for his own use. But, in the first place, there is no statement on record to this effect, and we are not put in possession of any of the details of that transaction. It is not admitted, and we have no materials to enable us to judge, how far it is or is not a statement capable of admission to proof. Apparently the respondent in the application was not able to specify exactly how the matter stands. But in my opinion, taking the statement of the respondents here as being substantially correct, it is not sufficient to sustain the proceedings. I am of opinion that nothing has been said which would have the effect of rendering competent the application to ordain the bankrupt to execute a disposition not *omnium bonorum* but of a certain portion of the property which had been sequestrated, just because his trustee and his creditors had undertaken to make it over to him. I do not say what the case might be in regard to the ordinary diligence, but I think a disposition *omnium bonorum* is in the circumstances incompetent.

Lord Young—I am of the same opinion, and on the same grounds, and I desire to say that the matter is not doubtful for a moment. The bankrupt here was undoubtedly sequestrated in 1882 under the statute, and a trustee appointed on his estate, but the trustee, with the approbation of the creditors, allowed him to continue his business as a publican. The ground of the application is stated as follows—"That the defender has for some time past and still continues to draw the proceeds of his business as a hotel-keeper at the Clyde Hotel, including the proceeds for the sale of liquors and other effects therein, and has in his possession the said proceeds, and which the defender has not applied and does not mean to apply in payment of his lawful debts." This is the ground of an application to have the defender ordained to execute a disposition *omnium bonorum* to certain creditors who supplied some of these liquors. Suppose that the ground of application had been a statement by the man himself—"I am a sequestrated bankrupt, but I am, nevertheless, allowed to draw the proceeds of the sale of liquors at my hotel, and I apply to be allowed to execute a disposition *omnium bonorum* for distribution among my creditors." Would not that have been ludicrous? But it is equally so in an application at the instance of parties who sold him the liquors. If he was carrying on business for his own behoof, or without any arrangement of creditors or the trustee acting for them, anyone trusting him was in the usual position of persons trusting an undischarged bankrupt. There was no property to look to, only a reversion to the estate remaining after his debts were paid, or which might be acquired after discharge from sequestration. If he was carrying on business under the direction of the creditors, or the trustee acting for them, and with their approbation, it would be a ground of action against them for payment of an account properly incurred in the course of that business carried on with their authority and for their behoof. But an application for a disposition *omnium bonorum* to attach the proceeds of the sale and put them under the authority of another trustee is simply ludicrous. This matter of the former sequestration does not seem to have been brought under the notice of the Sheriff, but there is no doubt of the facts. He was sequestrated, and a trustee appointed, and the sequestration still subsists. I am of opinion, then, that there is no case for a disposition *omnium bonorum*, and that there would be a case for going against the creditors, or the trustee acting for them, just according as the fact be that the business was or was not carried on for their behoof.

Lord Craighill was of opinion that a proof of the matters in controversy ought to be allowed to the respondents before the question of competency was decided.

Lord Rutherfurd Clark—I agree with your Lordship in the chair.

The Court sustained the appeal, recalled the judgment of the Sheriff, and dismissed the petition.

Counsel for Pursuers (Respondents)—Campbell Smith. Agent—William Officer, S.S.C.

Counsel for Defender (Appellant)—Baxter. Agent—W. B. Glen, S.S.C.

Wednesday, January 30.

SECOND DIVISION.

GRAHAM *v.* GRAHAM.

Husband and Wife—Divorce—Action of Reduction of Decree of Divorce—Process—Expenses—Payment to Account of Wife's Expenses—Right of Repetition.

In an action by a wife for reduction of a decree of divorce obtained against her by her husband, the Lord Ordinary in the Outer House, on a *prima facie* view of her case, ordered her husband to pay her two sums to account of her expenses, "reserving, however, any claim the defender may hereafter be able to instruct for repetition of said sums." Subsequently a further sum was paid to her, on the same understanding, as a fee for sending a commissioner to take evidence for her abroad. Her action having failed, and her husband having been found entitled to expenses therein—*held*, on a consideration of the Auditor's report, that the husband was entitled to demand repetition of the above sums, and have them included in the account of expenses.

In this case, reported *supra* 15th December 1881, vol. xix. p. 207, and 9 R. 327, which was an action for reduction of a decree of divorce obtained against Mrs Graham by her husband, the defender was, on 15th December 1881, by the Second Division adhering to the judgment of the Lord Ordinary (Adam), assoilzied from the conclusions of the action, and found entitled to additional expenses, and a remit was made to the Auditor to tax the same and to report. On the 25th January 1884 the Auditor, in obedience to the remit, "taxed the account of expenses at the sum of £868, 0s. 7d., reserving for the determination of the Court the question of the defender's right to include in his account the sums of £20, £80, and £40 paid by him to account of the pursuer's expenses in the cause,

