LORD TRAYNER—I agree with the Sheriff.

LORD MONCREIFF—I also agree with the Sheriff.

The Court dismissed the appeal.

Counsel for the Pursuer and Respondent — Constable — Duncan Smith. Agent — George H. Boyd, Solicitor.

Counsel for the Defender and Appellant —Crabb Watt, K.C. — A. M. Anderson. Agents—Clark & Macdonald, S.S.C.

Thursday, November 24.

SECOND DIVISION.

[Lord Kyllachy, Ordinary

HUNTER *v.* HUNTER.

Trust—Constitution of Trust—Sums Paid by Newspaper to "Person Adjudged by the Editor to be Next-of-Kin of Party Killed in Railway Accident"—Payment Received as Individual or as Trustee for All the Next-of-Kin—Insurance.

The proprietor of a newspaper advertised that £1000 would be paid to the person adjudged by the editor of the paper to be the next-of-kin of any person who having the current number of the paper on him at the time was killed in a railway accident.

Payment was made in terms of this advertisement to a sister of the person killed. This sister was selected by the editor as being the chief sufferer by the death of the deceased, the selection being made *in bona fide*, after inquiry and in knowledge of the existence and claim of other next-of-kin.

Thereafter in an action raised against this sister by the other next-of-kin of the deceased for payment of shares of the sum recovered from the newspaper, *held* (*aff.* judgment of Lord Kyllachy) that the defender had received the sum in question as an individual for her own use and not as a trustee for the deceased's next-of-kin, and defender *assoilzied*.

Law v. *George Newnes, Limited*, July 17, 1894, 21 R. 1027, 31 S.L.R. 888, *followed*.

On 27th July 1903 William Simpson Hunter, painter, Glasgow, was killed in a railway disaster at St Enoch's Station, Glasgow, while a passenger in a train which was wrecked. At the time of his death the deceased had in his possession the current number of two weekly newspapers, *Answers* and *Tit-Bits*, each containing an insurance coupon which entitled the person or persons adjudged by the editor of the paper to be the deceased's next-of-kin to sums of £1000 and £100 respectively.

Both coupons were in similar terms, and it is sufficient for the purposes of this report to refer to the coupon contained in *Answers*, which was as follows—"£1000 FREE INSURANCE.—In the event of any person having the current number of *Answers* on him or her at the time, being unfortunately killed *by an accident in the United Kingdom to any train in which he or she may be travelling as a passenger*, we have made arrangements whereby the person adjudged by the Editor of *Answers* to be the next-of-kin of the deceased will receive One Thousand Pounds, . . . provided notice in every case be given to the Editor within seven days from the occurrence of the accident. . . . . The person or persons who shall be adjudged by the Editor of *Answers* to be the next-of-kin of the deceased shall be the only person or persons entitled to receive and give a valid discharge for the money." . . .

Margaret Farquhar Hunter, a sister of the deceased, duly notified the Editor of *Answers* of her brother's death, and claimed payment of the £1000 through her agent, who wrote, *inter alia*, as follows:—"We observe that it is you who are to judge who is the next-of-kin entitled to the insurance money. The deceased was forty years of age. He has a father alive and three brothers besides our client, who was his only sister. Both were unmarried, and the deceased and his sister had lived for many years in family together, and by his death the sister has lost her means of support. The other members of the family did not live with our client."

Miss Hunter's claim was followed by a claim from one of her brothers. The course adopted by the editor of *Answers* is conveniently described in the following excerpt from a subsequent number of that paper:—"It was evident that this was a case in which the editorial discretion would have to be used in deciding as to whom the money was to go. The legal formalities, such as the preparation of affidavits of witnesses, &c., took some time, but in the end it was found that, as had been stated by Miss Hunter's solicitors, she had been to a large extent dependent on the earnings of the deceased man for her support, and that, to put the matter briefly, she had been the principal sufferer by her brother's death. Upon this we had no hesitation in adjudging Miss Hunter the next-of-kin of the deceased man, and we lost no time in intimating that decision to our agents and Miss Hunter's solicitors. At the same time we advised the gentleman who had preferred the claim on behalf of the brother that we had so decided."

As the result of these decisions the £1000 was paid to Miss Hunter by the proprietors of *Answers* in August 1903. For similar reasons and under similar procedure the £100 was paid to her by the proprietors of *Tit-Bits* in September 1903.

Thereafter in April 1904 the present action was raised by David Hunter and Alexander Hunter, both labourers, Glasgow, brothers of the deceased William Simpson Hunter, against their sister Miss Hunter for £275 each, being a fourth part of the two sums of £1000 and £100.

