Counsel for the First Parties—Sol.-Gen. Hunter, K.C. — D.-F. Dickson, K.C.— Macmillan. Agents—Simpson & Marwick, W.S.

Counsel for the Second Parties—Clyde, K.C. — Hon. W. Watson. Agents—Mackenzie, Innes, & Logan, W.S.

Wednesday June 29.

FIRST DIVISION.

DAILUAINE-TALISKER DISTILLERIES, LIMITED *v.* MACKENZIE AND OTHERS.

Process—Company—Companies (Consolidation) Act 1908 (8 *Edw. VII, c.* 69), *sec.* 120—*Order Asked for Meetings—Objection in Single Bills to Competency of Petition—Opportunity Given to Lodge Answers.*

A petition was presented, or bore to be presented, by a certain company for authority under section 120 of the Companies (Consolidation) Act 1908 to call and hold meetings to consider, and if so resolved approve of, a scheme of arrangement whereby the company would be absorbed in another company, the shareholders of the company receiving in return shares of the other company. A motion was made in Single Bills, in terms of the prayer of the petition, for intimation on the walls and in the minute-book in common form, and for an order for meetings to be convened of the members of the company, and of particular different classes of shareholders within the company, to consider, and if so resolved approve of, the scheme of arrangement. Objection was taken on behalf of certain shareholders to the order for meetings on the ground that the petition was the petition of the directors and not of the company, and not having been proposed "between the company and its members" was incompetent under section 120. The Court, *holding* that it was necessary that an opportunity should be given for anyone who conceived that the petition was incompetent and did not fall within the provisions of the statute to be allowed to say so, appointed the petition to be intimated on the walls and in the minute-book in common form, and allowed all concerned to lodge answers, if so advised, within four days thereafter.

Company—Companies (Consolidation) Act 1908 (8 *Edw. VII, c.* 69), *sec.* 120—"*Arrangement Proposed between a Company and its Members*"—*Competency.*

The Companies (Consolidation) Act 1908, section 120 (1), enacts—"Where a compromise or arrangement is proposed between a company . . . and its members or any class of them, the Court may, on the application in a summary way of the company or of any . . . member of the company . . . order a meeting of . . . the members of the company or class of members, as the case may be, to be summoned in such manner as the Court directs."

A petition was presented in the name of a company, but admittedly really by the directors thereof, for authority under section 120 of the Companies (Consolidation) Act 1908 to call and hold meetings to consider, and if so resolved approve of, a scheme of arrangement whereby the company would be absorbed in another company, and finally for sanction of the scheme.

The Court *held* that the petition was premature, because before they could order a meeting under section 120 they must have before them an arrangement or proposed arrangement between the company and its members, and be asked by the company or by its members to interfere for the purpose of calling a meeting, and that neither of these conditions was satisfied, because the directors were not entitled to speak for the company in this matter, amalgamation not being an ordinary purpose of management; but *sisted* the petition to give the directors an opportunity of bringing about that an arrangement should be proposed between the company and its members.

The Companies (Consolidation) Act 1908 (8 Edw. VII, c. 69), section 120 (1), is quoted in the rubric, *supra*.

The Dailuaine-Talisker Distilleries, Limited, presented a petition for authority to call and hold certain meetings, and for sanction of a scheme of arrangement. The nominal capital of the company authorised by the memorandum and articles of association was £580,000, divided into 29,000 preference shares of £10 each and 29,000 ordinary shares of £10 each. The whole of the said share capital was issued, and was fully paid. Of the said ordinary shares 9000 were voluntarily surrendered to the company by shareholders conform to special resolution passed on 4th and confirmed on 25th May 1901. That reduction of capital was duly sanctioned by the Court. Accordingly the capital of the company was at the date of the petition £490,000, divided into 29,000 preference shares of £10 each—£290,000, and 20,000 ordinary shares of £10 each—£200,000. The preference shares were entitled to a fixed cumulative preferential dividend at the rate of 5 per cent. per annum, and to rank both as regards dividend and capital in priority to the ordinary shares.

