by Lord Ormidale in *Gauld's Trustees* v. *Duncan, &c.*, (1877) 4 R. 691. Both these decisions were cited in *Grant's* case. *M'Call's* case must, I think, be regarded as a special one, in which, as Lord Deas who took part in the decision stated there was sufficient in the deed "to show that the testator did not intend children to come in place of their parents." Lord Moncreiff's view of *M'Call's* case was apparently to the same effect—*Bruce's Trustees* v. *Bruce's Trustees*, (1898) 25 R. 796, at p. 801. It must, however, be conceded that a direct gift in favour of persons surviving at a particular time may more readily be construed as one in which the *conditio* is intentionally excluded than a gift in favour of "a class and the survivors of them." On the other hand, it is, in my opinion, settled that the mere difference of phraseology is not itself of crucial importance.

For these reasons I reject the argument that the gift is in a form which excludes the *conditio*. There remains the question whether the nature of the gift and the relation of the parties bring the present case within the class to which according to the authorities the condition is applicable. As to that I feel no doubt, nor can I discover any indication of a contrary intention in the language or context of the clause.

As regards the primary meaning of a bequest to the "family" of a person indicated by a testator, I agree with the opinion of Lord Johnston as Lord Ordinary in *Searcy's Trustees* v. *Allbuary*, 1907 S.C. 823, at p. 828. I may also refer to the judgment of Jessel, M.R., in *Pigg* v. *Clarke*, (1876) 3 Ch. D. 672.

LORD HUNTER—Looking to the language employed by the testator in making the gifts to his brothers and sisters and their families I have difficulty in seeing that the *conditio si institutus sine liberis decesserit* applies in favour of grandnephews and grandnieces. The effect of the application of the *conditio* is, as stated by the Lord Chancellor in *Young* v. *Robertson*, 4 Macq. 337, "that if a legacy be given to an individual and he either predeceases the testator or dies before the period appointed for vesting, leaving children, the legacy does not lapse but the children are substituted in the place of the legatee." The children take what was in the parent at the time of the death of the parent. In the present case the testator has made no mention of the children of his brothers and sisters as a class. They are neither instituted nor conditionally instituted. He has specially selected as conditional institutes of the legatees the members of their families alive at the period of vesting. I should have thought that by the form of words the children of predeceasing nephews and nieces were expressly excluded and that there was therefore no room for the operation of an implied condition. There appears, however, to have been a similar difficulty in applying the *conditio* in the case of *Grant, &c.*, v. *Brooke, &c.*, 10 R. 92, and as it was not held to be an obstacle in that case I am not prepared to dissent from what I understand is your Lordships' view.

I concur with your Lordships in holding that there is no ground for extending the word "family" to other than children.

LORD JOHNSTON and LORD MACKENZIE were absent.

The Court answered the first question in the affirmative and the second question in the negative.

Counsel for the First and Second Parties—Sandeman, K.C.—J. A. Inglis. Agents—M. T. Brown, Son, & Co., S.S.C.

Counsel for the Third Parties—Constable, K.C.—W. T. Watson. Agent—G. W. Tait, S.S.C.

Tuesday, February 26.

FIRST DIVISION.

[Lord Cullen, Ordinary.

FRAME *v.* TAYLOR.

Reparation—Master and Servant—Workmen's Compensation—Bar to Action—Workman Accepting Payments of Half Wages—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 6.

An employee of a forage company was on 15th January 1917 run down and injured by a motor driven by a third party. Immediately after the accident he made a claim of damages against the third party and raised an action against him on 17th May 1917. The company, being aware of their employee's circumstances, and agreeing with him that he had a good claim against the third party, paid him half wages from 20th January to 14th March, when it was agreed that those payments were to be continued on the footing that if the employee recovered damages in his action he would refund the payments made to him. Receipts as for compensation under the 1906 Act were then taken from the employee for the payments already made and for subsequent payments, which bore that the payments were received in terms of the agreement. The company was in the habit of paying regular employees half wages when they were off ill. No claim for compensation was ever presented. In the action by the employee the third party pleaded that the employee having recovered compensation under the Workmen's Compensation Act 1906 was barred by section 6 of that Act from recovering damages. *Held* (*rev.* Lord Cullen, Ordinary) that the payments were not payments of compensation under the Workmen's Compensation Act 1906, and that the pursuer was not barred from suing.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) enacts, section 6—"Where the injury for which compensation is payable under this Act was caused under

circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof (1) the workman may take proceedings both against that person to recover damages and against any person liable to pay compensation under this Act for such compensation, but shall not be entitled to recover both damages and compensation."

