streets or bridges." It is plain and indeed admitted that the respondents can take no benefit from these words. They have not broken up any sewer, drain, or tunnel in or under the bridge. The section then proceeds—"and lay down and place within the same limits, pipes, &c., and from time to time alter or remove the same." I read these words as meaning that the undertakers may lay their pipes in the places which they have made for them under the authority of the Act. It is not a power to lay down pipes anywhere within the limits of the special Act, and if it be not, the only legitimate construction is that these pipes are to be laid in the trenches which the undertakers are empowered to make, and in no other place.

The statute then goes on to say—"And for the purposes aforesaid, to remove and use all earth and materials in and under such streets and bridges, and do all other acts which the undertakers shall from time to time deem necessary for supplying water to the inhabitants of the district included within the said limits."

The argument of the respondents was mainly founded on the power given to use the materials on and under the bridge. They said that the pipe in question was hung from the bridge, and that this was a use of the materials of the bridge within the meaning of the Act.

To my mind, the argument leaves out of account the earlier words of the section. The power is given "for the purposes aforesaid," and for no other purpose. The words which give this power do not enlarge the enactment, except in the sense of giving facilities for doing what the statute has already permitted to be done. If the purposes aforesaid are, as the respondents contend, limited to the laying down of pipes, &c., they must be limited to pipes which are laid down in the site permitted by the Act. Before they can take any benefit from the words on which they found, the respondents must show that the Act enables them to lay a pipe elsewhere than on the roadway of the bridge. If it is not a purpose of the Act to lay the pipes within the structure of the bridges, and for that purpose to pierce the abutments on either side, the right to use the materials in and under the bridge cannot give that power.

The respondents did not found on the general words at the close of the section, and it is plain that they can take no benefit by them.

I am therefore of opinion that the complainers are entitled to the interdict which they ask. I have been willing, as I have said, to adopt the most liberal construction, but I cannot bring the act done by the respondents within the authority of the statute.

The Court recalled the Lord Ordinary's interlocutor.

LORD TRAYNER was present at the hearing, but absent at the judgment.

Counsel for Complainers—Salvesen—F. T. Cooper. Agents—Hope, Todd, & Kirk, W.S.

Counsel for Respondents — Lees — Ure. Agents—Campbell & Smith, S.S.C.

Tuesday, July 17.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

LAW AND OTHERS *v.* GEORGE NEWNES, LIMITED.

Insurance — Contract — Condition-Precedent—Next-of-Kin.

The proprietors of a newspaper advertised that £100 would be paid by a certain insurance company to the person whom the proprietors decided to be the next-of-kin of anyone killed in a railway accident, who was proved to have been a constant subscriber to the paper. A subscriber having been killed in a railway accident, the proprietors decided to pay, and paid, the insurance money to his widow, but his children by a former marriage challenged the payment as illegal and wrongful, and sued the proprietors for payment to them as the true next-of-kin.

Held that the statements of the pursuers were irrelevant, as they were unable to produce the decision of the defenders that they were the next-of-kin of the deceased, which was a condition-precedent to recovery.

The weekly periodical entitled *Tit-Bits* advertised as follows:—"£100 will be paid by the Ocean Accident and Guarantee Corporation, Limited, 40, 42, and 44 Moorgate Street, London, E.C., to the person whom the proprietors of *Tit-Bits* may decide to be the next-of-kin of anyone who is killed in a railway accident in the United Kingdom, provided a copy of the current issue of *Tit-Bits* is found upon the deceased at the time of the catastrophe, or if it is proved that he or she is a subscriber through a news-agent or through the publishers. This sum will not be paid in the event of an accident to a railway servant when on duty, nor of a suicide. No claim will be paid in the case of the death of a child under ten years of age."

On 28th July 1893 Robert Law, painter, Causewayside, Edinburgh, was injured by a railway accident at the Tay Bridge Station, Dundee, and died from the effects of his injuries upon 4th August 1893.

