On 9th August 1888 the Lord Ordinary officiating on the Bills (SHAND) pronounced this interlocutor — ". . . Before disposing of the question which has arisen in regard to the extent of the petitioner's obligations to provide for his younger children by bond and disposition in security affecting the estates sought to be disentailed, Appoints the petition to be intimated to the Right Hon. George Arden Baillie Hamilton, Earl of Haddington, Tyninghame House, Haddingtonshire, and the Hon. Henry Robert Scott, barrister-at-law, London, being the surviving trustees under the antenuptial contract of marriage entered into between the petitioner and Lady Mary Hamilton Gordon, now Lady Polwarth, with consents therein mentioned, dated 29th January 1863, in whose names it is provided execution shall pass for implement by the petitioner of the provisions made by him in said marriage-contract, and ordains them to lodge answers thereto, or a minute stating the claim which they make for the securing of children's provisions to affect the estates sought to be disentailed as a condition of any disentail thereof, if so advised, &c.

"*Note.*—Without expressing a final opinion on the matter, which I should certainly not do until I had the benefit of argument, I may say that my impression is, that the reporter Mr Dewar is right in holding, notwithstanding the peculiar terms of the petitioner's marriage-contract, that the petitioner is bound to make provisions for his younger children to the extent stated in Mr Dewar's report, but that, on the other hand, I do not agree in Mr Dewar's view that the provisions to children should be made a postponed burden on the estate after a large amount of debt has been, in the first place, made a charge thereon. The argument on the petitioner's behalf on one or other of these points might lead me to form a different opinion, but if I were to give effect to this in the absence of any one to represent the creditors in the obligation, the youngest children, serious injustice might be done. I am therefore clearly of opinion that in this, as in all other cases, where a creditor's right to have an estate about to be disentailed burdened with debts due to him is in question, and the heir seeking to disentail proposes to create a burden less than *prima facie* appears to be the full amount, or to give a postponed security only, the creditor must be called by intimation or service so that his interest may be represented and preserved. I have therefore pronounced the interlocutor ordering intimation to the gentlemen charged with the protection of the petitioner's children's interests by his marriage-contract."

The petitioner thereafter lodged a minute in process, in which he stated that with reference to the views indicated by Lord Shand he was quite willing to grant the required bond and disposition in favour of his younger children without its being postponed to a power to borrow, as proposed by the reporter, and accordingly craved the Lord Ordinary to remit to Mr Dewar to adjust and see executed and recorded the necessary deed.

Counsel for the Petitioner — H. Johnston. Agent—George Bruce, W.S.

Tuesday, January 8, 1889.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

BLAIR *v.* NORTH BRITISH AND MERCANTILE INSURANCE COMPANY.

Bankruptcy—Sequestration—Recal—Affidavit—Extrinsic Objection—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. c.* 79), *sec.* 22.

The affidavit of a petitioning creditor in a sequestration was *ex facie* conform to statute, but it appeared on a proof that he had never been put upon oath. The Court, holding that this irregularity was a ground for recal of the sequestration, pronounced an interlocutor recalling it, on being satisfied that no rights or preferences of creditors would be affected by the recal.

The estates of William Blair, bookseller, in Dundee, were sequestrated on 28th August 1888 at the instance of the North British and Mercantile Insurance Company. He thereafter presented a petition to the Court craving recal of the sequestration, in which he averred, *inter alia*—"The affidavit and claim produced with the said petition by the said company bears it was deponed to by Mr Philip Robert Dalrymple Maclagan, secretary of the said company, and that the oath was administered by Mr Frederick William Carter, one of Her Majesty's Justices of the Peace for the county of the city of Edinburgh. Notwithstanding that the said affidavit and claim bears that Mr Maclagan was solemnly sworn and interrogated by Mr Carter, it is believed and averred that Mr Carter did not put Mr Maclagan upon oath or interrogate him in any manner of way in relation to the contents of the said affidavit."

In answers lodged for the North British and Mercantile Insurance Company it was replied that the petitioner's averments were irrelevant, and ought not to be admitted to probation.

The Lord Ordinary (WELLWOOD) pronounced the following interlocutor:—"Finds that the petitioner has set forth no relevant or sufficient grounds for recal of sequestration: Therefore refuses the petition, and finds the respondents entitled to expenses, &c.

