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, sub-sec. (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

and was in a position to distribute it among the creditors. "But the difficulty has occurred, that the original process, including the claims of creditors, and whole other documents in the sequestration, cannot now be found, with the exception of the sederunt book, two claims as hereinafter specified, and sundry other documents unimportant in so far as they do not relate to the ranking and claims of creditors. Every search has been made by the petitioner and his agents for the documents, but without success. They have appealed to Mr Caesar, the last trustee in the sequestration, who is now abroad. He has no recollection of what has become of them, but believes it likely that when leaving Edinburgh he returned them to the Sheriff-Clerk. The Sheriff-Clerk has made a thorough search but is unable to find any trace of them. The Accountant of Court has also been applied to, but can give no information. The petitioner believes that the process and claims are irretrievably lost."

In these circumstances the petitioner craved the Court to grant authority to him to take all necessary steps for the division of the estate notwithstanding the loss of the claims and other documents; to authorise advertisement setting forth the loss of the claims, and requiring creditors or their representatives, other than the two whose claims had been preserved, to lodge claims in the statutory form within a month, under certification that the assets of the estate should be divided among such creditors or representatives of creditors only as should lodge claims within that period; and to grant warrant to the petitioner to divide the estate among such creditors or representatives of creditors as should have so lodged claims, all claims being disposed of in accordance with the provisions of the Bankruptcy Act.

Certain of the creditors lodged answers, in which while admitting the facts stated by the petitioner they objected to being called on of new to produce vouchers for their claims, which it would be necessary for them to do if they were to "lodge claims in the statutory form." They therefore submitted that the petitioner should be authorised to find them entitled to a ranking and dividend on their claims as appearing in the sederunt-book.

The Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79), sec. 49, enacts that "to entitle a creditor to vote or draw a dividend he shall be bound to produce at the meeting or in the hands of the trustee, an oath to the effect and taken in manner hereinbefore appointed in the case of creditors petitioning for sequestration, and the accounts and vouchers necessary to prove the debt referred to in such oaths."

The petitioner objected to the respondents' proposal being given effect to, and referred to *Skirving's Trustee*, October 18, 1883, 11 R. 17, where the interlocutor pronounced was in identical terms with what the petition sought here. On the question of competency the petitioner argued that there was no doubt here as to the existence and nature of the sequestration proceedings. The sederunt-book afforded ample evidence of the petition and what followed thereon.

The respondents submitted that owing to the loss of the vouchers originally lodged by them they would be unable to lodge new claims in terms of the statute. Section 50 of the Bankruptcy Act afforded no help, for it merely gave a creditor an extension of time for finding his vouchers. Questions were likely to arise here as to the rights of some of the creditors, and these might be prejudiced if the petition were granted. The respondents at the same time called the attention of the Court to the case of *Anderson*, January 9, 1884, 11 R. 405, where the Second Division had refused a precisely similar petition. The distinction taken there between that case and the case of *Foulis*, July 18, 1872, 9 S.L.R. 631, was that in the former the process itself and the foundation of the process had disappeared. It was so in the present case also.

At advising—

LORD PRESIDENT—This is certainly rather a troublesome case, but we have what seems to me a direct precedent occurring in this Court in the case of *Skirving's Trustee*, for it is made manifest by an examination of the papers that that case was identical with the present in this, that the process (by which I mean the petition and all that follows thereon) had been lost, and there the Court set the sequestration in motion.

It is true that there is the case of *Anderson*, where the view taken by two of the Judges was that a proving of the tenor was necessary; but on the other hand Lord Rutherfurd Clark is entirely neutral on the point, and what is still more important is that this case of *Skirving's Trustee*, which had been decided two months before, was not mentioned to the Court. Accordingly, I think, we may proceed safely on the authority of the case in this division.

That being so, the question is, what order shall be pronounced? We are apprised by Mr Kennedy that there are questions as to the rights of certain creditors arising out of what has already been done by them in this sequestration. This being so, I think we should be rash if we prejudged the rights of creditors in any way at all, or did anything which would form a hard and fast rule for the action of the trustee in dealing with individual claims. It may be that some of the creditors will found upon their claims as having been already lodged in terms of the statute—that is to say, with vouchers and all—and it would rather appear that the trustee must consider individual cases and exercise his discretion, as, for instance, in the matter of advertising.

