The Crown has chosen to enter a caveat against our procedure being accepted as a precedent, in respect that the case is a very exceptional one, and that the result of our remitting to Mr Watherston has been that the appeal has been sustained on totally different grounds from those on which it was originally taken to Mr Watherston as referee.

The course taken by the Court in this case has certainly been exceptional, and the reasons for taking it have been so fully explained in our previous judgment in the presence of the Crown that I do not think it necessary to advert to them further. The precise circumstances are not likely to recur again. But I am not prepared to say that the Court will hold itself in any way tied by the precise form and grounds of appeal taken against a provisional valuation to a referee, and that it will not, where it thinks that necessary, remit to the referee to reconsider the case anew, with explanations or instructions. The course would still be exceptional, but we are in no way debarred from taking it, where, as here, it is necessary to enable the Court to perform its function under the Act.

LORD SALVESEN—I concur in the result of your Lordship's opinion, but I do so mainly because counsel for the Crown stated that in view of the arbiter's second report he was unable to support the original claim for increment duty.

LORD CULLEN—I am of opinion that no reason has been stated for interfering with the conclusion which the referee has now arrived at.

The Court pronounced this interlocutor:—

"Having considered the further report of Mr John Watherston and heard counsel for the parties, we find that the original decision of the referee dated 2nd June 1914 is wrong, and recal the same, and also his finding of expenses; we find that the decision stated in the said report is right, and affirm the same, and decern: Find no expenses due to or by either party in this Court or before the referee."

Counsel for the Appellants—T. G. Robertson. Agents—Laing & Motherwell, W.S.

Counsel for the Respondents—Solicitor-General (Morison, K.C.)—Candlish Henderson. Agent—Sir Philip J. Hamilton Grierson, Solicitor to the Commissioners of Inland Revenue.

# HOUSE OF LORDS.

*Friday, July 2.*

(Before Lord Dunedin, Lord Atkinson, Lord Shaw, Lord Parmoor, and Lord Wrenbury.)

## DUFF AND OTHERS *v.* THE S.S. "OVERDALE" COMPANY, LIMITED.

*Company — Partnership — Contract — Articles of Association — Construction — "The Partners for the Time being" of a Partnership "shall be the First Managers of the Company."*

The articles of association of a one-ship company, article 37, provided—"The partners for the time being of Babtie & Company of Glasgow shall be the first managers of the company. . . ."

*Held* (*rev.* judgment of the First Division) that the individuals who were partners of Babtie & Company at the time when the company was incorporated remained managers till death, resignation, disqualification, or removal, quite irrespective of any changes in the constitution of Babtie & Company.

The articles of association of the s.s. "Overdale" Company, Limited, provided—Article 37—". . . [*quoted supra in rubric*]. . . ." Article 40—"The managers, or any of them, may be removed from office by resolution to that effect passed at an extraordinary general meeting called for the purpose at which the holders of not less than three-fourths of the shares allotted (being present in person or by proxy) shall vote in favour of such resolution, but before removal they shall be entitled to receive from the chairman of such meeting three months' notice of the passing of such resolution." Article 47—"The managers or a partner or partners of their firm shall always be a shareholder in the company, and the office shall be vacated on their ceasing to be so, or on their becoming bankrupt or insolvent, suspending payment, or granting a trust deed for or compounding with their creditors."

Edward James Duff, engineer, Holly Lodge, Cressington Park, Liverpool, and others, *pursuers and appellants*, brought an action against the S.S. "Overdale" Company, Limited, and others, *defenders and respondents*, in which they sought declarator—"(*First*) That the pursuer, the said Robert Burns, is a manager of the said Steamship 'Overdale' Company, Limited, having been appointed a manager thereof by article 37 of the articles of association of the said company, and can only be removed from his office of manager by resolution under article 40 of said articles; and (*second*) that a resolution in these terms—'That, information having been received that the firm of Babtie & Company is to be dissolved on 30th September next, it is resolved to appoint the firm of Babtie, Weir, & Company as managers in succession to the partners of the said Babtie & Company from the date of the dissolution of the latter firm'—pro-

posed at an extraordinary general meeting of the said Steamship 'Overdale' Company, Limited, held on 12th August 1913, and declared by the chairman of said meeting to be carried, was incompetent and *ultra vires* and ought to be reduced; (*b*) the said resolution ought by decree foresaid to be reduced accordingly; and (*c*) the defenders Edward Primrose Babtie and Daniel Ferguson Weir ought and should be interdicted, prohibited, and discharged from acting as managers of the said Steamship 'Overdale' Company, Limited, in any way whatsoever under and by virtue of the said resolution, and interim interdict against their so acting should be pronounced against them."

The pursuers, *inter alia*, pleaded — "(2) Said resolution, being incompetent and *ultra vires*, ought to be reduced, and the pursuers are therefore entitled to decree of reduction as concluded for."