At the date of raising the action the defender, the pursuers, and one other brother were the whole next-of-kin of the deceased, who died unmarried and intestate.

The pursuers averred—"The said sums for which the deceased William Simpson Hunter had insured his life by the purchase of *Answers* and *Tit-Bits* formed part of and, it is believed, the whole of the estate left by him, and in respect that he died unmarried and intestate the pursuers are entitled each to one-fourth part thereof. The power of selection conferred by the terms of said coupons on the editors has reference solely to the discharge of the insurers, and has no other effect."

The pursuers pleaded—"(1) In respect that the defender is in possession of the whole estate left by the said deceased William Simpson Hunter, and has refused or delays to get herself decerned executrix-dative, she is barred from insisting in her objection to the pursuers' title to sue. (2) The defender having intromitted with the estate of the deceased William Simpson Hunter, is bound to furnish a statement of her intromissions to the pursuers as next-of-kin of the deceased. (3) The pursuers being two of the next-of-kin of the deceased William Simpson Hunter are entitled to decree as craved. (4) In respect that the said sums of £1000 and £100 were paid to the defender under contracts of insurance entered into by the deceased William Simpson Hunter upon his life as condescended on, the said sums belong to the estate of the deceased, and the pursuers are entitled to decree as craved. (7) On a sound construction of said contracts of insurance, the pursuers' interest in the sums insured is not affected by the selection by the editor of a person to whom payment may be made, and from whom a discharge may be received by the insurer."

The defender pleaded—"(1) No title to sue. (2) The pursuers' averments are irrelevant and insufficient to support the conclusions of the summons. (3) The defenders having been adjudged by the editors of *Answers* and *Tit-Bits*, whose discretion is absolute, as entitled to payment of the amounts insured, is not bound to divide the said amounts according to the rules of intestate succession. (4) The amounts insured having been paid to the defender as an individual, she is not liable to account for her intromissions with said amounts, and ought to be assoilzied. (5) The defender not having had any intromissions with the estate of the deceased, or in any event not being liable to account therefor, should be assoilzied."

On 2nd July 1904 the Lord Ordinary (KYLLACHY) assoilzied the defender.

Opinion.—"In this case the contentions of both parties have been particularly well stated. Indeed I have seldom seen a case so well stated both on record and in argument. The question is rather a novel one, and I have endeavoured to consider it on its merits, as well as with reference to the decision in the case of *Law* v. *George Newnes, Limited*, July 17, 1894, 21 R. 1027, 31 S.L.R. 888, which *prima facie* at least seems to rule it.

"My view is this, and I think it is fairly clear that the question depends upon this, whether the two funds in question were *in bonis* of the deceased at his death. If they were, I do not doubt that, although paid over to the defender (who was only one of the next-of-kin), she (the defender) would have been liable to account as for money received on behalf of the estate. I do not say she would have been liable to account to the pursuers, but to anyone whether belonging to the family or not, who had obtained the office of executor of the deceased. On the other hand, if the money was not *in bonis* of the deceased I do not see how there can be any liability to account to anybody. There could, *ex hypothesi*, be no liability to account to the executor of the deceased as such, and as regards the pursuers, the defender has no contract with them, nor did she receive the money under any contract to pay to them.

"Now, this being so, what is the test as to whether these moneys were *in bonis* of the deceased? The test I think is and must be this, could the pursuers, supposing they had been decerned and confirmed executors of the deceased, have sued—I mean successfully sued — the debtors under the coupons—the two newspaper proprietors for payment? And as to that I do not see how there can be any doubt, at all events if the case of *Law* v. *Newnes* was, as I must hold it was, well decided. For the judgment in that case, a substantially similar case, was that it was a condition-precedent of the debtor's obligation, a condition-precedent of the right to sue under it, that the person suing for payment should be clothed with a right to sue conferred by the editor of the paper, the editor of the paper in each case being empowered to select the recipient of the bounty. The obligation is to pay to such person as shall have been adjudged by the editor of the paper to be the next-of-kin in the one case and the nearest relation in the other. And, of course, if that is so, it is quite inconsistent with the moneys being *in bonis* of the deceased. The obligation at its best is an obligation not in favour of the deceased or in favour of the deceased's executors, but in favour of persons who are to be selected by the editors as possessing the requisite character, the grounds of selection, whether good or bad, being immaterial if in point of fact they are honest.

"The only doubt I have had is whether I ought not to have the facts ascertained by a proof—I mean the facts in connection with the editors' adjudication. But it did not appear to me that there was any real dispute between the parties that the editors proceeded as set out in the defences. What occurred is, I see, set out at length in one of the newspapers which was used at the discussion, and it appears that the two editors both arrived at the same result after hearing both parties, coming both, whether they are right or wrong, to the conclusion that the proper person to receive the benefit was the defender, the deceased's sister, who had lived with the deceased and had the main interest in his life.

