death has been broken, or, as it is put by Collins, M.R., in *Dunham* v. *Clare* ([1902] 2 K.B. 292), whether there has been a *novus actus interveniens* so that the old cause goes and a new one is substituted for it. I agree with your Lordship that the case must go back to the Sheriff to determine the question whether the man's death did in fact result from the injury.

LORD JOHNSTON was not present at the advising.

The Court remitted the case back to the Sheriff-Substitute as arbitrator to state whether in all the circumstances he found as a fact that death did or did not result from the accident, and to report.

On 24th February 1911 the Sheriff-Substitute reported as follows—"The Sheriff-Substitute begs respectfully to report to the Court that he finds as a fact that the death of the respondent's husband Samuel Dunnigan resulted from the accident libelled."

The case was further heard on 8th March, when counsel for the appellants stated that in view of the finding in the Sheriff-Substitute's report he did not intend to submit further argument.

LORD PRESIDENT—The whole matter has been dealt with in the previous stage of the case. We have now got an answer from the Sheriff-Substitute which is strictly in terms of the statute, and looking to the fact which he there finds—whether we would agree with him or not—I have no doubt that there was evidence on which he was justified in coming to the conclusion which he has reached. That ends the matter.

LORD KINNEAR — I am of the same opinion.

LORD JOHNSTON—I concur.

LORD MACKENZIE—I also concur.

The Court pronounced this interlocutor—

"Refuse to answer the questions of law as stated in the case: Affirm the determination of the Sheriff-Substitute as arbitrator: Dismiss the appeal, and decern: Find the respondent entitled to the expenses of the stated case on appeal, and remit," &c.

Counsel for Appellants—M'Lennan, K.C. —Aitchison. Agents — Balfour & Manson, S.S.C.

Counsel for Respondent — M'Kechnie, K.C. — Maclaren. Agents — Sturrock & Sturrock, S.S.C.

Friday, March 10.

EXTRA DIVISION.

(Before Lord Kinnear, Lord Dundas, and Lord Mackenzie.)

YOUNG *v.* BROWNLEE & COMPANY.

Company—Management—Directors' Powers —Balance Sheet—Undervaluation of Stock —Concealed Assets—Ultra vires—Action by Objecting Shareholder — Relevancy — Companies (Consolidation) Act 1908 (8 *Edw. VII, cap.* 69), *secs.* 113 *and* 281.

A shareholder in a limited company, carrying on the business of timber merchants, brought an action of declarator and interdict against the company, in which he averred that the balance sheet issued by the directors and passed by a general meeting was false and *ultra vires*, in respect that the stock of timber was entered therein at less than its true market value, whereby a part of the profits earned by the company were concealed from the shareholders, but he made no averment of fraud on the part of the directors.

Held that the valuation of the stock of timber was an administrative matter within the discretion of the directors in connection with which they were answerable alone to the general body of shareholders of the company, that there were no relevant averments of *ultra vires* actings on the part of the company or the directors, and the action *dismissed.*

Newton v. *Birmingham Small Arms Company*, [1906] 2 Ch. 378, *distinguished* (*per* Lord Kinnear) and *commented on.*

The Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69), enacts—Section 113—"(1) Every auditor of a company shall have a right of access at all times to the books and accounts and vouchers of the company, and shall be entitled to require from the directors and officers of the company such information and explanation as may be necessary for the performance of the duties of the auditors. (2) The auditors shall make a report to the shareholders on the accounts examined by them, and on every balance-sheet laid before the company in general meeting during their tenure of office, and the report shall state (*a*) whether or not they have obtained all the information and explanations they have required; and (*b*) whether in their opinion the balance-sheet referred to in the report is properly drawn up so as to exhibit a true and correct view of the state of the company's affairs according to the best of their information, and the explanations given to them, and as shown by the books of the company. (3) The balance-sheet shall be signed on behalf of the board by two of the directors of the company, or if there is only one director, by that director, and the auditor's report shall be

attached to the balance-sheet, or there shall be inserted at the foot of the balance-sheet a reference to the report, and the report shall be read before the company in general meeting, and shall be open to inspection by any shareholder. Any shareholder shall be entitled to be furnished with a copy of the balance sheet and auditor's report at a charge not exceeding sixpence for every hundred words. . . ." Section 281—"If any person in any return, report, certificate, balance-sheet, or other document, required by or for the purposes of any of the provisions of this Act . . . wilfully makes a statement false in any material particular, knowing it to be false, he shall be guilty of a misdemeanour . . ."