The defenders, *inter alia*, pleaded—"(4) The resolution sought to be reduced being valid and *intra vires* of the company, the defenders are entitled to absolvitor."

The *facts* are given in the opinion (*infra*) of the Lord Ordinary (DEWAR), who on 3rd December 1913 pronounced this interlocutor —"Sustains the pleas-in-law for the pursuers and decerns against the defenders in terms of the conclusions of the summons: Finds the pursuers entitled to expenses," &c.

*Opinion.* — "This is an action at the instance of certain shareholders in the steamship 'Overdale' Company, Limited, Glasgow, against the said company and Mr Edward Primrose Babtie and Mr Daniel Ferguson Weir, two of the managers, concluding for a declarator that a resolution passed at an extraordinary general meeting, which had the effect of removing the pursuer Robert Burns from the office of one of the managers of the company, was incompetent and *ultra vires* and ought to be reduced.

"The circumstances in which the action is brought are as follows:—The pursuer Burns and the defender Weir were for several years partners in the business of Weir & Company, shipbrokers, Glasgow, and the defender Babtie carried on business as a shipbroker in the same office. In the year 1907 they all entered into partnership under the firm name of Baptie & Company, and about the same time they formed the defendant company for the purpose of trading with the steamship 'Overdale.' The nominal capital of this company was £20,000, of which £15,000 was issued. Of this amount Messrs Burns and Babtie took up by themselves and their friends £5670 each, and Mr Weir and his friends took £3660. The first managers of the company were the partners in the firm of Babtie & Company, viz., Messrs Burns, Babtie, and Weir, and the company's business was carried on at the office of Babtie & Company, at 111 Union Street, Glasgow. At first it was not successful, but latterly it became fairly prosperous. Unfortunately friction arose among the managers, and the partnership of Babtie & Company was dissolved. It is now carried on by Messrs Babtie and Weir under the firm name of Babtie, Weir, & Company, without the assistance of Mr Burns, and as they held the view that Mr Burns having ceased to be a member of the firm was no longer qualified to be a manager of the company, they took steps to have him removed from the managership. Hence these proceedings.

"The decision of the question raised depends upon the meaning of article 37 of the articles of association, which is in the following terms:—'The partners for the time being of Babtie & Company of Glasgow shall be the first managers of the company. The managers shall carry on the business of the company, and shall exercise all the powers and duties incumbent on directors of companies under the Companies Acts 1862 to 1900, and shall also discharge the duties usually performed by the secretary, including the making of returns and notices required by the statutes.' The pursuers contend that under this clause the partners of Babtie & Company, viz., Baptie, Burns, and Weir, were appointed first managers as individuals, while the defenders maintain that the firm of Babtie & Company were the managers and not the partners as individuals, and they took the following steps to give effect to this view and to remove Mr Burns from office. On 31st March 1913 Mr Weir gave notice to his partners to dissolve the partnership of Babtie & Company at 30th September 1913. Then he and Mr Babtie on 30th July 1913 sent a notice signed by 'Babtie & Company' to the shareholders of the 'Overdale' Company, Limited, calling an extraordinary general meeting of said company for 12th August 1913 to consider the position arising in consequence of notice having been received of the dissolution of the said firm of Babtie & Company, and to elect new managers of the said company as from 1st October 1913. On 12th August 1913 the extraordinary general meeting was held, when the following motion was declared carried:—'That information having been received that the firm of Babtie & Company is to be dissolved on 30th September next, it is resolved to appoint the firm of Babtie, Weir, & Company as managers in succession to the partners of the said Babtie & Company from the date of the dissolution of the latter firm.' The following amendment was duly proposed and seconded, but a majority voted against it, viz. — That in respect that by articles of association of the company it is the partners for the time being of the firm of Babtie & Company who are appointed managers of the company, namely, E. P. Baptie, Robert Burns, and Daniel F. Weir, and the dissolution of the said firm does not affect the position of the said individuals as managers of the said company, and the position of the said individuals not having been altered by the proposed dissolution of the said firm, and no resolution to remove the said managers or any of them under article 40 of the articles of association of the company having been proposed or carried, and no notice of any such resolution being contained in the notice calling this meeting and specify-

ing the business to be transacted at it, there being no vacancy among the managers of the said company from death or otherwise, and no notice of resignation having been received from the managers or any of them at a general meeting of the said company, in accordance with article 39 of the articles of association of the said company, no managers fall to be appointed and it is incompetent to appoint any new managers, and the firm of Babtie, Weir, & Company should not be appointed." On a poll being taken the motion was carried by 875 votes to 567, and as there is no provision in the articles of association as to the majority necessary for the election of new managers, the chairman ruled that a simple majority was sufficient, and the motion was accordingly declared carried.