and to recover the same in this process under the finding for expenses in his favour." Counsel for the defender moved the approval of the account, which included the above three sums embraced in the reservation. He stated that the first of them (£20) was paid on 1st December 1880 in virtue of an interlocutor pronounced by Lord Craighill (before whom the case then depended in the Outer House) on 26th November 1880, in which he ordained "the defender to make payment to the pursuer of the sum of £20 to account of her expenses in the cause, reserving, however, any claim the defender may hereafter be able to instruct for repetition of said sum." The second sum (£80) was paid on 4th January 1881, under an interlocutor by Lord Craighill ordering payment under a reservation in the same terms. The third sum (£40) was voluntarily paid by the defender to the commissioner appointed by the Lord Ordinary to take evidence for the pursuer in Canada, on an agreement with the wife's agents that there should be the same right of repetition regarding it as regarded the other two sums.

Counsel for the pursuer opposed the motion for repetition of the three sums as being unprecedented.

At advising—

Lord Craighill—The interlocutors referred to were pronounced by me in the Outer House, and I think it right to say that now that I have cast my mind back to the circumstances of the case, I find the event has occurred which I had in view when I ordered the payments and made the reservations in regard to them. I remember that I thought the circumstances of the case rendered it reasonable that I should allow the pursuer in her action for reduction of her divorce such a sum as would be necessary to enable her to bring forward proof in support of her case, but what I desired to provide for was, that should the grounds of the reduction of the decree turn out to be unfounded, the defender might be put in the same position as if the order had not been pronounced. Therefore I think that the defender having been found entitled to expenses, and there being no technical question in the matter, it is only reasonable that he should be allowed to introduce the three sums in question into the account of expenses, and there is no distinction between the third and the two first sums. There was no interlocutor with reference to it, but there was an agreement that the sum advanced on the same footing as the other two sums should be repeated.

The Lord Justice-Clerk, Lords Young and Rutherfurd Clark concurred.

The Court pronounced this interlocutor—

"The Lords having heard counsel for the parties on the Auditor's report on the defender's account of expenses, Approve of the report; ordain the pursuer to make payment to the defender of the sum of Eight hundred and sixty-eight pounds sterling, being the taxed amount of the said expenses; and decern."

Counsel for Pursuer—J. C. Smith—M'Kechnie. Agents—T. & W. A. M'Laren, W.S.

Counsel for Defender—A. J. Young. Agents—Duncan & Black, W.S.

Friday, February 1.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

CRITCHLEY *v.* CAMPBELL.

Lease—Landlord and Tenant—Game Lease—Exclusive Right of Shooting — Possession of Material Part of Subject not given to Tenant —Actio quanti minoris.

A lease of shootings for a year gave the tenant "the exclusive right of shooting" over certain lands "all as lately occupied by D." The rent was payable before the season commenced, and was paid. It turned out that a portion of the land let was a commonty over which another proprietor had, and exercised, a joint right of shooting. The tenant raised against the landlord an action of damages on the ground that he had not obtained possession of the whole subject let to him. *Held* (1) that the action was equivalent to a claim for abatement of rent, and was not open to objection as an *actio quanti minoris;* (2) that the words "all as lately occupied by D" were demonstrative merely, and not taxative, and did not put it upon the tenant to inquire into the nature and extent of D's right, and therefore that the tenant was entitled to damages.

Process—Written Offer before Raising of Summons —Tender—Expenses.

Before the raising of an action the defender had offered, without prejudice to his legal rights, to pay the pursuer £75 in full of his claim. The offer having been rejected, the action was raised, and the offer was not repeated in it. The pursuer recovered £70. *Held* that the Court might competently consider the fact of the offer in determining the question of expenses, and that no expenses ought to be found due.

John Asheton Critchley of Stapleton Towers, Annan, sued Francis William Garden Campbell of Troup and Glenlyon for the sum of £200 in name of reparation for the loss he had sustained through the defender's failure to put him in possession of a material part of certain shootings let to him for the year 1882–83, and for which the stipulated rent had been paid by him before the shooting season began. By minute of lease dated 5th and 13th July 1882 the defender let to pursuer "the exclusive right of shooting over the lands of Glenlyon House," together with the privilege of fishing in a part of the river Lyon, and the mansion-house, garden, &c., "all as lately occupied by J. Griffith Dearden, Esq.," for one year, from Whitsunday 1882 to Whitsunday 1883, at a rent of £550, payable at 1st August 1882. The rent was duly paid, and a receipt was granted therefor dated 8th August 1882.

Before entering into the lease the pursuer asked two of his friends to visit Glenlyon and to obtain for him particulars regarding the extent and character of the shootings. In the spring of 1882 these gentlemen proceeded to Glenlyon, and were met by defender's gamekeeper and also by his factor Mr M'Gillewie. The party walked over a portion of the moor, but did not attempt the more distant beats, the direction and boundaries of which were pointed out by the game-