"I think, therefore, that the defender is entitled to absolvitor, with expenses."

The pursuers reclaimed, and argued—The question involved in the case of *Law* v. *George Newnes, Limited*, July 17, 1894, 21 R. 1027, 31 S.L.R. 888, was whether a newspaper having undertaken an obligation such as that undertaken by *Answers* could be compelled to pay twice; that case did not affect the present. The deceased when he purchased *Answers* entered into a contract with the proprietors of the nature of an insurance policy, the sum received by the defender under that contract was *in bonis* of the deceased, and she had received it as trustee for all his next-of-kin — *Jarvie's Trustees* v. *Jarvie's Trustees*, January 28, 1887, 14 R. 411, 24 S.L.R. 299; *in re Scottish Equitable Life Assurance Society* [1902], 1 Ch. 282. The editor had no power of selection as to the beneficial interest in the sum paid, but only as to the party from whom he was to get a discharge; even if he intended the defender to have the money as her own his intention did not affect the legal result.

Argued for the respondent—The sum in question was never *in bonis* of deceased; no title thereto was conferred upon anyone until the editor made his selection—*Law* v. *George Newnes, Limited, cit. sup.* The editor had selected the defender in good faith, and in knowledge of the claims of other next-of-kin. The defender was not the debtor in the obligation to pay, and no action lay against her.

Lord Justice-Clerk—I think that the facts which are admitted in this case show that the money was neither paid to nor accepted by the defender on the footing that she was receiving it only for the purpose of giving a discharge to the insurers and as trustee for other persons. In the case of *Law* v. *Newnes* it was decided that the editor of the paper was entitled to nominate whom he pleased as the next-of-kin, provided he acted in *bona fide*. In this case the documents show that he did so act, and that the defender was adjudged to be the next-of-kin after careful inquiry. I think none can have any claim against her on the ground that she is only a trustee for the money received, and any claim there might be by the remaining next-of-kin against the paper for paying away the money wrongfully could not be a claim against her

Lord Young—I think that in the circumstances of this case a very important legal question might be raised as to whether the proprietors of these newspapers ever came under any legal obligation to anyone under the passages which are cited and upon which any claim must be founded. But no such question is raised here, nor is it likely to arise, because these offers are made for the purpose of promoting the sale of the paper, and if the payments were not made honestly each time a *bona fide* claim was lodged they would fail to have the effect which they are intended to produce. It is admitted that at the moment when Mr Hunter was killed he was in possession of the current numbers of *Tit Bits* and *Answers*, and that these papers paid the sums promised by them to the person selected by the editors as the next-of-kin of the deceased. The question now arises whether the passages in the papers referred to import that the person who received the money did so on her own account or as trustee for the whole next-of-kin. I think it is not doubtful that according to the intention of the proprietors of the papers, the editors were to select the persons to whom the money was to be paid, and that such selection was made after full and proper inquiry, the choice falling on the person who was considered most in need of the money. The money was paid to that person, and the discharge granted by her was a full and sufficient discharge of the obligations on the part of the newspapers to pay the money—if any such obligation existed, regarding which I have, as I have said, considerable doubt. And I am clearly of opinion that she received the money on her own account and not as trustee for the whole next-of-kin. This follows from the judgment in the case of *Newnes*, where the Court upheld the selection made by the editor of the paper even though the person nominated was not strictly the next-of-kin of the deceased, and where I consider it to have been decided that the person chosen was entitled to the money for her own use. But even apart from the case of *Newnes* I am of opinion that the defender is absolutely entitled to the money which has been paid to her, and that the judgment of the Lord Ordinary is right.

Lord Trayner— The main argument urged for the reclaimers is that this money which was paid to Miss Hunter was *in bonis* of the deceased brother, and therefore that as he died intestate it falls to be divided among his next-of-kin. Now, if anything in respect of the alleged contract of insurance was *in bonis* of the deceased it was only an obligation by the insurers. If so, then the next-of-kin may have an action against the insurers, but they can have no claim against the present defender, who was debtor in no obligation, nor can they claim from her anything that the insurers were pleased to give her. The claim on the part of the next-of-kin against the insurers (if it exists) would not justify a claim against the defender or a decree against her. The next point urged is, that although the defender got the money on terms that made it her own so far as the insurers were concerned, she got it on terms which made her a trustee for its distribution among the next-of-kin of the deceased. That depends upon the contract on which the money was paid, whether it was or was not received on terms which made the defender a trustee. Whether there was an enforceable contract between the deceased and the proprietors of the newspapers is a matter on which I express no opinion. It was not argued to us, but I assume for the moment that there was such a contract. But if so, what was the contract? It is expressed in the advertisement, from which alone it can be gathered, and is to the effect that the proprietors of *Answers* would pay £1000 to