On 26th April 1910 James Brownlee Young, *pursuer*, brought an action against Brownlee & Company, Limited, timber merchants and sawmillers, City Sawmills, Port Dundas, Glasgow, and the directors of the company, *defenders*. The action concluded for (1) declarator "that the defenders, in the issuing of the balance-sheets of the said company, are bound to show in said balance-sheets the true and correct position of the affairs of the said company, and are not entitled to issue balance-sheets of the said company in which the stock of timber, &c., on hand on the property and assets side of the balance-sheets is entered at less than its true value, and the property and assets of the said company thus stated at less than their true value, with the object and result of concealing that profits have been earned in excess of what is shown in the balance-sheets;" and (2) interdict against the defenders "from issuing balance-sheets of the said company which do not show the true and correct position of the affairs of the said company, and in particular from issuing balance-sheets of the said company in which the stock of timber, &c., in hand on the property and assets side of the balance-sheets is entered at less than its true value, and the property and assets of the said company thus stated at less than their true value, with the object and result of concealing that profits have been earned in excess of what is shown in the balance-sheets."

The defenders, *inter alia*, pleaded—"(3) The averments of the pursuer being irrelevant, and insufficient to support the conclusions of the summons, the action ought to be dismissed."

The company's articles of association, *inter alia*, provided as follows—"110 (17) Before recommending a dividend on the ordinary shares, to set aside out of the profits of the company such sums as they think proper as a general reserve fund to meet contingencies, or for a dividend reserve fund to equalise dividends, or for depreciation, or for repairing, renewing, improving, extending, or maintaining the various works or property of the company, and for such other purposes as the directors may in their absolute discretion think conducive to the interests of the company, and, if they see fit, to invest the several sums so set aside upon such investments as they think fit; including a power to employ the sums so set aside, or any part of them, in the business of the company . . . 114. Subject to the rights of members entitled to shares issued upon special conditions, the profits of the company shall be applied in the order of priority and in the manner following, viz.—(*Firstly*) To the payment of a cumulative preferential dividend at the rate of £5 per cent. per annum on the capital for the time being called and paid up or credited as paid up on the preference shares; and (*Secondly*) Subject to the provisions and powers conferred upon the directors by clause 17 of article 110 hereof, the residue shall be divisible among the holders of the ordinary shares in proportion to the amount paid up on the shares held by them respectively. . . . 129. At the ordinary general meeting in every year the directors shall lay before the company a statement of the income and expenditure, and a balance-sheet containing a summary of the property and liabilities of the company made up to a date not more than three months before the meeting from the time when the last preceding statement and balance-sheet were made, or in the case of the first statement and balance-sheet from the incorporation of the company. 130. Every such statement shall be accompanied by a report of the directors as to the state and condition of the company, and as to the amount which they recommend to be paid out of the profits by way of dividends or bonus to the members, and the amount (if any) which they propose to carry to the general or other reserve fund, according to the provisions in that behalf hereinbefore contained, and the statement, report, and balance-sheet shall be signed by at least one director and countersigned by the secretary."

The *pursuer's averments*, so far as necessary, are set forth in the opinion of the Lord Ordinary (SKERRINGTON), who on 7th July 1910 dismissed the action as irrelevant. [See also summary of averments in opinion of Lord Dundas, *infra*.]

Opinion.—"When this case was debated I was under the impression that it raised a question of general importance to companies and to investors, viz.—as to the right of a company registered under the Companies Acts to have what is called an 'inner reserve,' and as to the title of a shareholder to insist upon a disclosure of such a reserve in the summary of the balance-sheet annually laid by the directors before the company at its ordinary general meeting. On reconsidering the matter, however, and re-perusing the record, I have come to the conclusion that no question of general importance falls to be decided, but that the action should be dismissed as irrelevant. The pursuer is a shareholder in Brownlee & Company, Limited, timber merchants and sawmillers, Glasgow, and he complains that the stock of timber on hand is entered in the balance-sheets of the company at less than its true value, with the object and result of concealing that profits have been earned in

