which the head-note is expressed conveys a different meaning in the one case from the other.

The true ground of judgment in *Russell's* case, to which I am able to give an intelligent assent (although I cannot understand how it squares with the decision in *Crabbe & Robertson*), is to be found in Lord Shaw's opinion, in which he points out that the only innuendo proposed by the pursuer was expressed in such terms as to preclude the defenders from taking the counter issue which they proposed, namely, "Whether the pursuer during the period from February till October 1911 repeatedly refused or delayed to make payment of his just and lawful debts to his trade creditors." That counter issue was founded on a list of eleven cases during a period of six months prior to the alleged slander in which the pursuer had been sued for debts and his creditors had been unable to obtain payment from him of the sums due at their due date, and only obtained payment after actions had been raised and in some cases after decree had been pronounced. I do not read his judgment as holding that the false publication of a decree in absence may not give a person against whom no decree has in fact been taken a ground of action; but that it does not reasonably infer an imputation of insolvency. He goes on to say—"Had the far less strained interpretation been put upon the words that the entry meant that this trader was a person who was refusing or delaying to pay his just debts this would have enabled the whole facts in both the issue and the counter issue to go before the jury because it was exactly that not unreasonable interpretation which the defenders were willing to meet, and if they had established their averments and their counter issue they would of course have been entitled to a verdict."

Now that innuendo is substantially the one which in the Lord Ordinary's opinion the pursuer has succeeded in establishing by the evidence which he adduced, and as there was no counter issue proposed it follows that he is entitled to damages. I do not think the case for the pursuer is made less strong but rather the reverse that the Lord Ordinary has also found it proved that the entry conveyed to the mind of the ordinary reader that the pursuer was a person to whom credit ought not to be given. For my own part I have no doubt, to use Lord M'Laren's language in *Crabbe & Robertson*, that the public look on the publication of a name in the "Black List" as equivalent to a note of doubt as to the credit or solvency of the individual. I accept, however, as now settled by the House of Lords that a false entry in Stubbs' Gazette that a decree in absence has been taken against a particular person does not naturally or reasonably imply that that person is insolvent, but that it may reasonably imply that he has refused or delayed to pay a just debt and is therefore a person to whom traders should be slow to give credit. Such an innuendo might have been met (or partly met) by the counter issue proposed in *Russell's* case, and would therefore have obviated the injustice which I think was the foundation of Lord Shaw's opinion. Had the latter adopted the view of Lord Kinnear as to the effect of the head-note as excluding any ground of action I should of course have been bound loyally to follow the judgment, although I confess I should have done so against my own conviction. I agree on this matter with the opinion of Lord Kincairney in *Crabbe & Robertson*, and with the substance of Lord Wellwood's decision in *Rarity* v. *Stubbs & Company*, 1 S.L.T. 74. I can easily conceive cases in which a head-note disclaiming a slanderous interpretation of a statement afterwards made instead of avoiding the slander may make it more pointed; and I observe that Lord Shaw expressly reserved his opinion on this point in the passage where he says—"I do not refer to the note which specifically stated that nothing was meant to be inferred except that a decree had been taken. It may be true that in a weekly gazette of this character a note so inserted might not alter the full effect of the wrong entry."

On the whole matter I have come to be clearly of opinion that the Lord Ordinary was right in finding a verdict for the pursuer, and as the question of the amount of damages was not raised I express no opinion upon it.

LORD GUTHRIE concurred.

The Court adhered.

Counsel for the Defenders and Reclaimers—The Solicitor-General (Morison, K.C.)—Garson. Agents—Balfour & Manson, S.S.C.

Counsel for the Pursuer and Respondent—J. A. Christie—A. M. Mackay. Agents—Manson & Turner Macfarlane, W.S.

Tuesday, July 2.

FIRST DIVISION.

BRUCE PEEBLES & COMPANY, LIMITED *v.* WILLIAM BAIN & COMPANY.

