that discharge. Admittedly, looking to the grounds of reduction stated, this action is unique; it is admittedly unprecedented. There is no instance in the books of a discharge being sought to be reduced upon such grounds as are here stated.

The case is the very common and familiar one of a debtor persuading his creditor to take a part-payment and give a discharge in full. There is no instance of a reduction upon the ground that the debtor getting such a discharge was really able to pay in full, and that the creditors were misled by him into the belief that he was unable. Apparently it comes to this, that there should be an investigation into the state of the debtor's affairs to see whether he was unable to pay more. I can see no other way of getting at the facts. I do not think we can give countenance to an action of that sort. The only averment is this—"It was represented, however, by the defenders that the debtor was insolvent, and absolutely without the means wherewith to settle the claim." It is stated in condescendence 5 that the pursuer means in proof of that to show that Farrell had got £700 from the estate of a relative who had died. But that is merely an indication of how the pursuer means to prove that the representation was untrue. I am prepared to decide the case upon the ground that this averment is altogether irrelevant. We cannot have an inquiry as to the accuracy of such a statement. It would involve an inquiry as to what were the debtor's means of livelihood, and what claims were made upon him either immediately pressing or prospective. I think we should not encourage such a litigation, and that the interlocutor reclaimed against should be recalled and the action dismissed.

LORD TRAYNER—I agree. This is an action of reduction based on the ground of concealment and also on the ground of false and fraudulent misrepresentation. The first ground of action can be disposed of in a sentence. There was no duty on the part of the debtor to explain to his creditor what was the real state of his affairs. If the creditor does not accept the statement which is made to him as to his debtor's pecuniary position he can make inquiries for himself. But if he accepts the statement made (and the composition offered) without making the truth of the statement a condition of his acceptance of the composition, then that is an end of the matter. There is, in my opinion, no case here for reduction on the ground of concealment.

As to false and fraudulent misrepresentation, the action is equally groundless. The averment is that it was represented that the debtor was impecunious and unable to pay his debt. It is not said that this was untrue. It is said that he had received a sum of money upon the death of a relative, but that does not show that he was not impecunious, for upon inquiry it might have appeared that notwithstanding the legacy he was none the less unable to pay his debts.

But when we look at the correspondence to which we are referred in support of the pursuer's averment, we see that the alleged representation, such as it was, was not made by either of the defenders. The pursuer's agent suggested a representation or consideration on which the composition was or had been received; this the defenders declined to give. No false representation was made by the defenders.

LORD MONCREIFF—I am of the same opinion. I think that the action is irrelevant. In judging of the relevancy the condescendence must be taken in connection with the correspondence which is referred to in it.

The pursuer's case is grounded on concealment of material facts and false and fraudulent misrepresentation, and essential error induced thereby. In support of these averments we were referred to the correspondence. I cannot find anything to support the construction which was put by Mr Howard Smith in his letter of 9th November upon Mr Edmond's letter of 8th November. That construction was immediately and emphatically repudiated by Messrs Edmond in their letter of 14th November; and Mr Howard Smith was thus put upon his inquiry as to Mr Farrell's means. But no further inquiry seems to have been made, and the only reply was an immediate request by telegraph that the £45 offered should be sent. It was sent, and received and retained.

I think that in these circumstances, whatever may be our view of Mr Farrell's conduct to the pursuer, this action must be dismissed.

The Court recalled the interlocutor reclaimed against, and dismissed the action, with expenses.

Counsel for the Pursuer—A. J. Young—J. W. Forbes. Agent—D. Howard Smith.

Counsel for the Defenders—Salvesen, Q.C.—Clyde. Agents—Macpherson & Mackay, S.S.C.

Thursday, May 24.

SECOND DIVISION.

[Lord Pearson, Ordinary.

LEITCH *v.* EDINBURGH ICE AND COLD STORAGE COMPANY, LIMITED.

Contract — Termination — Implement Impossible—Contract for Delivery of Specific Thing—Destination of Subject-Matter of Contract.

By a memorandum of conditions of let it was agreed between A and B (1) that A should remove from certain ground occupied by him, and should obtain entry to certain other unoccupied ground in lieu thereof; (2) that A should receive from B, without paying any price therefor, the old material of certain wooden buildings then occupied by him as stables in connection with his business as a carting contractor; and (3)

that A should erect at his own expense such buildings as he might require on the ground to be let to him instead of the ground from which he was to remove. Before it had been delivered to A, but after the date of the contract, part of the old material referred to was destroyed by fire without fault on the part of B. *Held* that there was here a contract for delivery of a specific subject, and that as it had perished without fault on the part of B, he was not liable in damages for failure to deliver it.

