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

explosions occurred in the pursuers' factory at Ardeer in the new or Misk factory. The pursuers have now ascertained that the first of the series of explosions took place in the crystallising house of the old plant in the T.N.T. department. The series of explosions was very violent. The first explosion of the series which occurred on the night of 30th July was followed at intervals, up to about 3 a.m. on the 31st July, by nine or ten other explosions, and about 10·30 in the morning of the 31st of July the most violent explosion of all took place. This last explosion not only wrecked buildings which had not been affected by the previous explosions but completely demolished many of the buildings which had been shaken by the previous explosions but still remained standing. This last explosion was the explosion of a material known as T.N.T. oil, which is the residue from the crystallisation of T.N.T., contained in about 180 drums which were standing near the T.N.T. plant in open ground. These drums had been ignited by the previous explosions and some of the drums nearly burnt themselves out but upon a detonation occurring, as it did in one or two of the drums, the rest of them exploded with tremendous violence. The whole of the old T.N.T. plant and buildings were completely destroyed, but although the buildings of the new plant were badly damaged it was found on examination that no explosion had taken place inside any one of them nor in the plant which they contained. The damage to the plant was unimportant and such as would be produced by a severe explosion in the vicinity and by falling debris of the containing buildings. The picric acid plant was also totally destroyed by fire, although one or two small explosions of picric acid had occurred. Two guncotton stoves were exploded at intervals by flying debris and one burnt away without explosion. Three cordite blending-houses and three cordite stoves caught fire and were burnt away, and some of the cordite buildings of the old factory were totally destroyed. (Cond. 7) The pursuers immediately after the said explosion made a careful and searching investigation into the facts, and have ascertained and aver that the said explosions were caused by the act of an enemy or of a person acting on behalf of an enemy. As the result of their inquiries the pursuers have definitely excluded as the origin of the explosions all causes independent of human agency. They have further excluded the possibility that the explosions were caused by fire or by the act or default of any member or members of the staff on duty in the T.N.T. department. The movements of all the men at work in that department have been made the subject of inquiry, as the result of which it has been ascertained that at and before the explosion these men were all engaged upon their allotted work. No work was being done either by them or by any other of the pursuers' employees in the crystallising house of the old plant, nor had any of the said men or of the said other employees been in it for some hours previously. The explosion, unless caused by hostile aircraft, must have been caused by the deliberate act of some unknown person who entered the area of the T.N.T. department without authority. The pursuers believe and aver that such person was an enemy agent. The explosion can only be accounted for as having had its origin in the act of such an intruder, who could easily have introduced fuses, detonators, and other material necessary to cause the explosion. The explosion was accordingly caused by an act of war. The loss and damage caused to the pursuers by the said explosions were thus covered by the war risk clauses above quoted in the said policies. With reference to the statements in answer, explained that the defenders received notice of the explosion immediately after its occurrence and that they had ample opportunity of making investigations into the whole circumstances of the explosion. The defenders, however, failed to take advantage of such opportunity."

The defenders *pleaded, inter alia*—"1. The pursuers' averments being irrelevant and lacking in specification, the action should be dismissed."

On 9th November 1917 the Lord Ordinary (CULLEN) sustained the first plea-in-law for the defenders and dismissed the action.

Opinion.—"The pursuers own and carry on a manufactory of explosives at Ardeer in the county of Ayr.

"They aver that on the night of 30th July 1915 a series of explosions occurred in their factory whereby loss and damage was occasioned to them estimated at £220,963.

"Under two policies of insurance issued by the defenders the pursuers were insured against, *inter alia*, loss or damage caused their property directly by '. . . war. . . .'

"The pursuers in this action now sue on these policies. They also (cond. 5) sue on a similar policy issued to them by another company, the North-Western Insurance Company, Limited, dated 1st February 1915, as to which they aver that 'the defenders have acquired the business of the said North-Western Insurance Company, Limited, and have taken over the company's assets and liabilities, and are accordingly liable to make good any loss arising under' the North-Western Company's policy.

"The relevancy of the pursuers' averments in relation to this last-mentioned policy is challenged by the defenders on the ground that they do not disclose a *jus quæsitum tertio* entitling the pursuers to sue the defenders. *Prima facie* this challenge seems well founded, and Mr Moncrieff for the pursuers stated that he did not maintain the contrary.

"The questions now at issue thus relate to the two policies issued by the defenders' company. There is a preliminary question as to due notice of the arising of the claim having been given to the defenders as required by the policies. As to this matter parties were at one that on the averments inquiry would be necessary if the pursuers' averments otherwise were relevant.

