is an undisclosed asset whose existence might make the financial position better than that shown, such balance-sheet would not in my judgment be inconsistent with the Act of Parliament"—and then he goes on to observe, what I think is exactly the ground on which the main question in this case should be decided, that assets are often by reasons of prudence estimated and stated to be estimated at less than their probable real value. The purpose of the balance-sheet is primarily to show that the financial position of the company is at least as good as there stated, not to say that it is not or may not be better. But then when he had expressed these views with regard to all the other resolutions, he came to consider the question of the resolution which tied up the auditors in the performance of their duty. It would be consistent with the Act if the auditors were to report that they examined the accounts and were satisfied with them, and that the fund had been employed in manner authorised by the company's regulations even although they did not go on to say how the money had been employed or give the information which the resolutions required him to withhold. But then it was said that the auditor would not be duly performing the duty laid upon him by the statute unless he himself were satisfied that his report presented a "true and correct view of the state of the company's affairs." But the special resolutions provided that it was the duty of the auditor not to give certain information, and the learned Judge says—"It is not consistent with the Act of Parliament that the auditor should be bound, even if he thinks the true state of the company's affairs is affected, to withhold that information from the company." The point of the judgment was that the resolutions were *ultra vires* in so far as they tied up the auditor in execution of the duty committed to him by statute instead of leaving it to his own judgment and discretion. But then so far as the substance of the regulations was left in the hands of the directors, the learned Judge saw nothing in the statute against what they had done. I do not think the case directly applicable to the present, because there was there a distinct statement that moneys had been carried to a reserve fund, and therefore there was an application of profits which ought to have appeared on the face of the balance-sheet. It is a totally different question when the complaint is simply that assets are stated at certain values which must be put upon them by estimate according to the discretion of the directors, and that that value does not satisfy the pursuer. But the point I think of Mr Justice Buckley's judgment, so far as it depends on the construction of the 113th section, is that all resolutions of that kind which regulate only the conduct of directors in the exercise of their duty may be within the statute, although if they go beyond that and propose restrictions on an auditor in the exercise of his duty, they are outside the statute and must be restrained.

On the whole matter, therefore, I agree with your Lordships that there seems no case here to justify our interference with this company.

The Court adhered.

Counsel for the Pursuer (Reclaimer)—Sandeman, K.C.—D. P. Fleming. Agents—H. B. & F. J. Dewar, W.S.

Counsel for the Defenders (Respondents)—Horn, K.C.—Black. Agents—Macpherson & Mackay, S.S.C.

Wednesday, March 8.

FIRST DIVISION.

SCOTT MONCRIEFF AND OTHERS (LINDSAY'S TRUSTEES), PETITIONERS.

Trust—Settlement—Accumulations—Thellusson Act (39 *and* 40 *Geo. III, cap.* 98), *sec* 1.

A testator left a sum of money for forming a public library, reading-room, and museum, and "authorised and empowered" the trustees to set apart and accumulate the annual interest, or such portion thereof as they might think expedient, for the purpose of erecting a suitable building. No power was given to encroach on capital.

Held that if the trustees, in order to get sufficient money for the erection of the building, chose to go on saving after twenty-one years, that was not struck at by the Thellusson Act, for the trust deed did not direct accumulations.

The Thellusson Act (39 and 40 Geo. III, cap. 98), enacts—Section 1—"No person or persons shall after the passing of this Act, by any deed or deeds, surrender or surrenders, will, codicil, or otherwise howsoever, settle or dispose of any real or personal property so and in such manner that the rents, issues, profits, or produce thereof shall be wholly or partially accumulated for any longer term than the life or lives of any such grantor or grantors, settler or settlers, or the term of twenty-one years from the death of any such grantor, settler, devisor or testator, or during the minority or respective minorities of any person or persons who shall be living or in *ventre sa mere* at the time of the death of such grantor, devisor, or testator, or during the minority or respective minorities only of any person or persons who under the uses or trusts of the deed, surrender, will, or other assurances directing such accumulations would for the time being, if of full age, be entitled unto the rents, issues, and profits, or the interest, dividends, or annual produce so directed to be accumulated; and in every case where any accumulation shall be directed otherwise than as aforesaid, such

direction shall be null and void, and the rents, issues, profits, and produce of such property so directed to be accumulated shall, so long as the same shall be directed to be accumulated contrary to the provisions of this Act, go to and be received by such person or persons as would have been entitled thereto, if such accumulation had not been directed."