"*Opinion.*—The first ground upon which the petitioner maintains that the sequestration should be recalled is that the affidavit on which sequestration was awarded was not made upon oath. He states that he believes and avers that the Justice of Peace before whom it bears to have been made did not put Mr Maclagan, the respondents' secretary, upon oath, or interrogate him in any manner of way in relation to the contents of the said affidavit. This is denied by the respondents, and the affidavit is *ex facie* regular, and sets forth that the compearer was 'solemnly sworn and interrogated.'

"Now, the proceedings being *ex facie* regular, it is in the discretion of the Court to allow or refuse inquiry. The petitioner asks for a proof at large to contradict the formal document on which sequestration was awarded. Such averments are easily made, and it would manifestly lead to great inconvenience and expense to

creditors if an inquiry were granted in every case in which the bankrupt chose to assert that, contrary to the statement on the face of the affidavit, the petitioning creditor had not in point of fact sworn to the verity of the oath. But I am clearly of opinion that if inquiry is ever to be allowed in such cases it must be upon averments much more specific than those made in the present case. To use the words of the Lord President in *Gillon* v. *Cæsar*, November 1, 1882, 10 R. 61, 'the petitioner would require to state what are his means of knowledge of the alleged fact that there is something wrong, and in what manner he proposes to prove his averments.' In the course of the discussion in the present case I invited the counsel for the petitioner to give some further information upon these points, but he was unwilling to do so, and preferred to take a judgment upon the petition as it stood." . . . .

The petitioner reclaimed, and was allowed a proof of his averment that the petitioning creditor had never been put on oath, after he had made the following addition thereto—"Mr Maclagan did not attend before Mr Carter to get the oath administered, but after signing the affidavit sent it along to Mr Carter to be signed by him. Mr Maclagan and Mr Carter never met with reference to this matter."

The result of the proof was to show that no oath had been administered, but that the Justice of Peace (Mr Carter) had merely put some such question as the following to Mr Maclagan, secretary of the Insurance Company—"Is this all true?" Mr Maclagan and Mr Carter both declared that in their experience it was not the practice to administer the oath to a creditor.

It appeared from the book containing the proceedings in the sequestration that there was only £25 available for distribution, and that the balance of the heritable debt chargeable against the bankrupt amounted to £17,000, and that the sequestration had had no effect in creating or cutting down preferences or in equalising diligence.

Argued for the petitioner and reclaimer—The sequestration must be recalled on account of the omission to administer the oath as the statute required. The omission of a statutory requisite made the recal of the sequestration necessary—Bankruptcy Act 1856, sec. 21; *Wylie* v. *Kyd*, June 21, 1884, 11 R. 968; *Gillon* v. *Cæsar*, November 1, 1880, 10 R. 61; *Scottish Widows* v. *Buist*, July 4, 1876, 3 R. 1078, *per* Lord President, p. 1081; Ersk. Inst. iii. 5, 10; *Ballantyne* v. *Barr*, January 29, 1867, 5 Macph. 330; *Hall* v. *Colquhoun*, June 22, 1870, 8 Macph. 891; *Campbell* v. *Myles*, May 27, 1853, 15 D. 685; 28 and 29 Vict. c. 9; *Gibson* v. *Greig*, December 17, 1853, 16 D. 233, *per* Lord Ivory, 239; *Turnbull* v. *M'Naughton*, June 27, 1850, 12 D. 1097. Assuming that the Court had a discretion to recal or not, this was a case in which they would recal, as the sequestration was injurious to the petitioner without being of any benefit to the creditors.

Argued for the respondents—There was clearly a discretion in the Court here, the proceedings being *ex facie* regular—*Ballantyne* v. *Barr*, *supra*; *Lawrie* v. *Motherwell*, November 22, 1888, 26 S.L.R. 98. The Court in the exercise of its discretion would not recal unless the awarding of the sequestration had caused injustice to someone. Recal would affect not only the rights of the petitioning creditor, but also of the others who had relied on the sequestration granted at his instance. The practice followed here was a prevalent one, and the validity of numerous sequestrations might be affected by recal in this case. Probably there was no more solemn attestation than that contained in a notary's protest, and yet the Court had sustained protests where the procedure set forth in the protest had not really taken place—*Macartney* v. *Hannah*, February 11, 1817, Hume, 76.