excess of what is shown in the balance-sheets. He explains (cond. 3) that during the first five years of the company's existence, viz., down to 31st March 1901, the valuations of the stock were arrived at 'after making deductions varying from 2½ per cent. to 16 per cent.' Presumably he means that these deductions were made from the market price of the stock for the time being, and presumably he approves of these deductions. He complains that for the year ending 31st March 1902, and for subsequent years, the deductions from the 'market value' of the stock have varied from 25 to 31 per cent. Thus in the balance-sheet for the year ending 31st March 1909 the 'stock of timber, &c., on hand per inventories' is entered at £166,692, 15s. 5d., a figure which the pursuer alleges was arrived at after deducting £53,000 from the market value. He avers (cond. 5), 'The deduction so made had the effect of representing the stock to be of much less value than it really was, and was made not because the defenders, the said directors, considered that the timber was of less value than the market value, or because they considered that the said deduction was required in order to arrive at a sound and prudent valuation of the stock, but was deliberately made by the said defenders with the intention and result of concealing from the shareholders the fact that profits had been and were being earned in excess of what was shown in the balance-sheet.'

"The pursuer does not aver that the directors in making these deductions were actuated by any dishonest or selfish motive. Nor does he allege that the members of the company, in approving of the accounts submitted to them by the directors, used their powers as a majority oppressively or unfairly. Indeed, the pursuer does not even allege that he ever brought his objections before his fellow members at a general meeting. In these circumstances, I am of opinion that the pursuer cannot succeed unless he relevantly alleges and proves that the company has acted *ultra vires* of its memorandum of association or of the Companies Acts. He makes such an averment in general terms in cond. 6, though his detailed statements have reference to the duties of the directors towards the company under the articles of association. At the debate, however, the pursuer's counsel referred to sections 112 and 113 of the Companies (Consolidation) Act 1908, and he argued that a company violates the statute, and so acts *ultra vires*, if it approves of accounts which are not in fact true accounts. I do not need to consider whether that is a correct proposition of law, because I am of opinion that there is no relevant averment that the valuations of timber as appearing in the balance-sheets were in fact incorrect. I assume in favour of the pursuer that the directors, if examined in the witness-box in regard to the balance-sheet of 31st March 1909, would depone that when the balance-sheet was signed on behalf of the board, as directed by section 113 (3) of the Act, they were of opinion that the timber, if sold at the market price then current, would produce £53,000 more than the sum entered in the balance-sheet. On the other hand, as it is not suggested that they acted otherwise than honestly, I assume that they would explain that some time must elapse before the stock could be realised in the ordinary course of business; that in their opinion timber is not the same as cash; that an unrealised profit is not the same as a realised profit; and that while they hoped that the stock would be sold for £220,000, everything depended upon the prosperity of the timber trade and the solvency of their customers. The whole question seems to me to be essentially one to be determined by the directors in the first instance, subject to the criticism of the Auditors and the control of the members of the company. Though it is no part of an Auditor's duty to value a stock of timber, it is his duty to inquire on what principle the valuation in the balance-sheet has been arrived at, and if he is dissatisfied with the explanation of the directors he should mention the matter in his docquet. I have no reason to doubt that the auditors did their duty in the present case, and I am of opinion that the pursuer has not stated any facts entitling him to reverse the decision of the directors, the auditors, and the members of the company."

The pursuer reclaimed, and argued—The pursuer offered to show that there was a deliberate attempt on the part of the directors to build up a secret reserve by understating the value of the stock in the balance-sheet. It was no case of mere precautionary under-valuation to guard against fluctuations in market value. An increase in the value of the stock was recognised as profit, and might quite properly be distributed as such—*Jamieson* v. *Mackinnon*, December 23, 1881, 9 R. 535, Lord President Inglis at 579, 19 S.L.R. 278; *Stringer*, L.R., 1869, 4 Ch. A. 475, Selwyn, L.J., at p. 492; Buckley on the Companies Acts (9th ed.), p. 652. Whether distributed or not, the shareholders were entitled to know from the balance-sheet what the profits were. This balance-sheet did not comply with the requirements of section 113 of the Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69) If a secret reserve were being accumulated, the balance-sheet must at least disclose the fact that such an asset existed — *Newton* v. *Birmingham Small Arms Company*, [1906] 2 Ch. 378. What was done by the directors was *ultra vires*, and was so whether it was done with the assent of the company or not. It was therefore immaterial that the pursuer had come to the Court without first bringing the matter before a general meeting of the company. Any individual shareholder was entitled to restrain the company from doing what was illegal or *ultra vires*—*Hoole* v. *Great Western Railway Company*, L.R., 1867, 3 Ch. App. 262, Lord Cairns at p. 268; *Howden* v. *Yorkshire Miners' Association*, [1903] 1 K.B. 308, Vaughan Williams, L.J., at p. 329; *Simpson* v. *Westminster Palace Hotel Company*, 1860, 8 Clerk (H.L.) 712; Buckley on the Companies Acts (9th ed.),

p. 613; Palmer's Company Law (8th ed.), p. 227.