It appeared that Law had been a subscriber to *Tit-Bits* for many years, and had obtained his copies regularly from a news-agent in Edinburgh. His widow therefore upon 12th August made a formal claim upon the editor of *Tit-Bits* for the sum in the advertisement, in consequence of the death of her husband through a railway accident. Upon 19th August 1893 a letter was sent to her in these terms:—"Dear Madam,—I desire to inform you that, after full inquiries have been made into the circumstances

attending the sad accident which caused the death of your husband at Tay Bridge Station, it has been found that you are entitled to the benefits of the *Tit-Bits* system of insurance. A cheque for £100 will be sent you during the course of next week. Pray receive my sincere sympathy in the great loss which you have sustained. Yours truly, "*For* THE EDITOR, "J. A. S."

And upon 23rd August this letter was sent:—"Madam,—As intimated in my letter of last week, the particulars which you sent forward as to the sad accident which resulted in the death of your husband at the Tay Bridge Station, Dundee, have been considered satisfactory, and you are entitled as next-of-kin to the £100 insurance which is extended to readers of this paper. Herewith I send you a cheque for this amount. Kindly sign the enclosed receipt and return to me in course of post."

Upon 21st August the agents for certain children of the deceased Robert Law by a former wife sent a telegram to Newnes, Limited, the proprietors of the paper, in these terms—"Robert Law's Insurance Claim—Writing on behalf of next-of-kin. Please wait letter."

The letter was in these terms and of the same date:—"Dear Sirs,—With reference to the claim for £100 insurance money made on behalf of the widow, as mentioned in your issue of the 19th curt., we are instructed by the whole children of the deceased to make application for their shares. We may state that our clients are the parties who would be entitled to be appointed executors and uplift the estate, but we shall be glad to learn your conditions, if any, of payment. Meantime we have to ask the favour of your retaining the money until we write you further on hearing from you." Upon 23rd August Mr Newnes wrote in reply—"In reply to your letter I have paid the insurance money to Mrs Law. You will observe that the conditions are that the money will be paid to the person I decide to be the next-of-kin, and having decided this in favour of Mrs Law, I regret I cannot accede to the application of the children." Mr Newnes, who sanctioned the correspondence and the payment, was the governing director of the defenders' company.

Upon 22nd December 1893, Henry Law, tailor, Dalkeith, and his brothers and sisters, the children of the deceased Robert Law by a former marriage, brought an action against George Newnes, Limited, for the sum of £100.

They averred—"(Cond. 6) In so acting and deciding that the deceased's widow is the next-of-kin of the deceased, the defenders acted and decided illegally and wrongfully and in bad faith, and in complete disregard of the terms of their said offer, and of the rights acquired thereunder by the pursuers, among whom there are no competing claims, and against whom no other person has or could intimate to the defenders that such person claimed as next-of-kin of the deceased. The defenders were not only well aware, before resolving to prefer the deceased's widow to the said sum of £100, that she was not, and did not claim as one of the next-of-kin of the deceased, but were also aware that the pursuers were his only next-of-kin."

The defenders averred—"(Stat. 4) By the defenders' system of insurance, and under the terms and conditions thereof as stipulated by them, it is not contemplated or intended that the benefits of the insurance should be confined to the nearest blood relations of the deceased, and in coming to the decision that the deceased's widow was the party entitled to the £100 payable on the deceased's death as aforesaid, and in making payment of that amount to her the defenders acted in perfect good faith, in accordance with their usual practice, and also in accordance with the provisions of the advertisement founded on by the pursuers."

The pursuers pleaded—"(1) The defenders having contracted with the deceased Robert Law to pay the sum of £100 to his next-of-kin in the event, as such has occurred, all as condescended on, and the pursuers being the sole next-of-kin of the deceased, are entitled to decree against the defenders for payment thereof, with interest and expenses as craved. (2) The defenders having illegally and wrongfully paid, or caused to be paid, the said sum of £100 to a person not being one of the next-of-kin of said subscriber, the pursuers are entitled to decree as concluded for with interest and expenses."