Alexander Frame, carter, 30 Newhaven Road, Leith, *pursuer*, on May 17, 1917, brought an action against T. S. Taylor, master laundryman, Edinburgh, *defender*, concluding for £600 damages for personal injuries.

The defender *pleaded, inter alia*—"2. The pursuer having recovered compensation under the Workmen's Compensation Act 1906 from his employers, is barred by section 6 of said Act from recovering damages from the defender, and the latter should be assoilzied."

On 9th November 1917 the Lord Ordinary (CULLEN), after a proof, limited to the averments of the parties relative to the acceptance of compensation under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sustained the second plea-in-law for the defender and assoilzied him from the conclusions of the action. To the interlocutor was appended the following opinion, from which the *facts* of the case appear.

Opinion.—"On 15th January 1917 the pursuer, who is the driver of a motor vehicle belonging to the Forage Supply Company, Limited, was knocked down and injured by a motor vehicle belonging to the defender, and in the present action he claims damages from the defender on the ground that the accident was caused by the fault of the latter.

"The defender pleads, *in limine*, that the pursuer is barred from maintaining the action in respect of his having, under the Workmen's Compensation Act 1906, recovered compensation from his employers, the Forage Company, within the meaning of section 6 (1) of that Act, and parties were agreed at the closing of the record in asking that there should be in the first place a proof limited to this matter, which proof has now been taken.

"On the evidence led there is not much controversy about the overt facts.

"The Forage Company held a workmen's compensation policy issued by the Commercial Union Assurance Company, Limited, to whom on 16th January 1917 they intimated the occurrence of the accident, saying that there was likely to be a claim in respect of it. The pursuer on his part intimated a common law claim against the defender through his then law agent, a Mr Tait. Thereafter the pursuer's interests came to be entrusted by him to the witness Mr Brooks, S.S.C., who was the law agent of the Forage Company, and also its secretary, and who took up the pursuer's claim against the defender. Before the summons was served Mr Brooks was called up for military service, in view of which he arranged with the witness Mr A. F. Fraser, solicitor, that the latter should in his absence attend to his business, including the affairs of the Forage Company and the pursuer's proposed action against the defender, and Mr Fraser thereafter acted for the pursuer, with the exception that he entrusted part of the proceedings connected with the issuing of the summons to Mr C. S. Petrie, solicitor, who obliged him in the matter, as he was busy with term business at the time. Thus after the initial intimation of the pursuer's claim against the defender the pursuer's interests were attended to by an agent who was also the agent of the Forage Company. This may perhaps explain the fact that no actual claim for compensation under the Act was made by or on behalf of the pursuer against the Forage Company.

"But while no such claim was made, the Forage Company made a series of payments to the pursuer, and it is the fact of these payments being received by the pursuer which has given rise to the question whether he is to be held to have 'recovered compensation' within the meaning of section 6 (1) of the Act.

"The accident occurred on a Monday, and it disabled the pursuer. On the following Saturday he received a full week's wages. This seems to have been in accordance with the practice of the Forage Company, and it is not founded on by the defender as having been specifically a payment of compensation. Thereafter from and including 27th January the Forage Company paid the pursuer half wages for each week (18s.) down to the end of April. It is not quite clear why the payments then ceased. The pursuer seems to have been advised that he should not take any more. The payments were not *de facto* made at regular weekly intervals owing to considerations of convenience in transmission, but it is not in dispute that they were intended and made as a series of weekly payments of half wages.

"In relation to the present question the series of weekly payments between 27th January and the end of April falls within two separate stages. Between 27th January and 14th March the payments were made without anything being explicitly arranged as to the footing on which they were being made and received. No written receipts were taken from the pursuer. The pursuer only gave written receipts shortly after 5th April, as I shall explain in a moment.

"On 14th March the pursuer had a meeting with Mr Brooks, who was on the eve of departure, and Mr Fraser, who was taking over temporarily the conduct of Mr Brooks' business. At this meeting Mr Brooks and Mr Fraser acted for the Forage Company as well as for the pursuer. They told the pursuer that the Forage Company were prepared to continue making the weekly payments of half wages on the footing that if he recovered damages in his forthcoming action against the defender he would refund the payments made to him, and to this proposition the pursuer agreed. The defender fully admits that on the evidence such an arrangement is proved to have been then come to between the Forage Company and

the pursuer. Further, in the arguments *hinc inde* which I heard, the condition as to refunding of payments was treated as applying to the payments of half wages before as well as after 14th March, when the arrangement was come to.

