing him he has to perform all the onerous obligations which his ancestor has undertaken, just as much as the heir of line, unless the estate is held under the fetters of an entail. He may be liable in a different order; if the debt is moveable he may have relief from the executor; and as heir of provision in a special subject he may have relief against the heir-general. But his representative character and his consequent liability to creditors are undisturbed. He takes the estate as an inheritance, and subject to the onerous obligations of the ancestor to whom he succeeds. That is the import of the judgment in the very important case of *Leslie* v. *Macleod*, June 20, 1870, 8 Macph. (H. of L.) 99, and I think the distinction between the character of an heir of provision taking property as an inheritance from his father, and that of an heir taking up a lease by virtue of a contract with the lessor, is very well brought out by a comparison of the case I have cited with that of *Macalister*, February 22, 1859, 21 D. 560, in which the respective rights of successive lessees are explained by the late Lord President. The case of *Macalister* differed from this in this respect, that the lease there was not given to the original lessee and his heirs, but to the original lessee, whom failing to one particular son; but then the Court had occasion to point out the difference between the legal effect of the ordinary words of destination as used in a conveyance of property, and the same words when used in a contract of lease. The case is an authority for holding that when a lease of ordinary duration is taken to one who has no power to assign to executors or to nominate heirs, and on his death, during the currency of the lease, to another, the second lessee is not bound by the obligations of the first, because he does not take by inheritance from his predecessor, but by contract with the lessor.

I am of opinion, therefore, that the Lord Ordinary's judgment is right, although I am not prepared to accept his Lordship's definition of the character in which the heir takes up the lease.

The LORD PRESIDENT concurred.

The Court adhered.

Counsel for the Pursuer — Cook — Constable. Agent — G. Brown Tweedie, Solicitor.

Counsel for the Defender—Guy—Graham Stewart. Agents — Clark & Macdonald, S.S.C.