The defenders pleaded—"(1) No title to sue. (2) The pursuers' averments are irrelevant. (3) Under the conditions of the insurance in question the defenders were entitled to pay the amount insured to the deceased's widow, and having in good faith decided that she was the party entitled to the said payment, and paid the amount to her, they have discharged their obligation under the said insurance."

Upon 21st February 1894 the Lord Ordinary pronounced this interlocutor:—"Sustains the second plea-in-law for the defenders, assoilzies them from the conclusions of the action, and decerns, &c.

"*Opinion.*—This is an action brought by the children and sole next-of-kin of the late Robert Law, to recover from the proprietors of the newspaper called *Tit-Bits* the sum of £100, for which sum it is alleged the deceased had effected an insurance with the defenders under what is called the *Tit-Bits* System of Insurance. The facts as set forth on record, and which are not in dispute, appear to be these:—The proprietors of *Tit-Bits* have for some time advertised in their paper that they, or a certain insurance company on their behalf, will pay the sum of £100 'to the person whom' they, the proprietors, 'may decide to be the next-of-kin of anyone who is killed in a railway accident in the United Kingdom, provided a copy of the current issue of *Tit-Bits* is found upon the deceased at the time of the catastrophe, or if it is proved that he or she is a subscriber through a newsagent or through the publishers.

"The late Robert Law was a regular sub-

scriber of *Tit-Bits* through a certain news-agent in Edinburgh. In July last he was killed at Dundee by what is admitted to have been a railway accident. He left a widow and certain children of a previous marriage, who are the present pursuers. The insurance money was claimed by the widow on the footing apparently that she was the next-of-kin in the sense of the advertisement. It was subsequently claimed by the pursuers as being the only next-of-kin, of the deceased in the legal sense. The defenders decided to pay to the widow, intimating to her that the particulars of the accident had been considered satisfactory, and that she was entitled as next-of-kin to the insurance money, for which, accordingly, they enclosed a cheque. The pursuers challenge that this payment was illegal and wrongful, and maintain that the defenders are still bound to pay to them as the true next-of-kin.

"I am of opinion that the pursuers have no title to sue, or at least, that their title is excluded by the decision of the defenders in favour of the widow. The defenders' obligation was not to pay to the next-of-kin but to such persons as the defenders might decide to be the next-of-kin. *Prima facie*, therefore, their decision was a condition-precedent of the right to sue, and although it may probably be true that if they delayed or refused to decide, or decided in bad faith, or otherwise acted in the matter dishonestly, the next-of-kin might have a right of action to enforce the contract, there is plainly no room in the present case for any suggestion of that kind. The widow was certainly not the next-of-kin, or one of the next-of-kin according to the law of Scotland, or, so far as I know, according to the law of England; but the question after all was what the defenders meant by the expression as used in their advertisement, and of that they reserved to themselves to be the sole judges. They decided in favour of the widow, so far as appears, from no interested motive, and quite honestly, and that being so, they cannot, in my opinion, be required to pay over again to the pursuers. I propose, therefore, to find that the pursuers' statements are irrelevant, and assoilzie the defenders from the action."

The pursuers reclaimed, and argued—It was *ultra vires* of the defenders to pay the money to the widow of the deceased when it was admitted that a wife was not one of the next-of-kin either by English or Scottish law. All that the defender could do was to name which of the next-of-kin was entitled to the sum offered, but he could not choose a person who was not next-of-kin at all. Upon the proof it was shown that information that the real next-of-kin were applying was given to the defenders before they paid to the widow—*Smokeball Company's* case, L.R., 1893, 12 B. 256.