At advising—

LORD PRESIDENT—The ground on which we are asked to recal this sequestration is, that the petition for sequestration which was presented by a creditor whose debt was of the requisite amount was not accompanied as the statute requires by an oath. The oath which is produced, or what is called the oath, appears *ex facie* regular, but it now turns out that it is not an oath at all. That, however, has been ascertained by evidence, and did not appear *ex facie* of the proceedings. It is therefore not imperative on us to recal the sequestration because of that defect; it is in the discretion of the Court to say whether they will recal the sequestration on that ground or not.

The distinction which has been established in a number of cases that have been referred to at the bar between objections arising *ex facie* of the proceedings, and objections which require to be established on proof, is now perfectly well settled in practice. In the one case the failure to observe the statute on the face of the proceedings is fatal; in the other case, where the defect in the proceedings or the objection to the proceedings requires to be verified by evidence, it is in the discretion of the Court to say whether they will sustain the objection or no. Now, in the present case it has been established that there was no oath taken at all, but the petitioning creditor, who appears as secretary of the North British and Mercantile Insurance Company, subscribed the paper which is also subscribed by one of Her Majesty's Justices of the Peace for the county of the city of Edinburgh, in which it is set out that the claiming creditor was solemnly sworn and interrogated, and that he deponed to the verity of the debt, and the paper winds up with these words—"All which is truth as the deponent shall answer to God." Now, it is no longer disputed—it cannot be disputed—that in so far as the paper sets forth that the secretary of this company was put upon oath, and that he deponed to the truth and verity as he should answer to God—so far as these statements are concerned this paper is entirely false, because no oath was administered. The lodging of an oath in a petition for sequestration is by no means a light or unimportant matter in the view of the Bankruptcy Act. There are several sections bearing upon it, as showing very clearly what the purpose and object of requiring the oath is. The 21st section provides that such a petition shall be accompanied by "an oath to the effect hereinafter specified," and "the effect hereinafter specified" is this, that the deponent shall swear to the verity of the debt claimed by him—that is in the 22nd section—and shall set out the security which he holds for the debt, if any. Now, it must be kept distinctly in view that this is an

oath of verity, and not an oath of credulity, and therefore it is quite clear from the sections to which I have already referred, that if a creditor makes a false statement, and swears to the verity of a debt which is not a debt, or makes any other wilfully false statement, he will be liable to be prosecuted for perjury. That is a result which would flow from the ordinary common law. But the statute does not even stand at the common law, because it attaches a very great importance to the form and effect of this oath which is lodged with a petition for sequestration. There is a special section applicable to this matter—section 178—which provides this—"If any person shall be guilty of wilful falsehood in any oath made in pursuance of this Act, he shall be liable to a prosecution either at the instance of Her Majesty's advocate or at the instance of the trustee, with the concurrence of Her Majesty's advocate, provided that in the latter case the prosecution shall be authorised by a majority of the creditors present at a meeting to be called for the purpose, and such person shall on conviction, besides the awarded punishment, forfeit to the trustee for behoof of the creditors his whole right, claim, and interest in or upon the sequestrated estate, and the same shall be distributed, either under the sequestration, or, if it be closed, under a process of multiplepoinding as is hereinbefore provided."

