ployer in compliance with a claim made under the Workmen's Compensation Act. They were charitable payments purely down to the 14th March, and after that they became payments subject to the condition attached—that the workman should refund in the event of his proving successful in his action. In these circumstances it seems to me that neither in form nor in substance does the sixth section of the statute apply.

I propose to your Lordships therefore that we should recal the Lord Ordinary's interlocutor, repel the second plea-in-law for the defender, and remit to his Lordship to proceed with the action.

LORD JOHNSTON—I do not think it is necessary to consider in this case the terms of the statute as applicable to this question, because I think it is the simple one—Was there or was there not an agreement between the employer and the employee to give and to accept compensation? If there was such, although it would be *res inter alios*, the defender can found upon it as an answer to this action. He has therefore to make out such an agreement. It is not enough for him to say that the actings of the employee were such as, though they did not suffice to establish an agreement with his employer, misled him, the defender, and bar the pursuer from now suing this action. That is not the situation at all. It is a question of agreement or no agreement, and no such agreement is proved. Nothing passed between the employer and employee which was binding upon them or either of them as an agreement to give and to take compensation under the statute. Accordingly I think the Lord Ordinary's interlocutor is not well founded.

LORD MACKENZIE—I am of the same opinion. I am not able to reach the same conclusion as the Lord Ordinary, who brings the matter to a point in the passage of his note in which he says there is room for inferring from the whole evidence that the payments in question were truly made and received as compensation. These were the six payments between the 20th January and the 14th March.

I do not gather that anything is said adverse to the honesty of the witnesses, and I think that a fair reading of all the evidence in the case, oral and documentary, confirms the account given by the pursuer Alexander Frame himself. He says—"I have not made a claim against my employers under the Workmen's Compensation Act." That is undoubted. Then he goes on—"I have always wished to recover damages from the defender," and describes what instructions he gave to his law agent. As regards these payments the only point upon which Mr Moncrieff was able to found was that they happened to be at the statutory rate. I am unable to see any reason for disagreeing with what Frame himself says, that they were made to him just to keep the house going.

When the formal receipt was signed on 4th April that really put into writing the terms of the arrangement which had been come to on 14th March, defining what had been throughout the true understanding of the parties, namely, that these payments were to be refunded in the event of Frame being successful in recovering damages from the person who is the defender in this action. Accordingly I think the action should proceed.

LORD SKERRINGTON concurred.

The Court recalled the interlocutor of the Lord Ordinary, repelled the second plea-in-law for the defender, and remitted the case to the Lord Ordinary to proceed.

Counsel for the Pursuer (Reclaimer)—Constable, K.C.—Ingram. Agent—John Brooks, S.S.C.

Counsel for the Defender (Respondent)—Moncrieff, K.C.—M. P. Fraser. Agents—Gordon, Falconer, & Fairweather, W.S.

Thursday, February 21.

FIRST DIVISION.

D. C. THOMSON & COMPANY, LIMITED *v.* W. V. BOWATER & SONS, LIMITED.

Process—Reclaiming Note—Competency—Diligence for Recovery of Documents—Refusal of Diligence—Reclaiming Note without Leave after Leave Refused—Court of Session Act 1868 (31 *and* 32 *Vict. cap.* 100), *secs.* 28 *and* 54.

Held, in an action of damages for breach of contract, that an interlocutor in so far as it disallowed certain items of a specification of documents, for the recovery of which diligence was sought, was reclaimable without leave of the Lord Ordinary in respect that it imported a disallowance of proof.

Stewart v. *Kennedy*, 1890, 17 R. 755, 27 S.L.R. 619, *distinguished.*

Observations per Lord Johnston and Lord Mackenzie as to the proper method of indicating items disallowed in a specification.

D. C. Thomson & Company, Limited, *pursuers*, brought an action against W. V. Bowater & Sons, Limited, *defenders*, concluding for £12,000 damages for breach of contract.

On 8th February 1918 the Lord Ordinary (ANDERSON) pronounced the following interlocutor:—". . . Grants diligence against havers at the instance of the pursuers and defenders respectively for recovery of the documents and others mentioned in the specifications for them, as amended at the Bar, and commission . . . to take the oaths and examination of the havers and receive their exhibits and productions . . ., and to report *quam primum*."

The amendment of the specifications consisted of deletions initialled by counsel for the parties of certain articles in the specifications which had been disallowed by the Lord Ordinary. The defenders moved for

leave to reclaim, which was refused, whereupon they reclaimed without leave.