"In these circumstances the pursuers plead that the motion was incompetent and ought to be reduced, and their argument, as presented to me, is, I think, sufficiently summarised in the aforesaid amendment. I am of opinion that it is well founded. It was not, I think, the firm of Babtie & Company who were appointed first managers under clause 37, but the partners of the firm, viz., Babtie, Burns, and Weir as individuals. The word 'partners' is used, and if the defenders' contention were correct it appears to me to have no meaning at all. It would have been sufficient and less ambiguous to say 'Babtie & Company' shall be the 'first managers of the company.' This apparently occurred to the defenders themselves, because I observe that the resolution they proposed on 12th August 1913 states that 'it is resolved to appoint the firm of *Baptie, Weir, & Company* as managers.' That is quite clear. But in article 37 it is the 'partners' who are appointed and not the 'firm'; and I think the reason probably is because each partner of the firm induced a number of friends to become shareholders of the company, and these shareholders would naturally desire that the man whose advice they had followed should look after their interests, not because he was a partner in a firm, but because they trusted him as an individual, and had confidence in his capacity to manage their affairs. It is said that the expression 'partners for the time being' means such partners as may *from time to time* become members of the firm of Babtie & Company, and that accordingly a partnership in that firm is a necessary qualification for managership in the 'Overdale' Company at all times. I do not think so. The 'partners for the time being' are appointed the 'first' managers. That must mean the present partners, because none to be hereafter assumed could possibly be the first. The article, it seems to me, did not contemplate the future; it dealt only with the present. It appointed a number of individuals and not one firm. This, I think, is made clear by article 40, which deals with the removal of managers. It provides that 'the managers, *or any of them*, may be removed from office by a resolution supported by not less than three-fourths of the shareholders after receiving three months' notice of such resolution. If the firm of Babtie & Company were appointed managers, I do not see why the expression 'or any of them' should have been used. To give any meaning to these words it is necessary to assume that several persons had been appointed under clause 37. It is then possible to remove 'any of them,' but that is not an expression which would have been used if the firm had been appointed. If I am right in this view it follows that Mr Burns could only be removed from office by the votes of holders of not less than three-fourths of the shares allotted, and that the proceedings at the extraordinary general meeting held on 12th August 1913 were therefore *ultra vires*. They were based on the assumption that Mr Burns had not been appointed as an individual, but had only acted as manager because he was a member of the firm of Babtie & Company; and that his copartners had the power of terminating his connection with the company in which he and his friends were largely interested by dissolving the partnership. I cannot find anything in the articles of association which conferred a power of this kind upon Babtie & Company. On the contrary, the company appointed its own managers, and, I think, retained the right to control them, and prescribed the manner in which they could be removed from office. My attention was directed to article 45, where it is provided that the managers out of their remuneration and commission 'shall defray their own office rent;' and also to article 47, which provides that 'The managers or a partner or partners of their firm shall always be a shareholder in the company.' It was argued that the firm here referred to was Babtie & Company, and the office was the office used by them. That may be so; but I see no reason why it should not also apply to any office which the managers might select, or to any firm of which they might be members. In any event, I do not think that it is sufficient to support the defenders' contention that no one could manage the company's affairs who was not a partner in Babtie & Company, and that Babtie & Company could consequently remove and appoint managers at will. If the company had intended to take the unusual course of placing the management of its affairs so completely beyond its own control I should have expected that to be set forth in the articles of association in clear and unambiguous language.

"On the whole matter I am of opinion that the pursuers are entitled to decree as concluded for with expenses."

The defenders reclaimed to the First Division, who (the LORD PRESIDENT and LORD SKERRINGTON, *diss* LORD JOHNSTON, LORD MACKENZIE being absent) on 9th December 1914 pronounced this interlocutor—"Recal said interlocutor [of 3rd December 1913]: Sustain the fourth plea-in-law for the defenders: Assoilzie them from the conclusion of the action, and decern: Find the pursuers liable to the defenders in expenses, and remit," &c.—and at advising delivered the following opinions:—

LORD PRESIDENT—The Steamship "Overdale" Company, Limited, was formed on 3rd October 1907 under the Joint Stock Companies Act; and by the 37th article of the articles of association of the company it is, *inter alia*, provided that the partners for the time being of Babtie & Company of Glasgow shall be the first managers of the company. The question we have to consider is, What is the true meaning of the expression I have just read?

I think it means just what it says—the partners of the firm of Babtie & Company, whoever they may be, so long as that firm continued to exist. That appears to me to be the plain and natural meaning of the language used; and it is significant that if it were intended to appoint the partners whatever the circumstances of the firm might be, and so long as the firm existed no more apt words could have been employed. It follows that if the firm of Babtie & Company were dissolved and ceased to exist, then, there being no longer partners of the firm of Babtie & Company, there is a vacancy in the office of managers of the ship, and a new appointment will fall to be made.

