in the negative, recalled the determination of the Sheriff-Substitute as arbiter, and remitted to him to award compensation to the appellant.

Counsel for Appellant—A. M. Mackay. Agents—Hill-Murray & Brydon, S.S.C.

Counsel for Respondents—Horne, K.C.—Aitchison, Agents—Steedman & Richardson, S.S.C.

Wednesday, December 3.

SECOND DIVISION.

[Sheriff Court at Dumfries.

COSTIN *v.* HUME.

Process—Title to Sue—Charitable Fund—Title of Donee to Vindicate Right to Donation in Hands of Third Party.

Held that the donee out of a charitable fund had a title to sue a third party to whom the committee of the fund had sent money for payment to donee.

Mary Catherine Costin, residing at Buccleuch Street, Dumfries, *pursuer*, brought an action in the Sheriff Court, Dumfries, against Andrew Hume, music teacher, residing at George Street, Dumfries, *defender*, in which she sought to have it found and declared that the defender had no right of property, or other right, title, or interest, in a sum of £67, 2s. which was remitted to him on or about 2nd January 1913 out of the "Titanic" Relief Fund, by the committee in charge thereof, through Mr Percy F. Corkhill, the Town Hall, Liverpool; that the sum in question was remitted to the defender for the benefit of the pursuer and her pupil child, who was born on 18th October 1912, and to be paid over by him to the pursuer; and that the defender was bound to pay the sum in question with interest thereon to the pursuer; and for decree ordaining the defender to make payment of the sum in question with interest.

The pursuer averred, *inter alia*—"(Cond. 1) The late John Law Hume, who was one of the bandsmen on the White Star Liner 'Titanic,' was drowned in the wreck of that vessel in mid-Atlantic on or about 15th April 1912. He was a son of the defender and resided with him. (Cond. 2) At the date of the death of the said John Law Hume the pursuer was engaged to be married to him. (Cond. 3) Immediately after the wreck of the 'Titanic,' public subscriptions were opened for the benefit of the dependants of those who had perished in the disaster, including a fund known as the Mansion House Fund, which was administered by a committee under the Lord Mayor of London. As the pursuer was about to become the mother of a child, of which the said John Law Hume was the father, she, through her agent, Mr G. T. Hendrie, solicitor, Dumfries, lodged an application for a grant from the said fund on or about 28th June 1912. A reply was received from the *Daily Telegraph*, London, in these terms—'As this fund is working in co-operation with the Lord Mayor's Fund in the distribution of temporary relief, the letter addressed to the Mansion House has been forwarded to us. Will you please furnish information as per form enclosed.' The form was duly filled up and returned to the *Daily Telegraph*, and in reply they wrote to Mr Hendrie as follows:—'We are now in receipt of the form in favour of Miss Costin. We are quite willing to regard this claim sympathetically, but not at the cost of casting a slur upon the family of the deceased man Hume. The father writes to us contesting the claim which you are presenting, and alleges that he has most conclusive proof that his son was not responsible. . . . In these circumstances the *Daily Telegraph* must await further proof from you.' It was not possible for pursuer to take proceedings to establish the parentage of her child until it was born. (Cond. 4) By letter dated 8th October 1912 the *Daily Telegraph* wrote Mr Hendrie as follows:—'It rests with you to bring the claim of Miss Costin to the notice of the Mansion House Fund for permanent relief, and you should address yourself to the Public Trustee, 3/4 Clements Inn, Strand, W.C.' Accordingly on 9th October 1912 Mr Hendrie lodged particulars regarding pursuer's claim with the Public Trustee, who duly acknowledged the same. On 18th October 1912 the pursuer's child, a daughter, was born, and intimation was on same date sent to the Public Trustee. By letter dated 21st October 1912 the Public Trustee wrote to Mr Hendrie—'I have to acknowledge receipt of your letter of 18th inst. informing me that an infant child has now been born in the Costin case. This child has now been entered on the schedule of dependants, and her mother will receive consideration for relief in respect of herself and the child in due course.' (Cond. 5) By decree dated the 2nd and 3rd, both days of December 1912, in an action in the Sheriff Court at Dumfries at the instance of the pursuer against the defender and others as representatives of the said deceased John Law Hume, the Sheriff-Substitute found and declared (First) that the said John Law Hume was the father of the female child of which the pursuer was delivered on Friday 18th October 1912, and (Second) that the pursuer was entitled to recover out of any estate left by the said John Law Hume the sums after mentioned, namely—£2, 2s. for inlying charges, and £6, 10s. sterling per annum for ten years as aliment for said child, payable said aliment quarterly in advance, and beginning as from said date of birth, with interest thereon from the respective dates of payment and £13, 0s. 4d. of expenses. Said decree was pronounced after evidence led, and the child is still alive. (Cond. 6) On 11th December 1912 Mr Hendrie sent a copy of said decree to the Public Trustee, and in reply received a letter dated 16th December 1912 stating that he had forwarded the copy decree to Mr P. F. Corkhill, honorary secretary of the Liverpool Titanic Fund, whose com-

