ance for the steamer shall be cancelled by the sellers and that the return premiums granted under same are for purchasers' account." These two terms are found in the letter of the 6th November. The former (*a*) was reproduced from the previous letter of the 1st November. Both are repeated in the telegrams exchanged on the 8th November. The contract was one which could be performed only by performance of the terms stipulated as regards each ship by the written contract relating to it and by performance also of the further terms which I have above marked (*a*) and (*b*). The sellers made default in performance as regards the "Claddagh." Their action therefore fails as regards the "Factor." The appeal in my judgment succeeds.

Their Lordships, with expenses, sustained the appeal, restoring the judgment of the Lord Ordinary, and dismissed the cross appeal.

Counsel for the Appellants—Hon. Wm. Watson, K.C. — Wright, K.C. — Carmont — Wylie (in Cross Appeal). Agents — Beveridge, Sutherland, & Smith, W.S., Leith —Thomas Cooper & Company, London.

Counsel for the Respondents—Sir John Simon, K.C. — Condie Sandeman, K.C. Agents—Maclay, Murray, & Spens, Glasgow —J. & J. Ross, W.S., Edinburgh—B. A. Woolf & Company, London.

Thursday, July 3.

(Before Viscount Finlay, Viscount Cave, and Lords Dunedin, Shaw, and Wrenbury.)

HINDLE *v.* JOHN COTTON LIMITED AND OTHERS.

Company—Directors' Powers—Articles of Association—Dismissal from Company of Managing Director—Appropriation of Dismissed Managing Director's Shares—Bona Fides—Averments—Proof.

In exercise of powers conferred by the articles of association of a company, the directors dismissed the managing director, resolved that he should cease to be a member of the company, and appropriated at the paid-up figure his shares, said to be worth a large premium. *Averments* as to want of *bona fides* on the part of the directors *held* (*rev.* decision of the First Division) sufficient to entitle to a proof.

On May 3rd 1918 Robert Hindle, *pursuer*, brought an action against John Cotton Limited, a company incorporated under the Companies Acts 1862–1900, and against C. R. W. Cotton, James Aikman Smith, and others, *defenders*, in which he sought to have reduced "(1) a pretended resolution of the board of directors" of the company, "dated 21st March 1918, resolving that the pursuer should cease to be a member of the company, and (2) a pretended appropriation of the pursuer's shares in the company, dated on or about 17th April 1918."

The pursuer pleaded—"(1) The pretended resolution by the directors of the company, dated 21st March 1918, and the pretended appropriation of the pursuer's shares following thereon, are incompetent, *ultra vires*, and illegal, and should be reduced in respect —(*a*) that article 36 of the articles of association, which is the alleged warrant for these actings, is contrary to public policy and illegal; (*b*) that the pursuer was not an employee whose membership of the company the directors could competently determine under the said article; (*c*) that the pursuer having previously given a valid notice for the transfer of his shares, under article 27 of the articles of association, it was incompetent for the directors to put in operation the provisions of article 36; (*d*) that the said resolution was passed, and the provisions of article 36 put in operation, by the directors at the instigation of the defender Mr Aikman Smith in bad faith, for the purpose and with the result of oppressing and defrauding the pursuer and appropriating to themselves the large surplus value of his shares."

The defenders pleaded—"(1) The averments of the pursuer so far as material being irrelevant and insufficient to support the conclusions of the summons, the action should be dismissed."

The *articles of association* of John Cotton Limited, *inter alia*, contained — Art. 27 — "Any member (other than the said George Cotton, or his legal personal representatives acting as such) who is desirous of transferring his ordinary shares, shall send by post to the company at the office a notice in writing specifying the number of shares he desires to transfer and naming the price which he asks for them." . . . Art. 36 — "Whenever a member of the company shall become bankrupt, or being an employee of the company (other than the said George Cotton) shall leave the company's service and be employed by any other person or persons or company carrying on the businesses or any of them authorised to be carried on by the company, or whenever a member is dismissed from the employment of the company for breach of faith, misconduct, or other offence which the directors deem prejudicial to the interests of the company, or from any other cause whatever, they may, at any time after such employee shall have left or been dismissed the company's service from whatever cause, resolve that he shall cease to be a member of the company; and thereupon he shall be deemed to have served the company with notice pursuant to article 27 hereof, and to have specified therein the amount paid up, or deemed to be paid up, on his shares as the proper price. Notice of the passing of any such resolution shall be given to the member affected thereby, and no employee of the company shall be interested as a partner or otherwise in any other firm, or shall hold shares in any other company carrying on the businesses authorised to be carried on by the company or similar businesses." . . . Art. 97 — "The office of director shall be vacated—(*a*) If he cease to hold the qualification of a director. (*b*) If he becomes bankrupt, or insolvent, or