"The broader question, on which alone I heard argument, and which I have now to determine, is whether the pursuers' averments are relevant to show that the explo-

sions in question were directly caused by 'war.'

"The pursuers aver that their inquiries into the origin of the explosions show, as they are prepared to prove, that these must have been occasioned by the intervention of a human agent. They say they do not know who this agent was. They aver that he was an enemy agent. This general averment of enemy agency is not irrelevant in a wide sense, but it is lacking in specification in not giving the defenders due notice of what might be proved under it. But Mr Moncrieff for the pursuers explained that the intended scope of this general averment was to be measured by the other averments which accompany it, and that while the pursuers had been unable to discover and were unable to offer to prove who the intervening human agent was, they relied on a proof of said other averments as relevant to establish that he must have been an enemy agent.

"The averments which the pursuers offer to prove are these—(1) that the explosions, as before mentioned, involved the intervention of a human agent; (2) that the explosions could not have been caused by any act or default of any member of their staff on duty in the department of their factory in question, whose activities and whereabouts have been all duly accounted for incompatibly with the possibility of any of them having been an agent in causing the explosions. The terms of the averments (Cond. 7) are as follows:—'The pursuers immediately after said explosion made a careful and searching investigation into the facts, and have ascertained and aver that the said explosions were caused by the act of an enemy or of a person acting on behalf of an enemy. As the result of their inquiries the pursuers have definitely excluded as the origin of the explosions all causes independent of human agency. They have further excluded the possibility that the explosions were caused by the act or default of any member or members of the staff on duty in the T.N.T. department. The movements of all the men at work in that department have been made the subject of inquiry, as the result of which it has been ascertained that at and before the explosion these men were all engaged upon their allotted work. No work was being done either by them or by any other of the pursuers' employees in the crystallising house of the old plant, nor had any of the said men or of the said other employees been in it for some hours previously. The explosion, unless caused by hostile aircraft, must have been caused by the deliberate act of some unknown person who entered the area of the T.N.T. department without authority. The pursuers believe and aver that such person was an enemy agent. The explosion can only be accounted for as having had its origin in the act of such an intruder, who could easily have introduced fuses, detonators, and other material necessary to cause the explosion. The explosion was accordingly caused by an act of 'war.'

"The pursuers in stating their *media concludendi* thus proceed, in point of logic, as by way of a process of exclusion. They offer circumstantial evidence which they say can only lead to the one conclusion, to wit, that the explosions must have been caused by an enemy agent.

"I think that the pursuers' view confuses probability with proof. Assuming the truth of their said averments it may be a conjecture of some probability that the hand of an enemy agent was at work. But I do not think that their averments at the most carry the matter beyond such a conjecture. *Quomodo constat* that the human agent involved was not some dismissed and resentful employee minded to wreak his revenge, or an outsider actuated by an instinct for malicious mischief, or a person of disordered mind. The pursuers argue that where the responsibility of a particular person for his conduct is at issue there is a presumption in favour of innocence or sanity as the case may be. But the person involved here is unknown. The pursuers apply their view with the effect of throwing on the defenders the task of finding out the perpetrator, which task they themselves have failed to accomplish, and then of proving that he was not an enemy agent. I do not think that the pursuers are justified in so shifting the *onus* on to the defenders. The pursuers have to prove their claim under the policies, and it seems to me that, assuming the truth of their averments with which I am dealing, they leave the claim unproved.

"Following these views, I shall sustain the defenders' plea to the relevancy, and dismiss the action."

The pursuers reclaimed, and in the course of their argument referred to the case of *Rankin & Company* v. *Cunard Company*, heard in the King's Bench Division and reported in the *Times* of 16th February 1918.

Counsel for the defenders did not cite any authorities.

LORD JUSTICE-CLERK—The Lord Ordinary has held that this case is irrelevant on the ground that the pursuers have averred nothing but probabilities, for he says, "I think the pursuers have confused probability with proof." I confess there is a great deal of justification for that view, but I think there are averments here which we cannot dispose of without inquiry. To my mind the first sentence in condescendence 7, taken along with what follows, amounts to a definite averment "that the said explosions were caused by the act of an enemy or of a person acting on behalf of an enemy," although it seems to be qualified by the statement that the pursuers do not know who the enemy or the enemy agent was who brought about the explosion.

The objections to relevancy here are so plain that they must have been fully in view of the counsel who drew the record, and I think one can appreciate the commendable motives which induced them to weaken their primary averment when by a very slight addition to what follows a clearly relevant case might have been made. But I do not think that the laudable effort to set out to some extent the proof which they propose to lead is sufficient to justify

us in saying that they have destroyed the relevant averment to which I have referred. In some cases where special legislation has intervened the Court may have to decide cases of this kind *ab ante*, but I do not think we are entitled, in cases where we are not so compelled, to give an opinion on the result of evidence or the inference to be legitimately drawn from evidence until after the proof has been taken. I think there is enough here to prevent us from deciding that the pursuers are not entitled to a proof.