mittee was dealing with the case, and Mr Hendrie was requested to communicate direct with Mr Corkhill in future at the Town Hall, Liverpool. Mr Hendrie accordingly did so, and received a reply from Mr Corkhill, dated 18th December 1912, that the claim was having attention. (Cond. 7) As Mr Hendrie did not hear further from Mr Corkhill for several months, he caused inquiries to be made, and ascertained that Mr Corkhill's committee had considered the pursuer's claim with the copy decree before them, and had resolved to make a grant for the benefit of the pursuer and her child out of the funds at their disposal of £67, 2s., being a sum equal to the total amount of aliment and inlying expenses awarded under said decree. This sum was remitted by Mr Corkhill to the defender on 2nd January 1913. It was acknowledged by the defender by letter dated 3rd January 1913, in which he said—'I note that the cheque you enclose corresponds in value to the claim which I am given to understand has been put forward on behalf of Miss Costin.' The defender prior to that date had been in correspondence with Mr Corkhill, making and urging claims on his own behalf, and urging that the pursuer's claim should not receive consideration by the committee. But Mr Corkhill made it clear to the defender that the committee did not and could not regard the defender as in any way dependent on the deceased, and that the pursuer's claim was a good one, as the committee believed it was the intention of the deceased to marry the pursuer, in which case he would have had the obligation of a wife and child. . . . (Cond. 8) The said remittance of £67, 2s. was made to the defender under the erroneous impression that the foresaid decree was binding upon him personally, and that he either had implemented or would implement the same by payment of the full sum down. He had, in fact, alleged to the committee that the pursuer's claim had been settled. The remittance, in fact, was made to the defender for the benefit of the pursuer and her child, and was not, to any extent or in any sense, a payment to the defender personally for his own benefit. . . . (Cond. 9) Having ascertained the foregoing facts regarding the remittance of £67, 2s., Mr Hendrie, on 25th April 1913, applied to the defender for payment, and in answer the defender wrote on 26th April 1913—'I have not received any sum of money to be paid to your client; had it been otherwise I would have adopted one of two courses, viz., either sent the sum to you or returned it to the sender. The sum to which you refer was sent me as a full payment of my own personal claim, of which I have full confirmation thereof.' This was duly communicated to Mr Corkhill, who, after making thorough inquiry, wrote to defender on 18th June 1913 informing him definitely that the money was intended for the benefit of pursuer and her child, and not in any sense for defender's own benefit. But in the face of that intimation the defender still lays claim to the money, and his agents, Messrs Whitelaw & Edgar, solicitors, Dumfries, on 28th June 1913, wrote to Mr Hendrie as follows—'We have seen Mr Hume and are instructed by him to say that the £67, 2s. which he received was intended for him, and he is therefore not prepared to pay over any part of that sum to your client (the pursuer).' The defender is thus fraudulently attempting to appropriate the said money, and the pursuer has been compelled to raise the present action. In consequence of defender's denial that he received Mr Corkhill's letter of 18th June 1913, Mr Corkhill on 23rd July 1913 sent defender a copy of said letter by registered post. Both letters were duly received by defender. . . ."