The company was established, *inter alia*, for the following objects:—"(1) To acquire and take over as going concerns the business of distillers, maltsters, bonded store and warehouse-keepers, merchants, and others, heretofore carried on at Dailuaine Distillery in the county of Banff, Talisker Distillery in the Isle of Skye, the Imperial Distillery and the Central Glenlivet Bonded Warehouses, Carron, Strathspey, in the

county of Elgin, and the North of Scotland Distillery, Aberdeen, all in Scotland and elsewhere, and the whole heritable and moveable property, stock-in-trade, book-debts, cash on hand, together with the goodwill, trade-marks thereof, and the business and contracts in relation to the same, and . . . (2) to carry on, whether in the United Kingdom or elsewhere, business as distillers, maltsters, yeast makers, bonded store and warehouse-keepers — [then followed further details]. (9) Also to make and carry into effect amalgamation of interests in whole or in part, or other arrangements with any other companies, partnerships, or persons. (17) To sell, dispose of, or transfer, the business, property, and undertaking of the company, or any branch or part thereof, in consideration of payment in cash or in shares or in debentures or other securities of any other company, or partly in each of such modes of payment, or for such other consideration as may be deemed proper."

The articles of association contained, *inter alia*, the following provisions with reference to the "Powers of the Board," viz.—"95. . . . (4) They may, upon such terms as they think fit, but subject to approval of a general meeting of the company, and to the giving of the requisite notice for such meeting, amalgamate with or purchase or acquire the business and property of any company, partnership, or person carrying on any business included amongst the objects of the company as specified in the memorandum of association, and may pay for the same either in cash or in shares, to be treated as either wholly or in part paid up, or partly in cash or partly in such shares, or in such other manner as the board may from time to time deem expedient."

The articles of association contained, *inter alia*, the following provisions with reference to "Dissolution of the Company," viz.—"126. The dissolution of the company may be determined on by the company whether the object be the absolute and final extinguishment of the company, or the reconstruction or modification of the company, or the amalgamation of the company with any other company, or any other object. 127. If it shall at any time appear to the board that one-half of the capital of the company for the time being paid up is lost, they shall thereupon summon an extraordinary general meeting to consider whether or not the company shall be dissolved and wound up. 128. The company, by a resolution passed by three-fourths of the votes at an extraordinary general meeting, convened with notice of the object, and confirmed by a similar majority at a second extraordinary general meeting, convened in like manner, and held not less than fourteen days nor more than one month thereafter, may determine on the dissolution of the company."

The petition set forth:—"On incorporation on 7th July 1898 the company duly acquired the goodwill and whole assets of the businesses above referred to, and has since carried on business.

"When the company was formed it was at a time of prosperity in the trade, and prices and values were greatly inflated. The company took over the Dailuaine, Talisker, and Imperial distilleries when handsome profits were being made, and with expectations that they would be continued. At that time the demand for the company's whisky was greater than the supply from Dailuaine and Talisker Distilleries, and the new Imperial Distillery (then just built) was expected to overtake the demand. Then immediately followed the depression in the distillery industry, and ever since the depression has been getting gradually more serious, so that the new Imperial Distillery was never really required, and has been virtually standing idle since the company was formed, costing the company about £600 a-year. Following this long depression there have come the additional onerous duties imposed by Government, which has further depressed the trade.

"These conditions have been occupying the serious attention of the directors for some time, and amalgamation with some other equally important company appeared to offer the best chance of combatting the difficulties presented and of meeting the increased severe competition in finding markets for the company's output.

"As the result of negotiations with the Highland Distilleries Company, Limited, the directors of the two companies have entered into an agreement for an amalgamation of the company with the Highland Distilleries Company, Limited, and in order to carry out that agreement a scheme of arrangement has been prepared.

"Under the arrangement the petitioners are to transfer to the Highland Distilleries Company, Limited, their whole assets of every kind, subject to that company discharging their liabilities and obligations, which include an overdraft to the bank of about £38,000. The Highland Distilleries Company, Limited, are also to pay all expenses of and incident to the agreement of sale and the expense of liquidating the petitioners' company.

"The consideration for the sale which is to be received for behoof of the shareholders of the petitioners is to be £150,500, to be represented and taken by the petitioners in debentures and shares in the Highland Distilleries Company, Limited, in the following proportions." [A statement thereof followed, and also a statement of past dividends paid and present quotations of ordinary and preference shares of the Dailuaine-Talisker Distilleries, Limited.]

"It is part of the scheme that the Highland Distilleries Company, Limited, should reduce their present nominal capital by the amount of the subscribed capital at present uncalled, and it is contemplated that the shares of the Highland Distilleries Company, Limited, which will then be of £3, 10s. each fully paid, should be divided into shares of £1 each, and so be of the same denomination as those to be issued to the petitioners.