As it so happened, that was exactly what occurred, because the firm of Babtie & Company was dissolved on 30th September 1913. At that date there ceased to be partners of the firm of Babtie & Company, and accordingly a meeting of the steamship company was held in anticipation of the event, on 12th August 1913, at which it was resolved to appoint the firm of Babtie, Weir, & Company as managers in succession to the partners of the said firm of Babtie & Company from the date of the dissolution of the latter firm.

This is the resolution which is challenged in the present action, and the ground of challenge is that there was no vacancy at 30th September 1913 in the office of managers. That, no doubt, would be true if the articles of association had appointed Mr Baptie, Mr Burns, and Mr Weir to be the managers of the company. But the articles of association do not so provide. They provided that the partners of Babtie & Company for the time being were to be the managers of this company, and accordingly when that firm was dissolved and there ceased to be partners of Babtie & Company the office of managers became vacant.

The obvious answer to the pursuers' case is that if the company had really intended Mr Burns, Mr Weir, and Mr Baptie to be managers of this company it was very easy to have said so. It is natural, and as we all know quite usual, in articles of association of a company to mention by name those who are to be the first managers of the company, and if it had been intended that Mr Babtie, Mr Weir, and Mr Burns were to be managers of this company, howsoever the firm was constituted and whether the firm continued to exist or ceased to exist, I cannot for my part understand why any reference should have been made either to the firm or its partners in the articles of association—it was so natural to say, if it had been so intended, that Mr Burns, Mr Weir, and Mr Babtie were to be the managers of this company. In short, I hold that the expression "partners for the time being" means such partners as may from time to time become members of the firm of Baptie & Company, and that, accordingly, partnership in that firm is a necessary qualification for the managership of the "Overdale" Company.

The Lord Ordinary has taken the opposite view. He has adopted the construction which the pursuers seek to put upon the expression, and holds that although there is no firm of Babtie & Company, and although there are no partners of the firm of Babtie & Company, Mr Burns, Mr Weir, and Mr Babtie still continue to be managers of this steamship company. The reason which the Lord Ordinary gives for coming to that conclusion is this—that the partners for the time being are appointed the first managers, and that that must mean the present partners, because none to be hereafter assumed could possibly be the first. I cannot agree. It seems to me the correct expression to use—if you are speaking of the members of a fluctuating body—to say that they are the first managers. The first managers of a company may be the directors of a certain board, the trustees of a certain trust, or the partners of a certain firm, however the board, trust, or partnership chances to be constituted at the time, and only when a new appointment is made do they cease to be the first managers even although the body fluctuates during the period of its existence.

The Lord Ordinary then proceeds to combat the view that the firm was appointed managers—a view which was not maintained to us and plainly could not be maintained, for it is not the firm, as the Lord Ordinary seems to assume in the latter part of his note, that are appointed managers of this steamship company; it is the partners of the firm, and therefore the remaining portion of his reasoning seems to me to be entirely beside the mark.

I hold, then, that it is not Mr Burns, Mr Weir, and Mr Babtie who were appointed managers of the Steamship Company, but the partners of the firm of Babtie & Company for the time being, and that individuals who are not members of that firm are not managers of the Steamship Company, and individuals who are members of the firm are managers of the Steamship Company. Therefore we ought not to declare, as we are asked to declare, that Mr Burns continued to be a manager of the Steamship Company after he ceased to be a partner of the firm in respect that the firm had ceased to exist. There was a vacancy in the managership, and the company were well entitled to pass the resolution which they have done on 12th August 1913.

I propose, therefore, to your Lordships that we should recal the interlocutor of the Lord Ordinary, sustain the fourth plea-in-law for the defenders, and assoilzie them from the conclusions of the action.

LORD JOHNSTON—In 1907 there was constituted one of the one-steamship companies

as a limited company under the style of the Steamship "Overdale" Company, Limited. This company was promoted by three persons—Babtie, Burns, and Weir—two of whom—Burns and Weir—were already in partnership, and continued to be so under the firm of Burns, Weir, & Company. *Unico contextu* with the constitution of the company, Babtie, Burns, and Weir arranged a partnership under the firm of Babtie & Company, as steamship managers, ship and insurance brokers, in Glasgow. They had secured the management of the s.s. "Overdale," and that so far as they were concerned *inter se*, but so far only as a piece of partnership business, and they contemplated obtaining for Babtie & Company, other business of a like nature. It is true that their contract of copartnery was executed some time after the constitution of the ship-owning company, but it had been already arranged and was made to draw back to that date.

I have said that this was the arrangement *inter se* of the partners of Babtie & Company. But they were not the s.s. "Overdale" Company, Limited; they were only the promoters. In their own contract of copartnery they undertook each to the others themselves to subscribe a definite proportion of the capital of the s.s. "Overdale" Company, and each to bring in subscribers of a further portion of that capital so that the whole capital necessary for the shipping venture should be secured. On the determination of the question which has arisen this fact has, I think, an incidental but not unimportant bearing.