Now, looking at these provisions in the statute, one cannot fail to see that the Legislature have attached very great importance to the making of this oath, and it cannot in the least derogate from the importance of this oath that by another Act of Parliament it is provided that in certain cases an affirmation may be substituted for an oath in cases of this description, because that statute makes very special provisions as to the conditions on which affirmation shall be allowed to take the place of an oath. The 2nd section of the Statute 28 and 29 Vict. cap. 9, provides that if a person called as a witness, or required or desiring to make an affidavit or deposition in course of civil or criminal proceedings, shall "refuse or be unwilling from alleged conscientious motives to be sworn, it shall be lawful for the court or judge, or other presiding officer or person qualified to take affidavits or depositions, upon being satisfied of the sincerity of such objection, to permit such person, instead of being sworn, to make his or her solemn affirmation or declaration in the words following—'I do solemnly, sincerely, and truly affirm and declare that the taking of any oath is, according to my religious belief, unlawful, and I do also solemnly, sincerely, and truly affirm and declare,'" and so on, which is the substance of his affidavit. Now, the first observation I make here is that it is not merely the expression of a desire on the part of the person who seeks to affirm in place of swear that entitles him to do so. The judge or judges or magistrate must be satisfied of the sincerity of his objection to take the oath, and the party himself who proposes to make an affirmation instead of an oath must use the very words of the statute. There is no alternative form—nothing in the shape of an affirmation but "the words following" must be used, and among "the words following" are these, "that the taking of any oath is, according to my religious belief, unlawful." But still further, the next section provides that any false statement made in such an affirmation will subject the party making it to the pains of perjury. Now, if an affirmation of this kind, made under this statute, and with all these conditions and safeguards, had been laid before us, of course we should have sustained it. But what have we got? We have got a paper which is neither an oath nor an affirmation, and which therefore does not bind the conscience of the party, and does not subject him, if false, to the pains of perjury. It is therefore quite impossible to say that this paper can be taken as coming in place of or serving the purpose of an oath as required by the terms of the Bankruptcy Act.

Now, except for one consideration that would be conclusive of the whole matter, but no doubt we have here power to exercise a discretion for the reasons I have already stated, and in the exercising of that discretion we are bound to look at the circumstances of the case. If there had been a sequestration here, the awarding of which had had the effect of reducing undue preferences, or equalising diligences, or creating a right or cutting down a right, or of preferring one or more creditors, that might have been a reason for considering whether it was necessary in the circumstances of the case, for doing justice between the parties, absolutely to recal this sequestration. But in the present case it is not said—and obviously cannot be said—that the awarding of this sequestration, or the first deliverance on the petition, has had any of these effects. There has been no diligence cut down, no undue preference created, no equalising of diligence—nothing in short that yields to any particular creditor a right, or has deprived any particular creditor of a preference, which he would otherwise have had, and therefore I think this case is a very simple case under the Act of Parliament. It is said that in exercising our discretion we should not interfere with the sequestration unless its existence is to work some injustice to some person—in short, unless it is necessary, in order to do justice between the parties in Court, that the sequestration be recalled. I do not think that is the proper view. I think there are many considerations which ought to operate with us in exercising this discretion, and one of those which operates chiefly on my mind in the present case is this, that the recalling of this sequestration will be a most excellent example, and that if we were in the circumstances of this case to refuse to recal it that would be *pessimi exempli*, and would tend to perpetuate a practice which is utterly illegal, and I think is also immoral. Therefore I am for recalling the sequestration.

LORD MURE—I am of the same opinion. This practice which your Lordship has alluded to has crept in to a great extent. It has been seen in other cases, but it is not in accordance with the statute, and, as matter of fact, does not comply with one of its provisions. As I read the Bankruptcy Act, when a petitioning creditor presents his application to enable him to obtain sequestration, the oath is absolutely essential. I concur with your Lordship, that when the proceedings are *ex facie* regular the Court have a discretion, and may dispose of the sequestration as circumstances may appear to warrant one way or the other. Here I think no harm would be done by stopping the sequestration that is

going on, because on the admitted facts of the case it appears that the sum covered by the sequestration is about £25, and the balance of the heritable debt which is claimable against the bankrupt is £17,000. I think it would be of the greatest possible advantage to the parties (for there is nothing but a fight about expenses to go on) that the sequestration shall come to an end. I concur with your Lordship in your remarks on the irregularity of the course of making an affidavit in the way in which I understand it has been done here, for the affidavit is framed as if the oath had been actually administered. There is no oath, in the sequestration, of any creditor, and yet the debtor is put into a position of sequestration by the producing of an oath which had not in fact been taken. I think we are obliged in this case, in the exercise of our discretion, to recal.

Lord Shand—I think the principles on which the Court should proceed in questions of this nature as to the recal of a sequestration have been very distinctly stated and settled in the case of *Ballantyne* v. *Barr*, and in the recent case of *Motherwell* v. *Lawrie*. If the proceedings disclose a case in which *ex facie* of the oath of the petitioning creditor there is something clearly wrong, then the sequestration ought to be recalled. Anyone looking at the oath is bound to see that it is not an oath which would warrant sequestration, and a third party cannot say he suffers any hardship if he does not examine the proceedings including the oath. If, on the other hand, the oath is in all respects *ex facie* regular, and a third party, a creditor, relies on that, the considerations are quite different when an application for recal of the sequestration comes to be made. The Court has held that in this class of cases there is a discretion to recal the sequestration or not, according to their view of what is just in the circumstances.