Argued for the respondents—Even conceding that it would be *ultra vires* to accumulate a secret reserve unbeknown to the shareholders, that was not truly the case made here. This was purely a question of valuation of stock, which was entirely a matter of opinion and within the discretion of the directors, subject no doubt to the wishes of the company in general meeting. Unless an objecting shareholder could get the support of a majority at a general meeting he had no redress—*Macdougall* v. *Gardiner*, L.R., 1875, 1 Ch. D. 13. The pursuer had never drawn the attention of the company to the matter or moved disapproval of the accounts, and this was just an attempt to get the Court to do a thing which was entirely within the province of the company itself, viz., to place a different value on timber from that which the directors as business men thought prudent. No fraud was averred, and therefore section 281 of the Companies Act 1908 had no application here; and further, the balance-sheet fully complied with the Companies Acts.

At advising—

LORD DUNDAS—I am for adhering to the Lord Ordinary's interlocutor. I think the action is radically irrelevant. It is necessary to attend closely to the pursuer's summons and condescendence in order to ascertain precisely what is his complaint against the company and the directors as regards the balance-sheets which have been issued in the years since 1902. The pursuer's counsel expressly disclaimed all intention of averring fraud or dishonesty on the part of the directors. If that had been the nature of his complaint, his remedy would presumably have been that prescribed by section 281 of the Companies Act 1908. But his case is that the company and the directors acted *ultra vires;* and his counsel admitted that if his averments fell short of this the action must fail. I am unable to see that any case of *ultra vires* has been relevantly stated.

I proceed to consider the pursuer's averments in the order of his record. He begins by setting out (cond. 5) that the valuation of the stock of timber as appearing yearly in the balance-sheets since 1902 has been arrived at on a method different from that previously adopted. I confess that I cannot find from the record in what the difference precisely consisted, except that the deductions made before 1902 were apparently smaller in amount than those made after 1902. It is baldly stated (cond. 3) that the valuations before 1902 "were arrived at after making deductions" (presumably from the market value of the stock in each year) "varying from 2½ per cent. to 16 per cent." "The method adopted under the new system," it is explained (cond. 5), "was to take the market value, that is, the pursuer believes, the wholesale or c.i.f. market value of the stocks (and which was the value entered in the inventories of the stock prepared for the purposes of the balance-sheet by the heads of the various departments of the business) and thereafter deduct from the value a percentage varying from 25 per cent. to 31 per cent."; and the fact that "so considerable a deduction" had been made was not, the pursuer complains, disclosed in the balance-sheets nor intimated to the shareholders in any way. I find in this no intelligible averment as to the essential difference between the "old system" of valuation, to which the pursuer takes no objection, and the "new system," which is said to be *ultra vires* of the company. This matter, however, is not of first-class importance in the case, and I leave it there.

But the pursuer goes on to aver (cond. 5) with regard to the balance-sheet for the year ending 31st March 1909, that "the deduction so made had the effect of representing the stock to be of much less value than it really was, and was made, not because the defenders, the said directors, considered that the timber was of less value than the market value, or because they considered that the said deduction was required in order to arrive at a sound and prudent valuation of the stock, but was deliberately made by the said defenders with the intention and result of concealing from the shareholders the fact that profits had been and were being earned in excess of what was shown in the balance-sheet." It is not at first sight easy to figure the motive (as to which no explanation is offered) underlying this intention to conceal, unless it were in some way fraudulent, which is expressly disclaimed; and the defenders, on the other hand, explain (ans. 5) "that in each year the directors duly considered the value at which stock on hand should be entered in the balance-sheet, making due allowances varying in each year, for the extent and nature of the stock, general trade conditions, and the like." But the pursuer proceeds (cond. 6) to maintain "that said deduction is illegal and *ultra vires* of the directors of the company, and in contravention of the company's statutes and of the memorandum and articles of association of the company." He refers particularly to articles 110 (17) and 130 of the articles of association. These appear to me to have no application at all. There is no question about what the directors have carried to the reserve fund provided for by article 110 (17.) The pursuer indeed goes on to allege that the method adopted of stating the balance-sheets is prejudicial to the shareholders, because it "diminishes the market value of the shares," as it conceals the existence of a "secret reserve fund," so that the financial position of the company is shown to be worse than in point of fact it truly is. There is not, however, on the pursuer's own averments, anything that can be accurately described as a creation of a secret reserve fund; what has been done (legally or otherwise) is to enter the stock in the balance-sheets at a depressed valuation. As regards alleged excess of power

