profits tax due by them to the Inland Revenue, leaving a nett sum due and payable by the Inland Revenue to the company of £6026, 1s. The reporter has called for an explanation why the liquidators closed the liquidation without taking into account the claim for repayment of excess profits duty, and it has been explained to him that while under the Finance Act 1921 (section 35) seven accounting periods, or 84 months, had to be taken for excess profits duty purposes, the liquidators had assumed that these periods terminated on the 31st day of March 1921—the date of the closing of the company's financial year—whereas they did not terminate until the 30th day of April 1921, thus leaving one month to be accounted for, and it is in respect of this month that the present sum of £6026, 1s. falls to be repaid by the Inland Revenue to the liquidator. The company having been dissolved the petitioners are not in a position to give an effectual receipt to the Inland Revenue for the said sum. The present application is accordingly brought under section 223 of the Companies (Consolidation) Act 1908 to have the dissolution of the company declared void for the purpose of authorising the petitioner James Finlay Muir to receive repayment of the said sum of £6026, 1s."

At the hearing in the Single Bills counsel for the petitioners, on the suggestion of the Court, moved their Lordships to allow the petition to be amended by deleting from the prayer the words quoted above in italics and to grant the prayer of the petition.

LORD PRESIDENT (CLYDE)—This is a petition presented under section 233 of the Companies (Consolidation) Act 1908 for a declaration that the dissolution of the company—which occurred less than two years ago—be declared void. The purpose is to enable the company to receive a considerable repayment of excess profits duty paid by it prior to its dissolution.

The reporter explains that the possibility of a repayment had not been foreseen owing to a misapprehension on the part of the company as to the true closing date of the accounting periods under section 35 of the Finance Act 1921. The case thus falls within section 223 of the Companies (Consolidation) Act 1908. The liquidation was a voluntary one, and, as it happens, the liquidator appointed by the shareholders is still surviving. Besides asking that the dissolution shall be declared to have been void, the prayer goes on to crave authority to the liquidator (who, as I have said, happens to survive) to receive the money and grant a receipt therefor. There is no warrant for this crave in the Act. I understand a similar crave has sometimes been granted in petitions of this kind under similar circumstances. But section 223 itself defines the only statutory consequences of the dissolution being declared void, namely—"thereupon such proceedings may be taken as might have been taken if the company had not been dissolved." It will be for the petitioners to consider what are the rights and powers of the liquidator consequent on the voidance of the dissolution.

We shall grant the prayer, as amended, to declare the dissolution to have been void.

LORD SKERRINGTON—I concur.

LORD CULLEN—I concur.

LORD SANDS—I concur.

The Court allowed the petition to be amended as proposed and declared the dissolution of the company to have been void.

Counsel for the Petitioners — Russell. Agents—J. & J. Ross, W.S.

Saturday, January 12.

FIRST DIVISION.

[Lord Constable, Lord Ordinary officiating on the Bills.

NAKESKI-CUMMING *v.* GORDON AND OTHERS.

Bankruptcy—Sequestration—Recal—Irregularity—Affidavit—Failure to Specify Security—Arrestment—Latent Defect—Bankruptcy (Scotland) Act 1913 (3 *and* 4 *Geo. V, cap.* 20), *secs.* 20, 21, *and* 30.

Sequestration of a bankrupt was obtained by creditors whose debts, amounting to £661, 7s. 6d., were constituted by decree against the bankrupt and his wife jointly and severally. In their affidavits the creditors omitted to specify a security held by them over the estate of the bankrupt's wife, consisting of an arrestment which had attached a sum of £23, and stated that they held no security for their debts. In a petition for recal of the sequestration, *held* that the omission to specify the security being a latent defect in the affidavit, the question of recal was one for the discretion of the Court, and, the irregularity complained of not having prejudiced the bankrupt *quoad* the granting of the sequestration, petition *refused.*

Michael Nakeski-Cumming, Edinburgh, *petitioner*, presented a petition in the Bill Chamber for recal of the sequestration of his estates. Miss Mary Guilia Gordon, Miss Alice Magdalene Gordon, and Miss Isabella Gordon, the creditors on whose application the sequestration was obtained, *respondents*, lodged answers.

The *facts* of the case are narrated in the opinion (*infra*) of the Lord Ordinary.

On 28th November 1923 the Lord Ordinary officiating on the Bills (CONSTABLE) refused the petition.

Opinion.—"This petition is based upon two grounds—(1) that the sequestration proceedings were nimious and oppressive, and (2) that the oath of the petitioning creditors failed to comply with the statute by specifying certain securities held for the debt.