Turning now to the articles of association of the company, a board of directors *eo nomine* is not provided for, but managers are appointed to exercise all the powers and duties incumbent on directors under the Companies Acts, as was quite competent under the Acts in force at the date of the company's registration. As I read them the Companies Acts 1862 to 1900 contemplate that the directors should be individuals, and the Companies Act 1900 in the definition clause, section 30, declares that "the expression director includes any person occupying the position of director by whatever name called." Accordingly the articles of the company provide (article 37) "the partners for the time being of Babtie & Company of Glasgow shall be the first managers of the company," and accordingly Babtie, Burns, and Weir became the first managers or directors of the company. What has happened is this. Things went on apparently smoothly in the management of the company until March 1913, when Weir, having split partnership with Burns in the firm of Burns, Weir, & Company, gave notice of his intention to terminate also the copartnery existing between Babtie, Burns, and himself under the firm of Babtie & Company, as at the end of the current year, 30th September 1913. The manager, Burns dissenting, then called a meeting of the company to consider the position arising out of the dissolution of the firm of Babtie & Company as at 30th September next, and to elect new managers of the s.s. "Overdale" Company as from 1st October. Shortly prior to that meeting Babtie and Weir had formed the partnership of Babtie, Weir, & Company, and they succeeded at the meeting so called in getting a resolution of the company passed appointing the firm of Babtie, Weir, & Company as managers in succession to the partners of the said Babtie & Company from the date of the dissolution of the latter firm. The result of the procedure, if valid, was to oust Burns, and to obtain the management for themselves. Babtie and Weir controlled 875 votes, but these were less than three-quarters of the voting power of the company. I am of opinion that the act of the shareholders at the said meeting was invalid in respect that the first directors had not been removed, and that their appointments did not fall by the mere dissolution of the firm. Incidentally, I may add that Babtie and Weir had had to take the course they did because they had not the three-fourths majority necessary to remove Burns. The question depends on the interpretation of the expression "the partners of the firm for the time being of Baptie & Company, of Glasgow, shall be the first managers of the company." This is not the appointment of Babtie & Company as first managers, whether that would have been competent or not, as to which I express no opinion. It is true that their contract of copartnery assumes that the firm are to be appointed managers, but so far as the company and its shareholders are concerned that agreement is *res inter alios acta*. By the articles the individual partners for the time being of that firm are appointed. And they are appointed the first managers. There is nothing to indicate that these individuals if they cease to be partners of Babtie & Company are to cease to be managers and do not necessarily remain until death, resignation, or removal the first managers of the company. They may die or they may resign, but if they do neither and the company want to get rid of them they may (article 40) be removed from office by resolution passed by a three-fourths majority at an extraordinary general meeting. They may continue to be partners of Babtie & Company and Babtie & Company may continue to subist, yet any one, two, or all of them may be removed from the office of manager. There is, so far as I can see, nothing to make the continued existence of Babtie & Company a condition of Babtie, Burns, and Weir continuing to be managers until they are removed. It was attempted to be argued that partners for the time being described a fluctuating body as if it was for the time being and from time to time, so that if at any particular time one desired to know who were the managers of the Steamship Company one must ask who are at that point of time the partners of Babtie & Company. But the fallacy of this is at once seen when one considers that, assuming that there has been a change in the personnel of Babtie & Company rendered competent by the terms of the contract of copartnery of that firm, the new partners might conceivably have become managers, but they never could have become the first

managers. It is true that as a general rule where the term "for the time being" is used it refers to the point of time at which the question arises which requires to be referred to a point of time. But the expression is always controlled by the context, and here it is controlled by the term "first managers." And it is perfectly intelligible that this should be the intention. The shareholders when they appointed their first managers knew the partners for the time being, that is, at that time, of Babtie & Company, and it is not naturally to be supposed that they were giving a roving commission to the partners whoever they might be at a future time under the terms of a contract of copartnery to which they were no parties. That would have been exactly equivalent to appointing Babtie & Company as their managers, which is exactly what they did not do. It is not made part of the qualifications of the manager that he shall continue a partner of Babtie & Company, or that Babtie & Company should continue to subsist as a firm. Hence I conclude that the former partners of Babtie & Company, viz., Babtie, Burns, and Weir, were first managers of the company, and will continue to be so until by the terms of article 40 they or any of them are removed from office. As this has not yet been done the resolution appointing managers in succession to them was *ultra vires.*