Company—Process—Petition—Compromise with Creditors Proposed by Directors without having Consulted Company—Competency—Companies (Consolidation) Act 1908 (8 *Edw. VII, cap.* 69), *sec.* 120.

Held (*dis.* Lord Johnston) that a petition presented in name of a company, whose directors had power to do everything not reserved by statute or the articles of association for the company itself, under section 120 of the Companies (Consolidation) Act 1908, for power to convene meetings and for sanction of a scheme of arrangement with the creditors of the company, was competent although the views of members of the company had not previously been ascertained.

The Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69) enacts—Section 120—"(1)

Where a compromise or arrangement is proposed between a company and its creditors or any class of them, or between the 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 creditor or member of the company, or in the case of a company being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or 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. (2) If a majority in number representing three-fourths in value of the creditors or class of creditors, or members or class of members, as the case may be, present either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors or the class of creditors, or on the members or class of members, as the case may be, and also on the company, or in the case of a company in the course of being wound up, on the liquidator and contributories of the company. . . ."

Bruce Peebles & Company, Limited, incorporated under the Companies Acts 1862 to 1907, and having its registered office at East Pilton, Edinburgh, *petitioners*, presented a petition craving the Court "to appoint intimation of this petition to be made on the walls and in the minute-book in common form; to order meetings to be convened (*a*) of the members of Bruce Peebles & Company, Limited, (*b*) of the holders of the mortgage debentures thereof, and (*c*) of the holders of the unsecured debentures thereof, for the purpose of taking into consideration, and if so resolved, of approving of, the 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 day and place of said meetings, and specially if they see fit to fix the place of meeting in London; to appoint the secretary of the company or its agents to give at least seven days' notice thereof to the said members and debenture holders by advertisement once in the *Edinburgh Gazette*, and once in each of the *Scotsman*, *Glasgow Herald*, 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 of proxy and a copy of the said scheme of arrangement to every member and debenture holder (or in the case of joint members or holders to the first-named) to his address as it appears in the registers of members and holders respectively; to authorise the secretary of the company when giving notice of the meetings to the members of the company to incorporate therein a notice as to the proposed alterations on the articles of association, so that the special resolution thereanent may then be considered with the view of passing and afterwards confirming the same; to appoint Frederic Ernest Andrews, the chairman of the company, whom failing Andrew Wilson Tait, one of its ordinary directors, whom failing Courtenay John Shiells, another of the 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; and on resuming consideration hereof with the report of the chairman of the said meetings, and upon the necessary special resolution as to the alterations on the articles of association being passed, to sanction the said scheme of arrangement, and to decern; or to do otherwise in the premises as to your Lordships may seem right."

Article 108 of the *Articles of Association* of the petitioners' company was in the following terms, *inter alia*—"The management of the company shall be vested in the board, who shall have and exercise all such powers of the company as are not by Act of Parliament or these presents expressly declared to be exercisable by the company in general meeting, subject nevertheless to such regulations as may be prescribed by the company in general meeting; but no regulation made in general meeting shall invalidate any prior act of the board which would have been valid if such regulation had not been made."

The *facts* were—The petitioners were incorporated on 5th December 1908 to acquire the business and assets and undertake the liabilities of a company of the same name then in liquidation, and to carry on business as electrical engineers. The acquisition of the business, &c., of the former company was carried out under a scheme of arrangement which was sanctioned by the Court by interlocutor dated 10th November 1908. The issued capital of the petitioners consisted of £162,459 in shares of £1 each fully paid. Under the scheme of 1908 holders of the 5 per cent. debentures of the former company became mortgage debenture holders in the petitioners' company. The 5 per cent. debentures issued by the former company amounted in all to £75,000. Under the scheme of 1908 the ordinary creditors of the former company became unsecured debenture holders. At the date when the petition was presented there were mortgage debentures outstanding amounting to £49,850, and unsecured debentures amounting to £51,072. The general objects of the scheme of arrangement referred to in the prayer of the petition were to continue the mortgage debentures, a higher rate of interest being paid thereon and a fund being created for the redemption of those debentures, and to convert the unsecured debentures into preference shares of £1 each.