"Prior to 14th March Mr Brooks had been in touch with the Commercial Union Assurance Company about the case, and on 13th March he had a telephone conversation with the company's representative Mr Cooper, which resulted, according to the evidence of Mr Brooks, in the company agreeing that the weekly payments of half wages to the pursuer should be continued. Mr Brooks so recorded this result of the conversation in his business books at the time. Mr Cooper differs. Both witnesses appeared to me to be unexceptionable in point of credibility, and the difference between them is no doubt due to misunderstanding, or it may be failure of recollection on the part of Mr Cooper. It does not seem to me to be very material whether the one or the other witness is right. The observation made by the defender's counsel, *quantum valeat*, was that Mr Brooks for the Forage Company was negotiating with the Insurance Company on the footing of the weekly payments being compensation, and was seeking the authorisation of the company for their continuance.

"Mr Cooper about this period also went off on military service. Mr Fraser continued communications with the Insurance Company, and sent them excerpts from Mr Brooks' books under date 13th March. Thereafter he received a letter from the company dated 4th April saying—'Kindly pay to the injured man weekly compensation at the rate of 18s. during total incapacity, that being the sum due under the Act.' Having received this letter Mr Fraser wrote to the pursuer saying that he had sent some 'insurance forms' to the Forage Company that day, and that 'as the agreement between us is that the weekly payments of 18s. are paid and received on the footing that a refund thereof will be made by you if you are successful against Mr Taylor, you can sign these forms for each payment, and we shall return you the forms on such refund being made.' At the same time he sent the 'insurance forms' to the Forage Company. They are printed forms of receipt for payments to a workman of compensation under the Act. On these forms all the payments from 27th January onwards were filled in, and they bear a series of signatures by the pursuer applicable to each weekly amount. For the most part the pursuer adhibited his said signatures at one time. One or two subsequent payments he signed for individually.

"In view of the case of *Wright* v. *Lindsay*, 1912 S.C. 189, 49 S.L.R. 210, the defender admitting the fact of the foresaid agreement made on 14th March does not found on the payments made to the pursuer after that date. He founds on the payments as per week made prior thereto, six in number, beginning with that under date 27th January. He maintains (1) that these payments were payments by way of statutory compensation, and were acknowledged as such by the pursuer on the foresaid receipts; (2) that they were made and received without qualification; (3) that if they were, when made and received, of the nature of compensation, they represented at the time 'compensation recovered' by the pursuer within the meaning of section 6 (1) of the Act; and (4) that the statutory effect under section 6 (1) of their recovery as compensation by the pursuer could not, in a question with the defender, competently be undone by an *ex post facto* agreement between the pursuer and his employers such as was come to on 14th March as already mentioned. The opposing views presented by the pursuer are (1) that the payments between 27th January and 14th March were not when made stamped with the character of compensation, but were 'indeterminate' in character, which seems to be equivalent to saying that they were payments made by the Forage Company merely *ex gratia*, and were accepted as such; (2) that the agreement of 14th March with the receipts following thereon had a double operation on these prior payments in respect (*a*) the pursuer thereby for the first time, and voluntarily, agreed to stamp the payments *ex post facto* with the character of compensation which they did not have when made; and (*b*) qualified his action in doing so by adjecting *unico contextu* the conditional agreement to refund said payments.

"The pursuer took another line of contention regarding the effect of the receipts as evidence, which was that he did not read them and did not know their terms, and is not bound by what they contain. Now the fact of the receipts having been given is specifically tabled on record by the defender, and the pursuer in response does not on record in any way challenge them as having been signed by him under error, as I think he was bound to do if he meant to maintain that he was not to be held as having assented to their terms. And as regards the questions put to him on the subject in the box, I was not much impressed with his disclaimer of knowledge of the character of the receipts. In common with Mr Fraser, and also with Miss Currie, the clerk of the Forage Company who took the receipts from him, he says he did not read them. But that any of these three persons did not understand the receipts to be receipts for payments made by way of statutory compensation I am unable to believe. The outward form of the receipts speaks for itself. And the pursuer from Mr Fraser's letter to him of 5th April knew that the forms were forms of the Insurance Company, who were only interested in the matter of statutory compensation.