LORD SKERRINGTON—The Lord Ordinary has negatived (rightly, as I think) what he understood to be the defenders' contention, viz., that article 37 of the articles of association of the Steamship "Overdale" Company, Limited, appointed the firm of Babtie & Company to be the first managers of the Steamship Company. He has accordingly given effect to what, so far as appears from his opinion, was the only alternative view presented to him, viz., that article 37 appointed Mr Babtie, Mr Burns, and Mr Weir "as individuals" to be the first managers of the company, with the result that the appointment did not terminate when the firm of Babtie & Company was subsequently dissolved on 30th September 1913, but, on the contrary, continued to exist as a joint appointment in the persons of those three gentlemen. According to this construction the expression "the partners for the time being of Babtie & Company" is merely a roundabout description of the persons who by the operation of article 37 were to be appointed managers as soon as the articles should become binding by registration. Seeing that the articles were executed on 2nd October 1907 and registered on the following day, and that the three partners of Babtie & Company (Mr Babtie, Mr Burns, and Mr Weir) were among the seven signatories of the memorandum and articles, it is difficult to understand why, if the Lord Ordinary's construction is the correct one, article 37 did not either name these three gentlemen or describe them as "the present partners" of Babtie & Company. There is a third construction of article 37 which as it seems to me is a very natural one, viz., that the right and power to manage the business of the Steamship Company was conferred upon Mr Babtie, Mr Burns, and Mr Weir in their character as partners of Babtie & Company, with the result that they would cease to be managers if and when they ceased to be partners. Article 37 is elliptical in respect that it does not expressly state whether the "time being" there referred to was a particular point of time, viz., the date of the registration of the company, or a tract of time running for an indefinite period from that date. For the sake of clearness I shall write out *ad longum* the first sentence of article 37, adding in brackets what must be implied on either construction.

The Lord Ordinary's construction is as follows:—

(Upon the registration of the company) the partners for the time being of Babtie & Company of Glasgow shall be (and are hereby appointed to be) the first managers of the company.

The defenders' construction is as follows:—

(From and after the registration of the company) the partners for the time being of Babtie & Company of Glasgow shall be (and shall act as) the first managers of the company.

On the whole I think that the latter is the more natural and better construction of the two. I admit that in certain events this construction might lead to difficulties, but I think that these were exaggerated by the pursuers' counsel. For example, the partners of the firm might dissolve the copartnery at any moment by mutual consent, and might by this device leave the Steamship Company without anyone to manage its business, in violation of the spirit and intention of article 39, which forbids the managers to resign until after they have given at least two months' notice to the company in general meeting of their intention to do so. There is not much substance in this objection. Article 39 would not make it impossible for the managers to resign office on an hour's notice if they chose to do so, though such resignation would expose them to an action for damages for breach of contract at the instance of the company. I should suppose that a voluntary dissolution of the firm without two months' previous notice given to the company would be equivalent to a resignation without notice, and would be attended by the same liability for damages on the part of the managers. Another objection which is entitled to some little weight is illustrated by what actually happened in the present case. From the registration of the company on 3rd October 1907 until 2nd November 1909 the firm of Babtie & Company had no written contract of copartnery. Accordingly if one of the partners had died or become bankrupt during this period it might have been difficult for the shareholders of the company to ascertain whether the firm was thereby dissolved, or whether it must be regarded as still subsisting in virtue of some verbal agreement between the partners such as was afterwards embodied in clause 10 of the written

contract. If this contingency had been pointed out at the time the signatories to the articles would probably have replied that they had every confidence that the surviving or solvent partners would give them correct information as to the position of the firm. Lastly, clause 10 of the contract of copartnery entitles the remaining partners "to introduce new partners into the partnership." How (asked the pursuers' counsel) could such new partners be regarded as "first managers" of the Steamship Company? I see no reason why the "first managers" should not be a fluctuating body, but if I am wrong as to this, then a person subsequently introduced into the partnership would not be one of the managers.

Hitherto I have confined my attention to article 37, though of course it must be read along with the whole other articles. I do not, however, propose to refer to any of the other articles, because all seem to me to be consistent with either construction of article 37.

For the foregoing reasons I am of opinion that the Lord Ordinary's interlocutor should be recalled, and that the defenders should be assoilzied.

LORD MACKENZIE was absent.

The pursuers appealed to the House of Lords.

At delivering judgment—

LORD DUNEDIN — Prior to the 3rd of October 1907 two gentlemen, a Mr Burns and a Mr Weir, in Glasgow, acted together as shipbrokers, and in their office there was another gentleman called Mr Babtie, who also acted as a shipbroker. Mr Babtie had an opportunity of acquiring a certain vessel at a price that he thought was moderate, but I suppose he had not capital enough himself to make the purchase, and therefore he approached his neighbours with a scheme for getting up a limited company—what is generally known as a one-ship company—the object in their eyes (and I am not meaning that it was not a perfectly legitimate object) being that they should be the managers of the vessel—a position, as we all know, which is perhaps more certain to bring in remuneration than sometimes are the dividends of the ship itself—and the managers of the vessel were to be the three persons. For that purpose they proposed to form a new firm, which was to be called Babtie & Company, of whom the three partners were to be Weir, Burns, and Babtie. All that was done, the vessel was acquired, the company was formed, and in the articles of association of the company article 37 provided that "the partners for the time being of Babtie & Company of Glasgow shall be the first managers of the company." The managers were by other articles appointed to act in the way that directors act.

