LORD ORMIDALE and LORD HUNTER did not hear the case.

The Court pronounced this interlocutor—

". . . Direct the Lord Ordinary to grant the crave in branch (1) of the prayer of the note. . . ."

Counsel for the Petitioners—C. H. Brown, K.C. — Maconochie. Agent — Wm. Hugh Hamilton, W.S.

Tuesday, February 5.

SECOND DIVISION.

WHITE CROSS INSURANCE ASSOCIATION, LIMITED, AND ANOTHER, PETITIONERS.

Bankruptcy — Sequestration — Recording Abbreviate of Sequestration — Failure Timeously to Transmit Abbreviate to Keeper of Register of Inhibitions—Abbreviate Transmitted more than Two Days after Date of First Deliverance—Application for Confirmation of Abbreviate already Recorded, or Alternatively for Authority to Record New Abbreviate—Nobile Officium—Bankruptcy (Scotland) Act 1913 (3 *and* 4 *Geo. V, cap.* 20), *sec.* 44.

The Bankruptcy (Scotland) Act 1913, sec. 44, enacts—"The party applying for sequestration shall present, before the expiration of the second lawful day after the first deliverance if given by the Lord Ordinary, or present or transmit by post before the expiration of the second lawful day after the said deliverance if given by the Sheriff, an abbreviate of the petition and deliverance, signed by him or his agent, in the form of Schedule A (No. 1) hereunto annexed, to the Keeper of the Registers of Inhibitions and Adjudications at Edinburgh, who shall forthwith record the said abbreviate in the said Registers, and write and subscribe a certificate thereof on the said abbreviate in the form also specified in the said Schedule A (No. 2), and shall, on the request of the party transmitting such abbreviate, and on payment by him of the fees of such registration, and of the postage, re-transmit the said abbreviate by post to the said party. . . ."

The petitioners in a petition for the sequestration of a bankrupt presented an abbreviate of the petition and the first deliverance of the Sheriff thereon to the Keeper of the Registers of Inhibitions and Adjudications, which he received and recorded, but the date on which the petitioners so transmitted the abbreviate was sixteen days after the date of the first deliverance, the petitioners having omitted *per incuriam* to transmit it within two days of the date of the first deliverance as required by the Bankruptcy Act. Thereafter the petitioners presented a petition to the Court of Session praying the Court either to confirm the abbreviate already recorded, or alternatively to authorise the petitioners to transmit a new abbreviate to the Keeper of the Registers of Inhibitions and Adjudications within two days of the date of the interlocutor granting the authority prayed for, and to authorise the Keeper to receive and record the abbreviate. The Court *refused* the first alternative of the prayer, but *granted* the second alternative.

The Bankruptcy (Scotland) Act 1913, sec. 44, is quoted *supra* in rubric.

The White Cross Insurance Association, Limited, 5 Moorgate Street, London, and Thomas Campbell, accountant, 170 Hope Street, Glasgow, as trustee on the sequestrated estates of Daniel Livingstone Maclachlan, motor salesman, lately carrying on business at 83 West George Street, Glasgow, and thereafter at 65 North Wallace Street, Glasgow, *petitioners*, presented a petition to the Second Division of the Court of Session in which they craved the Court "To ratify, approve, and confirm the recording of the abbreviate of the said petition for sequestration and deliverance by the Keeper of the Registers of Inhibitions and Adjudications at Edinburgh, or alternatively to authorise the petitioners the White Cross Insurance Association, Limited, to transmit within two days of your Lordship's final interlocutor hereon to the Keeper of the Registers of Inhibitions and Adjudications at Edinburgh an abbreviate of the petition for sequestration and the first deliverance thereon, and to grant warrant to and authorise the said Keeper of the Registers of Inhibitions and Adjudications to receive and record in the said Registers the said abbreviate, and to write and subscribe a certificate thereof on said abbreviate in the prescribed form. . . ."

The petition stated, *inter alia*, that on 9th May 1923 the petitioners the White Cross Insurance Association, Limited, presented a petition to the Sheriff of Lanarkshire for sequestration of the estates of Daniel Livingstone Maclachlan, and that on 14th June 1923 the Sheriff confirmed the appointment of the petitioner Thomas Campbell as trustee, and awarded sequestration. The petition stated further—"That *per incuriam* the petitioners the White Cross Insurance Association, Limited, omitted to present or transmit to the Keeper of the Registers of Inhibitions and Adjudications an abbreviate of the petition and the first deliverance thereof within the time prescribed by the statute.

"The petitioners the White Cross Insurance Association, Limited, however, presented an abbreviate of the petition and deliverance in the form of Schedule A (No. 1) to the Keeper of the Registers of Inhibitions and Adjudications at Edinburgh on 25th May 1923, and this abbreviate was recorded by the said Keeper in said Registers, and a certificate in the form prescribed was written thereon. As, however, the abbreviate was not presented in accordance with the provisions of said Act, this petition is presented to the

nobile officium of the Court" [in accordance with the crave of the petition quoted *supra*].