"The proposed scheme necessitates the

assets of the company being transferred to the Highland Distilleries Company, Limited, at a face value materially different from what they are entered at in the last balance-sheet of the company. This, however, is reasonable and necessary to enable the company to amalgamate with the Highland Distilleries Company, Limited, on equal terms, tested by the past profit-earning capacity of the two companies. The Highland Distilleries Company, Limited, has been in existence for over twenty years, and now possesses four distilleries, viz., (a) Glenrothes, (b) Bunnahabhain, (c) Glenglassaugh, and (d) Tamdhu." [Then followed a statement of the dividends paid by and quotations of the shares of the Highland Distilleries Company, Limited.]

"The scheme should yield to the respective shareholders of the two companies, on the reconstructed capital basis, a profit corresponding to the profits that each company was making before the Dailuaine-Talisker Distilleries, Limited, ceased to pay any dividend on its preference shares.

"There are great advantages to be obtained from the amalgamation, and the shareholders of the two companies will participate equally in these." [A statement of the advantages followed.]

"The scheme may be sanctioned by the Court after it has been approved of by the requisite majority of the shareholders, in accordance with section 120 of the Companies (Consolidation) Act 1908.

"The scheme involves that on its adoption and sanction by your Lordships the Company should, for the purpose of carrying out the scheme, including the distribution of the debentures and shares, go into liquidation. The liquidation would be placed under the supervision of the Court, and the necessary petition will be presented at the proper time."

[The petitioners quoted article 127 of the articles of association *v. sup.*]

"Having regard to the proposed terms, it may be suggested that *prima facie* one-half of the capital is lost. It is therefore proposed that prior to the meeting of the company to consider the scheme the shareholders should on the same day have an opportunity of considering whether or not the company should be dissolved and wound up.

"In the circumstances above explained, the company desire the authority of the Court to summon and hold meetings of the members of the company, and of the preference shareholders and ordinary shareholders of the company, for the purpose of ascertaining their wishes regarding the said scheme of arrangement, and, at the meeting of the company, of passing the appropriate resolution to wind up the company in the event of the scheme being sanctioned by the Court, with or without amendment.

"This petition is presented, and the procedure therein is regulated by the Companies (Consolidation) Act 1908, and particularly section 120 thereof."

The prayer of the petition was for the Court "to appoint this petition to be intimated on the walls and in the minute-book in common form, and to order meetings to be convened (*a*) of the members of Dailuaine-Talisker Distilleries, Limited, (*b*) of the holders of preference shares of that company, and (*c*) of the holders of ordinary shares of that company, for the purpose of taking into consideration, and, if so resolved, of approving of the compromises or arrangements set forth in the scheme of arrangement hereinbefore specified and hereto annexed; to authorise the board of directors of the company to fix the times and places of said respective meetings, and to appoint the secretary of the company, or its agents, to give at least seven days' notice thereof to the said members and shareholders, by advertisement once in the *Edinburgh Gazette*, and once in each of the *Glasgow Herald*, *Scotsman*, and *Times* newspapers; to appoint the secretary of the company or its agents to post, seven days at least previous to the day of such meetings, a notice stating the place, day, and hour, and the object of the proposed meetings, and accompanied by a form or forms of proxy and a copy of the said scheme of arrangement to every member and holder (or, in the case of joint-holders, to the first named) to his address as it appears in the register of members; to appoint the terms of said notice and advertisement and relative proxies to be adjusted at the sight and to the satisfaction of the Clerk of Court; and to appoint John M'Kissock Ross, one of the ordinary directors of the company, whom failing, William Grigor Allan, another of its ordinary directors, whom failing, such person as the said respective meetings may appoint, to act as chairman of the said meetings, and to direct the chairman so appointed to report the result of such meetings to your lordships; to authorise the secretary of the company, when giving notice of the meeting of the members of the company, to issue therewith a notice of a meeting to be held on the same day as said meeting, but prior thereto, to consider any resolution that may be submitted in terms of article 127 of the articles of association; and on resuming consideration hereof, with the report of the chairman of the said meetings, to sanction the said scheme of arrangement. . . ."

The petitioners moved in Single Bills on 18th June 1910 for intimation on the walls and in the minute-book in common form, and for an order for meetings to be convened in terms of the prayer of the petition, but objection was taken on behalf of Thomas Mackenzie, chairman and managing director, and also on behalf of certain other shareholders, to the order for meetings being granted, on the ground that the petition was incompetent as being really not the petition of the company but of the directors or a majority of the directors, and as not having been proposed "between the company and its members" in terms of section 120 of the Companies (Consolidation) Act 1908.