I think the safe course is that we should grant the prayer of the petition, stopping at the word "statute," on page 7, line 4. That will prejudge no man's case, and will enable Mr Kennedy's clients to found whatever argument is open to him upon the previous steps in the procedure, which they may be able to show to have taken place.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court pronounced this interlocutor:—

"Grant authority to the petitioner to proceed in the sequestration and to take all necessary steps therein for the division of the estate and otherwise, notwithstanding the loss of the claims and other documents, and the petitioner's consequent inability to use or produce the same in terms and for the purposes of the statute: And remit to the Sheriff of the Lothians and Peebles to proceed therein."

Counsel for the Petitioner—Cullen—R. S. Brown. Agents—Patrick & James, S.S.C.

Counsel for the Respondent—Watt—Kennedy—Trotter. Agent—M. G. Yool, S.S.C.

Tuesday, March 7.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

PATERSON (CHRISTIE'S JUDICIAL FACTOR) *v.* HARDIE AND OTHERS.

Marriage-Contract—Antenuptial Marriage-Contract—Power of Wife to Assign Marriage-Contract Provision Granted by her Husband.

By antenuptial marriage-contract a husband bound himself to pay to his wife, in the event of her survivance, an annuity of £300. He also assigned to trustees a policy of insurance on his life, to be held and applied by them in security to his wife "for implement and satisfaction to her of the provisions hereinbefore conceived in her favour."

During the subsistence of the marriage the husband and wife assigned in favour of a creditor of the husband the wife's interest in the annuity of £300, and also in the said policy.

In a competition with regard to the proceeds of the policy arising after the husband's death between the assignee and the judicial factor on the marriage-contract trust-estate, *held* (*aff.* judgment of Lord Kyllachy) that the assignation by the spouses was valid, and that therefore the assignee fell to be preferred.

Interest—Rate of Interest—Debt.

Interest at the rate of 5 per cent., following the general rule, *allowed* on a debt, *moratâ solutione.*

By antenuptial contract of marriage executed in 1885 Charles Jameson Christie bound himself, and his heirs, executors, and successors, to pay to his promised spouse Janet Anderson Rintoul after his death "a free yearly jointure or annuity of £300" so long as she should survive him, or in the option of his said spouse, and in place of the said annuity, to convey to her "in liferent for her liferent use allenarly" one-third of his whole estate, heritable and moveable. The annuity or liferent, as the case might be, was to be restricted to £120 in the event of his widow contracting a second marriage, and it was declared that such restricted annuity "shall be purely alimentary and not alienable or assignable by" the wife.

In security of the foregoing provisions Mr Christie assigned to certain trustees a policy of insurance for £2000, in trust for the following trust-purposes—"First, for payment of any expenses which may be incurred in the execution of the trust hereby created; second, that the said trustees may hold and apply the said policy of assurance, sums of money therein contained, and bonuses and additions, and others before assigned, after fulfilling the preceding purposes of this trust, in security to the said Janet Anderson Rintoul for implement and satisfaction to her of the provisions hereinbefore conceived in her favour." Mr Christie bound himself to pay the annual premiums on the policy, and declared that in the event of the provisions to his wife being otherwise secured to the satisfaction of the trustees they should be bound to execute any writings necessary to reinvest him in the policy.

In the same deed Janet Anderson Rintoul on the other part made over to and in favour of herself and her husband and the survivor in liferent, and the children of the marriage in fee, all her property and *acquirenda* "other than the provisions before specified."

By assignation in security dated 29th October 1879 Mr Christie for himself, and as administrator-in-law for his wife, and the said Mrs Janet Anderson Rintoul or Christie his wife, assigned to John Hardie and his heirs and assignees whomsoever, all right, title, and interest which Mrs Christie had or might thereafter have in the said annuity of £300, and also in the said policy of insurance. The assignation proceeded upon the narrative that "I, the said Charles Jameson Christie, am presently justly indebted to John Hardie . . . . the sum of £1321, 2s. 3d., and that we both [*i.e.*, Mr Christie and his wife] are desirous of securing him in payment thereof, as well as of legal interest now due and to become due."

The marriage-contract trustees never accepted office, and on Mr Christie's application a judicial factor was appointed on the trust-estate in 1871.

Mr Christie died on 7th March 1897, survived by his wife and ten children. Mr Alexander James Paterson, C.A., the judicial factor, received payment of the sum contained in the insurance policy, amounting with bonus additions to £3600, and raised an action of multiplepoinding with a view to the distribution thereof.

Claims were lodged (1) by Mr Paterson, who, as judicial factor, claimed the whole fund *in medio* "in order that he may administer and apply the same in implementing the provisions contained in the said antenuptial contract in favour of Mrs Christie and the children of the marriage;" and (2) by Mr Hardie, who claimed to be ranked and preferred to the extent of £2386, being the amount of the debt due to him by Mr Christie, *plus* interest at five