The petitioners *averred, inter alia*—"As the date for redemption of both the said classes of debentures is fixed by the scheme of 1908 at 1st July 1918, and the finances of the company are not as yet sufficient to provide the money for their repayment, the position has been occupying the serious attention of the directors for some time, and certain suggestions have been made for meeting the situation. The directors are satisfied with the prospects of the com-

pany and are of opinion that it has a good future before it after the war. The company has been able to make business connections with other allied businesses which it is considered will be highly advantageous to the company. After giving the matter their most careful and mature consideration the directors have prepared a scheme of arrangement which they propose the company should enter into with both classes of the said debenture holders and a provisional agreement embodying the scheme has been entered into between the company and individual members of the mortgage debenture holders and unsecured debenture holders for and on behalf of these holders respectively. Such a scheme may be sanctioned by the Court after it has been approved of by the requisite majority of each class of these debenture holders in accordance with section 120 of the Companies (Consolidation) Act 1908. The directors also propose under direction of the Court to lay the scheme now proposed before an extraordinary general meeting of the company with the object of obtaining the approval of the members thereto."

On 11th February 1918 the Lord Ordinary officiating on the Bills (SALVESEN) pronounced the first order in the petition, ordering the meetings to be convened at such date as the directors might fix, appointing a chairman, and directing the chairman to report the result of the meetings to the Court. The directors called the meetings for 22nd February.

On 8th March 1918 William Bain & Company, Limited, incorporated under the Companies Acts and having their principal office at Lochrin Iron Works, Coatbridge, *respondents*, lodged answers to the petition.

The *Respondents averred, inter alia*—"As regards the procedure in this petition the following are the facts—There was, it is believed and averred, no general meeting of the shareholders held before the presentation of the petition, to which the proposal to put the new scheme before meetings either of the classes of members or of the classes of creditors concerned was submitted. The petition had the authority of the board of directors only. The petition was presented during the February recess to the Bill Chamber Judge, and no prior intimation of the intention to do so was given to the respondents. The prayer of the petition did not ask for any intimation except on the walls or for service on anyone concerned or for an order allowing answers. . . . The directors it is believed had proxies already secured to a large amount to enable them to carry their proposals in the different meetings which were called by the board for Friday 22nd February, ten days after the date of the advertisement of the interlocutor. There was thus no adequate time for those objecting to the fairness of the proposals to obtain support for their opposition. The favourable vote was to the extent of 97 per cent. in value—a proxy vote. The petition narrates a certain pretended provisional agreement between the 'company and individual members of the two classes of debenture holders for and on behalf of' these holders respectively. The averment may tend to mislead. The parties other than the company bear to be (1) one mortgage debenture holder, and (2) a single firm (D. F. Wishart & Company) holders of an unsecured debenture amounting to £80. These persons had and have no authority to act on behalf of those 'on behalf of' whom they are said to sign. They took no steps to obtain such authority, and the document is habile to bind nobody but themselves. They are mere nominees of the directors for the purpose of presenting a model agreement to the Court. On the other hand neither has the company in general meeting sanctioned said provisional agreement, the first parties to it being truly the board of directors. It is submitted that the whole proceedings are incompetent in respect (1) that the company in general meeting has never proposed to the debenture holders and to the members concerned the scheme now appended to the petition; (2) that the scheme is not one or other of the two forms which alone may be sanctioned under sec. 120 of the Companies (Consolidation) Act 1908, namely, a compromise between a company and its creditors or any class of them, or a compromise between the company and its members or any class of them; and (3) that it is incompetent in virtue of said section to sanction an arrangement by which creditors are against their will to be converted into holders of shares in the concern and to be deprived of the status and remedies of creditors."