The pursuer pleaded, *inter alia*—"(1) The sum of £67, 2s. having been remitted to defender for the benefit of the pursuer and her child, and not to any extent for the personal benefit of the defender, and the defender having laid claim thereto as his own personal property, the pursuer is entitled to decree of declarator and payment in terms of the prayer of the writ. (4) *The defender having fraudulently laid claim to said money after direct intimation from the sender that it was not for the defender's personal benefit, the pursuer is entitled to declarator and payment as craved.*" [The words printed in italics were added by amendment in the Inner House.]

The defender pleaded, *inter alia*—"(1) No title to sue. (3) The averments being insufficient to support the conclusions of the writ, the action should be dismissed with expenses.

On 21st October 1913 the Sheriff-Substitute (CAMPION) sustained the first plea-in-law for the defender and dismissed the action.

Note.—". . . The difficulty I have had all along in the case is whether the pursuer is one who has a title to sue this action. It is a case of a gratuitous contribution granted by the committee of the Titanic Relief Fund for the benefit of pursuer and her child. But the pursuer would not have been in the position of having a title to sue said committee for the sum in question. If so, she cannot have now a better title to sue anyone in whose hands the sum awarded may through some misunderstanding be deposited. This would appear rather to be a case of *condictio indebiti*. 'If the payment have been made under an unavoidable error in fact (affecting the payee's right to receive the money) restitution may be demanded' (Bell's Prins). And thus, however careless a person paying in error may have been, he may recover back what he has paid from one who had no right to receive it, provided only he has not intended to waive all inquiry, and meant the payee to have the money at all events. From the correspondence produced it is clear that the person paying in error did not intend to waive all inquiry, and mean the payee to have the money.

"The sum in question may have been remitted to the defender Hume under the erroneous impression that the defender had already settled with the pursuer for the sum of £67, 2s. awarded under the Sheriff Court decree, or was still in some way

responsible for payment of the same, or at all events that the money would thus reach the pursuer. But the pursuer then was not the person who made the payment in error, and therefore not the person with title to sue for repayment of the same. I am therefore of opinion that this action as brought is not in the circumstances the appropriate remedy."

The pursuer appealed, and argued—This was not a case of *condictio indebiti*. The Relief Committee had parted with the property in the money, which now belonged to the pursuer, and in the present action she was simply indicating her right to obtain possession of it—*Brierly* v. *Mackintosh*, June 1, 1843, 5 D. 1100, *aff.* 5 Bell's App. 1.

Argued for the defender — The pursuer had no title to sue. She could not have sued the Relief Committee for the money, and she had no assignation from them of their right in the money—*Pyper* v. *Christie*, November 8, 1878, 6 R. 143, *per* Lord Young at p. 145, 16 S.L.R. 67; *M'Donald* v. *M'Coll*, June 17, 1890, 17 R. 951, 27 S.L.R. 761; *Hunter* v. *Hunter*, November 24, 1904, 7 F. 136, 42 S.L.R. 92; *Hislop* v. *Macritchie's Trustees*, June 23, 1881, 8 R. (H.L.), 95, 19 S.L.R. 571; *Tweddle* v. *Atkinson*, 1861, 1 B. & S. 393; Mackay, Manual of Practice, p. 126; Pollock on Contracts (8th ed.), p. 223.

LORD JUSTICE-CLERK—This case has been thrown out in the Court below, on the ground, as stated by the Sheriff-Substitute —who treats the case as a *condictio indebiti*—that there was no title to sue. I cannot agree in that judgment. We cannot deal with the merits of the case at this stage, but it appears to me that the pursuer has set out a good title to sue. Her case is simply this, that a certain sum of money was sent by A to B to be delivered to her, and that B declines to deliver it. In those circumstances it appears to me that the proper course is to remit the case back to the Sheriff to allow a proof.