compound with his creditors. (*c*) If he becomes lunatic or of unsound mind. (*d*) If he carries on, or is directly or indirectly engaged, either alone or in partnership with or as agent for any other person or persons, in the carrying on of any business similar to or competing with the business of the company or any branch thereof. (*e*) If he shall be removed by extraordinary resolution of the company; but this subsection shall not be applicable to the said George Cotton, nor to his nominee appointed in terms of article 91 hereof." . . . Art. 115—"The said George Cotton shall be the first managing director of the company, and he shall hold office until resignation or disqualification as a director, or such removal as is hereinafter mentioned, whichever shall first happen. On the said George Cotton ceasing to hold the said office the directors may from time to time appoint any director to be managing director, or any other person to be manager of the business of the company, either for a fixed term (subject to article 97), or without any limitation as to the period for which he is to hold such office; and they may fix the remuneration both of the said George Cotton and of any such managing director or manager who succeeds him in that office, and may, subject to any contract between either of them and the company, from time to time remove or dismiss him from office; but the company may, by extraordinary resolution, remove any managing director or manager before the time appointed for expiration of his office, and every such contract as is mentioned in the article shall be made subject to this provision."

The pursuer *averred*—"(Cond. 9) For some time prior to 1918 considerable friction existed between the pursuer and Mr Aikman Smith with regard to the accounts and investments of the company, with regard to which the pursuer was unable to get any satisfactory explanations. The annual accounts and balance-sheets were presented by Mr Aikman Smith in an unintelligible form, and he resented all inquiries with regard to them. Finally he devised a plan to get rid of the pursuer and forfeit his shares, and having during the pursuer's absence on holiday persuaded the other directors, namely, his partner Mr Wells and the defender Mr Cotton, to agree to this course, he informed the pursuer at a meeting of the board held on 27th February 1918 that the directors had resolved to dismiss him from his office in the company. With reference to statements in answer, admitted that the secretary sent the list of investments referred to, and that the accounts and balance-sheets were audited by the firm mentioned. Explained that they accepted the figures in said stock books as correct, as they were entitled to do. *Quoad ultra* denied under reference to explanation in preceding condescendence with reference to the annual accounts and balance-sheets. (Cond. 10) The ostensible reason assigned for this resolution was the pursuer's relations with a girl, formerly an employee of the company, who had left the company's service in 1914. The incident came before the board and was discussed about the time when the girl left, and it was dismissed by Mr Aikman Smith with the observation that as the girl was now out of their service the board had nothing more to do with it. The pursuer's offence so far as it affected the company was thus condoned, and the matter of pursuer's said relations was again brought forward in 1918 as a mere device to cloak the scheme which at the instigation of Mr Aikman Smith the board now proceeded to put into execution. With reference to the statements in answer the correspondence and extract certificate of birth are referred to. Admitted that the pursuer is the father of the child referred to in the said certificate. Explained that the pursuer was not summoned to the meeting of directors on 20th February 1918. Explained further that at the date of the directors' pretended resolution of 21st March 1918 the pursuer was still a director of the company. The pretended minutes of meetings of directors are referred to for their terms. Admitted that the other directors intimated to the pursuer that they were agreeable to enter into an agreement with him on the terms mentioned in the answer, and explained that the pursuer has never refused to negotiate on these terms, provided suitable and reasonable safeguards were granted to make the terms effective, and in particular if the pursuer were protected against an attempt to forfeit his shares under article 36. The pursuer as an alternative offered his shares for sale to the company, and the correspondence which then took place is referred to. No meeting of directors was called to consider the offer made by the pursuer to sell his shares, the offer being declined by the secretary without any authority from the directors. *Quoad ultra*, the statements in answer, so far as not coinciding with the pursuer's statements, are denied. . . . (Cond. 16) In any case, and apart from these legal objections, the resolution of 21st March 1918, and procedure following thereon, was not a *bona fide* exercise of the directors' powers. On the contrary the said proceedings were carried through in the circumstances already stated in pursuance of a fraudulent plan to confiscate the pursuer's property. The result of the defenders' actings would be to enable them to appropriate the pursuer's shares, which as already stated are worth at least £40,000, at an expenditure of £6600. The whole actings thus constitute a gross attempt to oppress and despoil the pursuer and are illegal. The explanations in answer are denied."