I propose to your Lordships therefore that we should recal the interlocutor of the Lord Ordinary and allow a proof before answer.

LORD DUNDAS—I have come to the same conclusion. The question is certainly a narrow one—whether upon these pleadings there should or should not be an allowance of proof. The condescendence here has evidently been framed with care and with candour, and with the view of not going an inch beyond what the pursuers believe that they can prove. Upon a very strict reading of the condescendence it may be that the Lord Ordinary's conclusion is right. But it may turn out to be a very narrow question upon the facts, as it is now upon the record, whether there has here been loss through war in the sense of the policies. The idea involved is a complex one, and I think a very slight difference in the way in which the facts come out may turn the scale in favour of one party or the other. Upon the whole I think the fairer and the better course is that the Lord Ordinary should have the facts before him before he decides the case.

LORD SALVESEN—I am very clearly of opinion that the pursuers have stated a relevant case here. They say that they "have ascertained and aver that the said explosions were caused by the act of an enemy or of a person acting on behalf of an enemy." They state also some reasons that have led them to that conclusion, namely, that the result of their investigations is to show that none of the causes which might ordinarily be assigned for such an explosion, as, for instance, spontaneous combustion of the materials involved or disaffection amongst the workmen, could have been the cause of this explosion. I do not think they weaken their case at all by saying that.

The Lord Ordinary thinks that unless they proceed by a process of complete exclusion of all possible causes of this accident that happened to their works that they fail on relevancy. Now I entirely disagree with that view. I do not think one ever decided a question of fact, however clear upon the evidence it might be to the mind of the individual judge, where every possibility of the facts being otherwise was excluded. But the Courts proceed not by methods of mathematical demonstration or even of deductive logic, but on the evidence adduced in the particular case. And the question always is, whether the evidence adduced leads reasonably to a legitimate inference in one direction or another. If the probabilities of two possible theories, one of which infers no liability, are equally balanced, a pursuer must necessarily fail. But if, on the other hand, there is evidence pointing in one direction and merely a remote possibility of some other cause, then I apprehend that the Court is perfectly justified in drawing an inference of fact, although it is not and never can be a matter of certainty.

Accordingly I think the reasoning upon which the Lord Ordinary has rejected the demand for a proof here is fallacious, and that the interlocutor of the Lord Ordinary ought to be recalled and the case remitted to his Lordship to take a proof.

LORD GUTHRIE—I concur. I do not agree with the Lord Ordinary's view expressed in the second last paragraph of his note any more than Lord Salvesen does. He says—"I think the pursuers' view confuses probability with proof. Assuming the truth of their said averments, it may be a conjecture of some probability that the hand of an enemy agent was at work, but I do not think that their averments at the most carry the matter beyond such a conjecture." Without knowing what evidence is to be led, except by the statement of the general lines of the inquiry, I do not think it is possible to know whether the pursuers' evidence will only result in a conjecture or will amount to legal proof. Outside the region of mathematics proof is never anything more than probability. It is for the Court in each case to say whether the probability is so slight or so equally balanced by counter-probabilities that nothing more results than a surmise, or whether the probabilities are so strong and so one-sided as to amount to legal proof. The abstract possibility of mistake can never be excluded.

The Lord Ordinary seems to me to assume that nothing can be proved under the pursuers' averments except what is actually set out in detail in condescendence 7. It is not for the pursuers to set out the particulars of their precognitions on record, but only to give fair notice of the line or lines of evidence which they are to adduce. In this case the pursuers say in the first sentence of condescendence 7—"The said explosions were caused by the act of an enemy or of a person acting on behalf of an enemy." They then go on to make a statement which may or may not have been necessary, but of which if superfluous the defenders have no interest to complain. And then comes the perfectly distinct statement—"The pursuers believe and aver that such person was an enemy agent. The explosion can only be accounted for as having had its origin in the act of such an intruder, who could easily have introduced fuses, detonators, and other material necessary to cause the explosion."

That sentence seems to me necessarily to exclude all the possible causes that the Lord Ordinary has referred to, and in addition the cause which the Lord Advocate suggested as a *reductio ad absurdum*, namely, a meteoric stone.

I think that the pursuers here are clearly entitled to an inquiry. And I do not agree

with Mr Sandeman's suggestion that they will be excluded from leading the kind of evidence that was referred to in the course of the argument, such as that a piece of a detonator was found of German manufacture, or that a man in the works had been approached by a German to get him to undertake to blow up these works—a request which he refused, but as to which he swore secrecy.