Argued for the pursuers (respondents)—The reclaiming note was incompetent. The Lord Ordinary had refused certain items of the defenders' specification. That was an interlocutory judgment, which could not be reclaimed against without leave. Leave had been refused, and consequently the reclaiming note must be refused—*Stewart* v. *Kennedy*, 1890, 17 R. 755, *per* Lord Shand at p. 756, 27 S.L.R. 619.

Argued for the defenders (reclaimers)—The reclaiming note was competent. *Stewart's* case (*cit.*) was distinguished, for there the reclaiming note was against an interlocutor granting diligence. Here the interlocutor reclaimed against refused diligence, and that was in substance a refusal of proof. Such an interlocutor could be reclaimed against without leave—*Lamont & Company* v. *Dublin and Glasgow Steam Packet Company*, 1908 S.C. 1017, *per* Lord M'Laren at p. 1020, 45 S.L.R. 806; *Quin* v. *Gardner & Sons, Limited*, 1888, 15 R. 776, 25 S.L.R. 577.

At advising—

LORD PRESIDENT—This action has been set down for proof before the Lord Ordinary on an early day in March, and by way of preparation of evidence both parties sought and obtained a diligence for the recovery of documents. On the 8th February the Lord Ordinary pronounced an interlocutor granting commission and diligence for the recovery of documents set out in the specification which is before us. His Lordship disallowed certain of the documents which are to be found in the second, sixth, and seventh heads of the specification of the defenders. They were dissatisfied with that refusal and asked leave to reclaim, which was refused. They then presented this reclaiming note in terms of section 28 of the Court of Session Act of 1868, and the question we have now to decide is whether or no this reclaiming note is competent. I am of opinion that it is competent, on the ground that it is a reclaiming note against an interlocutor importing a refusal of proof. If the defenders' right to recover these documents were denied, then it might be that at a subsequent stage of the case the Lord Ordinary would on account of their absence be compelled to disallow evidence relevant to the issue which he has to try. For the documents may be for aught I know the only evidence, or at all events the best evidence, in support of certain relevant facts. They may constitute the only means by which those facts can be proved.

It may very well be that this is, to use the words of Lord President Inglis in the case of *Stewart* v. *Kennedy*, 1890, 17 R. 755, at p. 756, 27 S.L.R. 617, "an interlocutor which neither allows nor refuses proof, and which has no effect except to bring before the Lord Ordinary certain documents which may or may not be received in evidence or turn out to be admissible or not." But this does not exhaust the question. The interlocutor may be all that the Lord President indicates it is, but it may be something more. I think that it imports—that is to say, carries with it—the refusal of proof. Nor is it sufficient to designate it, as Lord Shand does in the same case at p. 757, as "an interlocutor which has been pronounced in the course of carrying through a proof which has already been allowed." It may be so, and yet it may import the refusal of proof. For my own part I would prefer to describe it in the words of Lord M'Laren in the case of *Lamont & Company*, 1908 S.C. 1017, at p. 1020, 45 S.L.R. 806, as an interlocutor which makes "irrevocable findings touching inquiry into the facts of the case."

From the argument and opinions in *Stewart* v. *Kennedy* I gather that it was the practice to reclaim against such interlocutors without leave, and that the reclaiming notes were entertained. In my opinion that was a correct practice, because this is not a mere question of procedure; it goes further than that. The refusal of these documents may at a subsequent stage of the case involve the disallowance of important evidence, and gaps may be found in the proof which would require to be filled up by an allowance of additional proof with all the delay and expense which that necessarily entails. It appears to me therefore that this is an important question and not one merely relating to procedure.

If what I have just said, and if the sustaining of the competency of this reclaiming note is thought to be inconsistent with the decision of this Court in the case of *Stewart* v. *Kennedy*, then I am prepared to reconsider that decision.

LORD JOHNSTON—I do not think that it is necessary to impugn the decision which was pronounced in the case of *Stewart* v. *Kennedy*, 1890, 17 R. 755, 27 S.L.R. 617. We are here in a different set of circumstances, to which different considerations apply. In *Stewart* v. *Kennedy* the interlocutor held to be not reclaimable was one granting a diligence to recover documents. This is one refusing such a diligence. I commence by saying that I think it would be most unfortunate for the procedure in this Court if we found ourselves compelled either by statute or by prior practice and decision to determine that this interlocutor is not appealable.