The *admitted facts* of the case are given *infra* in the opinions.

On 10th July 1918 the Lord Ordinary (ORMIDALE) repelled heads (*a*) and (*b*) of pursuer's first plea and the defenders' first plea, and *quoad ultra* allowed parties a proof.

Opinion.—"The first plea-in-law for the pursuer, sub-head (*a*), raises the question whether article 36 is contrary to public policy and illegal. That appeared to me a question of some difficulty, and if the plea had been insisted in I should have taken time to consider my judgment. But as Mr Constable

in the concluding speech for the pursuer intimated that he did not propose to press it, I shall for that reason repel it.

"Plea 1 (*a*) being thus disposed of, I do not think it necessary to delay giving judgment on the other points that were argued.

"Plea 1 (*b*) raises the question whether the pursuer was an employee of the company. In my opinion he was. He was the managing director. Article 115 provides for 'managing director' and 'manager' indifferently. I mean that the provisions of the article, leaving out of view the first managing director, are equally applicable to the holder of either office. The directors have identically the same powers as to the appointment, the remuneration, and the dismissal of both. These are the ordinary *indicia* of employment, and it seems to me that the pursuer having been appointed by the directors of the company, remunerated by them, and being liable to dismissal by them, was an employee of the company in the sense of article 36. The words of that article within brackets, viz. ('other than George Cotton'), to my mind confirm this view. They indicate that the gentleman in question was within the meaning of the article an employee, though the provision that follows is not to be applicable in his case. The only office which could be described as an office of employment held by him was, as I understand, that of first managing director.

"Now if that be so I am not entitled to vary or restrict the meaning of the word 'employee' merely because of the extraordinary results that may follow from the application of article 36 in the case of a manager who is also a director.

"It is, no doubt, a drastic thing for directors to be able to do to put out of the company one of their number and so indirectly disqualify him from acting as a director when special provision is elsewhere made in the articles for terminating his office as a director, and this apparently occurred to the directors themselves, because they thought it necessary to proceed to take steps to bring into operation article 97. This appears to me to have been unnecessary, but if it was, such a mistake does not lead to my necessarily construing the article as the mistake would suggest that I should do. It seems to me, as at present advised, that if they were in order in dismissing the pursuer and declaring that his membership of the company because of that dismissal had ceased, then necessarily his holding of the office of director was also thereby terminated. This question does not, however, require to be decided, because the pursuer resigned his office of director. The point may have a bearing on the other question as to the directors' right in the circumstances to proceed under 36. I only decide that as managing director the pursuer was an 'employee' of the company. Accordingly I am not able to sustain plea 1 (*b*).

"With regard to plea 1 (*c*) I have no doubt whatever that a proof must be allowed. The averments of the pursuer in regard to this matter, which are denied by the defenders, and the letters produced, are sufficient and relevant to infer that he had given a valid notice for the transfer of his shares under article 27, and so set in motion a procedure which, it seems to me, could not be ousted by a rival procedure being thereafter started by the directors under article 36. The articles of association are clear and distinct that whenever a valid notice is given by a member for the transfer of his shares under article 27 a certain procedure by way of laying his shares before the members of the company, naming the price which he proposes to sell them at, must be followed. But I say no more on the point, because as I say there must be inquiry, and I do not wish to prejudge or foreclose any question that may arise after the proof.

"On plea 1 (*d*) I think there must also be inquiry. I think the averments of want of good faith on the part of the defenders are far from strong or specific, but underlying them all there is the outstanding fact that for no reason stated and for no good reason appearing, seeing that the pursuer himself had given notice to the company that he was willing to sell the whole of his shares and so cease to be a member of the company, the directors put in operation article 36, with the result, not of making the pursuer cease to be a member of the company any quicker, but depriving him of two-thirds of the value of his shares, *i.e.*, making him accept for his shares £6600 instead of, on the figure stated by the pursuer at which he offered to sell (and they appear to have been valued for other purposes not very long before at the same figure), £20,000 or so. The true market value the pursuer says would be £40,000.