under the general statutes, the pursuer's counsel urged that the balance-sheets are "false," because a large amount of circulating capital (*e.g.*, in the balance-sheet for 1909, the difference between £166,000 and £203,000, which is alleged to be the "true value" of the stock) is not disclosed in the profit and loss account on the balance-sheet. But the argument appears to me to involve a fallacy, for both sides of the balance-sheet do disclose the amount of the company's circulating capital, in accordance with the directors' valuation of it, which, however, the pursuer considers to be stated at too low a figure. The difference, accordingly, between the parties seems to me to be one of opinion or estimate, and not one involving, at least *prima facie*, any excess of statutory power. Article 7 of the condescendence does not appear to add anything material to the pursuer's main averments, but illustrates, I suppose, the sort of evidence which he wishes to lead at the proof, if a proof is allowed.

Now from beginning to end of the pursuer's record, which I have endeavoured to summarise, I nowhere find any relevant averment of *ultra vires* action on the part of the defenders. The gist of his allegations is that valuations of stock have been made by the directors and approved by the company in general meetings, which he considers were very much too low from his point of view as a shareholder. *Prima facie* valuation of stock is a matter for the discretion of the directors, and if shareholders are dissatisfied their remedy is to disapprove of the directors' report and set about getting a new board appointed whose actings will be more to their mind. The pursuer's objection is one which, so far as I see, might be put forward with equal relevancy to the valuation of any other of the items of the company's property and assets appearing in the balance-sheets. I am not at all prepared to lay down as a general proposition that it is illegal for directors to make a low valuation of stock or other assets in order to create a reserve in view of future and contingent liabilities. I think such action is *prima facie* within the region of their discretion, and cannot be challenged in the law courts by a dissatisfied shareholder or shareholders. Cases may, no doubt, be figured where a particular mode of valuation might be illegal, and as such liable to be restrained by the Court, *e.g.*, the converse case of an over valuation, which might be held to be illegal if it involved danger of dividend being paid out of capital. But I cannot find in the present record averments to show that what is complained of lay outside the sphere, in the first instance, of the directors' discretion. The whole aspect of the case is adverse to the pursuer. He has not even brought his complaint before a general meeting of the company, for the reason, as was frankly explained, that he was aware that his protest would meet with no success there. The balance-sheets have been passed and docqueted by auditors against whose capacity and probity nothing is suggested, and duly approved by the company in general meetings assembled. Whether or not the valuations actually made by the directors were the most prudent in the interests of all concerned we have, of course no means of judging, and it would be irrelevant to consider.

I think the form of the pursuer's summons, which must have been the subject of careful thought and preparation, demonstrates his inability to frame a relevant case of *ultra vires* actings, upon which alone (as he admits) he can hope to prevail. The declarator sought is in effect that the balance-sheets must be such as to disclose the "true value" of the stock. This is, in one sense, a mere platitude; but the point lies in the word "true." I do not see how we are to declare, as applicable to the valuations in the balance-sheets of this company, an absolute standard of truth; the "true value" of a subject yet unmarketed must depend to a certain extent upon matters of forecast or conjecture, and must be arrived at by the directors upon a sound and honest consideration of the whole facts before them, having in view their duty both to the company and to the shareholders as individuals. But the pursuer asks further for declarator that the property and assets of the company must not be entered in the balance-sheets "at less than their true value, with the object and result of concealing that profits have been earned in excess of what is shown in the balance-sheets." This qualification does not, I think, lessen the pursuer's difficulty. It introduces a subjective element—the directors' "object"; but I apprehend that intention (fraud or dishonesty being out of the case) cannot affect the legality, or the reverse, of the thing that is done. So far as the conclusion for interdict is concerned, the weakness of the pursuer's case is even more apparent. It would, in my opinion, be out of the question to pronounce an interdict which on the face of it would strike at the issuing of balance-sheets disclosing stock entered at other than its "true value"—surely a flexible term, requiring definition in each concrete case,—with the "object" above indicated, which would apparently lead the Court's inquiry, if a breach of interdict was alleged, to the ascertainment as matter of evidence of the object and intention with which the balance-sheets were framed—a matter surely irrelevant, at least where fraud is not in issue. The pursuer's counsel admitted that he could not maintain the conclusion for interdict as it stands, but suggested that, after proof had been led, the terms of the order might be adjusted to fit the facts proved. It is true that such a course is sometimes allowed, and the precise terms of the interlocutor may be framed otherwise than in the language of the summons. But before such procedure is resorted to, it is, I apprehend, a condition-precedent that a relevant case has been put forward on record to justify an interdict within (if not exhaustive of) the conclusions which are asked for. As already said, I consider this pursuer has failed to