"That the whole other requirements of the said Bankruptcy (Scotland) Act 1913 have been complied with by the petitioners, and the petitioners believe and aver that the omission which is the cause of the present application has not prejudiced the rights and preferences of any creditor."

Counsel referred to the following authorities — *Train & M'Intyre, Limited*, 1923 S.C. 291, 60 S.L.R. 193; *Stark* v. *Hogg*, 1886, 23 S.L.R. 507; *Allan*, 1861, 23 D. 972; *A B*, 1858, 21 D. 24; *Tolmie*, 1853, 16 D. 105; *Munro*, 1851, 13 D. 1209.

The Lord Justice-Clerk referred to *Martin*, 1857, 20 D. 55.

LORD JUSTICE-CLERK (ALNESS)—This is a petition by the White Cross Insurance Association and by the trustee on the sequestrated estates of Daniel Livingstone Maclachlan. It is presented to the *nobile officium* of the Court in these circumstances —On 9th May 1923 the White Cross Association presented to the Sheriff of Lanarkshire a petition for the sequestration of the estates of Maclachlan, and on that date the Sheriff pronounced a first deliverance granting warrant to cite the bankrupt. As directed by section 44 of the Bankruptcy Act of 1913, an abbreviate of the petition and deliverance following upon it should have been transmitted within two days to the Keeper of the Registers of Inhibitions and Adjudications for recording. *Per incuriam* this was not done. On 25th May 1923, however, an abbreviate was presented to the Keeper and was recorded by him. Whether he had any right or duty to record the abbreviate thus tardily presented to him, or whether, when recorded, that abbreviate had any effect in law, I reserve my opinion, as the question was not fully argued before us. I am disposed, however, to think that the Keeper should not have registered the abbreviate and that its registration was in the circumstances ineffectual.

The prayer of the petition to this Court alternatively craves that the already recorded abbreviate should be ratified, approved, and affirmed by the Court, or that the petitioners should be authorised, within two days of the interlocutor to be pronounced by the Court on this petition, to transmit to the Keeper an abbreviate of the petition and the first deliverance thereon, and that the Keeper should be authorised now to receive and record the abbreviate. In either event the petitioners' counsel admits that the rights and preferences of creditors (if any) cannot be prejudiced by the delay, and that these rights and preferences should be safeguarded in the interlocutor to be pronounced. I humbly advise your Lordships to grant the latter alternative of the prayer of the petition. For that course the cases which Mr Stevenson referred to, beginning with the case of *Munro* (13 D. 1209) appear to me to afford the necessary authority. It is true that the circumstances are not precisely the same in this case as in the cases which Mr Stevenson cited, because in all of them, I think, there was a subsisting and unrecorded abbreviate of sequestration. On the other hand if it be the case, as seems likely, that the attempt to record the abbreviate in this case was abortive, then these cases are a direct authority for the course which I venture to suggest to your Lordships we should here adopt.

LORD ORMIDALE — I entirely concur. I doubt very much whether the remedy suggested in the first part of the prayer of the petition is competent. I agree with the observation made that the first abbreviate not having been timeously lodged may well have no effect whatever. According to the statute the abbreviate ought to have been lodged within 48 hours after the date of the first deliverance, and that was not done.

I venture to think that the practice in the office of the Keeper of the Register of Inhibitions, following it is said the opinion of Crown counsel, under which abbreviates however late in being presented are accepted and recorded is a practice not warranted by the statute and is a bad practice. Obviously the result of it may frequently be to mislead the party presenting the abbreviate and to lead him to think that he has presented his abbreviate in due time. I do not know whether that was the case here, but a very long time has elapsed since the 23rd of May before any steps have been taken by the parties to have the error corrected.

On the other point I agree with your Lordship that we are following the normal course and the consistent practice of the Court in adopting the alternative prayer of the petition.

LORD ANDERSON—I concur. This is an example of a general class of case in which the Court in the exercise of the *nobile officium* is in use to correct blunders or errors that have been made in carrying out the procedure of the Bankruptcy Acts. Cases in the books show that other errors have been rectified by the Court, *e.g.*, making a mistake in the *Gazette* notice calling a meeting of creditors, or failing to insert a *Gazette* notice to that effect at all.

The particular error in this case is familiar, namely, a failure to record timeously the abbreviate of the petition for sequestration and the deliverance thereon. There is no doubt, on the authorities to which Mr Stevenson referred us, that that is an error which the Court is in use to rectify, and our duty is to rectify it. The only point is how that is to be done. The prayer of the petition is alternative that (*a*) what has been done should be ratified by the Court and allowed to stand, or (*b*) that we should instruct those responsible to proceed *de novo* by lodging a new abbreviate. I am of opinion that the latter is the proper course because an abbreviate which has not been timeously recorded is just in the same position as to its legal effect as an abbreviate which has never been presented for recording purposes at all.