Accordingly, I think the question here is, whether in the discretion of the Court this sequestration ought or ought not to be recalled? It is a sequestration in which everything would appear to a third party to be *ex facie* regular. Now, in that aspect of the case, if it had appeared, now that we have the sederunt-book and the whole proceedings, that the recal of the sequestration would be a serious injury to the creditors generally, because it would leave or make preferences granted by the bankrupt unchallengeable which might otherwise have been set aside, I should have had the utmost difficulty in saying that the sequestration should be recalled. As was pointed out in the case of *Motherwell* v. *Lawrie*, section 42 of the Bankruptcy Act contains this important provision—"In all questions under this Act or preceding Acts regarding sequestration of the estates of debtors, the sequestration shall be held to commence and take effect on and from the date of the first deliverance on any petition for sequestration, which shall be held to be the date of the sequestration, although the sequestration be not actually awarded until a later date;" and again, under the title of "effect of sequestration on ranking of creditors," there are very important provisions in sections 107 to 111, both inclusive, of the statute which all take effect from the time when the first deliverance in the sequestration is granted. One of these is to the effect that the order shall operate as "a decree of adjudication of the heritable estates of the bankrupt for payment of the whole debts of the bankrupt, principal and interest." The second is that sequestration "shall be equivalent to an arrestment in execution and decree of forthcoming, and to an executed or completed poinding." There is an interruption of prescription by section 109, and cutting down of preferences by sections 110 and 111 of the statute.

Now, if the case had presented this aspect—that there were creditors here ranking who had relied on the sequestration in ignorance of the fact that the alleged deponent, the petitioning creditor, had not taken an oath, as he ought to have done, and their interests had therefore been prejudiced, because they had been induced to rest satisfied with this sequestration, and so had not taken proceedings themselves—then I should have said that in its discretion the Court ought not to recal the sequestration.

But in the cirumstances I entirely concur with your Lordship. I am of this opinion because the question is now one entirely between the bankrupt and the petitioning creditor. The bankrupt maintains that this creditor who seeks to maintain the sequestration is not in a position to do so, and neither the trustee nor any other creditor has resisted the recal. Your Lordship has gone fully into the provisions of the statute in regard to the necessity for an affidavit. Nothing could be more express than the enactment of section 22, which refers back to section 21—requiring that there shall be an oath taken—and that such oath shall be taken before the judge ordinary, magistrate, or justice of the peace. That is because these are the only parties who are in use or are entitled to administer oaths. The purpose for which the party goes before the judge ordinary, magistrate, or justice of the peace is, that he shall take an oath as the statute requires. Then, as your Lordship has pointed out, both under a declaration in terms of provisions of the Act 28 and 29 Vict. cap. 9, and under an oath duly made, a person who has made any false statement is, in the first place, liable to prosecution for perjury, and in the next place, is liable to forfeiture of his claim on the estate. These are circumstances showing the importance of the oath to be administered, but we do not require these circumstances, for section 21 makes it clear that an oath must be administered.

We have had previous cases of this kind. There was one in which in a competition for a trusteeship one of the parties stated that all the oaths on the other side were open to objection on this ground (*Wyllie* v. *Kyd*, 11 R. 968). I confess I was impressed with the conviction that the averment could only be stated to delay the case, or at least as a mere haphazard statement. I could not have believed that such an intolerable practice as appears from this proof could have existed. There is this to be said for the person appearing before the Justice on this occasion, that apparently business men had got lulled into the view that they may call a thing an oath which is not an oath, and I concur in thinking that the sooner business men are taught that this is an unsound view the better, and that we should recal this sequestration, if for no other reason with the view of marking decisively the

impropriety of proceedings of this kind.

I should like to add that I put my judgment on the general question, and not on the specialities of this sequestration. There may be little, if any, estate for division amongst unsecured creditors, but I can understand that the heritable creditors may find the sequestration valuable in enabling them to give a title. In cases of sale it is notorious that a title by the trustee in a sequestration is a valuable title, for it is generally free from exception, and I can understand why creditors should resort to sequestration in order to be able to give such a title. But if they do so they must comply with the provisions of the statute, which in this case I am satisfied has not been done.

