to a jury. The question therefore is, whether there is such special cause as to justify the course taken by the Lord Ordinary. Mr Jameson enumerated a great many points which he said made the case special. I was not impressed with any of them except the one to which your Lordship has alluded. Indeed, they seemed to me to be just very proper questions for a jury to judge of. But we have this speciality, that the alleged right-of-way passes not only through the pursuer's property, but also through the properties of a number of other proprietors. The pursuer who as asserting his right as proprietor against the alleged right-of-way, could not have called these parties, but the defenders might have called them in an action at their instance, as they are the pursuers of the issue raised in the action. I have never very well understood why a person asserting a right-of-way can select one of a number of proprietors through whose properties the alleged right-of-way passes as the object of his action, but according to the practice of our Court he can. There are, accordingly, absent parties who have interests to be protected. It is perfectly true that nothing decided in this action will be *res judicata* against them, but though this is true, an adverse issue to this case would in fact be most prejudicial to these parties, and impose a difficulty upon them in asserting their own rights. Accordingly, these parties being absent through the option of the parties who are pursuers of the issue, and having regard to the case of *Blair* v. *Fraser-Tytler*, I think the proper course to follow is to send the case to proof before a judge.

Lord M'Laren—In this case the Lord Ordinary has followed previous decisions in which the case of there being absent pursuers who might be defenders to an action of declarator of right-of-way is treated as exceptional, and I agree that his judgment should be affirmed.

Lord Kinnear concurred.

The Court adhered.

Counsel for the Pursuer—Jameson, Q.C. —J. Wilson. Agents—A. J. & J. Dickson, W.S.

Counsel for the Defenders—Guthrie, Q.C. —Constable. Agents—Wallace & Pennell, W.S.

Saturday, March 4.

FIRST DIVISION.

CRUICKSHANK *v.* GOWANS.

Process — Bankruptcy—Discharge — Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. c.* 79), *sec.* 146.

An undischarged bankrupt applied to the Court for a remit to the Accountant of Court to report, and for his discharge thereafter on the ground that the report prepared by the trustee in terms of sec. 146 of the Bankruptcy Act 1856 was defective in the essentials required by that section, and that the trustee having been discharged, the machinery of the sequestration had broken down.

The Court *refused* the petition as incompetent, holding that the petitioner's proper course was to make his application to the Court which awarded sequestration.

White, March 18, 1893, 20 R. 600, *distinguished.*

The estates of John Cruickshank were sequestrated in the Bill Chamber, and John Stuart Gowans, C.A., was appointed trustee thereon on 19th October 1888.

Before applying for his discharge Mr Gowans lodged the following report with the Accountant of Court:—"The trustee has not been able to recover sufficient assets even to pay the expenses of taking out sequestration, and no dividend has been paid to the creditors. The trustee cannot certify that the bankrupt has made a fair discovery or surrender of his estate, and he cannot state whether or not the bankrupt has been guilty of any collusion. The trustee is unable to state that in his opinion the bankruptcy has arisen from innocent misfortune." Mr Gowans was discharged on 16th June 1892.

In these circumstances the bankrupt on 31st January 1899 presented a petition to the Court setting forth that he was now desirous of being finally discharged, and that Mr Gowans's report was defective in the essentials required by section 146 of the Bankruptcy Act "in so far as the trustee does not certify whether the petitioner made a fair discovery and surrender of his estate, whether he has been guilty of any collusion, and whether the petitioner's bankruptcy arose from innocent misfortunes or losses in business, or from culpable or undue conduct."

The petitioner accordingly craved the Court to ordain Mr Gowans to lodge a report with regard to his conduct in these particulars, and failing Mr Gowans's so doing to remit to the Accountant of Court, or other competent person, to furnish such report in lieu thereof, and thereafter to find the petitioner entitled to his discharge.

Mr Gowans lodged answers, in which he submitted that the application was incompetent.

The Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. c. 79), sec. 146, enacts that "the bankrupt may . . . petition the Lord Ordi-

nary or the sheriff to be finally discharged, . . . provided that every creditor who has produced his oath . . . shall concur in the petition, . . . and the bankrupt may also present such petition on the expiration of two years from the date of the deliverance actually awarding sequestration without any consent of creditors, and the Lord Ordinary or the sheriff, as the case may be [shall after sundry procedure] pronounce a deliverance finding the bankrupt entitled to a discharge, provided that it shall not be competent for the bankrupt to present a petition for his discharge . . . until the trustee shall have prepared a report with regard to the conduct of the bankrupt, and as to how far he has complied with the provisions of this Act, and in particular whether the bankrupt has made a fair discovery and surrender of his estate, . . . and whether he has been guilty of any collusion, and whether his bankruptcy has arisen from innocent misfortune and losses in business or from culpable or undue conduct."