I therefore agree with your Lordships in thinking that we should authorise a fresh

abbreviate to be transmitted as suggested in the alternative crave of the petition.

LORD HUNTER did not hear the case.

The Court pronounced this interlocutor—

"... Refuse the first of the alternative craves in the prayer of the petition: Grant the second alternative thereof, that is to say, authorise the petitioners to transmit within two days from this date to the Keeper of the Registers of Inhibitions and Adjudications at Edinburgh an abbreviate of the petition for sequestration and first deliverance thereon mentioned in this petition, and grant warrant to and authorise the said Keeper to receive and record in said Registers the said abbreviate, and to write and subscribe a certificate thereof on said abbreviate in the prescribed form: Reserve all objections to parties interested against the validity of the sequestration referred to in this petition and all answers to such objections, and declare that no part of the expenses of this present application and proceedings shall be chargeable against said sequestration, and decern: Dispense with the reading hereof in the minute book and authorise the issue of immediate extract."

Counsel for the Petitioners—J. Stevenson. Agents—Auld & Macdonald, W.S.

Wednesday, February 6.

SECOND DIVISION.

[Sheriff Court at Hamilton.

O'NEILL *v.* GIFFNOCK COLLIERIES, LIMITED.

Workmen's Compensation—Expenses—Discretion of Arbitrator—Successful Party Refused Expenses—Absence of Material Facts Justifying Refusal—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *Second Schedule* (7).

The Workmen's Compensation Act 1906, Second Schedule (7) as applied to Scotland, enacts—"The costs of and incidental to the arbitration and proceedings connected therewith shall be in the discretion of the . . . arbitrator, or sheriff."

In an arbitration under the Workmen's Compensation Act 1906 the arbitrator, having found that the workman was partially incapacitated and that the incapacity was due in part to the workman's failure to exercise his back, made an award as for partial incapacity, but found no expenses due to or by either party. No reason was assigned for refusing the claimant his expenses.

Held that there were no materials to justify the arbitrator in exercising his discretion as he had done, and that the workman was entitled to his expenses.

In an arbitration under the Workmen's Compensation Act 1906, in the Sheriff Court at Hamilton, between Charles O'Neill, drawer, 134 King Street, Pollokshaws, *appellant*, and the Giffnock Collieries, Limited, coalmasters, Giffnock Collieries, Thornliebank, Glasgow, *respondents*, the Sheriff-Substitute (HAMILTON) found no expenses due to or by either party.

The appellant appealed by a Stated Case, which set forth—"This is an arbitration in which the appellant claims compensation as for partial incapacity from 7th April 1923, in respect of an accident for which compensation had for some time been paid to him by the respondents as for total incapacity without any agreement or award.

"Proof was allowed and led before me on 17th October 1923, and I found that the following *facts* were admitted or proved:—1. That on 31st May 1922 the appellant, while in the employment of the respondents, received personal injury by an accident arising out of and in the course of his employment. 2. That the said injury consisted of his straining his back through falling while endeavouring to replace a hutch upon an underground set of rails. 3. That prior to his accident the appellant's average weekly wage was £3. 4. That the respondents paid compensation to the appellant as for total incapacity at the rate of £1, 15s. per week—the sum of 15s. being payable under the Workmen's Compensation (War Additions) Acts 1917 and 1919—up to 7th April 1923. 5. That at the last-mentioned date they refused to pay further compensation on the ground that the appellant had recovered from the said injury and was fit for his former employment. 6. That the appellant on 7th April 1923 had, and now has, partially recovered from the said injury, and that he then was, and now is, fit for light work. 7. That he has not yet fully recovered from the said injury and is not fit for his former employment. 8. That his present state of partial incapacity is due in part to the said injury and in part to his failure duly to exercise his back by light work or otherwise. 9. That the appellant is at present unemployed and earned nothing. 10. That it was not proved that there was any employment available to the appellant for which he was at the present time capable, and 11. That 10s. per week is, in the circumstances, a reasonable amount of compensation to be paid by the respondents to the appellant.

"I therefore awarded to the appellant the sum of 10s. weekly in name of compensation for partial incapacity for the period from 7th April 1923 until the further orders of Court, and found no expenses due to or by either party."

The *question of law* for the opinion of the Court was—"On the foregoing facts was I bound to award expenses to the pursuer?"

The Sheriff-Substitute appended the following *note* to the Stated Case:—"After considering this case along with the medical assessor I have come to the conclusion that the claimant's condition is, and has since at least 7th April last been, one of partial disability due in part to the accident and in part to lack of proper treatment. I think that for some time past regular exercise for