William George Scott Moncrieff, Sheriff-Substitute of Lanarkshire, and others, the trustees acting under the trust-disposition and settlement of the deceased Charles Lindsay of Ridgepark, Lanark, presented a petition to the Court for authority to uplift and apply capital.

The *circumstances* in which the petition was presented were as follows:—Charles Lindsay of Ridgepark, Lanark, died on 14th December 1884, leaving a trust-disposition and settlement, dated 16th May 1883, and registered in the Books of Council and Session 13th March 1885, whereby he assigned and disponed his whole estate to certain trustees (hereafter called the first-mentioned trustees) in trust for the ends, uses, and purposes therein mentioned.

By the said trust-disposition and settlement the truster, after providing for the payment of debts and certain legacies and the establishment of bursaries, directed his trustees to hold the residue of his means and estate, and to pay and apply the annual profits thereof in payment of an annuity of £100 to his sister Mrs Thomson, and after payment of that annuity to pay the balance of the annual profits to his widow Mrs Lindsay. The seventh purpose was in the following terms:—"*In the seventh place*—Whereas I am desirous of establishing a free public library, reading room, and museum within the burgh of Lanark, I direct and appoint my trustees, as soon after the death of my wife, the said Christina M'Call Reid or Lindsay, or as soon after my death should she predecease me, as convenient, to pay, assign, and convey the whole of the free residue and remainder of my means and estate to and in favour of the said William Morison, Hugh Davidson, Andrew Smith, and Alexander Morison, and the survivors or survivor of them, and the Provost of the burgh of Lanark, and his successors in office, as trustees for the purposes following, *videlicet:—In the first place*—For payment of the said annuity to the said Mary Lindsay or Thomson while she may survive; and, *in the second place*, after payment of the said annuity, they shall apply the free annual interest and produce of the said residue, and the whole of my books and collection of fossils, in forming a free public library, reading-room, and museum within the burgh of Lanark, to be called 'The Lindsay Institute'; and the said trustees shall be entitled, and they are hereby authorised and empowered, to set apart and accumulate the whole of the balance of the said annual interest and produce of the said residue, or such portion thereof as they may consider expedient, for the purpose of erecting a suitable building for the said library, reading-room, and museum; and, *lastly*, after deducting the expense of managing and of insuring the buildings, books, and furniture and other property therein against loss by fire, and all other expenses incurred in maintaining the said library, reading-room, and museum, and keeping the whole books and other property therein in good order and repair, the free balance, if any, may be applied in increasing and extending the library and reading-room and in forming a museum illustrative of the natural history of animals, vegetables, and minerals of Lanarkshire, both recent and fossil, and in giving a course of scientific lectures at suitable periods; and I confer upon the said trustees full power to frame rules and bye-laws, and to do all and whatever acts, deeds, matters, or things which may be necessary and proper for carrying my desire into complete execution and effect."

The testator was survived by his said sister and widow, and the first-mentioned trustees paid the income to them as directed. Mrs Thomson died on 19th November 1899, and Mrs Lindsay on 19th July 1902, and thereafter the first-mentioned trustees conveyed the residue of the estate to those of the trustees named who survived and were willing to act, as trustees for the Lindsay Institute. The petitioners were the then acting trustees.

The value of the said residue (after payment of debts and the fulfilment of the prior purposes of the said trust-disposition and settlement) as at the date of its conveyance to the trustees in terms of the said seventh purpose of the said trust-disposition and settlement, was, according to the prices paid for the various stocks and shares, £15,757, 17s. 8d. The value of the capital of the estate was as at 1st December 1909 £14,093, and the annual income amounted to £550.

The petitioners stated they had found it impossible to rent any building suitable for the purpose of a library, reading-room, and museum. Accordingly they had accumulated the annual income as it accrued, and the amount of accumulated income now in their hands was £3670, 19s. 2d.