"There may be some explanation of all this, but there is none apparent on the averments made either by the pursuer or by the defenders. The averments of the pursuer I am bound at this stage to accept. The averments made by him in the light of the extraordinary fact of difference in value seem to me relevant to infer that the directors acted in bad faith in setting in operation the procedure which flows from article 36.

"Accordingly I shall repel heads (*a*) and (*b*) of plea 1, repel plea 1 for the defenders, and allow parties a proof of their averments."

The defenders reclaimed to the First Division, and on 16th October 1918 the action was dismissed.

LORD PRESIDENT—The position of the defenders' company in this case seems to me to be sound and unassailable, and no evidence that could be adduced in support of the averments made in this record would throw any further light upon it.

The pursuer was a shareholder of the defenders' company, and he was likewise managing director. On the 20th February 1918 he was dismissed from his office as managing director on account of serious misconduct, which in the view of the directors was prejudicial to the interests of the company. His dismissal from the office of managing director is not challenged if his position was such that the directors were entitled to dismiss him. But rather

more than a month afterwards, on the 21st March 1918, the directors met and resolved to exclude him from his membership in the company. That resolution is challenged in this action upon three separate and distinct grounds:—In the first place, because it followed upon an inept resolution, it is said, on the 20th February, in respect that the pursuer being managing director of the company was not within the meaning of article 36 of the articles of association an employee of the company. That I think an unsound ground of challenge, and for the reasons given by the Lord Ordinary very fully in the opinion appended to his interlocutor, in which I fully concur. The parenthetical sentence relative to Mr Cotton, I think, leaves no doubt whatever on the question that 'employee' in the article in question included managing director.

The second ground of challenge was that prior to the resolution of 21st March 1918 the pursuer had set in motion certain procedure which is prescribed by article 27 and following articles of the articles of association, and accordingly it is contended that it was incompetent for the directors to pass the resolution which they did pending procedure initiated by the pursuer on the 13th March, just a week before the resolution was come to. Now the Lord Ordinary considers that a rival procedure was in existence at the date of the resolution in question, and that no procedure could competently take place under the 36th article if procedure had been already initiated under article 27. I offer no opinion upon that question. No doubt if the proceedings under article 27 had come to a close it would have been incompetent to proceed under article 36, but if they had not come to a close, then a very difficult question, it appears to me, would have arisen, upon which it is unnecessary to express any view, because I am of opinion that no procedure was initiated by the pursuer under article 27.

His law agent upon the 13th March wrote a letter in which he offered the pursuer's shares at the price of £30 a-piece and asked for an answer. The answer came that the offer was declined, and in a subsequent letter the pursuer said that although his offer was still open it would be closed unless accepted within a reasonable time. It is impossible, I think, to consider these letters as importing the initiation of 'procedure under article 27. They were, I think, correctly characterised by the Lord Advocate as a counter offer—an offer to resign the directorship of the company if the pursuer's shares were taken off his hands at the price of £30 each.

I think it quite clear from the pursuer's own record that the Lord Advocate correctly described the effect of the letters in question, because in a passage to which I called attention in the course of the discussion the pursuer says that he, as an alternative to a proposal made to him by the directors, offered his shares for sale to the company, and the correspondence which then took place is referred to. No meeting of the directors was called to consider the offer made by the pursuer to sell his shares, the offer being declined by the secretary without any consideration of it by the directors. That averment appears to me to place it beyond doubt that the pursuer never intended the letter of 13th March to be an offer under article 27. It is equally certain that the defenders' secretary did not understand it in that sense. It was neither more nor less than an offer to sell his shares for £30 each, which if not accepted within a reasonable time would be withdrawn.

For these reasons I am of opinion that no rival procedure had been set up on the 13th March under article 27, and that accordingly it was open to the defenders' directors to pass the resolution which they did on 21st March 1918.

That resolution is challenged on the ground that it was not come to in good faith by the directors, and the Lord Ordinary has allowed the pursuer proof of his averments on this head, with regard to which the Lord Ordinary says—"I think the averments of want of good faith on the part of the defenders are far from strong or specific." I think on the other hand that there are no averments at all of want of good faith on the part of the directors. The record from beginning to end is destitute of suggestion of improper motive. All that is said upon record is that the man was dismissed for causes which in the opinion of the directors were prejudicial to the company's interests, that he subsequently was willing on his own terms to part with his shares, and that these shares had risen to a premium.