The opinion of the Court (LORD PRESIDENT, LORD KINNEAR, and LORD SALVESEN) was delivered by

LORD PRESIDENT—This is a petition presented, or at any rate bearing to be presented, by the Dailuaine-Talisker Distilleries, Limited, for authority to call and hold meetings, and for sanction of a scheme of arrangement. I need not dwell upon the precise character of the scheme. It is sufficient to say that it is a scheme under which this company will really be absorbed in another company under an arrangement by which the shareholders of the present company will receive an equivalent of the real value of their shares in the shares of the other company.

The prayer of the petition asks for intimation on the walls and in the minute book in common form, and it then goes on to ask for an order for meetings to be convened of the members of the company, and of particular different classes of shareholders within the company, and it makes elaborate provisions for giving the whole of the members and shareholders notice by advertisement, so that they may come to the meeting, and also for giving them notice of the particular scheme of arrangement that is desired, by a copy of the scheme being sent to them.

The question raised to-day is this. The petitioners have moved to-day in Single Bills for intimation, and for an order for the meetings. Objection has been taken on behalf of certain shareholders to the order for meetings being granted, and they ask for an opportunity of being heard on answers which they intimate that they are prepared to present. We have considered the question carefully, and the view of the Court is this. We think it is necessary that an opportunity should be given for anyone who conceives that the petition is incompetent—that is to say, that the scheme as proposed does not fall, so far as competency is concerned, within the provisions of the statute—to be allowed to say so.

We therefore propose to order intimation on the walls and in the minute book in common form, and to say in the interlocutor that answers, if any, must be lodged within four days. The case will then be put out at once, and while it will be for the persons concerned to consider whether they should or should not lodge answers that go to the merits as well as to the competency, they must understand that they will not be heard upon the merits at that stage—that is to say, that the only answer which we think can be made to proceeding to the next step, namely, to order meetings, is an objection to the competency of the whole petition as presented. If the respondents choose to put in answers on the merits, there is of course no harm in that and they will lie over. But the respondents are not, according to our view, bound to do so, because assuming that there is no good objection made to the competency, and assuming the meetings are held and the proposed scheme of arrangement carried, the arrangement will still have to be sanctioned by the Court, and before it is so sanctioned it will be perfectly possible for any dissentient person who has been beaten at the meeting to lodge by means of a note any objections which he conceives are in his mouth against the scheme upon the merits.

The Court appointed the petition to be intimated on the walls and in the minute book in common form, and allowed all concerned to lodge answers, if so advised, within four days thereafter.

Answers were lodged on 22nd June on behalf of Thomas Mackenzie, chairman and managing director of the company, and a holder of 652 preference and 4112 ordinary shares, and separate answers were also lodged on the same day on behalf of Alexander Wood and others, being shareholders of preference shares of a *cumulo* nominal value of £8380.

The answers for Thomas Mackenzie stated, *inter alia*—"Mr Mackenzie, while reserving all objections to the petition on the merits which may competently be stated by him by lodging additional answers, or in other appropriate form, objects to the competency of the petition upon the following grounds— . . . It is a necessary part of the scheme that the company should go into liquidation. The company is solvent and able to carry on its business. The directors have no power to put the company into liquidation, and equally no power to bind the company to liquidate. Liquidation is a matter for the company and the company alone to consider and resolve upon in general meeting. The petition though presented in name of the company is not the petition of the company. The company has never authorised the petition, and neither the petition nor the scheme of arrangement nor the agreement has been submitted to or considered by any general meeting of the company. The respondent submits that the directors having no power of their own to present the petition, and the company never having authorised it, the petition is incompetent and should be refused.

"The provisions of section 120 of the Companies (Consolidation) Act 1908, under which section the petition is presented, cannot be invoked by the petitioners, in respect that the proposed transfer of the whole undertaking and assets of the company to the Highland Distilleries Company is not a compromise or arrangement between the company and its members within the meaning of the said section. In substance and in reality the proposed transaction, as set forth in the said scheme of arrangement and agreement, is a transfer to the said Highland Distilleries Company within the meaning of section 192 of the said Act. The deviations from the forms and procedure prescribed by the said enactment which are involved in the proposals of the petitioners are incompetent, and are adopted as a device for the purpose of avoiding the rights of the respondent and other shareholders provided to them by said enactment and under

the articles of association of the company. Moreover, the petitioners cannot, under and in terms of the Companies Act, evade the conditions of said section 192 by placing the voluntary liquidation of the company under the supervision of the Court.