I therefore think that there ought to be a proof here.

The Court recalled the interlocutor of the Lord Ordinary and allowed a proof before answer.

Counsel for Pursuers (Reclaimers)—Lord Advocate (Clyde, K.C.)—Moncrieff, K.C.—C. H. Brown. Agents—Webster, Will, & Company, W.S.

Counsel for Defenders (Respondents)—Sandeman, K.C.—Lippe. Agents—Cumming & Duff, W.S.

Wednesday, February 27.

SECOND DIVISION.

[Lord Ormidale, Ordinary.

GIBSON *v.* BLAIR.

Right in Security—Bond and Disposition in Security—Maills and Duties—Competency—Titles to Land Consolidation (Scotland) Act 1868 (31 *and* 32 *Vict. cap.* 101), *sec.* 119.

In consequence of a dispute as to the proper rate of interest in existing circumstances, the creditor in a bond and disposition in security in the form prescribed by the Titles to Land Consolidation (Scotland) Act 1868 raised an action of maills and duties against the debtor in the bond one day before the interest on the bond was due and payable. *Held* that as there had been no default the proceedings on the part of the creditor were premature, and that accordingly the action was incompetent.

On 10th November 1917 William Gibson, Writer to the Signet, Edinburgh, *pursuer*, creditor in a bond and disposition in security over certain heritable property situated in George Street, Edinburgh, brought an action of maills and duties against John Sloan Blair, 20 Pitt Street, Edinburgh, *defender*, the debtor in the bond.

On 31st August 1907 the defender had granted the pursuer a bond and disposition, which was recorded on 4th September 1907, over certain heritable property at No. 37 George Street, Edinburgh, in security of the sum of £600 borrowed by the defender from the pursuer. The position of matters between the parties at the raising of the action appears from the following averments.

The pursuer averred—"(Cond. 2) In August 1915 it was arranged between the pursuer and defender that the rate of interest payable on the said sum of £600 should be at the rate fixed by the Commissioners for fixing the rates of interest payable on heritable securities in Scotland from and after the term of Martinmas 1916, whether the rate then should be more or less than 4 per cent., which was the rate stipulated to be paid to Martinmas 1916. The said Commissioners prior to Whitsunday 1917 fixed the rate at 5 per cent. The defender now declines to pay the 5 per cent., alleging that at the time this arrangement was made it was never anticipated the Commissioners' rate would go so high as 5 per cent."

The defender in his statement of facts averred—"(Stat. 1) Prior to the defender's purchase of the subjects of security contained in the bonds and dispositions in security referred to in the condescendence for pursuer the defender was tenant of the shop and premises No. 37 George Street, Edinburgh, forming part of said subjects, at a rent of £200, and carried on therein the business of wine and spirit merchant and restaurateur. In 1907 the defender arranged to purchase the said subjects from his late father's trustees at the price of £12,000. To enable the defender to pay the said price he borrowed £7400 from the trustees of the late Mr Duncan Macpherson on bond and disposition in security, recorded on 3rd September 1907, and £600 from the pursuer on bond and disposition in security, recorded on 4th September 1907. These transactions were carried through after a report and valuation had been obtained for the lenders by Mr W. Allan Carter, C.E., Edinburgh. At the time of the defender's purchase in 1907 the total rental of the subjects was £522, 10s. per annum. (Stat. 2) The defender in 1912 disposed of his said business, and let the premises in which same was carried on, on a lease at a rent of £200 per annum. The defender is not now engaged in business. (Stat. 3) The interest payable on said loans was duly and regularly paid by the defender at Whitsunday and Martinmas in each year down to and including Whitsunday 1917. By letter dated 7th February 1917 the agents for the lenders intimated that from Whitsunday 1917 the rate of interest on the loans would be increased to 5 per cent. Shortly after this intimation the defender submitted to the said agents a statement of the rents and outgoings, representing to them that the defender was not in a financial position either to supplement the free rents to meet the increased rate of interest or to repay the loan, that he was willing to have the rate of interest increased from 4 to 4½ per cent. as from Martinmas 1916, but was unable to undertake the payment of a higher rate through conditions consequent on the war. On 20th March 1917 the agent for defender wrote to the agents for the lenders that the defender would, no doubt, make arrangements for meeting the half-year's interest at Whitsunday 1917, that he could not make any promise to pay a higher rate of interest after that, but that if the defender should find himself able to pay a higher rate he would do so. By letter dated 1st November 1917 the agents for the lenders notified to the defender's agent a