The petitioners, *inter alia*, stated—"In these circumstances the petitioners are of opinion that in order to carry out the trust purposes it will be necessary to erect buildings suitable for the said library, reading-room, and museum. Under the said trust-disposition and settlement the petitioners have power to use the income of the trust estate for this purpose, but no power is given them to encroach on capital. The accumulated income is, however, insufficient to enable them to acquire a site and to erect suitable buildings. In order to provide such a sum as might be necessary for these purposes, accumulation for a further considerable period would be necessary, and as this would involve the postponement of the benefit to the burgh of Lanark of the trust, the petitioners believe that further accumulation is inexpedient. Accordingly they are desirous of employing a portion of the capital of

the trust estate not exceeding the sum of £3670, 19s. 2d. (which is equal to the amount of the accumulated income) for the acquisition of a site and the erection of the necessary buildings. With a view to ascertaining whether, if this sum were withdrawn from the capital, a sufficient sum would remain to produce the necessary income for meeting the expenses connected with the maintenance of the buildings and the upkeep of the library, reading-room, and museum, the petitioners have caused inquiries to be made in other localities in Scotland possessing similar institutions. As a result of these inquiries the petitioners are led to believe that an annual income of £325 would be sufficient for these purposes, and this sum would be produced by the balance of the capital remaining after the withdrawal of the proposed sum."

The prayer of the petition was for the Court "to grant warrant to and authorise the petitioners to uplift from the capital of the said trust estate a sum not exceeding the sum of £3670, 19s. 2d. [*eventually as after mentioned restricted to* £2000], or such other sum as to your Lordships shall seem proper, and to apply and expend the whole or such portion as may be found to be necessary of the said sum of £3670, 19s. 2d., or such other sum as your Lordships may authorise the petitioners to uplift, in acquiring land for the purpose of a library, reading-room, and museum, and in erecting the same in terms of the said trust-disposition and settlement of the said deceased Charles Lindsay." [The prayer of the petition as originally brought also asked authority to expend a certain sum in the erection of a hall or lecture room, but this they withdrew when the petition was before the reporter.]

On 17th March 1910 the Court remitted to Mr G. F. Dalziel, W.S., to inquire as to the facts and circumstances set forth in the petition and report.

On February 21, 1911, the reporter lodged his report, which, *inter alia*, stated—"Your Lordships will observe from the terms of the trust-disposition and settlement already quoted that the petitioners are not in terms directed to accumulate income for the purpose of erecting the necessary buildings, but they are authorised and empowered to do so, and no authority is given to them to encroach upon capital for that purpose.

"It seems to the reporter that in the circumstances the power of accumulating is equivalent to a direction to accumulate the income so long as the accumulations are, in the view of the trustees, insufficient to meet the cost of the erection of the proposed institute, and that as a consequence of the Thellusson Act this express or implied direction to accumulate is null and void from and after 14th December 1905, *i.e.*, twenty-one years after the death of the testator. In support of this view the reporter begs respectfully to refer your Lordships to the case of *Lord* v. *Colvin*, 1860, 23 D. 111.

"If the view expressed by the reporter is sound, it appears to him that the result of the application of the Thellusson Act is that the direction to accumulate the income of the estate is no longer binding on the petitioners, but that as the residuary legatees of the testator they are now entitled to receive and apply the whole income of the trust estate for the purposes directed by the testator in whatever manner they consider expedient. In other words, it seems to the reporter that but for the Thellusson Act the petitioners would have been bound to go on accumulating income until they had in hand a sufficient sum to pay for the erection of the institute, but that in consequence of the application of the Act the accumulation of income after 14th December 1905 became a matter for the discretion of the petitioners. In support of this view the reporter respectfully refers your Lordships to the case of *Ogilvie's Trustees* v. *Kirk-Session of Dundee*, 1846, 8 D. 1229, and particularly the opinion of Lord Fullerton at p. 1242.

"The reporter has been in communication with the petitioners' agents regarding the effect of the Thellusson Act, and they have informed him that the petitioners consider the question to be one of considerable difficulty, and that they do not feel justified in continuing the accumulation of income. The petitioners have hitherto acted on the view that the continued accumulation of income after the expiry of twenty-one years from the date of the testator's death was forced upon them by the terms of the testator's will, with the consequence that in one view the beneficial enjoyment of the trust funds would be postponed for a period of more than twenty-one years after the testator's death.

"They consider therefore that their present duty is to apply for judicial authority to utilise a portion of capital in carrying out now the testator's intentions.

"In point of fact the petitioners have till now continued to accumulate the income of the trust, and it is explained in the petition that at 31st December 1905—a few days after the expiry of twenty-one years from the date of the testator's death—the accumulations of income in the hands of the petitioners amounted to £1493, 17s. 11d.; that the accumulations had increased to £3670, 19s. 2d. when this petition was presented in February 1910; and that the annual increase is at the rate of about £550 a-year, *i.e.*, by the end of this year (31st December 1911) they will amount to £4770 or thereby.