LORD DUNDAS—I agree, and if I add a few words it is only because the case is rather a peculiar one. The Sheriff-Substitute, as your lordship has pointed out, sustained the plea of no title to sue, and when the case came here we also heard an argument by the respondent's counsel to the effect that the pursuer's case was irrelevant. That contention is not very artistically stated on the record, but I think the third plea for the defender was meant to raise it. So that we have before us pleas to relevancy and to title, to consider. The second plea for the defender was (no doubt quite rightly) abandoned by counsel at our bar.

Now I agree with your lordship in thinking that as regards the plea to title the Sheriff-Substitute has fallen into error. He says in his opinion—"It is a case of a gratuitous contribution granted by the committee of the 'Titanic' Relief Fund for the benefit of pursuer and her child. But the pursuer would not have been in the position of having a title to sue said committee for the sum in question. If so, she cannot have now a better title to sue anyone in whose hands the sum awarded may, through some misunderstanding, be deposited." I think there is a *non sequitur* involved in that statement. Be it that the pursuer could not have sued the donor, the charitable fund, if they had not paid her, surely it does not follow that if the charitable fund places the money intended for the pursuer and her child in the hands of a third party, the pursuer may not perfectly well, so far as title goes, sue that party for the money. Suppose the fund had chosen to deposit the money in a bank for behoof of the pursuer and her child, could the bank possibly have disputed liability to pay the money upon her due demand? I think not. The Sheriff-Substitute also talks about *condictio indebiti*. I cannot see that *condictio indebiti* arises here at all. It is not a case where the donor is endeavouring to get repayment of money which he had paid under error. It is a case of this pursuer seeking not repayment but payment from the defender, who, she says, has got money belonging to her in his hands. I think, therefore, with your lordship that the pursuer's averments are quite relevant to support her title, and also, if substantiated, to support her case upon the merits. But I agree in thinking that we cannot go further than that at present, and that the case must go back to the Sheriff-Substitute for proof, because the respondent's counsel is not in a position to admit the documents upon which obviously the case to a large extent depends. We cannot, therefore, repel even the plea to title in the meantime, and it is not worth while to repel the plea to relevancy. The pursuer's averments bearing upon her title to sue must go to proof, along with her averments on the merits. All that we now say is that her record is relevant as regards both title and merits; but the documents and other matters requiring substantiation will have to be formally proved.

LORD GUTHRIE — I am of the same opinion. The Sheriff-Substitute, although he has found the pursuer has no title to sue, has pretty clearly indicated that he has no sympathy, so far as the facts have been brought before him, with the defender's position, because he says — "The defender, however, denies that he has any funds belonging to the pursuer, though if there ever could be any misapprehension on that point it must surely have been effectually removed by the letter of 18th June 1913 from Mr Corkhill, the secretary of the fund, to the defender Hume." In dealing with the title to sue he has not mentioned or adverted to the case of fraud which the pursuer makes in her condescendence. The case of fraud against the defender comes out in condescendence 7. She says—"Mr Corkhill made it clear to the defender that the committee did not and could not regard the defender as in any way dependent on the deceased, and that the pursuer's claim was a good one." Then in condescendence 9 she says—"The defender is thus fraudulently attempting to appropriate the said money." The

Sheriff-Substitute, on the other hand, deals with the case as one where there has been some misunderstanding. He says —"If so, she cannot have now a better title to sue anyone in whose hand the sum awarded may through some misunderstanding be deposited." Then he says—"The sum in question may have been remitted to the defender Hume under the erroneous impression that the defender had already settled with the pursuer." As I read the pursuer's case, it is not a case of misunderstanding or erroneous impression at all, but that the defender was not only bound to know but did actually know that he was getting this money for Miss Costin and not for himself. A plea-in-law has now been added appropriate to the averments of fraud.

LORD SALVESEN was absent.

The Court recalled the interlocutor of the Sheriff-Substitute and allowed a proof before answer.

Counsel for the Pursuer — Carmont. Agents—Beveridge, Sutherland, & Smith, W.S.