I take what Lord Shand says in the case of *Stewart* v. *Kennedy* (*cit.*, at p. 756). After enumerating the interlocutors, particularly those relating to proof, which may competently be reclaimed against, he proceeds—"These are the classes of interlocutors with reference to which the 28th section allows a reclaiming note to be presented within six days. That being so, I do not think that the present interlocutor falls within them. It is an interlocutor which has been pronounced in the course of carrying through a proof which has already been allowed." So far we are here in the same position. "In particular cases no doubt mischief may result from the absence of a right to reclaim, but I think the balance of convenience is in favour of restricting reclaiming notes of this kind." I entirely agree in this view that the balance of

convenience is in favour of restricting reclaiming notes relating to proof, but only when done with discrimination. The object is to get on with the cause and not to allow tactical obstruction, and therefore primarily the object is to get on with the proof where one has been allowed. In *Stewart* v. *Kennedy* a diligence for recovery of documents had been allowed. It may have been too wide, but the recovery would not have affected the proof. If there was good objection to their production *in evidence*, their production in evidence would have been stopped at the proof. If confidentiality was pleaded, they would have been sealed up for disposal of the objection by the Lord Ordinary at the proof, unless, as in *The Admiralty* v. *Aberdeen Steam Trawling Company*, 1909 S.C. 335, 46 S.L.R. 254, leave to reclaim were allowed.

Here, on the other hand, we are in the case in which the diligence for recovery has been refused, although from the course taken by the Lord Ordinary this does not appear so on the surface of his interlocutor, and leave to reclaim has been refused. Consider then what the result of that is in the conduct of the case—a document is called for which one party considers to be essential to his case, but the Lord Ordinary refuses recovery and the party must go on with his proof. The Lord Ordinary may be wrong; he may not have sufficient information to enable him to judge. The document may be essential to the case, and if it is so the result of a refusal, and of the refusal of leave to reclaim, would be this, that the document cannot be produced before the proof—the proof must go on, as if it was a final proof, to the end. Even then, if there has been error the party cannot get the error corrected. There must be a hearing in the Outer House and a decision on the proof as led by the Lord Ordinary, and then the party who has been refused recovery must practically make a case in the Inner House for opening up the proof, and not merely allowing in the document but allowing in all the evidence which the production of the document may incidentally involve.

There can be no doubt therefore that when the recovery is refused, and when therefore delay, expense, and dislocation of procedure are concerned, the balance of convenience and expediency is all in favour of allowing a reclaiming note of this kind. That the Lord Ordinary has refused leave to reclaim cannot be left out of consideration and lays a heavy *onus* on the reclaimers. But I do not see on the face of the record anything to justify our refusing them the opportunity of being heard. There is no reason for saying that the reclaiming note will only serve to hang up the proof. If that could be demonstrated it would be the fault of the reclaimer, who must have delayed lodging his specification for recovery, and thus a quite different question of balance of convenience would arise. It need not do so here, as we can hear and dispose of the reclaiming note after the Single Bills. Is there then anything in the statute to prevent our taking this course? The Lord President in *Stewart's* case is very careful to say—"I think it is the clear meaning of the Act of 1868 that an interlocutor granting a diligence for the recovery of documents is not within the 27th or 28th section." He thus limits himself to the granting and says nothing about the refusing.

The case of *Stewart* v. *Kennedy* is then no direct decision which we should require to follow until it is overruled by a larger bench, for this case can be distinguished from it. When one comes to look into the statute there does not seem to be anything, convenience and expediency being all the other way, to preclude our receiving this reclaiming note. The position of this case is provided for by section 27 (4) of the Act of 1868. An order for proof has been allowed, and this is an application for an order necessary for giving effect to such interlocutor. It might have been included in the order for proof, though I hardly think that in practice this would be found practicable. But it is none the less when asked an order necessary for giving effect to the interlocutor allowing proof. There is nothing therefore in the abstract question of competency apart from that of convenience and expediency.

If I may be allowed before concluding to do so, I would draw attention to the irregularity of the procedure before the Lord Ordinary in the matter of this motion for a diligence. He has determined what he would allow and disallow of the articles in the specification, and then sent the counsel for the parties to make the necessary deletions and to remodel the specification accordingly, and he has then granted the diligence in terms of the specification as altered at the bar. Had the objection been taken we could not have looked at this reclaiming note, for on the face of the interlocutor sheet it would have been one of consent, the alteration being one made apparently *ex parte* at the instance of the defenders themselves. According to proper practice, unless such is the case, it is the duty of the clerk to authenticate the alterations on the specification, unless, as is often done, the Lord Ordinary does it himself, and to refer in the interlocutor to the specification as altered not at the bar but at the sight of the Court, and stating how it is authenticated. Then what is the act of the Lord Ordinary and not of the party appears on the face of the interlocutor.

LORD MACKENZIE—The interlocutor reclaimed against bears that "the Lord Ordinary granted diligence for the recovery of the documents in the specifications as amended at the bar." At the close of the argument before us it was put to Mr Watson what the purpose of the reclaiming note was. He said he was not reclaiming against the granting of the diligence—he was reclaiming against the refusal of the Lord Ordinary to grant a diligence for the recovery of the documents set out in the articles of the specification which had been deleted.