Now these averments are not sufficient in my opinion to raise a case of want of good faith upon the part of the directors. I accept the law laid down in the cases cited to us. Directors, exercising their discretionary powers even under such an article as 36 in this company's articles of association, must not do so capriciously, arbitrarily, or corruptly, and they must exercise their powers in good faith. I see nothing to suggest that the directors here acted either capriciously, arbitrarily, or corruptly, or without good faith. But it is not sufficient to say that the shareholder was willing to go out on his own terms, and that the shares had risen to a premium, to raise against the defenders a case of lack of good faith for putting in force such an article as 36. That article confers very wide discretionary powers on the directors, and suggests plainly that if a member of the company has been guilty of such conduct as was attributed to the pursuer, and it is not challenged—rightly attributed to him—then the directors may get rid of that member even although the shares have risen to a premium, and even although he is willing upon his own terms to cease his membership.

For these reasons I consider that the Lord Ordinary's interlocutor cannot be supported and that we should dismiss this action.

LORD MACKENZIE—I am of the same opinion.

The first point that was argued to us was that covered by the first plea-in-law for the pursuer, "that the pursuer was not an employee whose membership of the company

the directors could competently determine under" article 36. The view taken by the Lord Ordinary on that question is adverse to the pursuer, and in my opinion the Lord Ordinary is right. The question whether or not a person is an employee of the company must, of course, depend upon the phraseology of article 36, and it does not appear to me that light is thrown by the construction put upon that term in the authorities which were cited to us, because within article 36 itself we have a plain indication of what is meant by the term 'employee' as used in that article with reference to the position of George Cotton. George Cotton, under article 115, was a managing director, and his position is expressly excepted from the positions of the other employees of the company, plainly showing, I think, that in the mind of the draughtsman of that article but for the exception he would have been brought within the category of those who were termed employees. The position of managing director was one which depended upon contract between the person employed and the board, and was not of the nature of a delegation by the board to one of their members of powers which could be exercised by the board as a whole.

The pursuer was an employee. Then it appears to me the consequences follow as provided for in article 36. I do not think it was necessary for proceedings to be taken under article 97, head E, because if the procedure provided for under article 36 was followed out, then 97a became operative, and the pursuer would necessarily vacate his office of director if he ceased to hold the qualification which would be the consequence of putting into force the provisions of 36.

It was maintained that on a just construction of article 36 it was only intended to operate *in invitum*, and that if an employee had been dismissed for breach of faith or misconduct or for an offence which the directors deemed prejudicial to the interests of the company, and if he said "I am quite willing to divest myself of the shares," that disabled the directors from putting in force article 36. I am unable to find, on a just construction of article 36, that there is any such provision; there is certainly no provision so expressed, and I am unable to imply one.

The pursuer's argument upon this point, which in my judgment appears to be the one admitting of most discussion, fails.

The next point was that covered by plea 1, head (*c*), "that the pursuer having previously given a valid notice for the transfer of his shares under article 27 of the articles of association it was incompetent for the directors to put in operation" article 36. Now it is unnecessary to consider what would have been the rights of the directors had the fact been as stated in that head of plea 1. In my opinion the fact is not as stated. The pursuer did not give a valid notice for the transfer of his shares under article 27. In my view, in order to bring himself within article 27 it is incumbent upon the pursuer to show that he had placed his shares on the table, so to speak, and that he had thereafter no control over the matter, which would require to be followed out in accordance with the articles which immediately succeed 27. As I read the correspondence, that was not the position which the pursuer took up. He made an offer of his shares at a definite price, and the meaning of the letters is "Take the shares or leave them, that is my figure." I cannot regard that as a notice under section 27. Accordingly that sub-head of plea 1, I think, does not avail the pursuer.