state a relevant case against the defenders. I do not think any proof should be allowed, and indeed I find it difficult to see what facts the pursuer avers his intention or desire to prove. The Lord Ordinary's interlocutor ought, in my opinion, to be adhered to, with additional expenses.

LORD MACKENZIE—This action is brought against Brownlee & Company, Limited, and the directors by one of the shareholders. The conclusions of the action and the averments make it plain that the only question raised is one of valuation. The demand of the pursuer, put shortly, is that the defenders are not entitled to issue balance-sheets in which the stock of timber on hand is entered at less than its true value. He says that the value of the timber has been understated in the balance-sheets since the year 1902 by amounts which varied in each year. I pass over for the moment the motive which the pursuer imputes to the defenders for so undervaluing a portion of their assets.

It is important to notice, in the first place, that it is nowhere averred that there has been any fraud, corruption, or oppression on the part of the directors or of the company, nor is it suggested that the course pursued throughout these years, during several of which the pursuer was himself a director, was not adopted in perfect *bona fides* for the good of the company. It is not stated that the pursuer ever challenged the valuations at any meeting of the company. The case, as was conceded by counsel for the pursuer, depends entirely upon his establishing that it was *ultra vires* of the directors and of the company to do what they have done. Their actings would be *ultra vires* if they had transgressed any of the provisions in the memorandum of association. We were not referred in argument to any provision in the memorandum which it was said had not been observed. Our attention was directed to section 113 of the Companies Act of 1908. That, however, refers only to the powers and duties of auditors. It is not said that the auditors have not had access to the books, accounts, and vouchers of the company, and their docquet on the last balance-sheet to 31st March 1909 bears that they have obtained all the information and explanations which they require. They state that the balance-sheet is properly drawn up so as to exhibit a true and correct view of the state of the company's affairs at 31st March 1909, according to the best of their information and the explanations given to them, and as shown by the books of the company. The balance-sheet was signed by two of the directors of the company. This is exact compliance with the provisions of section 113, and no more could be required under this head. A reference was made to the articles of association 114 (2), 110 (17), and 130, but these in my opinion do not advance the pursuer's case. A reference was made of a somewhat fugitive character to section 281 of the Companies Act of 1908, which provides that if any person wilfully makes in a balance-sheet a statement false in any material particular, knowing it to be false, he shall be guilty of a misdemeanour. This, however, is quite inappropriate to the matter in hand in the absence of any averment of fraud, because the charge which is brought in the present action by the pursuer against the directors and the company alike is that they have underestimated the true value of the timber. Counsel were asked to define by amendment of the conclusion of the summons what was meant by the expression "true value" but refrained from doing so. There is no principle for guidance suggested, and a decree in terms of the declaratory conclusion would not indicate to the directors of the company whether the true value of the timber was the price at which it was bought, the market price on the day when the balance-sheet was made up, or some other figure. It was conceded that if the market price were taken there must be a discretionary power in the board to take into consideration the contingencies to which the business is subject, and it had practically to be conceded that the question was one of degree. The moment, however, that this is admitted, it becomes apparent that the true sphere in which the whole of this matter lies is that of administration. Upon the conclusions of this summons, and the averments in this record, I am of opinion that the question is one of *intra familiam*. The pursuer and the defenders are all parties to a contract, and a vital term of that contract is that the affairs of the company are to be managed by the board of directors. It is their voice which must be heard in the first instance. What they say is subject to the criticism of the auditors, and the final word in regard to such a matter as we are dealing with here rests with the majority of the shareholders. The pursuer is attempting in this action to get the Court to manage the affairs of the company. In my opinion his only remedy for the grievance which he alleges is to go to a meeting of the company and endeavour to persuade a majority of the shareholders to take the same view as he does himself.