"If your Lordships should be of opinion that the petitioners are not entitled to continue the accumulation of income, it appears to the reporter that their proposal to encroach on capital to enable them to erect a suitable institute forthwith is in the circumstances reasonable, but it would remain for your Lordships to consider what sum they may be authorised to uplift.

"If, on the other hand, your Lordships are of opinion that the petitioners may go on accumulating income, they maintain as a separate ground of their application

that it is inexpedient that such accumulation should continue, and that they should be authorised to uplift part of the capital of the trust for the purpose of the immediate erection of the proposed institute.

"The petitioners point out in support of this latter view that the benefit intended by the testator to be conferred upon the inhabitants of Lanark by the possession of the proposed institute would be considerably postponed if they are not allowed to utilise part of the capital. It seems to the reporter that the testator contemplated that the buildings would be paid for entirely out of accumulations of income, and unless your Lordships decide that by the operation of the Thellusson Act the petitioners are no longer bound or entitled to accumulate income for that purpose, the mere fact of the delay occasioned by the necessity for further accumulations would not appear to the reporter to be a necessary reason for authority being granted to the petitioners to encroach on capital. Your Lordships will observe that the trust for the erection of the institute only came into real operation on the death of the testator's widow in July 1902, and the testator presumably had in view that considerable time must elapse after the death of his widow before the accumulations of income would amount to a sum sufficient to meet the cost of erecting an institute. . . .

"In considering this matter your Lordships may wish to have in view what the result would be if a sum of, say, £3600 was uplifted from the capital of the trust and applied in or towards payment of the cost of erecting an institute.

"The approximate value of the capital of the trust estate amounts, as stated in the petition to, say	£14,000
"And the petitioners desire authority to uplift, say . . .	3,600
Leaving .	£10,400

"This sum would yield annually, if invested at 3¼ per cent., £338. The present investments of the trust yield a higher return than 3¼ per cent., but probably that is as high a rate as can be safely relied upon in considering the future working of the trust.

"The petitioners have stated in the petition that an annual income of £325 would be sufficient for the proper maintenance and upkeep of the proposed institute. . . .

"The petitioners have lodged in process an abstract giving some details of the annual expenditure of various institutes of a similar character in different parts of Scotland. The annual expenditure of the institutes referred to in the abstract ranges from about £60 to £500, and, so far as he is able to judge from the data before him, it would seem to the reporter that a sum of £325 should be sufficient for the annual expenditure of an institute such as the petitioners desire to erect.

"Your Lordships, however, will observe that if an institute is erected at the cost proposed by the petitioners, and if they are authorised to apply £3600 of the capital of the trust to meet that cost, the income of the trust will—or at least may—in that event only, be sufficient to meet the ordinary annual expenditure of the institute according to the petitioners' estimate and leave a very small margin over—only £13, although this would be increased if the trust investments yield more than 3¼ per cent. It seems to the reporter that it would be more prudent and more in accordance with the expressed wishes of the testator to ensure that there would be a substantial margin in the income of the trust after providing for the ordinary annual expenditure, so that there may be (to use the testator's words) funds available for 'increasing and extending the library and reading-room, and forming a museum illustrative of the natural history of animals, vegetables, and minerals in Lanarkshire, both recent and fossil, and in giving a course of scientific lectures at suitable periods. . . .'

"In the whole circumstances it appears to the reporter that the preliminary question requiring to be determined is whether the petitioners are still entitled, notwithstanding the terms of the Thellusson Act, to accumulate income until they have a sufficient sum to pay for erecting an institute.

"If that question is answered in the negative, the circumstances are probably such as would justify judicial authority being given to encroach on capital.

"If the question is answered in the affirmative, the further question arises on the petitioners' contention whether any ground exists for the testator's directions with regard to the accumulation of income being superseded in the way proposed.

"If and when your Lordships reach the stage of considerating the amount which the petitioners may be authorised to uplift from capital, it appears to the reporter that no sufficiently definite scheme for the acquisition of a site and for the erection thereon of the institute they propose has yet been submitted, and if your Lordships also take that view the petition might be continued in order that the petitioners may have an opportunity of submitting to your Lordships some such definite scheme. In that event the reporter would humbly suggest that an interlocutor should be pronounced containing a finding of your Lordships' decision on the result of the application of the Thellusson Act, and *quoad ultra* continuing the petition.