The respondents argued—Newnes had intimated to the widow that he had preferred her to this insurance money before he received any intimation that the next-of-kin of the deceased were claiming in the matter. He had therefore exercised his discretion, and had selected the widow as the person who was to receive the money. He was therefore bound to pay it to her. Under the Intestate Succession Act the widow became one of the heirs *in mobilibus*, and it had been decided that the next-of-kin were the heirs *in mobilibus*, so that Newnes was within his right when he selected her—*Tronsons* v. *Tronson*, November 2, 1884, 12 R. 155. Even if the widow was not next-of-kin, the defender was entitled to choose her, because he exercised his discretion in the way in which he said he would do in the advertisement, and acted without fraud—*Martins* v. *M'Dougall's Trustees*, December 5, 1885, 13 D. 274; *Ramsay* v. *United Colleges of St Andrews*, June 28, 1860, 22 D. 1328, *aff.* June 4, 1861, 23 D. (H. of L.) 8. The decision of the proprietors was a condition-precedent of the pursuers suing under this contract at all, and they had not that decision in their favour, therefore they had no title—*Caledonian Railway Company* v. *Gilmour*, December 16, 1892, 20 R. (H. of L.) 13.

At advising—

LORD JUSTICE-CLERK—The defenders in their weekly newspaper announced that £100 would be paid by the Ocean Accident and Guarantee Association to "the person whom the proprietors of *Tit-Bits* may decide to be the nearest of kin of anyone who is killed in a railway accident" in the United Kingdom, provided a copy of the current number of their paper was found upon the deceased or that the person is found to be a subscriber. The deceased Robert Law was killed in such circumstances, and his widow applied for payment of the insurance. The proprietors of *Tit-Bits* through their managing director decided in her favour and so intimated. After he had done so, and before the money was paid, the children of the deceased by a former marriage intimated a claim. The defender, however, considering, it may be presumed, that having given his decision the matter was ended, gave effect to his decision by forwarding a cheque to the widow. The children now sue him for the £100.

The proprietors were entitled in advertising such an insurance as they did, to prescribe their own conditions, and these as described imply that there were to be no elaborate proceedings, but that the decision was to be that of the proprietors acting upon their own judgment. They could not be required to wait for any indefinite time, or to advertise for claims or anything of that kind, but were entitled to proceed in their own way. Here a claim did reach them from the widow, they considered the claim, and gave a decision on the claim. That decision was admittedly erroneous from a legal point of view; but the question is, can those who in law hold the place of next-of-kin, come forward and sue for the amount merely on the allegation that they are the next-of-kin, and that the person decided to be the next-of-kin was not so in reality? I have come to be of opinion that they cannot. The proprietors having kept

the power of decision in their own hands, exercised it, and although in doing so they must be held to have blundered grievously in their judgment, the question is, can they be called to account in a court of law, and because they have blundered be decerned to pay the money over again. I think that they cannot. I do not think that the pursuers could have any relevant ground for reducing what was done. But this is not a case of reduction, but one of demand by persons who have not been decided by the proprietor of *Tit-Bits* to be nearest of kin, to compel him to pay £100 to them, because they are in that position. They are not, as I think, entitled to such a judgment. I am in favour therefore of adhering to the Lord Ordinary's interlocutor.

LORD YOUNG—I am disposed to agree in the result at which your Lordship has arrived. The defenders in this case do not of course raise any question regarding their liability to pay the sum of £100 to the party who is decided by themselves to be the next-of-kin to the deceased person, because they have paid over the money. I must say, however, that I have great doubts, although it is not necessary to decide the question in this case, as to the validity of a policy of insurance granted in the way which the defenders have done here. It is not the effect of the Stamp Act I am considering upon that question, whether the proprietor of a newspaper who inserts in his paper an obligation to pay a certain sum of money, in certain given circumstances, is liable to pay a contribution to the Revenue if he fulfils the obligation or not. The pursuer here seeks to deal with the advertisement in the defenders' newspaper as a policy of insurance effected by the deceased man, as an onerous contract, the payees under the contract being the next-of-kin of the deceased according to the law of Scotland. The plea-in-law is—[*Here his Lordship read the pursuers' first plea-in-law*]. Now, I am of opinion that there was no contract between the deceased person and the defenders of the kind they claim in their favour. I should think that if one party made a contract, under the form of a policy of insurance, with another to pay a sum of money on his decease to his next-of-kin, that what was due under the policy would be part of the estate of the deceased, and liable for his debts. I do not think, however, that there was anything of the kind as such an undertaking here.