"Putting aside the pursuer's ineffectual attempt to challenge the receipts as not being evidence, according to their terms, for the purpose of the case, and accepting them as available evidence, the question for determination on the evidence as a whole is whether the six payments between 27th January and 14th March fall to be regarded as 'compensation recovered' by the pursuer within the meaning of section 6 (1), or

whether they fall to be regarded as having been paid and received on some different footing. If the former alternative is the right one I understand the pursuer's counsel to allow that the effect would be to bar the present action; and whether he meant to allow this or not, I think, on the hypothesis stated, that the effect would be to bar the present action. Section 6 (1) does not postulate complete payment of compensation, otherwise a workman might recover 9/10ths of his compensation, take no more of it, and then recover damages from the third party, and keep both the amount of his damages and the 9/10ths of his compensation.

"In considering the matter thus put in issue the first question which naturally suggests itself is this—If the payments made between 27th January and 14th March were not made and received as compensation, what was the different footing on which they were made and received? The difficulty in the case arises from the absence of any overt claim preceding or accompanying the payments tabled by the pursuer against his employers. The absence of such an overt claim may have been due, as I have already suggested, to the fact that except at the very first the same law agent acted both for the pursuer and for his employers.

"There is some evidence to the effect that the Forage Company are wont to deal generously with employees who have been incapacitated for service by accidental injury or illness, but it does not seem to me to go the length of showing reliably that the series of weekly payments of half wages to the pursuer here in question were made merely as an exhibition of an established practice of benevolence on the part of that company.

"While there was no overt claim by the pursuer against the Forage Company for compensation, and no overt acknowledgment by that company of their liability to pay him compensation, there may yet be room for inferring from the whole evidence that the payments in question were truly made and received as compensation. I am of opinion that there are sufficient grounds for such an inference.

"In the first place I think, as I have said, that the absence of an overt claim by the pursuer under the Act is fairly explained by the dual position of agency occupied first by Mr Brooks and afterwards by Mr Fraser. In the next place the payments of half wages per week represented admittedly the rate of compensation to which the results of the accident, as averred by him, entitled him during his then state of incapacity. In the next place I do not think that any adequate explanation is offered in the evidence as to why these payments were made and received if they were not made and received as compensation. Finally the pursuer, who had not previously granted receipts, did after 5th April grant receipts for, *inter alia*, the six payments in question, acknowledging them to have been paid and received as compensation under the Act, and I am unable to relieve the pursuer from the effect of his having granted such receipts according to their terms.

"As regards this last consideration I quite keep in mind the pursuer's view that the receipts, accepting them on their terms, are to be regarded as a voluntary act on his part whereby he agreed to effect a change in the character of the six payments in question and to stamp them with a new character which hitherto did not attach to them. But I confess that I see no satisfactory grounds in the evidence for adopting this view. Under the agreement come to on 14th March no distinction was drawn between the character of the payments made prior thereto and the payments agreed to be made subsequently. There was no separate reference to the prior payments. All the payments, prior and subsequent, were subjected to the conditional obligation to refund, but no distinction was drawn between them as regards the character otherwise attachable to them. What the Forage Company then agreed to was to continue making the same kind of payments subject to a conditional obligation to refund applicable to all of them. The pursuer was not asked, nor did he offer or agree, to treat the prior payments as anything different in character from what they had been when made. And in the receipts which he thereafter signed he treated all the payments as similar in character.

"The defender founds, *inter alia*, on the negotiations between the Forage Company and its Insuring Company as reinforcing his contention by showing that to the mind of the Forage Company the matter of statutory compensation was present from the first and that they intended the payments in question as payments to account of compensation. I have little doubt that such was the standpoint of the Forage Company, and while their negotiations with the Insurance Company may not have been known to the pursuer personally, they were necessarily known to his agent who was also the agent of the Forage Company. There may, however, be involved, on this aspect of the case, a question as to the precise extent of the agency for the pursuer entrusted by him to Mr Brooks and Mr Fraser—a topic which was not mooted at the discussion. I prefer, therefore, to confine myself to the considerations which I have before stated.

"If I am right in holding that notwithstanding the absence of an overt claim by the pursuer under the Act and the absence of an overt recognition of liability by his employers when the payments here in question were made, there is room for an inference from the evidence as to the footing on which the payments took place, and that the true inference is that they were made and received as payments of compensation under the Act, then it follows that the pursuer has 'recovered compensation' within the meaning of section 6 (1) without any qualifying agreement such as to bring in the rule of *Wright* v. *Lindsay*, and is not entitled to maintain the present action.

"Following the views which I have above expressed I shall sustain the second plea-in-law for the defender."