"I am unable, either from the petition itself or from the argument of the petitioner, to discover anything which would support the first ground. The petitioner questions

the reality of the petitioning creditor's debt, but that debt rests upon a decree of the Court of Session, and the petitioner has already failed in an attempt to suspend a charge thereon. The petitioner also points out that the decree is four years old, and suggests that the motive of the sequestration was to disable him from insisting in an action to constitute certain claims against the judicial factor on the estate of the late Charles Gordon of Halmyre. But that action has already been disposed of by an interlocutor pronounced by Lord Morison on 8th November 1923, which bears:—'The Lord Ordinary, having considered the cause, assoilzies the defender from the conclusions of the summons, and decerns; and in respect that the pursuer stated, on the defender moving for expenses, that he did not intend to insist further in these claims, finds no expenses due to or by either party.'

"The petitioner's second ground is more arguable. Sections 20 and 21 of the Bankruptcy Act require the petitioning creditor to produce an oath specifying what other persons, if any, besides the bankrupt, are liable for the debt, and any security which he holds over the estate of the bankrupt or of other obligants. The debts in respect of which sequestration has been awarded in the present case were constituted by a decree against the petitioner and his wife, jointly and severally, and the affidavits of the petitioning creditors, while they specify Mrs Cumming as a co-obligant for the debts, state that the creditors hold no security for the debts. Now the present petitioner says that they did hold securities over the estate of Mrs Cumming in the shape of (*a*) an arrestment used in the hands of the Inland Revenue which attached a sum of about £23, and (*b*) a decree dated 25th July 1918 pronounced by the Sheriff-Substitute of Peebles in certain confirmation proceedings finding Mrs Cumming entitled to certain expenses against the petitioning creditors, which according to the present petitioner's statement amount to about £30.

"The latter claim is not admitted by the present respondents, but they admit that an arrestment was used in the hands of the Inland Revenue as stated. The question is whether the omission to specify it as a security held over the estate of the co-obligant is a sufficient ground for recalling the sequestration.

"It was in the first place contended for the respondents that an arrestment is not a security within the meaning of the Bankruptcy Act at all. In my opinion it is. Independently of authority I should reach this conclusion on the construction of section 2 of the Bankruptcy Act, which defines 'security' as including 'securities heritable or moveable, and rights of lien, retention, or preference.' But I think the point is settled by authority (*Woodside* v. *Esplin*, 9 D. 1486; *Gibson* v. *Greig*, 16 D. 233; *Dow* v. *Union Bank*, 2 R. 458; *Mitchell* v. *Scott*, 8 R. 875).

"The statute in providing machinery for the recal of a sequestration (section 30) gives no directions as to the grounds upon which the application should be granted, but there is a well-settled distinction between defects which are, and those which are not, apparent on the face of the sequestration proceedings. In the former case the Court has no discretion and must grant recal; in the latter case it has a discretion (*Ballantyne* v. *Barr*, 5 Macph. 330; *Mitchell* v. *Motherwell*, 16 R. 122). The present case clearly falls within the latter category because the affidavits are *ex facie* regular. Further, no special reason has been suggested, and I can see none, for supposing that the petitioner sustained any prejudice through the omission. If the affidavits had been framed in conformity with the facts sequestration would have followed all the same. Indeed it is difficult to see the object of the statutory requirement. It was not contained in the old Bankruptcy Act of 1814 (54 Geo. III, cap 137, sections 15, 18), but was introduced in the Statute of 1839 (2 and 3 Vict., cap. 41, section 9) where a common provision was applied to oaths for the purpose of petitioning, voting, and ranking, and the granting of sequestration was discretionary, and it has been retained in the two later Acts in which the requirements of oaths for these purposes are separately specified, and under which the award of sequestration is compulsory. Further, it is to be noted that the later statutes make express provision for correction of oaths for the purpose of voting or ranking, and it has been held that corrections may be made after voting has taken place (*Latta* v. *Dall*, 4 Macph. 100). It would be a curious result if an omission which can be rectified for these purposes must be held fatal in a petition for recal. Only one authority comes near the present case (*Mitchell* v. *Motherwell*), but I think it is distinctly favourable to the present respondents. The petitioning creditor had failed to specify an inhibition which he had used against the debtor, and the omission was held to be no sufficient ground for recalling the sequestration. It appeared that in fact the inhibition had attached no estate, but the Lord President (Inglis) in his opinion added—'Even if it had secured something that would not have led to the dismissal of the petition for sequestration, nor would the proceedings have necessarily been thereby invalidated. The matter would have been rectified in the course of the sequestration.' The Lord President and Lord Shand both in their opinions indicate the absence of prejudice as an important element in the exercise of the Court's discretion. The contemporaneous decision in *Blair* v. *North British and Mercantile Insurance Company* (16 R. 325), where a sequestration was recalled on the ground that no oath had been administered to the petitioning creditor, is significant by way of contrast, the oath being, it was pointed out, the necessary foundation of a series of statutory provisions, and the omission of it being, in the words of the Lord President, 'utterly illegal' and 'also immoral.'