Upon the third point which was maintained, that is, under head (*d*), "that the said resolution was passed and the provisions of article 36 put in operation by the directors at the instigation of the defender Mr Aikman Smith in bad faith for the purpose and with the result of oppressing and defrauding the pursuer and appropriating to themselves the large surplus value of the shares." Of course in considering this question in a matter of relevancy I take the pursuer's averments. He says that the shares, which were worth £40,000, were taken from him at the price of some £6600. Well, it may be that it is a hard case for the pursuer or it may not. The fact remains that he made the bargain which is contained in article 36. One quite sees that there might be circumstances under which the pursuer in such an action as this could make a *prima facie* case of oblique motive, and I take as an illustration this—The article provides that the directors "may, at any time after such employee shall have left or been dismissed the company's service from whatever cause, resolve that he shall cease to be a member of the company." Now if at the time the employee is dismissed the shares are at a discount and no action is then taken, but a year or two years afterwards the shares reach a substantial premium and the board then take steps under article 36, I think it would be difficult in that case to refuse to allow an inquiry. But I cannot find in the dates alleged on record that there was any undue delay on the part of the board when they came to know the full facts of the relationship of the pursuer with the girl whose name is mentioned, or that they delayed in any way to put article 36 in operation.

Further, one must point out in justice to the defenders in this case that they seem to have made the pursuer an offer which, as the Lord Advocate admitted, had the pursuer accepted would have meant this, that it would not have been fair dealing thereafter to put in operation against him article 36, and he would have had an opportunity of getting rid of his shares under article 27. Unfortunately for himself the pursuer would have none of the offer of the board. The board thereafter said, "We must put in force article 36." That has now been done, and I am unable to see that they have done anything which they were not warranted in doing. I come to that conclusion giving full effect to the point made for the pursuer, that in construing an article which involves forfeiture in part of the value of the shares it must be construed strictly. Construing this article strictly, I

think the defenders have acted in accordance with their powers, and that there are not facts and circumstances set forth on record which would justify us in saying that they did so in bad faith.

I am accordingly of opinion that the result should be as your Lordship suggested.

LORD CULLEN—I am of the same opinion. I think the contradiction which Mr Constable said the defenders' view presented between article 36 and article 97 does not arise. Article 97 applies to a case where it is necessary for the shareholders to bring a director's term of office to an end by removing him from it. But a director's office may become vacant otherwise than by removal by a meeting of the shareholders, so as to make his removal in that way unnecessary. He may, for example, have voluntarily divested himself of his qualifying shares.

As regards the offer made by the pursuer on the 13th March to sell his shares, it seems to me that that was an offer to sell at £30 per share and nothing else. And therefore it was not an offer such as article 27 contemplates.

As regards the alleged bad faith on the part of the directors, it appears to me that article 36 makes it *prima facie* a legitimate and sufficient reason for action on it that the member in question is in the position of having been in the employment of the company and of having been dismissed. The fact that the shares happened to be at a premium when the directors took action so that loss would result to the pursuer and corresponding benefit to his fellow members, including the directors, and that the directors were conscious of this result, is not a sufficient reason for holding the directors disabled from putting article 36 into operation.

I accordingly agree in thinking that the case fails on relevancy and ought to be dismissed.

The pursuer appealed to the House of Lords. [*Stewart* v. *James Keiller & Sons, Limited*, 1902, 4 F. 657, 39 S.L.R. 353, was referred to in the case.]