Now the three gentlemen whom I have named accordingly proceeded to act as managers, but unfortunately I suppose friction arose between them, and what happened was this, that seemingly Mr Babtie and Mr Weir took one side and Mr Burns took another, the result being that the majority gave notice of the dissolution of the firm, and having done that they conceived that according to the proper construction of the article the result was that, once the firm was dissolved there would no longer be any managers, and they summoned a meeting of the company to elect new managers. The result of that was the initiation of this action, which was brought by Mr Burns to have it declared that under the constitution of the company he was still a manager of the company, and that the proceedings for electing new managers would be futile.

Now whether he is right or wrong depends entirely on the construction of those words—"The partners for the time being of Babtie & Company of Glasgow shall be the first managers of the company." According to the construction that Messrs Babtie and Weir put upon it, and upon which they acted at the time they dissolved the firm, those words were equivalent to this—"The first appointment shall be the partners of Babtie & Company as they may be from time to time." The construction of the other side is—"The partners of Babtie & Company as they happen to be at the time of the incorporation of the company shall be the first managers." No one says, of course, that the appointment was of Babtie & Company as a firm — everybody agrees that it was as individuals — but the two opposing constructions are those that I have by glossing made rather more clear than the words are themselves.

Speaking for myself, I have no hesitation in preferring the second construction, and in doing so I agree with the Lord Ordinary, and with one of the learned Judges, Lord Johnston, in the First Division of the Inner House. I look at this matter as a pure matter of construction, because I do not think whatever these people may have meant can matter. We have to look at it from the point of view of the outside shareholder, who is entitled to trust to the articles of association as he finds them. Not only do I think the second construction more appropriate to the grammar as it stands for this reason, that first of all the words "first appointment" are not used—the words used are "shall be the first managers," and the words are "for the time being," and there is no mention of the words "from time to time"—but I am greatly moved also by this, that I think if it is *in dubio* it is surely extremely unlikely that the management of the company should be subject to the sweet will of three persons over whom the company have no control. The respondents' argument here necessarily leads to this, that the firm of Babtie & Company could have introduced any number of persons with whom the shareholders were perfectly unacquainted, and by making them partners of Babtie & Company have made them managers of the company.

I think that second construction gathers still further strength when we find that as a matter of fact the articles of partnership of Babtie & Company were not really settled in their final form till two years after the company had been started. I think if the

company was to be put in this position of having its managers a fluctuating body at the will of somebody else, the words to effectuate it would have had to have been extremely clear. It seems to me a much more proper interpretation which starts with a set of people whom you know as the first appointment, and does not start with an elusive body which may perhaps change from time to time. The company have it in their own hands if they do not like any of these people after trying them in their course of management, because under section 40 they can get rid of them by the appropriate majority.

The result is that I move your Lordships to allow the appeal, and to restore the judgment of the Lord Ordinary.

LORD ATKINSON—I concur. I think on the true construction of this section it means the persons who when these articles became operative happened to be members of this company. That is the time being in my opinion, namely, when these articles came into operation.

LORD SHAW—I have very little, if anything, to add to what has fallen from my noble and learned friend on the Woolsack.

The only question for the consideration of the House, in my judgment, is what is the meaning of the term in section 37 of these articles of association. The term used is "the partners for the time being of Babtie & Company of Glasgow shall be the first managers of the company." Upon that the learned Lord Ordinary, in a judgment characterised by his usual good sense, says—"The 'partners for the time being' are appointed the 'first' managers. That must mean the present partners, because none to be hereafter assumed could possibly be the first." In the Inner House Lord Johnston uses also this language—"There is nothing to indicate that these individuals, if they cease to be partners of Babtie & Company, are to cease to be managers, and do not necessarily remain until death, resignation, or removal the first managers of the company. They may die or they may resign, but if they do neither, and the company want to get rid of them, they may (article 40) be removed from office by resolution passed by a three-fourths majority at an extraordinary general meeting."

So cogent do these words appear to me to be that I have viewed with some surprise the judgment of the majority of the First Division of the Court of Session. I have made an anxious endeavour to get to the root of that judgment, and it appears to me to be in those sentences of the learned Lord President when, referring to the Lord Ordinary's interlocutor, he says that the Lord Ordinary's reasons are "that the partners for the time being are appointed the first managers, and that that must mean the present partners, because none to be hereafter assumed could possibly be the first." The learned Lord President says "I cannot agree," and then he adds this, which appears to be the light derivable upon the reasons for the judgment appealed against—"It seems to me the correct expression to use—if you are speaking of the members of a fluctuating body—to say that they are the first managers."