Lord Adam—In my opinion the difference between *ex facie* objections and latent objections is perfectly sound, and well established in law, and I think it is also quite clear that the latter class, namely, latent objections which must be a subject of proof and inquiry as to whether they are established, will take place probably in nine out of ten cases in applications for recal of sequestration, for if they are not *ex facie* the sequestration will be granted, and therefore inquiries into latent objections will take place in the sequestration. And that being so, I have no doubt that it has been held in such cases that when the latent objection is established it is entirely in the discretion of the Court whether the sequestration be recalled. It occurs to me that where the truth of the latent objection has been established the sequestration should be recalled, unless it can be shown that there are interests involved which should lead to a different result, and accordingly I think the question is—Is it or is it not established as against the recal of the sequestration that other creditors have acquired rights which would be prejudicially affected by a recal? I think that would be the proper inquiry. If that be not shown, then I think that it should be recalled. Now, in the present case it has not been established, certainly it has not been so to my satisfaction, that any other creditor would be prejudiced. No preference has been acquired, no preference has been cut down, and so far as we can ascertain, nothing has been done whereby the interests of other creditors would he affected by the recal of this sequestration. If the affidavit is a bad one I do not know that the fact that it is a particularly bad one, as it is in this case, would affect the question whether the sequestration should be withdrawn as affecting the interests of the other creditors. In this case, though there is really no oath at all, if I had been satisfied that the other creditors would be prejudicially affected I would hesitate to recal, but being satisfied that they are not prejudicially affected, I concur with your Lordships that the sequestration should be recalled.

The Court recalled the sequestration.

Counsel for the Petitioner—Watt. Agent—William Officer, S.S.C.

Counsel for the Respondents—Balfour, Q.C.—Low—Maconochie. Agents—J. & F. Anderson, W.S.

Saturday, January 12.

FIRST DIVISION.

[Sheriff of the Lothians and Peebles.

THOMSON *v.* M'BAIN (THOMSON'S TRUSTEE).

Bankruptcy — Master and Servant — Implied Agreement—Claim for Wages for which there had been no Agreement—Presumption—Proof.

A long period of service raises a presumption that remuneration therefor was intended even although there was no agreement for wages.

A father lodged a claim in his son's sequestration, averring that he had served his son as vanman for seven years without receiving wages. It was admitted that there had been no agreement for wages. The trustee rejected the claim as collusive. On appeal, the Court *recalled* the trustee's deliverance, and allowed the claimant a proof of his averments as to the circumstances connected with the constitution of his alleged debt.

On 16th January 1888 Donald Thomson, merchant, Fearn, Ross-shire, granted a trust-deed for behoof of his creditors, and on the same day he granted a promissory-note for £160 in favour of his father Donald Thomson senior, and also a holograph acknowledgment that he was indebted to his father in this sum, being the amount of eight years' wages for his services as vanman. Donald Thomson senior lodged no claim under this trust-deed.

The attempted settlement under the trust-deed having fallen through, sequestration of the estates of Donald Thomson junior was obtained on 13th April 1888, and George M'Bain junior, C.A., Aberdeen, was appointed trustee.

Donald Thomson senior claimed in the sequestration. The trustee, on the ground that it was a collusive claim, rejected it.

Against this deliverance Donald Thomson senior appealed to the Sheriff of the Lothians and Peebles.

In his examination the bankrupt said—"I assisted in maintaining my father since I started business; my sister also contributed. My father lived with me till about three or four months ago. He acted as my vanman, but I gave him no wages, merely his meat and clothing. I never agreed to give my father wages."

In the minute lodged in the appeal the appellant averred, *inter alia*, that he was employed for eight years by the bankrupt as his vanman. Had he not so acted the bankrupt would have required to employ another assistant, and to pay him wages. He had rendered the service, but had received no wages, and long prior to February 1888 the present claim had not only been made, but had been admitted and arranged by the bankrupt.

The respondent (the trustee) averred that the claim was not lodged until sequestration proceedings were commenced. The appellant was just in the natural position of being maintained by his son, and partly in return for such maintenance, and partly to occupy his leisure time, he drove the van.