which 'payment' could have been 'demanded' from the King or his heirs and successors if the *dominium utile* had still remained the property of the Crown."

The pursuer reclaimed, and argued—This was a right of relief intended to pass with the lands, into whosoever hands they might at any time go, and was therefore now enforceable at the instance of the present proprietor of them against the representative of the granter of the disposition containing the right.

The defender was not called on.

At advising—

Lord Young—I am of opinion that the interlocutor of the Lord Ordinary in this case is altogether right. I am disposed to agree with his Lordship, although it is necessary to express an opinion upon that point, that if this were a general assignable clause of relief it has been well assigned. I concur with the Lord Ordinary, however, that it is not a general assignable clause of relief, but a clause of relief strictly and inalienably in favour of the Crown and the royal successors of the Crown in that land. As his Lordship has pointed out, it is an obligation of relief of very different significance and value in favour of the Crown and the Crown's royal successors, from what it would be if in favour of a subject. But it is quite unnecessary for me to say more than that I concur in the judgment of the Lord Ordinary and in the grounds on which it proceeds.

Lord Craighill and Lord Rutherfurd Clark concurred.

The Court adhered.

Counsel for Pursuer—Low. Agents—C. & A. S. Douglas, W.S.

Counsel for Defendant—J. P. B. Robertson—Graham Murray. Agents—Tods, Murray, & Jamieson, W.S.

Tuesday, January 29.

SECOND DIVISION.

[Sheriff of Argyle.

HUYSSEN & OVENS *v.* SINCLAIR.

Bankruptcy — Sequestration — Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. c.* 79), *sec.* 103 *—Debtors (Scotland) Act* 1880—*Cessio.*

A debtor was sequestrated in 1882, and while still undischarged carried on a business. A creditor in this business presented a petition in 1883 to have him ordained to execute a disposition *omnium bonorum*, alleging that by an arrangement with his trustee and creditors he was allowed to appropriate to himself the whole profits of the business. *Held* that the application was incompetent.

Peter Sinclair, inn-keeper, Dunoon, was sequestrated in September 1882, and a trustee was appointed on his estate. In September 1883, while he was still an undischarged bankrupt, Huyssen & Ovens presented this application to have him ordained to execute a disposition *omnium bonorum* for behoof of creditors. The petitioners stated that Sinclair was notour bankrupt by insolvency concurring with an expired charge, dated 18th August 1883, on a bill which he had granted to them for the price of wines. They further stated—"That the defender has for some time past, and still continues, to draw the proceeds of his business as a hotel-keeper at said 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."

The Sheriff-Substitute (Campion) decerned Sinclair to execute a disposition *omnium bonorum* in favour of a trustee named in the interlocutor. On appeal the Sheriff (Forbes Irvine) adhered.

Sinclair appealed, and argued — The petition was incompetent, in respect he was at its date an undischarged bankrupt under the sequestration of 1882. The 103d section of the Bankruptcy (Scotland) Act 1856 provided that all estate acquired by the bankrupt after the date of his sequestration, and before he had obtained his discharge, was vested in his trustee. The effect of this application, if granted, would simply be to supersede the old trustee and bring in another.

The respondents, in reply, admitted that the appellant was undischarged from the sequestration, and cited the case of *Abel* v. *Watt*, Nov. 21, 1883, 21 Scot. Law Rep. 118, in support of his contention that the application was nevertheless competent. They further stated at the bar that the appellant was in point of fact in actual possession in his own right of the hotel premises under an arrangement with the creditors and trustee in his sequestration. Even if the sequestration were to receive the effect contended for, the appellant was bound to make a disposition in their favour to the extent of the proceeds from the business his creditors had allowed him to carry on with goods obtained from the respondents.

The appellant denied the alleged arrangement with his creditors as to the carrying on of his business.

At advising—

Lord Justice-Clerk—In this application at the instance of the petitioners there is no allegation made except that their debtor was notour bankrupt and the debt due to them was resting-owing, and the Sheriff was asked in the application to pronounce an interlocutor in terms of the Debtors (Scotland) Act, finding the debtor liable to execute a disposition *omnium bonorum* in name of a trustee. It is now merely stated to us (for there is no printed statement or plea with reference to this part of the proceedings) that the whole of the proceedings were incompetent, because at the date of the application and at the present time the debtor was and is an undischarged bankrupt, and his property, past and present, was vested in the trustee appointed on his sequestrated estate. This is not denied by the petitioning creditors, but it is said that the bankrupt is in possession of some property which was made the subject of a separate contract between his trustee and him, and under which the trustee and his creditors are not entitled to claim that property, which had been apparently retransferred to the bankrupt

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,