This was an action at the instance of William Leitch, carting contractor and cab proprietor, Edinburgh, against the Edinburgh Ice and Cold Storage Company, Limited, Edinburgh, in which the pursuer concluded for payment of the sum of £40 as damages for breach of contract.

By a memorandum of conditions of let dated 13th February 1899, and entered into between the defenders as landlords and the pursuer as tenant, it was agreed that the pursuer should remove from certain ground which he then occupied and should enter upon the occupation of certain adjoining unoccupied ground equal in extent. Upon the ground which the pursuer was to vacate there were certain wooden buildings which he had occupied as stables in connection with his business. By article 4 of the memorandum of conditions of let it was agreed that the pursuer should "receive from the company the old material of the said buildings on the said ground tenanted by him" (being the ground from which he was to remove), "without paying any price therefor, so soon as the buildings are demolished by the company, provided said material is handed over within forty-eight hours of the said William Leitch being requested by the company to quit the premises and his so doing," and that the pursuer should "erect at his own expense such buildings as he may require on the ground now agreed to be let to him in lieu of the ground" from which he was to remove.

The pursuer averred that the old material referred to in the above article meant all the wood which had been used in the construction of said buildings; that the result of the lease was that the pursuer had "to leave the ground presently occupied by him and enter upon adjoining ground of practically the same area, upon which he" would "require to build stables similar to and in lieu of those referred to in article 4 of said memorandum"; that on 14th February 1899 the defenders' agents notified the pursuer that he would require to vacate the subjects occupied by him on the 16th February in order that the demolition of the buildings might commence on that day; that while the defenders were on said last-mentioned day in the course of demolishing part of the said buildings they took fire, and the material of which they were composed was completely destroyed as building material; that the defenders were thus unable to hand over said material to the pursuer, who was thus being compelled to build his stables with other material which he had to purchase.

The defenders pleaded — "(1) The pursuer's averments are irrelevant and insufficient in law to support the conclusions of the summons. (4) The defenders, in consequence of said fire, were unable and were not bound to deliver to the pursuer the material consumed by fire, or any equivalent therefor."

On 23rd December 1899 the Lord Ordinary (PEARSON), after having heard counsel in the procedure roll, dismissed the action as irrelevant, and decerned, finding the defender entitled to expenses.

Opinion.— . . . . "In my opinion the action is irrelevant. The pursuer's case is, that owing to the fire, which is not alleged to have occurred through the fault of the defenders, they became 'unable to fulfil their obligation to hand over said material to the pursuer, who is thus being compelled to build his stables with other material.' It was explained that this does not refer to any compulsion exercised by the defenders, but merely means that he has had to provide himself otherwise with the building material.

"The question whether the pursuer's averments disclose a breach of contract depends on the precise nature of the contract entered into. The defenders were to hand over, and the pursuer was to receive free of charge, 'the old material of the said buildings.' This was a part, and apparently not the most important part, of the complex contract disclosed in the conditions of let, and the parties are holding to all the rest of the contract. But assuming that pursuer is entitled to isolate this portion of the contract, and to make it the ground of a separate claim, his case discloses an obligation on the defenders to deliver a specific article which perishes before delivery without fault on either side.

"In such a case the contract is subject to the implied condition, that if performance becomes impossible through the perishing of the article without fault on the part of either contractor, the parties are excused from performance. The doctrine is thus expressed by Professor Bell in his Principles (s. 29)—'If the obligation be general, not confined to a specific thing, the engagement is absolute, provided the object of it be intelligible. If the object be some specific thing, the obligation is so far conditional that it may be defeated by the extinction of the thing.' The principle was illustrated in the cases of *Taylor* v. *Caldwell* (3 Best & Smith, 826); and *Appleby* v. *Myres*, L.R., 2 C.P. 651.

"The present case presents this peculiarity, that the pursuer was to obtain delivery of the materials 'without paying any price therefor.' Accordingly, the pursuer loses his timber while the defenders lose nothing, the contract otherwise being performed, although theoretically the delivery of the timber without price must have had its counterpart in the stipulations undertaken by the pursuer. But it is impossible to state the value of the timber in terms of the contract. And whatever other remedy the pursuer might have, *e.g.*,

to declare the contract off for failure of a material part of it, as to which I express no opinion, I think it clear that there is no ground for an action of damages as for breach of contract."