At delivering judgment—

VISCOUNT FINLAY—This case has been very fully and I need not say very clearly argued. In my opinion the Lord Ordinary was right in saying that the plea-in-law No. 1 under head (*d*) in the record should go to proof. I read the material part of the first plea—"The pretended resolution by the directors of the company dated 21st March 1918, and the pretended appropriation of the pursuer's shares following thereon are incompetent, *ultra vires*, and illegal, and should be reduced in respect (*d*) that the said resolution was passed, and the provisions of article 36 put in operation, by the directors at the instigation of the defender Mr Aikman Smith in bad faith for the purpose and with the result of oppressing and defrauding the pursuer and appropriating to themselves the large surplus value of his shares." It appears to me that that is a matter which ought to go to proof. I quite agree that a mere bald allegation of fraud, introducing the adjective "fraudulent" or the adverb "fraudulently," will not make a case which should go to proof; there must be an averment of the circumstances with reasonable particularity which it is said constitute fraud. If the circumstances were such as the Lord President refers to in his judgment, then I should not have differed from the conclusion at which the Court of Session, reversing the Lord Ordinary, arrived. The Lord President says this—"That resolution is challenged on the ground that it was not come to in good faith by the directors, and the Lord Ordinary has allowed the pursuer proof of his averments on this head, with regard to which the Lord Ordinary says, 'I think the averments of want of good faith on the part of the defenders are far from strong or specific.'" I do not stop to comment upon that statement of the Lord Ordinary, though I think there is some ground for some of the observations made by counsel for the appellant with regard to that portion of the judgment. Then the Lord President goes on—"I think, on the other hand, that there are no averments at all of want of good faith on the part of the directors. The record from beginning to end is destitute of suggestion of improper motive. All that is said upon record is that the man was dismissed for causes which, in the opinion of the directors, were prejudicial to the company's interests, that he subsequently was willing on his own terms to part with his shares, and that these shares had risen to a premium. Now these averments are not sufficient, in my opinion, to raise a case of want of good faith upon the part of the directors. I accept the law laid down in the cases cited to us. Directors exercising their discretionary powers, even under such an article as 36 in this company's articles of association, must not do so capriciously, arbitrarily, or corruptly, and they must exercise their powers in good faith. I see nothing to suggest that the directors here acted either capriciously, arbitrarily, or corruptly, or without good faith. But it is not sufficient to say that the shareholder was willing to go out on his own terms, and that the shares had risen to a premium to raise against the defenders a case of lack of good faith for putting in force such an article as 36." If the record had contained nothing beyond what the Lord President says in the passage I have just read I should agree with his conclusion, but it appears to me to be quite impossible to say that the record is in that state. There is an allegation not only in general terms but supported by specific details that the directors did not act in the matter in good faith.

Now as at present advised I am not at all inclined to agree with the proposition put forward by the Lord Advocate, that if there be ground on which the directors might have acted you cannot inquire into their motive. Where the question is one of abuse of powers, the state of mind of those who acted, and the motive on which they acted, are all important, and you may go into the question of what their intention was, collecting from the surrounding circum-

stances all the materials which genuinely throw light upon that question of the state of mind of the directors so as to show whether they were honestly acting in discharge of their powers in the interests of the company or were acting from some bye-motive, possibly of personal advantage, or for any other reason. That is a subject which must be inquired into, and unless all the authorities which lay down that directors must exercise their powers honestly and for the purposes for which those powers were given are wrong, an inquiry where relevant circumstances are alleged must take place.

Now the Lord Advocate has referred us at some length to condescendence 10, and has argued that the allegations there are not sufficient. I am not prepared to deal with the case upon the footing on which the Lord Advocate attempted to put it. With regard to that condescendence, it appears to me that if this matter goes to proof it will be for the tribunal to inquire into the question whether, whatever it was the directors alleged as the reason for the dismissal—whether it was conduct in 1914, or as the Lord Advocate says later relations with the girl which resulted in the birth of a child in March 1916—it will be for the tribunal to consider whether the directors honestly acted with reference to these matters in the interests of the company, considering that it was misconduct which would prejudicially affect the interests of the company.

Now under these circumstances I can see no grounds for reversing the decision of the Lord Ordinary that this matter should go to proof on the question of *bona fides*.

With regard to head (*c*) under the same plea-in-law it appears to me that that is a matter purely of the construction of documents, and I do not take the view with regard to that head (*c*) which was in the first instance contended for by the appellant; in fact, as I understand it, counsel for the appellant really withdrew their claim to have head (*c*) sent to proof.

Under these circumstances I move your Lordships that proof be allowed on the plea-in-law No. 1 under head (*d*).

VISCOUNT CAVE—I agree and I have nothing to add.

LORD DUNEDIN—I concur.

LORD SHAW—It is advisable to say nothing upon the merits of a case which is to go to proof.

The substantial averment of the pursuer in this case is this, that the moving cause of the resolution to dismiss the pursuer was not the interests of the company, but was the aggrandisement of the directors themselves. Directors in view of the opportunity of such personal gain must of course be scrupulously careful in the wielding of the serious power committed to them to have regard to the true interests of the company itself. There may be other motives unconnected with the true interests of the company which are suggested or alleged, but upon a statement of the kind which I have first mentioned, clearly made, and in circumstances sufficiently put before the Court, I do not see my way to give any countenance to the idea that an inquiry here should be refused.

LORD WRENBURY—I agree.

Their Lordships reversed the interlocutor of the First Division and allowed a proof in support of plea 1 (*d*).

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