The pursuer reclaimed, and argued—Upon the facts there was no evidence that the

pursuer had elected to take compensation under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58). Sections 2 and 6 of that Act applied where compensation had been claimed under it; here compensation had not been claimed under the Act. The money was sent in the usual course and was not accepted as compensation under the Act. The First Schedule, section 3, only applied to voluntary payments which could not be exacted as of right. To bar the pursuer it was necessary to show that he had elected to proceed under the Act or that he had accepted payments tendered to him unequivocably as compensation—*Aldin* v. *Stewart*, 1916 S.C. 13, 53 S.L.R. 49; *Mackay* v. *Rosie*, 1908 S.C. 174, 45 S.L.R. 178; *Wright* v. *Lindsay*, 1912 S.C. 189, 49 S.L.R. 210; *Kelly* v. *North British Railway Company*, 1916 S.C. 19, 53 S.L.R. 53.

Argued for the defender (respondent)—The defender had under the Act of 1906 a right to inquire into what had taken place between the pursuer and his employers, and the Court should scrutinise the evidence and consider whether the workman had expressly or impliedly elected to take compensation under the Act. An agreement to take compensation could be inferred from the acceptance of half wages for a period—*Mackay's* case (*cit.*). No doubt a workman might agree with his employers as to compensation, and *unico contextu* might also agree to repay if he recovered damages from a third party, but if, as here, a plea of bar had once vested in the third party by reason of the acceptance of compensation, a subsequent agreement as to repayment could not oust that plea. Here the pursuer was aware of his rights under the Act and accepted payments under it, and his employers were insured only against claims under the Act.

At advising—

LORD PRESIDENT—This action I think must proceed. The barrier reared against the workman by the 6th section of the Workmen's Compensation Act of 1906 is not technical or formal; it is a matter of substance. The design and policy of the clause is to preclude a workman from making money out of an accident which has befallen him, and to prevent him claiming compensation from a third party as well as from his employer. And the question in this case is whether *de facto* the workman has obtained payment of compensation from his employer. I answer that question of fact in the negative.

Immediately after the accident befel him on the 15th January 1917 the pursuer was advised that the defender was responsible and must pay him damages. Acting upon that advice he made a claim against the defender. His employers, who became aware of the circumstances, shared his view. The result is the present action, raised on the 17th May 1917. It is met with a plea that a series of payments were made to the workman, dating from the 20th January, I think, down to the 14th March, the quality of which it is said precludes the workman from prosecuting this action against the defenders. And the question we have to decide is—What was the character of these particular payments? because it is common ground that the payments made subsequent to the 14th March constitute no bar against the pursuer's action.

Now the Lord Ordinary says that no explanation was offered in evidence as to why the payments to which I have just referred were made and received if they were not made and received as compensation. There I differ from the Lord Ordinary. The recipient of the payments was under no doubt as to the character impressed upon them. "Why," he is asked, "did you get money from your employer—was it to keep you alive?" And the answer is "Yes, to keep the house going till the plea was settled. . . . I did not ask for any money; it was offered to me." It is common ground that the workman made no claim under the Workmen's Compensation Act. Nor was the payer of the money under any illlusion. The money was paid in accordance with a standing instruction of this company—a most commendable instruction—to pay any employee half wages when he was off ill if he was a regular employee. And the clerk of the company who made the payments, without any special instructions whatever from the employer to make them, says—"The practice of the company as regards accidents to workmen is that they practically always made payment to a man who is off work whether he is disabled or ill. Sometimes part payment only is made. I remember the accident to the pursuer. He was very ill in consequence for a time. I paid him his first week's wages after the accident in full, and after that I paid him half wages. I entered these payments in my book every week. . . . Frame did not at any time, to my knowledge, make a claim against the company for workmen's compensation." It is said then that these payments were equivocal and indeterminate. I am of opinion that they were not. They were very clearly charitable payments made by the employer in pursuance of a practice which had long prevailed in his work, and were made irrespective altogether of liability under the Workmen's Compensation Act. That went on, as I have said, till the middle of March. Then apparently the agents for the parties were minded to regularise the payments made, if I may use the expression, and accordingly what they did was this—they made a bargain that in future the payments should continue, but that an obligation should be taken from the workman to refund them in the event of this action proving successful. And in order to bring the payments made down to the 14th March under that agreement and within that protection they swept them into the receipt, and the workman accordingly signed receipts for all payments from 20th January onwards, but under the express condition that he was to refund if this action was successful.

Under these circumstances I think it is impossible to say that these payments from the 20th January to the 14th March were made as a matter of obligation by the em-

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