Argued for the respondents—The petition was incompetent. No compromise or arrangement had ever been proposed between the company and any of its members or creditors, and that was a necessary preliminary to such an application as the present—Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69), sec. 120. The only proposals made were between the directors and the creditors. If the proposals were directors' proposals the petition was premature—*Dailuaine-Talisker Distilleries, Limited* v. *Mackenzie*, 1910 S.C. 913, 47 S.L.R. 717. Further, in the present case the interested parties had had no opportunity of considering the proposals or of getting the necessary information to enable them to judge of the merits of the proposals. Article 108 of the articles of association of the petitioners' company did not cover the present case. It was essential that every step contemplated by section 120 should have been taken—*In re Empire Mining Company*, 1890, 44 Ch. D. 402; *Edinburgh American Land Mortgage Company, Limited* v. *Lang's Trustees*, 1909 S.C. 488, 46 S.L.R. 340; *Caldwell & Company* v. *Caldwell*, 1916 S.C. (H.L.) 120, 53 S.L.R. 251. The proceedings at the meetings had not homologated the actings of the directors.

Argued for the petitioners—The petition was competent. The *Dailuaine* case (*cit.*) was distinguished, for there the directors were acting *ultra vires* in doing what they had done. Here the directors had power—Article 108 of the articles of association. If so there was no need to go to the company before coming to the Court—

Assets Company v. *Guild*, 1885, 13 R. 281, *per* Lord Shand at p. 292, 23 S.L.R. 170; Steibel, Company Law, pp. 726 and 727; Palmer's Company Precedents, 11th ed., Part i, p. 1492 and p. 1505; Gore-Brown's Concise Precedents, 4th ed., pp. 902 to 904; *Lang's* case (*cit.*); *Empire Mining Company's* case (*cit.*). But in any event, the company having met, the petition should be allowed to proceed—*Dynevor Dyffryn and Neath Abbey Collieries Company*, 1879, 11 Ch. D. 605; *Caldwell's* case (*cit.*). The First Schedule, Table A, section 71, of the Act of 1908 was referred to.

LORD PRESIDENT — This is a petition which bears to be presented at the instance of Bruce Peebles & Company, with the object of obtaining the sanction of the Court to a proposed arrangement with the company's creditors under section 120 of the Companies Act 1908, and incidentally thereto, of getting the authority of the Court to summon and hold meetings of the company, of the mortgage debenture holders, and of the unsecured debenture holders of the company in order that they may consider the scheme of arrangement.

Objection is taken to the competency of the petition on the ground that it is presented at the instance of the directors alone, and that the company has really no part or lot in the business at this stage. And it is common ground, I understand, that the provisional agreement that has been laid before us, although bearing to be sealed with the company's seal, and to be executed on the part of the company, was not approved of or considered by the company, but that it was the act of the directors alone. Under these circumstances it is said that a petition under the 120th section of the statute is incompetent, because antecedent to the presentation of that petition the terms of the provisional agreement ought to have been considered and approved of by the company.

Now a complete answer, it appears to me, to that argument is, on the assumption that the directors and the directors alone acted, that they have ample power conferred upon them by the articles of association of the company to effect such a provisional agreement and to present an application to the Court for the purpose of having it considered by the company and ultimately sanctioned. Article 108 provides that the management of the company shall be vested in the board, who shall have authority to exercise such powers of the company "as are not by Act of Parliament or these presents expressly declared to be exerciseable by the company in general meeting." To use the words of Lord Shand, commenting upon a similar clause in the articles of association of the Assets Company—*Assets Company* v. *Guild*, 1885, 13 R. 281, at p. 292, 23 S.L.R. 170—I say that "anything more ample in the way of powers given to directors could scarcely be conceived. They have all the power of the company itself, excepting only that they shall not exercise any powers which are by the Act of Parliament or by the articles declared to be exclusively exerciseable by the company alone by special resolution."

Accordingly it appears to me that the petition is competent at the instance of the company, although only the directors have taken part in the provisional agreement which preceded the presentation of the petition, and I am prepared on that ground to repel the objection to the competency.