The Bankruptcy (Scotland) Act Amendment Act 1860 (23 and 24 Vict. c. 33), sec. 3, enacts that "the said Court, in either Division thereof, or the Lord Ordinary, or the sheriff, may refuse the application for the discharge of any bankrupt, although two years have elapsed from the date of sequestration . . . . if it shall appear from the report of the Accountant in Bankruptcy, or other sufficient evidence, that the bankrupt has fraudulently concealed any part of his estate or effects, or has wilfully failed to comply with any of the provisions of the Bankruptcy (Scotland) Act 1856."

The Bankruptcy and Cessio (Scotland) Act 1881 (44 and 45 Vict. cap. 22), sec. 6, subsec. (1), enacts that "a bankrupt shall not at any time be entitled to be discharged of his debts unless it is proved to the Lord Ordinary or the sheriff, as the case may be, that one of the following conditions has been fulfilled . . . (*b*) that the failure to pay five shillings in the pound . . . has in the opinion of the Lord Ordinary or the sheriff, as the case may be, arisen from circumstances for which the bankrupt cannot justly be held responsible." Sub-sec. (2) enacts that "in order to determine whether either of the foresaid conditions has been fulfilled, the Lord Ordinary or the sheriff, as the case may be, shall have power to require the bankrupt to submit such evidence as he may think necessary in addition to . . . the report made by the trustee under section 146 of the said Act."

Argued for the petitioner—The report of the trustee was not such as to entitle the bankrupt to his discharge—*Campbell* v. *Brown*, February 14, 1855, 17 D. 430. His only course, therefore, was to appeal to the *nobile officium* of the Court, which in similar cases, where the bankrupt had been unable to get a report from the trustee, had remitted to the Accountant of Court—*White*, March 18, 1893, 20 R. 600. Such a course was indicated by sec. 3 of the Act of 1860.

The respondent founded upon sec. 146 of the Act of 1856, and sec. 6 of the Act of 1881, and argued that the application was incompetent in respect that the trustee, having been for six years *functus officio*, could not now be called upon to make a report, and that the statutes clearly pointed to the judge who awarded sequestration as the proper tribunal to which an application like this should be presented. In *White's* case the trustee had never reported at all.

Lord President—The ground of application to this Court, as Mr Forsyth has very frankly said, is that there has been a failure of the Bankruptcy Act in this particular case, and that the bankrupt has no court to appeal to in the predicament in which he finds himself.

Now, I think when the facts are examined, that is not the fact. In the case of *White* there had been no report lodged, and the trustee had disappeared. In these circumstances there was clearly a breakdown of machinery, and accordingly we remitted to the Accountant of Court to give such a report as he could. But in this case the trustee has given in a report. It may be a good report or a bad report; it is for the judge in the sequestration to decide upon that. Therefore I think that we have no right to interfere, and that Mr Forsyth's remedy is to go to the court of the sequestration and make the best argument he can on the report.

Lord Adam, Lord M'Laren, and Lord Kinnear concurred.

Counsel for the Petitioner — Forsyth. Agent—William Spink, S.S.C

Counsel for the Respondent — Kemp. Agents—J. M. Wood & Robertson, S.S.C.

Saturday, March 4.

FIRST DIVISION.

WALKER (WILSON'S TRUSTEE) *v.* WILSON AND OTHERS.

Bankruptcy—Loss of Sequestration Process and Claims—Procedure to Enable Sequestration to go on—Nobile Officium.

Where in a sequestration the original process, including the petition, the claims of all the creditors excepting two, and the whole other documents, with the exception of the sederunt-book, had disappeared, and in spite of diligent search could not be found, the Court, on the application of the trustee, *granted* authority to him to proceed in the sequestration and to take all necessary steps therein for the division of the estate.

Skirving's Trustee, October 18, 1883, 11 R. 17, *followed*. *Anderson*, January 9, 1884, 11 R. 405 *overruled*.

The estates of the late David Hay Wilson were sequestrated in 1879, and in 1898 James Walker, C.A., was confirmed trustee thereon, there having been three other trustees in the interval. Mr Wilson now presented a petition to the Court in which he set forth that he had realised the bankrupt's estate