"None of the conditions have been fulfilled which are declared by the said statute, and in particular by sections 129 and 182 thereof, to be conditions under which a company may be wound up. The company is not a company 'liable to be wound up under the Act.' [Section 120 (3).]

"The Companies (Consolidation) Act 1908 makes no provision under any of its sections for the transfer of the whole undertaking and assets of a company to others, being in effect a liquidation of the company, except in the case of a company which is proposed to be or is in course of being wound up, and the petitioners do not aver, nor is it in accordance with the facts, that the company proposes to be or is in course of being wound up. No resolution for winding up has been passed by the company, nor has any application for winding-up been presented to the Court.

"The prayer of the petition upon a sound interpretation thereof craves power to reduce the share capital of the company, and the company has not passed a special resolution to reduce its share capital in terms of section 46 of the Companies (Consolidation) Act 1908.

"The prayer of the petition upon a sound interpretation thereof craves authority to wind up the company, and the company has not passed a resolution, nor has an application been presented to the Court, for the winding-up of the company."

The answers for Alexander Wood and others contained similar contentions.

Argued for the respondent Mackenzie, and adopted by the other respondents—The scheme was incompetent because the company were not really the petitioners. The directors had no power in this matter to represent the company without getting first authority in general meeting. It was incompetent because there was no arrangement proposed between the company and its members. It was incompetent also because it involved the reduction of the capital of the company—*Cooper Cooper* v. *Johnston*, Weekly Notes, 1902, p. 199, Buckley, p. 277. It was incompetent because it involved the liquidation of the company, and there was silence as to any circumstances which would justify liquidation. The petitioners had sought to apply section 120 of the Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69) to circumstances to which the section really applicable was section 192. Both these sections were, under the Companies (Consolidation) Act 1908, living sections, so that the cases of *Liquidator of the Melville Coal Company, Limited* v. *Clark*, July 2, 1904, 6 F. 913, 41 S.L.R. 715, and *Bruce Peebles & Company, Limited* v. *Whiteley's Executors*, November 28, 1908, 16 S.L.T. 506, no longer applied. A company could not exclude the section which was now 192 either by its articles of association—*Payne* v. *The Cork Company, Limited*, [1900] 1 Ch. 308—or by its memorandum—*Bisgood* v. *Henderson's Transvaal Estates, Limited*, [1908] 1 Ch. 743, which reviewed *Cotton* v. *Imperial and Foreign Agency and Investment Corporation*, [1892] 3 Ch. 454. Apparently the object of the petition was to avoid having to pay out dissentients as the petitioners would have to do under section 192.

Argued for the petitioners—The directors had power under article of association 95 to bring the petition in the name of the company. The practice in England was to get an order for such meetings — Buckley on Companies (9th ed.), p. 278. Section 120 of the Companies (Consolidation) Act 1908 was not meant to be confined to the case of a scheme between a company and its members, no part of which could have been brought under any other section. Section 120 and section 192 were not mutually exclusive. Under section 120 the Court might, if they saw fit, give dissentient shareholders similar rights to what they would have had under 192—Buckley on Companies, p. 431; *Cambrian Mining Company*, 48 L.T. 114—and so in *Canning-Jarrah Timber Company*, [1900] 1 Ch. 708, it was held just and equitable dissentient shareholders should be paid out, while in *Bruce Peebles & Company* (*cit. supra*) it was held not equitable. But the question whether or not it was equitable was really a question on the merits. *Cooper Cooper* (*cit. supra*) was a question of reduction of capital, and did not as here involve the extinction of the company. To hold that a majority had not power under section 120 to bind a minority would deprive the section of all efficiency or introduce a distinction between shareholders and creditors. On this power of compulsion they referred to *Tea Corporation*, [1904] 1 Ch. 12. The case of *Bisgood* was questioned in Palmer's Company Law (8th ed.), p. 411.