But the *Dailuaine-Talisker Distilleries* case, 1910 S.C. 913, 47 S.L.R. 717, has been cited to us as an authority to the opposite effect. It appears to me, without making any comment upon the opinions expressed in that case, that the decision is in favour of the view which I have just indicated, and that if we followed the decision in the *Dailuaine* case the same course would be taken as I propose to your Lordships should be taken, although my ground of judgment is somewhat different.

LORD JOHNSTON—I think that this case is on the same lines as the *Dailuaine* case, 1910 S.C. 913, 47 S.L.R. 717, and that an irregularity has taken place in the action of the directors of this company in moving in this matter as they have done without authority from the company.

Although in the management of the company the board of directors are vested with all the powers of the company, still they are limited by the extent of the powers of the company. To take such a step as the directors did in the *Dailuaine* case was not in the power of the company acting through its directors merely, but only of the company in meeting assembled, and directing and specially authorising its directors. Unwarned by the *Dailuaine* case the board of directors here have again put the cart before the horse; and, they having neglected the warning given them by the Court, I should have been for throwing out this petition as incompetent. But something more has been done in this case under an interlocutor of Lord Salvesen in vacation. I cannot believe that his Lordship had had his attention drawn to the *Dailuaine* case, or I feel certain he would not have signed it. We are now practically asked to approve what Lord Salvesen did, and to carry matters a stage further in the condoning of irregularity by holding that what has now been done has put matters upon the rails, and that therefore this company and its directors are entitled to proceed with this petition as if it had been presented after the proposal had been submitted to a meeting of the company instead of before.

I think that such condoning of irregularity where important interests are involved and sought to be protected by statutory procedure is a dangerous course to take, and I am not at all satisfied that this will not appear when we get the report on the remit which we are now, I understand, asked to make. But as this is to be treated by your Lordships as a matter of discretion I content myself with indicating my doubts.

LORD SKERRINGTON — Counsel for the respondents raised a sharp question of competency, which turns upon the construction of section 120 of the Companies (Consolida-

tion) Act 1908. He contended that although we have before us a petition presented in name of Bruce Peebles & Co., in reality no such petition is before us because the name of the company has been used by the directors without any authority to that effect. It is common ground that the presentation of this petition was not authorised at any general meeting of the company. Accordingly if the true meaning of section 120 is, that as a condition-precedent to the institution of proceedings under that section the company must have given its approval by a resolution at a general meeting, then I should be disposed to say that the statute ought to be obeyed and the petition dismissed as incompetent. On referring, however, to the section I do not think that the respondents' construction is supported by its language. All that the section says or implies is that the application must be made by the company. Accordingly we are thrown back upon the general law and upon the particular contract of copartnery for the purpose of ascertaining what are the powers of the directors of this company as regards this particular bit of business. The words of article 108 of the articles of association are not ambiguous. It is there stipulated that the management of the company shall be vested in the board, who shall have and exercise all such powers of the company as are not by Act of Parliament, or the articles, expressly declared to be exerciseable by the company in general meeting. There is nothing either in the statute or in the constitution of the company which makes it necessary that the present petition should be sanctioned by a resolution of the company in general meeting. I express no opinion in regard to what bearing (if any) the failure to hold a general meeting of the company may have upon our judgment as to the fairness of the procedure and the propriety of sanctioning the proposed scheme. The decision in the *Dailuaine* case, 1910 S.C. 913, 47 S.L.R. 717, is in conformity with what I regard as the correct construction of the statute, though opinions may differ in regard to the scope and meaning of certain of the dicta by the judges who took part in the decision of that case.

The Court repelled the objections to the competency of the petition.

Counsel for the Petitioners—Sandeman, K.C.—Wilton. Agents—Davidson & Syme, W.S.

Counsel for the Respondents—The Lord Advocate (Clyde, K.C.)—A. M. Mackay. Agents—Drummond & Reid, W.S.