"I am of opinion that the defect or defects which are founded on in the present case, being of a technical character which did not prejudice the debtor, are not suffi-

cient to warrant the recal of the sequestration; and I shall therefore refuse the petition."

The petitioner reclaimed, and appeared personally in the summar roll in support of his reclaiming note. Counsel for the respondents was not called upon.

LORD PRESIDENT (CLYDE) — The oath which accompanied the petition for sequestration omitted mention of an arrestment which ought to have been referred to therein as constituting a security over the estates of the debtor's co-obligants.

Sequestration is a form of diligence, and all forms of diligence are *strictissimi juris* in the sense that any defect or flaw in the form of diligence resorted to which is patent upon its face makes the diligence bad and exposes it to the liability of recal. But the irregularity complained of here is not a patent defect. It is a latent one. When the objection is of that character it is clear upon the authorities that the question of granting or refusing an application for recal is one which has to be solved by an exercise of the Court's discretion, and with regard to the exercising of that discretion in the present case we have carefully considered what ought to be done. If these securities, the value of which is stated in the petition, and is trifling in relation to the debt which was the ground of the petition, had been fully disclosed at the time the petition was presented, they would have formed no obstacle to the granting of the petition. So far therefore as prejudice to the debtor was concerned there was none.

We have to consider, of course, whether the omission involved any substantial defect involving the legality of the proceedings themselves, such, for instance, as a statement in the petition that the oath had been duly taken, whereas in point of fact no oath had been taken at all — *Blair* v. *North British and Mercantile Insurance Company*, (1889) 16 R. 325. But the irregularity complained of in the present case is not of that character. Again, we have to consider the general circumstances of the case as bearing on the question how the exercise of our discretion might prejudice the interests of parties. To recal the sequestration would, of course, be against the interests of the creditors, and since the irregularity complained of did not prejudice the debtor with respect to the granting of the sequestration, there is nothing before us to show any prejudice to him by refusing to recal it. In these circumstances it appears to me that there is no ground upon which we should be justified in exercising our discretion to recal the sequestration. As was pointed out by Lord President Inglis in the case of *Mitchell* v. *Motherwell* (16 R. 122), even if the oath omitted mention of an inhibition directed against the debtor's heritable estate which attached estate, that would not necessarily lead to the recal of the sequestration, especially in view of the fact that for all practical purposes of the sequestration such an omission could be put right in the later proceedings in connection with the voting and ranking. I agree with the Lord Ordinary in thinking that the vague and general averments in the petition with regard to oppression and fraud are not such as would entitle them to be treated as relevant. Therefore I am for adhering to the Lord Ordinary's interlocutor.

LORD SKERRINGTON — Section 30 of the Bankruptcy (Scotland) Act 1913 is similar to the corresponding sections of the earlier Sequestration Acts in this respect, that it does not afford any assistance to the Court as to the grounds upon which it ought to proceed in granting or refusing a petition for recal of a sequestration. Accordingly one is thrown back upon practice as embodied in the decisions of this Court, and the decisions are clear as to what the Court ought to do. If there is an irregularity on the face of the proceedings, the Court must apply the ordinary rule applicable to diligence and recal the sequestration. On the other hand if the objection is latent, as in the present case, the Court has a discretion in the matter. In the exercise of that discretion it would consider whether creditors who are not responsible for the irregularity would be prejudiced if the sequestration should be recalled, but that consideration is absent from the present case. Again, it would be material if the irregularity in the proceedings was due to fraud upon the part of the creditor who petitioned for sequestration or his agents. Charges of this kind are contained in the petition for recal, but in my judgment they are irrelevant. Again, it would be material if the petition for recal contained a relevant averment to the effect that the bankrupt had suffered prejudice in consequence of the petition for sequestration having failed to disclose some fact which the statute requires to be disclosed in such a petition. The irregularity of which the bankrupt complains is the failure of the petitioning creditor to disclose the existence of a security which he alleges that the creditor held over the estate of a co-obligant, but the petition for recal fails to allege relevantly that the bankrupt suffered any prejudice in consequence of the non-disclosure. I agree with your Lordship that the petition for recal ought to be refused.

LORD CULLEN—I concur. It is not contended by the petitioner that if the securities in question had been duly set forth in the oath their existence would have formed any ground whatever for refusing the petition for sequestration; and having given my best consideration to all that he has said in his speech I have been unable to discover any case of real prejudice capable of arising to him from the omission of mention of the securities which should lead us to exercise our discretion by granting a recal.

LORD SANDS—I concur.

The Court adhered.

For the Petitioner—Party.

Counsel for the Respondents—Carmont. Agents—Mackenzie, Innes, & Logan, W.S.