LORD KINNEAR—This is a petition for authority to call and hold meetings of a limited company for the purpose of carrying through a certain scheme of arrangement by which it is proposed that the company shall amalgamate with another company and thereafter carry on business. The petition is presented under the 120th section of the Companies (Consolidation) Act 1908, and the only question which we are now considering, and should dispose of, is whether the petition is competent. We have heard a good deal of argument which touches the merits of the proposed scheme, and touches also certain questions as to the manner in which it may be carried out, but the only question which we are in a position to decide is whether the petition at the present stage of the proceedings is competent or not.

I think that the petition is premature. The conditions of the 120th section, reading them shortly so as to make the provisions applicable to the particular case before us, and disregarding those that are applicable to different questions altogether, are, that

where an arrangement is proposed between a company and its members or any class of them, the Court may, on the application in a summary way of the company or any member, order a meeting of the members of the company to be summoned in such manner as the Court directs. The conditions which must be satisfied before we can order a meeting in terms of this section are that we have before us an arrangement or proposed arrangement between the company and its members, and that we are asked by the company or by the members to interpose for the purpose of calling a meeting. I do not think that here either of these conditions is satisfied.

The petition is presented in the name of the company, but it is admittedly presented by the directors, who have entered into certain provisional arrangements and now propose to carry them through by virtue of the proceedings authorised by the 120th section, but who have not brought the matter before the company itself. It is said that the directors are agents of the company, and are entitled to speak for them and to act for them in all matters in which it is competent for the company itself to act. I have no doubt that they are agents for all ordinary purposes of management, and for exercising all the powers competent to the company itself according to its constitution. They can conduct all the business which the company is able to conduct; but what is now proposed is an extraordinary procedure which is not within the scope of the memorandum or articles of association, but is authorised only by this Act of Parliament. It is said that it is in effect an agreement for an amalgamation which is, by the express terms of the 95th article of association, sub-section 4, a proceeding which the directors are empowered to take. That sub-section provides that the directors may, upon such terms as they think fit, and subject to the approval of a general meeting, amalgamate with or purchase or acquire the business and property of any company or person carrying on any business within the objects of the company according to the memorandum of association. I do not think that that clause puts the directors in any better position than they are under their general powers of management. If the directors are in a position to carry through the proposed amalgamation by virtue of the powers given to them by sub-section 4, they do not require the intervention of the Court; they can proceed upon their own authority to call a general meeting to consider the amalgamation which they propose. But it is because they desire to do something more than sub-section 4 enables them to do that they come here under section 120 of the Act of Parliament. They do not, however, present to us an arrangement or proposed arrangement in the sense of that section. The arrangement contemplated is an arrangement between the company and its members. There is no arrangement here between the company and its members, because there is no statement that the company has considered the arrangement at all so as to enable them to make a proposal to the members, and until something is proposed by the one party and accepted by the other there is no agreement. It is said that the clause contemplates not only a completed arrangement but any proposed arrangement. I do not think that makes any difference to the argument. My difficulty is that as yet nothing has been proposed either to or by the company. The first condition of the section is that the petitioners shall show to us that an arrangement has been proposed by the company to its members or by certain members of the company to the company as a whole. I think at the present stage of these proceedings nothing of the kind has been done; we have no proposed arrangement between the company and its members before us at all.

As I have said, we had a great deal of argument upon different and much more far-reaching objections to the actual proposal than that which I have now considered. I should be disposed to agree with the respondents' contention that a great part of the argument, if it were well founded, is logically applicable as a preliminary objection to the competency, although in effect it goes to the merits; but I think it will be much more advantageously considered at a later stage of the proceedings, if we ever reach such a stage, when the question on the merits is fully before us.

I think, therefore, that the petition is premature; but I think it would be extremely inadvisable—and might involve the company in unnecessary expenditure and unnecessary procedure—if we at once throw out the petition. Because, assuming that the arrangement may be a good one in itself and one which the company may be disposed to enter into, I think the directors should first have an opportunity of bringing it before the company, and the company should have an opportunity of considering whether it should propose to come to such an arrangement before the petition is finally thrown out. I should therefore move your Lordships to sist the petition in the meantime in order that the petitioners should have an opportunity of taking such action as they may think fit; and if the result of their proceedings should be that an arrangement is made or proposed between the company and its members, they may then move in the petition again in order to set the procedure of section 120 in motion.