the person adjudged by the editor to be the next-of-kin of any person killed in a railway accident, and having the current number of the paper in his or her possession at the time. I need not refer to the advertisement in *Tit-bits*, because it is practically to the same effect. The advertisements go on to say—"The person or persons who shall be adjudged by the editor of *Answers* to be the next-of-kin of the deceased shall be the only person or persons entitled to receive and give a valid discharge for the money." It is suggested that that only means that it is left to the editor of the newspaper to select from among the next-of-kin one who may give him a good discharge, leaving the question as to whom the money belongs to be settled among the next-of-kin. I am unable to read the contract in such way. The words I have quoted above do not mean that the person selected is to be the only person entitled to give a good discharge, but that the person adjudged by the editor to be the deceased's next-of-kin is to be the only person entitled to claim the money, to receive it, and to give a good discharge. Here the editor, having the whole circumstances before him, including the fact that there were other next-of-kin, adjudged that the defender was the person entitled to claim the money, to receive it, and to give a discharge. I repeat what I said in the case of *Law* v. *Newnes*, 21 R. 1027, that if the editor was proved to have acted in *mala fides* some remedy would be found. But in the present case there is no suggestion of *mala fides;* the editor seems to have acted on intelligible and reasonable grounds. He made full inquiry into the circumstances and found that Miss Hunter resided with her deceased brother, and, as he says, that she had been to a large extent dependent on the deceased man for her support and was the principal sufferer by his death.

I think the Lord Ordinary's judgment here is well founded, and also that it is in entire accordance with the decision in *Law* v. *Newnes*.

LORD MONCREIFF—I am of the same opinion. If the editor of *Answers* had a power of selection there is an end of the question because the narrative of the case published in his paper shows that, in the full knowledge of the existence and claims of other next-of-kin, he selected Miss Hunter not as a trustee but as an individual, and that he favoured her claim because she was the principal sufferer by the death of the deceased. If, on the other hand, the editor acted *ultra vires* and not in good faith, then I doubt whether the pursuers have any claim against Miss Hunter. They may, but I greatly doubt it, have a right of action against *Answers*. But if they have any legal claim it can only be against that paper, because after full inquiry the sums in question were paid to Miss Hunter for her own use alone.

On the whole matter, in accordance with the decision in the case of *Law* v. *Newnes*, my opinion is that the editor had an unqualified power of selection provided he exercised it *in bona fide*, and it is not suggested that he acted otherwise.

The Court adhered.

Counsel for the Pursuers and Reclaimers — Younger — A. A. Fraser. Agent — J. Struthers Soutar, Solicitor.

Counsel for the Defender and Respondent —Hunter—Ross Taylor. Agents—Macpherson & Mackay, S.S.C.

Wednesday, November 30.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

ALLAN *v.* THE INCORPORATION OF CORDINERS OF EDINBURGH.

Incorporation — Trade Incorporation in Burgh — Friendly Society — Sanction of Court to Bye-Laws — Entry-Money — Usage — Burgh Trading Act 1846 (9 *and* 10 *Vict. cap.* 17), *sec.* 3.

The Burgh Trading Act 1846, section 3, made it lawful for trade incorporations to make bye-laws relative to the management and application of their funds and relative to the qualification and admission of members with the sanction of the Court of Session, but reserved power to such incorporations to make without the sanction of the Court such bye-laws as they could theretofore have made of their own authority.

In 1850 an Edinburgh trade incorporation obtained the sanction of the Court to bye-laws which stipulated that any alterations should receive the sanction of the Court as required by the statute. These bye-laws included a table of entry-money. The incorporation subsequently increased the entry-money from time to time without obtaining the sanction of the Court.

The practice prior to 1846 was not uniform. In 1729 a decreet-arbitral in a submission between the Town Council and the trade incorporations within the city declared that bye-laws made by the incorporations were of no force unless ratified by the Council. From 1729 to 1812 the incorporation altered its entry-money without obtaining the approval of the Council, but from 1812 to 1840—the date of the last bye-laws prior to 1846—the incorporation obtained such approval.

In an action of declarator brought in 1903 by an applicant for admission against the incorporation, *held* that the bye-laws regulating the entry-money passed since 1850 required as a condition of their validity the sanction of the Court of Session, inasmuch as prior to 1846 the incorporation had not a free hand in that matter, and that therefore the applicant was entitled to be admitted as a member of the incor-