Counsel for the Defender—A. A. Fraser. Agent—R. T. Calder, Solicitor.

Wednesday, November 19.

FIRST DIVISION.

KENNETH (SHEDDEN'S TRUSTEE) *v.* DYKES AND OTHERS.

Trust — Discretionary Powers — Delectus personæ—Assumed Trustee.

A testatrix who died on 3rd June 1910 by her trust-disposition and settlement nominated and appointed two persons her trustees and executors and conveyed to them her whole estate, but by a subsequent codicil she recalled the appointment of one of the two so nominated. By the third purpose of her will she gave and bequeathed the whole residue of her estate "to my trustees," to be by them divided among such charitable and philanthropic societies, institutions, and objects in or connected with Glasgow as "my trustees" in their absolute and uncontrolled discretion should decide. Throughout her settlement the testatrix in referring to her trustees described them as "my trustees," except in the following instances—(*a*) she left £50 "to each of my said trustees" who should accept office; (*b*) she empowered her trustees to employ a law agent, "who may be of my said trustees' own number;" and (*c*) she declared that notwithstanding that she had bequeathed to each of "my said trustees" accepting office the foresaid legacy, "my said trustees" were to have the immunities and privileges of gratuitous trustees. Power to assume new trustees was not expressly given.

The sole appointed trustee died on 29th December 1910 without having made any allocation of funds, but on 30th September 1910 he had assumed a co-trustee, and this assumed trustee, on 22nd December 1911, executed a minute by which he allocated a sum of £500 to a certain Glasgow charity.

Held that the assumed trustee was entitled to exercise the discretionary powers conferred by the third purpose.

Opinion by the Lord President—"Whether or no there is *delectus personæ*, it appears to me, cannot be determined, either solely or mainly, by an examination of the discretionary powers given, or by the difficulty or delicacy of the exercise of these powers?"

A Special Case was presented by (1) William Kenneth, sole trustee acting under the trust-disposition and settlement of Miss Janet Shedden, Gourock, dated 11th February 1904, and two codicils thereto dated 11th February 1904 and 5th April 1907 (*first party*), (2) Mrs Margaret Shedden or Dykes, niece and sole next-of-kin of the testatrix, with the consent and concurrence of her husband the Rev. Thomas Dykes, D.D. (*second party*), and (3) the Royal Hospital for Sick Children, Glasgow, and the honorary treasurer thereof (*third parties*), in order to obtain the opinion of the Court on certain questions arising out of the said trust-disposition and settlement.

The *trust-disposition* and *settlement* of the testatrix was as follows:—"I, Miss Janet Shedden, . . . in order to settle the succession to my whole estate in the event of my decease, do hereby assign, dispone, and convey the whole means and estate of every description, heritable and moveable, wherever situated, that shall belong and be owing to me at the time of my decease, to Robert Scott Stewart, solicitor in Glasgow, and Andrew Stewart, solicitor in Glasgow, and the acceptor and survivor of them, as trustees and trustee for the purposes after specified; and I nominate and appoint the said Robert Scott Stewart and Andrew Stewart, and the acceptor and survivor of them, to be my executors and executor—[*By codicil dated 5th April* 1907 *the testatrix revoked and recalled the appointment of Robert Scott Stewart as trustee and executor*]: But these presents are granted in trust always for the purposes following, *videlicet*:—(First) I direct my trustees to pay all my just debts, sick-bed and funeral expenses, and the expenses of the trust hereby created: (Second) I give and bequeath the legacies following to the following persons and others respectively, and direct my said trustees to pay the same accordingly, namely—(*Primo*) £50 to each of my said trustees who shall accept office under these presents—[*Here followed a number of legacies*]: And said legacies shall all be paid as soon as possible after the lapse of six months from my decease, with interest from and after the lapse of such six months at the average rate of interest, if any, that my trustees shall have received from my estate, howsoever the same may be invested or wheresoever the same may be: And my trustees shall be the absolute judges as to what such average rate of interest is or