"If, however, your Lordships should consider that authority may now be granted to the petitioners to uplift the said sum of £3600—or such other sum as your Lordships may determine—from the capital of the trust for the purpose of erecting the proposed institute, and that it is unnecessary for the petitioners to submit more precise information as to the cost of the proposed institute, the reporter humbly suggests that an interlocutor in the following terms may be suitable—The Lords having resumed consideration of the petition and report by Mr G. F. Dalziel, grant warrant to and

authorise the petitioners to uplift from the capital of the trust estate of the late Charles Lindsay the sum of £ , and to apply and expend the said sum in acquiring land for the purpose of erecting thereon, and in erecting thereon, a library, reading-room, and museum in terms of the trust-disposition and settlement of the said Charles Lindsay: *Quoad ultra* refuse the petition: Find that the expenses of this application are chargeable against the income of the trust estate, and decern."

On February 25th 1911 counsel for the petitioners in asking the Court to grant the prayer of the petition referred to *Ogilvie's Trustees* v. *Kirk-Session of Dundee*, July 18, 1846, 8 D. 1229.

LORD PRESIDENT—We are quite satisfied that the trustees here are acting in the most ample good faith in every way, but there is a view of the case which strikes us, and it is this. The Thellusson Act strikes at accumulations, and therefore, so far as the directions of the trust necessitate accumulations, those directions are gone after twenty-one years. But the Thellusson Act does not prevent trustees or anyone else from saving out of income. Accordingly we are not inclined to think that the trustees will commit any impropriety which is struck at by the statute if they choose to go on saving. The check upon the trustees is not under the Thellusson Act, but under the directions of the trust. Suppose a sum of money is given to trustees for certain purposes. If the trustees sit with folded hands and, to gratify a miserly pleasure, allow the money to roll up, and do nothing, the check upon their proceedings would be that they were not fulfilling the purposes of the trust. But if as a practical matter the trustees have not enough money to provide, out of their income, for a necessary purpose of their trust—in the present case for the erection of a library—it is not likely that an objection founded on the terms of the trust would be successful. Suppose the trustees were in a position to get a very small room in which to store the books, the Thellusson Act would not prevent them from saving money out of their income to build an addition to that room. Savings of income are not accumulations in the sense of the Thellusson Act. This consideration does not make the present application impossible or improper. It makes it a practical question whether it would not be more prudent for the trustees to refrain from encroaching on capital at the present moment, and starting with the narrow margin of income that would be produced by the capital so reduced—whether it would not be more prudent to have a few more years' saving, after which the margin would not be so narrow. We feel that the trustees have not considered that, because they have thought, in perfectly good faith, that they were hampered from doing so by the provisions of the Thellusson Act, and accordingly we shall continue the case until they have an opportunity of doing so.

LORD JOHNSTON and LORD SKERRINGTON concurred.

LORD KINNEAR and LORD MACKENZIE were sitting in the Extra Division.

The Court did not then pronounce any interlocutor.

On 8th March counsel for the petitioners informed the Court (Lord President, Kinnear, Johnston, and Mackenzie) that the petitioners had the opportunity of acquiring a certain piece of ground, and were able and wished to restrict the prayer of the petition to the sum of £2000.

The Court pronounced this interlocutor—

"Grant warrant to and authorise the petitioners to uplift from the capital of the trust estate of the late Charles Lindsay a sum not exceeding £2000, and to apply and expend the said sum in acquiring land for the purpose of erecting thereon, and in erecting thereon, a library, reading-room, and museum in terms of the trust-disposition and settlement of the said Charles Lindsay: *Quoad ultra* refuse the prayer of the petition, and decern," &c.

Counsel for the Petitioners — R. C. Henderson. Agents—Steedman, Ramage, & Company, W.S.

Thursday, March 9.

FIRST DIVISION.

[Sheriff Court at Glasgow.

KYLE *v.* M'GINTYS.

Master and Servant — Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (4)—*Unsuccessful Action of Damages Followed by Request for Assessment of Compensation under the Act — Other Dependants after Expiry of Six Months Seek to be Sisted.*

The Workmen's Compensation Act 1906 enacts—Section 1 (4)—"If, within the time hereinafter in this Act limited for taking proceedings, an action is brought to recover damages independently of this Act for injury caused by any accident, and it is determined in such action that the injury is one for which the employer is not liable in such action, but that he would have been liable to pay compensation under the provisions of this Act, the action shall be dismissed; but the Court in which the action is tried shall, if the plaintiff so choose, proceed to assess such compensation, but may deduct from such compensation all or part of the costs which, in its judgment, have been caused by the plaintiff bringing the action instead of proceeding under this Act. . . ." Section 2 (1)—"Proceedings for the recovery under this Act of compensation for an injury