I am of opinion that the reclaiming note is competent, but in view of what has been said I think it will be necessary in future

to distinguish between those articles of a specification which are granted and those which are refused, because we are told that as a result of what happened in the Outer House both counsel had initialled the deletions from the specification. Now if counsel desires to preserve his right to reclaim against the refusal of recovery of certain documents, then it will be necessary for him to ask the Lord Ordinary, if there is a partial diligence granted, to grant *quoad* certain articles and to refuse *quoad* others, and then that will preserve the right to come here by way of a reclaiming note against the refusal of the diligence in regard to the articles struck out. I say that because I think it is necessary to distinguish between reclaiming notes against interlocutors granting diligence and reclaiming notes against interlocutors refusing diligence.

I am of opinion that in regard to interlocutors granting diligence it is necessary for the consent of the Lord Ordinary to be obtained. That is my view on account of what was said in the case of *Stewart* v. *Kennedy*, 1890, 17 R. 755, 27 S.L.R. 617. I think that when the Lord Ordinary grants a diligence he thereby neither allows nor refuses proof, because mere production of the documents does not in the least settle whether these documents can be made evidence in the case. But when he refuses a diligence for the recovery of documents he thereby pronounces an interlocutor which imports a refusal of proof because so far as regards the Outer House that is an end of the matter, as the party who desires to recover the documents is shut out by the action of the Lord Ordinary, and he never gets a chance of endeavouring to make these documents evidence in the case.

In my opinion it would not conduce to good practice if anything were said which would weaken the authority of *Stewart* v. *Kennedy* and abolish the control which the Lord Ordinary has over processes before him. Where all he does is to say, "I shall allow diligence as regards these particular documents," then I think that can only be reclaimed against with his leave.

I think there would be a high degree of inconvenience if we were to hold it to be incompetent to reclaim against a refusal of the recovery of documents. Take, for example, the doctrine that you can only prove by the best evidence, and that a particular document is in existence; that the party upon whom the *onus* of proof rests has only a copy; that he applies for a diligence to recover the principal and is refused; that he proceeds to prove his case by putting to his witness the copy, and that it is at once objected to because the principal is in existence. That is an extreme case, but it is necessary to test the matter by extreme cases where you are dealing with a question of competency.

Accordingly I am of opinion that to the extent I have indicated it is competent without leave to reclaim against an interlocutor refusing diligence, and that we should sustain the competency of this reclaiming note, but that as regards an interlocutor granting diligence the authority of *Stewart* v. *Kennedy* stands.

LORD SKERRINGTON—I have felt doubts and difficulty about this case, but what has fallen from your Lordships has removed my doubts, and I therefore concur.

The Court repelled the objections and appointed the cause to be put to the Summar Roll.

Counsel for the Pursuers (Respondents)—A. M. Stuart. Agents—Menzies, Bruce-Low, & Thomson, W.S.

Counsel for the Defenders (Reclaimers)—Watson, K.C.—C. H. Brown. Agents—Tods, Murray, & Jamieson, W.S.

Saturday, March 2.

SECOND DIVISION.

[Lord Cullen, Ordinary.

NOBEL'S EXPLOSIVES COMPANY, LIMITED *v.* THE BRITISH DOMINIONS GENERAL INSURANCE COMPANY, LIMITED.

Insurance — Process — War — Proof — Loss Directly Caused by War—Loss Averred to be Due to Enemy Agency, but Agent Unknown—Relevancy.

A firm of explosives manufacturers held policies of insurance against damage caused by "war" over certain property which sustained extensive damage owing to a series of explosions. They averred that the explosions were due to the act of an enemy or an enemy agent. And they continued that while they were unable to name the agent their investigations into the possible causes of the explosions demonstrated the fact that they could only have originated from the deliberate act of a person who entered a certain part of their premises without authority. The Court on a question of relevancy *allowed* a proof before answer.

Nobel's Explosives Company, Limited, *pursuers*, brought an action against The British Dominions General Insurance Company, Limited, *defenders*, for payment of various sums amounting in all to £9534, representing the value of certain property, insured by the pursuers with the defenders, which had been damaged or destroyed in consequence of a series of explosions.

The *policies of insurance* in question each contained the following clause:—"This policy is to cover the risk of loss of and/or damage to the property hereby insured directly caused by rioters, civil commotions, war, civil war, revolutions, rebellions, military or usurped power, including the risk of fire and/or explosion directly caused thereby and originating on the premises insured or elsewhere."

The pursuers averred, *inter alia*—"(Cond. 6) On the night of 30th July 1915 a series of