I can only say that that reasoning in no way appeals to my mind. In order to be the first managers the idea of fluctuation must be put out of the mind. Affairs must be crystallised at the first date when the first managers are appointed, and the point of crystallisation is the incorporation of this company. Then, and only then, and at that time, can you discover who the persons are. To say further that the firm of Babtie & Company can thereafter, by dissolution or otherwise or by any internal act of its own, so change its own *personnel* as to operate the dismissal of one or more of the managers of the "Overdale" Steamship Company seems to me to be a contradiction in ideas. The dismissal of the managers of the "Overdale" Steamship Company is charged upon the company itself, and that is accomplished by putting into effect section 40 of its articles of association. That was attempted in this case but failed, the requisite majority not having been obtained, and it appears to me to be impossible to sustain a resolution giving effect to a dismissal but not conforming to the 40th article of association.

LORD PARMOOR—I concur, but I should come to the same conclusion even if I agreed with the argument addressed to your Lordships' House by Sir Robert Finlay as to the meaning of the words "for the time being," and the meaning of the words "the first managers of the company." I think the effect of article 37 is to designate the persons to be the first managers of the company, and that a person so designated does not cease to be a manager of the company even although the firm of Babtie & Company may be dissolved. Of course that view would be independent of any special interpretation to be given to the words "for the time being," or to the words "the first managers of the company." I think that under the articles the managers, whom I will call the designated managers, can only be removed under the provisions of article 40, and that they cannot be removed unless the necessary majority under the terms of that article can be obtained.

Reference was also made to article 47. Now article 47 no doubt was intended to deal with the qualification of managers, who under those articles are in the same position as directors in an ordinary case. Article 47 provides that the managers shall always be shareholders in the company. I do not now refer merely to the matter of grammar. But it provides further that a partner or partners of their firm shall always be a shareholder in the company. That may be a term put in for the protection of the firm of Babtie & Company, but in my opinion it does not in any way alter the fact that Mr Burns has been designated a manager of the company under article 37, and he cannot be removed except under the provisions of article 40.

LORD WRENBURY—In this appeal is involved no question of law. For its decision no qualification is required other than an

intelligent understanding of the English language. The words to be construed define who are to be the first managers of the company, the first persons who in articles of association are generally called directors. The words defining the first managers immediately fix a point of time, and that is the point of time when management commences. There is no provision as to who are to be the subsequent managers The provision is as to who are to be the first managers.

The company was incorporated on the 3rd October 1907. That fixes the point of time. The first managers, the managers at that time, are to be "the partners for the time being" of Babtie & Company. These words may—and I will assume that in the absence of something to the contrary they presumably would—speak not at one point of time only, but at more than one point of time, but they do not necessarily speak at more than one point of time. The words are not "from time to time," but "for the time being." Now I shall be quite correctly using the English language, as I understand it, if I say this—"On the 1st January 1916 the chairman of a certain committee shall be the person who for the time being is president of the college of surgeons." I am there necessarily speaking of one point of time. In this sentence, in my opinion, they clearly speak at only one point of time, namely, the point of time when there can be first managers.

That covers, it appears to me, the whole grounds of this case. I will only give one illustration for the purpose of explaining my meaning. If the partners of Babtie & Company at Glasgow on the 3rd October 1907 were A and B and C, and subsequently C retired and D was made a partner of the firm, there is no provision that A, B, and D shall be managers, for D cannot be a first manager—he is a subsequent manager, and not a first manager. Therefore the words of article 37 define, and define plainly in my opinion, simply this, that A and B and C shall be the first managers, and they do nothing more.

In article 47 the respondents, I think, may find consolation to this extent, that I agree that those words speak as if there were to be found somewhere a provision that the managers should be persons associated in a firm, for article 47 runs thus—"The managers or a partner or partners of their firm shall always be a shareholder of the company." I set myself therefore to find out whether that assumption is true. Is there a provision that a manager shall always be associated in a firm? There is not. It is not to be found in the articles of association, and according to my judgment it would be quite a wrong principle of construction to say that because I find a phrase which assumes that there is a contractual term in the articles, therefore it is inserted by that fact, when otherwise it is not to be found. Now that is the position, it appears to me, in this case.

For these reasons, the provision in the articles is, in my humble judgment, perfectly plain, and defines simply that three people—they were in fact Babtie, Weir, and Burns—should be the first managers of the company, and it results that when those persons dissolved partnership that had no operation at all in altering the constituent members of the body of managers of the company.

For these reasons I agree that this appeal succeeds.

Their Lordships sustained the appeal and restored the interlocutor of the Lord Ordinary, with expenses.

Counsel for the Appellants (Pursuers)—Horne, K.C.—Brown. Agents—Maclay, Murray, & Spens, Glasgow; J. & J. Ross, W.S., Edinburgh; Thomas Cooper & Company, London.

Counsel for the Respondents (Defenders)—Sir R. B. Finlay, K.C.—Hon. Wm. Watson, K.C. Agents—Wright, Johnston, & Mackenzie, Glasgow; Webster, Will, & Company, W.S., Edinburgh; William A. Crump & Son, London.