LORD JOHNSTON—This application bears to be an application by the company, but the proposed arrangement is one which the company has not yet even considered. It emanates entirely from the board of directors, and in this matter I do not think that the directors are entitled to speak for the company. I agree, therefore, that before this petition can proceed the

directors must call a meeting of the company and get their approval, as a provisional matter, to the agreement which they, the directors, have proposed, and authority to proceed with this application. I agree also that this petition may be continued in order to allow these necessary steps, which should have been preliminary to it, to be taken.

LORD SALVESEN — I also agree. The machinery of this section may be set in motion in an appropriate case by any creditor or member of the company, as well as by the company itself. I think it is plain that before a creditor or member of the company can bring an application under section 120 there must have been some arrangement or compromise proposed by the creditor or member of the company to the company, and that it would never do to allow a member or a creditor who had made a provisional agreement with a third party involving the interests of the company, but without consulting the company at all, to obtain an order from the Court calling certain meetings to see whether the necessary majority in favour of this scheme could be obtained. If that is plain as regards a member or a creditor of the company, it appears to me equally to apply to the case with which we are here dealing — that of a proposed arrangement between the company and its members. In short, there must be two parties to a proposed arrangement, and before the Court can be asked to intervene there must be some evidence before the Court that a proposed arrangement of the kind embodied in the scheme has been submitted to both parties — proposed by one for the consideration of the other. So far as I can judge from this petition, nothing of the kind has been done. The scheme which has been brought forward by the directors on their own initiative alone — I shall assume at this moment entirely in the interests of the company—has never been submitted to the members of the company as such.

Strictly speaking, therefore, the petition ought to be dismissed as not brought in terms of section 120, but I agree with your Lordship in the chair that it is not desirable that we should throw it out, but should give the petitioners an opportunity of showing that there really is an arrangement proposed between the company and its members within the meaning of section 120 by submitting it to a general meeting of the company and obtaining their approval. On the other matters I also agree with your Lordship in the chair that it is desirable that we should refrain from expressing any opinion.

The LORD PRESIDENT was absent.

The Court sisted the petition *in hoc statu*, reserving all questions of expenses.

Counsel for the Petitioners (in Single Bills)—The Dean of Faculty (Dickson, K.C.) — Macmillan — (on the competency) Constable, K.C.—Hon. W. Watson. Agents—Davidson & Syme, W.S.

Counsel for the Respondent (Thomas Mackenzie)—Clyde, K.C.—Moncrieff. Agents—Gordon, Falconer, & Fairweather, W.S.

Counsel for the Respondents (Wood & Others)—Clyde, K.C.—Gentles. Agents—J. & R. A. Robertson, W.S.

Wednesday, June 22.

SECOND DIVISION.

STEWART AND OTHERS (WATSON'S TRUSTEES) v. WATSONS.

Succession—Election—Duty of Immediate Election—Prejudice by Delay—Provision to Widow of Annuity of £500 or such Other Sum as Trustees should Consider Reasonable, with Power to them to Vary Amount.

A testator directed his trustees to pay to his widow until her death or re-marriage £500 per annum, or such other sum as they in their discretion should think reasonable. He added in a codicil a power to his trustees to reduce or increase or vary the amount of this provision. *Held* that as no third party could show any prejudice from the postponement of the widow's election between this provision and her legal rights she was not bound immediately to elect.

Andrew Stewart, solicitor, Glasgow, and others, the trustees and executors of the late John Watson, warehouseman, Glasgow, acting under his trust-disposition and settlement dated 28th December 1891, and relative codicils, *first parties;* Mrs Jane Bruce Nicoll or Watson, widow of the said John Watson, *second party;* Joseph Watson, eldest son of the said John Watson, *third party;* and John Alexander Watson and Jeanie Watson, the whole remaining children of the said John Watson, both being in minority, *fourth parties*, brought a special case for the determination of, *inter alia*, the second party's rights under the deceased's testamentary writings.

By his trust-disposition and settlement the testator provided, *inter alia*—"(*Fourth*) I direct my trustees to hold the whole residue of my means and estate, and from the income thereof to pay to my said wife, or to others for her behoof, the sum of Five hundred pounds sterling per annum, or such other sum as my trustees in their discretion shall consider reasonable, so long as she remains my widow, for the maintenance of herself and the maintenance, education, and upbringing of such of my children as may reside in family with her, payable such annual sum half-yearly, quarterly, or in such other manner and in such sums as to my trustees shall appear most convenient and most beneficial to all concerned . . . : (*Fifth*) I direct my trustees during my said wife's lifetime and viduity, and after each year satisfying or providing for the allowance directed to be paid under