Turning again to the conclusions of the summons, what is alleged is that the company and the directors are not entitled to act in the manner complained of with the object and result of concealing that profits have been earned in excess of what is shown in the balance-sheets. The motive for the action does not appear to me to be relevant to the question. The decision of the case must depend on whether the action was *ultra vires* or not. If it was *ultra vires* the motive which actuated the defenders does not matter. If it was not *ultra vires*, then (in the absence of any averment of fraud) the motive does not affect the question. A good deal was said in the course of the discussion as to the directors having undervalued the timber from a desire to form a secret *reserve*. It is probably sufficient to say that no mention is made of secret reserve in the conclusions

of the action. If it is necessary to go further, I may add that there cannot be a reserve until there is a profit, and that it cannot be ascertained that there is a profit until the valuation has been made. For these reasons I think that the pursuer is not entitled to the declarator which he asks. The conclusion for interdict appears to me to be in an even worse position. It is suggested that the conclusion might be modified and adjusted to meet the necessities of the case. This, however, could only be done if the case was relevantly laid, and for the reasons already stated I do not think the present is a relevant case. In no case would it be possible to grant an interdict which makes use without explanation of such a phrase as true value. In my opinion the Court ought not to entertain the proposition that directors of a company against whom there is no averment of fraud, corruption, or oppression, who make what appears to the minority of the shareholders to be an unduly low valuation of assets, the existence of which is fully disclosed in the balance-sheet, are exposed to interdict.

It only remains to notice an argument founded upon the granting of certificates by the directors setting forth the amount of the percentage deducted from stock given to certain ordinary shareholders to facilitate the sale of their shares. What these certificates bore according to the averment was merely that certain amounts were written off. This does not appear to me to conflict with the view that the balance-sheet when presented was a true one.

Upon the whole matter, I am of opinion that the interlocutor of the Lord Ordinary should be arffimed.

LORD KINNEAR—I agree with both the opinions which have been delivered. I agree with your Lordships that if there had been any relevant ground of complaint disclosed in this action it would still have been impossible to sustain the action as it is laid. I think that the declarator would be futile and that the interdict would be altogether oppressive. The declarator would really tend to establish no right whatever in the shareholders against the company or against the directors. If it means only that the directors are not to issue balance-sheets which are not true, according to the best of their judgment and belief, it is, as Lord Dundas observed, a platitude. If it is meant that their statement of value must be accurate, according to some specific standard of which the pursuer approves, there is nothing in the proposed declarator to show what the standard is. Nobody can tell what it is that the Court holds to be the standard of accuracy to which those directors are to conform, and I agree with both your Lordships that it adds nothing to the clearness of the declarator that the pursuer goes on to describe the presumed object with which the undervalue is stated, namely, that the object and result was to conceal that profits had been earned in excess of what is shown. The sole purpose of preparing a balance-sheet is to show the financial position of the company, and among other important features in their financial position is the amount of profits earned. But you cannot ascertain profits until you have valued the stock in the first place, and therefore the process of valuation necessarily must have for its object and result, if the valuation is stated at a higher or lower figure, a proportionate lowering or heightening of the statement of the profits earned.

Then as to the interdict, it is a perfectly well-settled rule that we never ought to pronounce an interdict against anybody without exactly defining what it is that he is forbidden to do under the serious penalties that attach to a breach of interdict, and I agree with Lord Dundas that it would be out of the question to subject the directors to the penalties of a breach of interdict because they had interpreted in one way or another a word liable to so many ambiguities as the word "value." It is out of the question, therefore, to my mind that whatever ground of complaint the pursuer may have against his directors we should give him the judgment which he asks.

But then I think with your Lordships that it is proper and necessary to go a little further and see whether the pursuer has really any relevant case of *ultra vires*. Now his complaint is that in valuing the timber stock the directors have made too low an estimate. If that were all, I confess I do not see that any question could have been raised at all, but he goes a step further than that, because, as I understand his case, it is not only that the directors have reached a certain estimate in the exercise of their commercial skill and experience, and that in his judgment that estimate is too low, but that, having ascertained what he alleges they consider the true value, they have proceeded to make a deduction from that value for the purpose of making, or at least with the effect of making, the business of the company appear to be less profitable than it really is. Now I think the main consideration in answer to that objection is, that it is just as much the business of the directors to consider by what method they are to strike a balance of profit and loss so as to leave a safe margin with a view to the financial stability of the company, as it is to estimate the actual value of the stock at a particular time. And if the prudence of stating a higher or lower value as the value to be taken into account in the balance-sheet is to be considered at all, it is a question which by the nature of their office is necessarily left to the exercise of their judgment and discretion.