My own inclination as regards the matter is that the only sanction of this undertaking is the credit of the newspaper. I think that the only meaning of the advertisement—which need not even be in the defenders' own paper—is that it is inserted in the interest of the newspaper, *i.e.*, to induce people to purchase *Tit-Bits*, and I suppose it is successful in that result. Now, the credit of the newspaper will depend upon the proprietors honestly and honourably paying over the sum they have advertised to pay according to the terms of their own undertaking when any of their subscribers have been killed in a railway accident, or it will be otherwise affected if they do not pay, and accordingly it is the fact that when they have to pay the sum advertised we find that that is duly announced in the newspaper; and no doubt if, on the other hand, they failed to pay when the circumstances arose under which they had agreed to pay, that fact would be made public and would be disadvantageous to the newspaper. I am doubtful if the contract can be made anything more than that. There is no occasion for us to decide that question here, but I felt it my duty to indicate the doubt I have experienced upon this matter.

The appeal is brought in this case on the question whether there is not here an undertaking by the proprietors of *Tit-Bits* to pay £100 to the next-of-kin, according to the law of Scotland, of the person killed by the accident described in the case. The money has been paid to the widow of the deceased, and the Lord Ordinary says that the widow is certainly not the next-of-kin or one of the next-of-kin according to the law of Scotland, nor, so far as he knows, according to the law of England, but that the defenders' obligation was, not to pay the money to the next-of-kin according to the law of Scotland or according to the law of England, but to whomever should be decided by the proprietors of *Tit-Bits* to be the next-of-kin of the deceased. That was the defenders' obligation, assuming there was any obligation upon them at all. I cannot say that there was anything dishonourable or contrary to any legal obligation in the proprietors of *Tit-Bits* saying—"We think that the widow is the next-of-kin of the deceased man, and that she is the most proper person to receive the £100 promised in the advertisement." It is enough for us to say that in our opinion there was no contract obligation enforceable against the proprietors of *Tit-Bits* by those who are the next-of-kin of the deceased man according to the law of Scotland. In my opinion the case should be dismissed.

LORD RUTHERFURD CLARK—This action is laid on a contract of insurance which the deceased is said to have made with the defenders through an advertisement which they are in use to issue, and it is brought to recover the amount due under that contract.

The advertisement is in these terms—"£100 will be paid by the Ocean Accident and Guarantee Corporation to the person whom the proprietors of *Tit-Bits* may decide to be the next-of-kin of anyone who is killed in a railway accident," provided a copy of the newspaper is found on the deceased, &c. I doubt if the defenders undertake to make any payment. The obligation seems to be to furnish the next-of-kin of the deceased with the means of obtaining the money from the company above mentioned.

This point was not taken by the defenders. They have elected to satisfy any claim which could be made against the

company. But in an action on the debt they have the same defences, and unless the pursuers can show that they are entitled to recover against the company, I do not see how they can recover against the defenders.

In order to obtain payment from the company they were bound to produce the decision of the proprietors of *Tit-Bits* that they are the next-of-kin of the deceased. That was a plain condition-precedent, for the decision of the proprietors is the only warrant on which the company could be required to pay. It is not the less a condition-precedent in this action where the defenders have assumed the liabilities of the company but have not surrendered any of their defences. The debt cannot be recovered unless the conditions-precedent to the recovery are fulfilled. In so far as the action is laid on the contract alone, I am of opinion that the defenders are entitled to absolvitor.