The pursuer reclaimed, and argued—Impossibility of performance was, as a general rule, no answer to an action for damages for non-performance (Addison on Contracts (9th ed.) 132); and this was especially the case when the impossibility did not arise until after the date of the contract. This case fell under the general rule and not under the exceptions to it. The intention of the parties to this contract was, that the pursuer, who was removing for the convenience of the defenders, should be saved the expense of providing material for the new stables which he had to build in consequence of the removal. The defenders contracted to provide him with building material. Although part of the building material on the ground was destroyed, it could have been easily replaced, and the contract would have been completely carried out by replacing it with other material of the same kind. The exception in the case of a contract to deliver a specific thing only applied when the thing in question was something which it was not reasonably possible to replace, or when the contract between the parties could not be fulfilled by replacing it. All that Professor Bell said (Prin. 29) was, that when the object of the contract was some specific thing the obligation "*may* be defeated by extinction of the thing." That meant that it may or may not according to whether it was reasonably possible to replace the thing or not. In the case of *Taylor* v. *Caldwell* (1836), 3 B. & S. 826, the thing destroyed was a music-hall, which could not be readily replaced, or indeed replaced at all in time for the execution of the contract.

Counsel for the defenders was not called upon.

LORD JUSTICE-CLERK—I have no doubt that the judgment of the Lord Ordinary is right. A certain contract was made between the parties under which one of them was to be allowed to appropriate certain material on the ground. The party who was to get this material complains that he did not get it. He does not say that he wishes to be off with his bargain in other respects because he did not get the material. He proposes to go on with other parts of the contract. But he says that the defender must give him the material in question, or its equivalent in money. The fact is that it was destroyed by fire without fault on the part of the defender. I think this material which the pursuer was to get, and which was accidentally destroyed, was a specific subject, and that consequently, as it has perished without fault on the part of the defender, the pursuer is not entitled to succeed in his demands.

LORD YOUNG and LORD TRAYNER concurred.

LORD MONCREIFF—I am of the same opinion. The wood in question was a specific subject. Before delivery it was destroyed, without fault on the part of the defender. The case therefore is just a typical instance of the rule that where a specific subject is sold and perishes without fault on the part of the seller before delivery the seller is not liable in damages for failure to deliver.

The Court adhered.

Counsel for the Pursuer—A. M. Anderson. Agent—W. R. Mackersy, W.S.

Counsel for the Defenders—Gunn. Agents—Whigham & MacLeod, S.S.C.

Thursday, May 24.

SECOND DIVISION.

[Sheriff-Substitute of Lanarkshire.

M'FARLANE *v.* MITCHELL.

Lease—Renewal of Lease — Agreement to Pay Increased Rent Inferred from Tenant's Remaining on after Intimation of New Terms—Tacit Relocation.

The tenant of a shop, more than forty days before Whitsunday, received a letter from his landlord's agent intimating that his rent for the coming year was to be £110 instead of £80 as it had been before. The tenant's agent replied that the tenant would not agree to these terms. On 5th April the landlord's agent wrote in answer, saying that his former letter contained the conditions upon which the tenant would occupy the shop for the incoming year. The tenant without any further protest remained on in the shop. *Held* that he was liable for rent at the rate of £110 per annum.

This was an action brought in the Sheriff Court at Glasgow by Miss Margaret M'Farlane and Miss Agnes M'Farlane, 424 Saint George's Road, Glasgow, against Alexander Burgess Mitchell, wine and spirit merchant, 420 and 422 Saint George's Road, Glasgow, in which the pursuers craved decree for the sum of £55, being the half-year's rent due at Martinmas 1899 for the licensed premises occupied by him as their tenant.

The defender admitted that he was tenant of the premises during the term ending Martinmas 1899, and that he refused to pay rent at the rate now asked. He averred that he had been tenant of the premises during the year from Whitsunday 1898 to Whitsunday 1899 at a rent of £80 per annum; that no fresh terms had been agreed on between the parties; that he had never been warned away by the pursuers; and that the premises had been retaken by him for the year from Whitsunday 1899 to Whitsunday 1900 at the old rent by tacit relocation. He admitted liability for rent at the rate of £80 per annum, and stated that he was willing to pay the rent due, at that rate, or at such rate as might be fixed