I do not at all doubt that if the company considers either that they have exercised that discretion wrongly, or that they have failed to make a due disclosure to them of the grounds on which they have exercised it in a particular case, the company may control their conduct as directors. The company is entitled to consider their

balance-sheet when it is offered, and to make such regulations for the production of a fresh one as it thinks fit. But I do not see any ground for holding that a single shareholder has a right to complain and bring his objections not before the company but before this Court. The sole ground of the objection is, as I said, that the directors have exercised erroneously a discretion which they are bound to exercise, and have made an excessive provision for future contingencies by stating the value of their stock at a lower amount than they would have done if they had made only a reasonable provision for it. There is no authority for holding that a shareholder who differs from their opinion, and yet has not thought fit to bring the matter before the company, is entitled to bring it before this Court. Nor does it make the case better when he says that as a shareholder he is entitled to more information than he has got—"As a shareholder the pursuer is entitled not only to be informed in the balance-sheet that such a deduction has been made, and as to the amount of the deduction, but also to have disclosed its application in the books of the company." Now I apprehend, to use the words of a very high authority, Lord Justice Buckley, it is perfectly competent to the shareholders of the company to say that as to particular items in their business it is in the interests of the company that secrecy should be observed. There is no interest in the public to know all these details and know all the facts that are brought out in the balance-sheet. That is to say, there is no interest which entitles the public to intervene or control the management of the company. There is an interest in the company, but then it is for the company to say whether it is more for their interest that secrecy should be observed in certain particulars or that these particulars should be known in full detail to all the shareholders. If there is a real question of judgment and discretion as to whether particular items in their opinion should be disclosed or not, then the shareholder who thinks that a fuller disclosure ought to be made may bring his complaint before the company, but it is for the company to decide whether it should be made or not. The real position, I think, in a question of this kind, is stated with his usual clearness by the late Lord President Inglis in a passage to which Mr Fleming referred in the case of *The City of Glasgow Bank* v. *M'Kinnon*, where he points out that it is the duty of the directors on the one hand to the company to leave a safe margin in striking the balance of profit and loss, and on the other hand it is their duty to consider the interest of the shareholders for the time being so as to give them a fair share of profits actually earned to which they are entitled. But then that is the question for their judgment and discretion in the first place, and the judgment and discretion of the company itself in the second, and it is not a question upon which a court of law can be asked to intervene and control both directors and company in the exercise of its judgment and discretion, which, of course, we could only do by taking the benefit of commercial skill and experience of persons engaged in other businesses of the same kind.

I cannot say that on the face of the record there is any relevant averment that anything has been done *ultra vires* the company at all. The series of citations from the articles of association show how the company requires the directors to carry on its business. Whether the directors have performed their duty in the execution of these directions or not, it is for the company to say, but there is nothing to suggest on the record that anything that is complained of is *ultra vires* the company itself. But then we were referred in argument to a section of the Act of 1908, and if anything had been done that was in contravention of the provisions of that section, then I have no doubt that a case could have been made that such a thing was *ultra vires* the company. The 113th section is concerned mainly with the powers and duties of auditors, and among these duties they are required to make a report on every balance-sheet laid before the company stating whether or not they have obtained all the information and explanations required, and whether in their opinion the balance-sheet referred to in the report is properly drawn up so as to exhibit a true and correct view of the state of the company's affairs, according to the best of their information and the explanations given and shown by the books of the company. Now so far that deals only with the duty of the auditors, and it is not said that the auditors have not performed their duty. But there is beyond that an implied obligation upon the directors of the company and the company itself, as was held in the case of *Newton* v. *Birmingham Small Arms Company*. In that case there was a complaint that the company had by certain special resolutions altered their articles by providing that the directors might set aside a sum out of profits to form an internal reserve fund without disclosing the fact that this fund need not be disclosed by the balance-sheets, that no information need be given to the shareholders about it, that the directors might invest and apply it according to their discretion, and while particulars of this fund were to be disclosed to the auditors, it was to be the auditors' duty not to disclose any information with regard to it to the shareholders. Mr Justice Buckley, before whom the action came, does not appear, as I read his judgment, to have had any difficulty about any other part of the resolutions except the last resolution which forbade the auditors to disclose the information laid before them, and he said in particular that he could see nothing inconsistent with the Act of Parliament — which, of course, is the standard for deciding whether anything is *ultra* or *intra vires*—in the provision that the balance-sheet should not disclose the internal reserve fund. "If the balance-sheet be so worded as to show that there

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