I do not say that the pursuers would be without remedy if the defenders refused to decide or decided in bad faith. But their action could not be laid on the contract alone. It must be laid also on the wrong. Accordingly they aver that the defenders in deciding that the widow was next-of-kin acted in bad faith and in the knowledge that the pursuers alone possessed that character. There is no other averment.

I am of opinion that this averment is not proved. No claim was made by the pursuers until the decision was given in favour of the widow, and was intimated to her. I think that the decision was given in good faith, and that the money was paid in the honest belief that it was due to the widow by reason of the decision in her favour.

LORD JUSTICE-CLERK—Lord Trayner concurs in the judgment of the Court. (Lord Trayner was present at the hearing, but absent at the judgment.)

The Court adhered.

Counsel for the Reclaimers—N. J. D. Kennedy — Wilton. Agents — Gray & Handyside, S.S.C.

Counsel for the Respondents — Ure — J. Wilson. Agents—Davidson & Syme, W.S.

HIGH COURT OF JUSTICIARY.

Friday, July 13.

(Before the Lord Justice-Clerk, Lord Adam, and Lord Wellwood.)

HASTIE *v.* ATKINSON.

Justiciary Cases—Mines—Miner's Wages—Payment by Weight of Mineral—Improper Filling—Standard Weight System—Validity of Coal Mines Regulation Act 1887 (50 *and* 51 *Vic. c.* 58), *sec.* 12.

Section 12 of the Coal Mines Regulation Act 1887 enacts that where the wages paid to miners depend on the amount of mineral got by them, they shall be paid according to the actual weight got by them of the mineral contracted to be gotten; provided that nothing in this section shall preclude the coalmaster from agreeing with the miners that deductions shall be made in respect of hutches being improperly filled, such deduction being determined in such special mode as may be agreed upon between the parties.

A coalmaster agreed with his employees that the standard weight system should be adopted in the mines, and that no payment should be made for the excess weight of any hutch beyond 10 cwt., the standard weight.

In a criminal prosecution against the manager of the mine, as the person responsible for the due observance of the Act, *held* that the agreement was valid, and that the failure to weigh hutches loaded beyond ten hundredweight, or to pay for the contents of the hutch beyond that amount, was not a contravention of section 12, the deduction from the weight being in respect of improper filling, and thus authorised by the section.

Opinions by the Lord Justice-Clerk and Lord Wellwood that the duty imposed by the statute, apart from agreement, is to weigh the mineral in the hutches, and not the gross contents. *Contra* by Lord Adam.

This was an appeal under section 67 of the Coal Mines Regulation Act 1887 (incorporating 20 Geo. II. c. 43) against a conviction and sentence pronounced in the Sheriff Court of Lanarkshire at Hamilton. The complaint upon which the conviction proceeded was at the instance of the respondent Her Majesty's Inspector of Mines for the Eastern District of Scotland, and charged the appellant, the manager of the Fairhill Colliery, with contraventions of sections 12 and 13 of the same statute.

Section 12 is in the following terms:—"12 (1). Where the amount of wages paid to any of the persons employed in a mine depends on the amount of mineral gotten by them, those persons shall be paid according to the actual weight gotten by them of the mineral contracted to be gotten, and the mineral gotten by them shall be truly weighed at a place as near to the pit mouth as is reasonably practicable: Provided that nothing in this section shall preclude the owner, agent, or manager of the mine from agreeing with the persons employed in the mine that deductions shall be made in respect of stones or substances other than the mineral contracted to be gotten, which shall be sent out of the mine with the mineral contracted to be gotten, or in respect of any tubs, baskets, or hutches being improperly filled in those cases where they are filled by the getter of the mineral, or his drawer, or by the person immediately employed by him; such deductions being determined in such special mode as may be agreed upon between the owner, agent, or manager of the mine on the one hand, and