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

by the Court. He also stated that at the beginning of 1899 the parties were negotiating regarding a lease for several years; that while these negotiations were pending, the defender, at the suggestion of the pursuer's agent, lodged an application for a renewal of his licence, and that after he had done so the pursuer's agent attempted to raise the rent to the rate now claimed, but that the defender had refused to agree to these terms.

The defender pleaded, *inter alia*—"(3) The defender not having agreed to the terms of any new lease, and not having been warned away, his tenancy of the premises in question must be held to be renewed on the former terms (*i.e.*, at a rent of £80 per annum.)"

The pursuers pleaded—"(1) The defence is irrelevant, and the pursuers are entitled to decree as craved. (2) The sum sued for having become due by the defender to the the pursuers at the term of Martinmas last, and not having been paid, pursuers are entitled to decree as craved."

Certain letters were referred to and produced, the material parts of which were as follows:—

On 30th March 1899 the pursuer's agents wrote to the defender—"As you have failed to arrange terms with us as to the tenancy of the shop 420 and 422 St George's Road, held by you as tenant under our clients the Misses Macfarlane as proprietors, we have now been instructed to intimate to you that your rent for the coming year from Whitsunday 1899 to Whitsunday 1900 will be £110 sterling, and that the shop will be occupied by you on the following conditions"—[Then followed certain conditions as to the conduct of the business]. On 4th April 1899 the defender's agent wrote to the pursuers' agents—. . . "Mr A. B. Mitchell has handed me your letter to him of the 30th ult. The holiday has prevented its being replied to sooner. Mr Mitchell cannot agree to the terms of your letter." . . . He requested that the draft of the proposed lease should be sent to him for revisal.

On 5th April 1899 the pursuers' agent wrote to the defender's agent—"We have your letter of yesterday. Our letter of 30th ult. contains the conditions on which Mr Mitchell will occupy this shop for the incoming year." . . .

To this letter no reply was made on behalf of the tenant, and he continued to occupy the premises in question without further protest.

On 25th January 1900 the Sheriff-Substitute (SPENS) issued an interlocutor in which he repelled the defences, and decerned as libelled, with expenses.

Note.—"Defender is a yearly tenant under pursuers. On 30th March 1899 pursuers' agents wrote intimating, *inter alia*, that the rent for the ensuing year from Whitsunday 1899 to Whitsunday 1900 would be £110. There is no room for tacit relocation in this case. Defender admittedly has stayed on. There never has been any recal of that letter, and in these circumstances I hold that he is liable for rent at £110 for this year's current rent. This intimation, it will be seen, was given more than forty days before Whitsunday 1899."

The defender appealed to the Court of Session, and argued—When there is a current lease, unless either (1) the tenant is duly warned away and effectual steps are taken for his removal, or (2) a new agreement is concluded between the parties, then tacit relocation takes place, and the tenancy is continued upon the same terms as before—Ersk. ii. 6, 35. It is not sufficient that one of the parties shall have shown a disposition to insist upon a change in the conditions of lease. Here there was no warning away. The letters of 30th March and 5th April did not in themselves amount to a warning away, and however that might be they were not followed up by any effectual proceedings for the removal of the tenant. If any warning was ever given it must be held to have been departed from. In any view, the landlords, having attempted to exact rent at a higher rate for the subsequent term, could not now maintain that the tenant had been duly warned away. Neither was there any new agreement concluded between the parties. No doubt assent to new terms of lease might be inferred from a tenant remaining on after receiving timeous notice that the rent was to be raised, but it was not possible to draw such an inference where the tenant expressly refused to assent to the new terms and the landlords took no steps to have him removed. See *Morrison* v. *Campbell*, June 22, 1842, 4 D. 1426, where the judgment proceeded upon the ground that the tenants had not intimated their refusal to agree to the new terms. Here the tenant had done what the tenants there had failed to do. It was also to be noted here that the parties were in negotiations for a lease, and in these circumstances the tenant could not be held simply by staying on to have acquiesced in new proposals to which he had expressly refused his assent. Tacit relocation might take place although the parties were not strictly speaking tacit—*M'Intyre* v. *M'Donald*, December 11, 1829, 8 S. 237; *Robertson & Company* v. *Drysdale*, February 21, 1834, 12 S. 477. For an instance of the kind of case in which possession was held to be referable not to tacit relocation but to a new arrangement, counsel referred by way of contrast to *Sutherland's Trustee* v. *Miller's Trustee*, October 19, 1888, 16 R. 10.

Counsel for the pursuers were not called upon.

LORD JUSTICE-CLERK—Nothing could be more clear than that this was not a case of tacit relocation. There was a positive statement of the landlords to the contrary. The only question is whether the tenant agreed to pay a rent of £110 by sitting on after being told that that was to be the amount of the rent. In the letter of 30th March there was an intimation that the landlords would only consent to the continuation of the tenancy upon the terms set forth. In reply to this letter the tenant's agent replied refusing to consent to the altered conditions. But on the following day the

landlords' agents wrote adhering to what they had said upon 30th March. At that point only one of two courses was open to the tenant—either to stay on at the new rent or to go. He chose to stay on, and by doing so he must be held to have agreed to the landlords' terms, and having agreed to them he must pay the sum now sued for.

LORD YOUNG—I am of the same opinion. Of course I do not think that the letter of 4th April can be regarded as an assent by the tenant to the new terms. But I regard the letter of 30th March as specifying the conditions upon which the landlords were willing to keep the defender on as tenant. If he was not willing to agree to these conditions then he had notice to quit. The letter of 4th April does not assent to these terms, but the tenant subsequently agreed to them by staying on. It was not open to him to remain on without agreeing to the new terms. He could only stay on upon the terms mentioned in the letter of 30th March. If an action of removing had been brought by the landlords, the tenant's answer would have been that he was entitled to retain possession, because by staying on he had assented to the new terms proposed by the landlords. Tacit relocation is out of this case. The parties were not tacit. They made a new agreement. I am very far from thinking that there may not be tacit relocation although there have been meetings and conversations and even letters passing between the parties. But here the tenant must be held to have assented to the new terms intimated by the landlords.

LORD TRAYNER—I am of the same opinion. Tacit relocation is out of the case, because on 30th March the landlords' agents intimated that the tenant was not to be allowed to remain in his premises upon the former terms. In reply the tenant's agent wrote saying that he would not agree to the new conditions. But the landlords were entitled to impose what conditions they pleased. All that the tenant's letter came to was, that if these were the only conditions upon which he was to be allowed to stay, he would rather go, as he would not agree to them. But in fact he did not go—he stayed on. That was virtually a departure from his letter. He remained in the premises, and by doing so he must be held to have acquiesced in the letter of 30th March, and to be bound now to fulfil its conditions.

LORD MONCREIFF—I am of the same opinion. Tacit relocation is out of the case here. At first I had some difficulty in spelling out of these letters an agreement on the part of the tenant to pay the increased rent, £110. The letter of 30th March stated the terms upon which the landlords were willing to continue the tenancy. On 4th April the tenant's agent wrote refusing to assent to these terms. If that letter had not been replied to on behalf of the landlords, I should have had difficulty in holding that the tenant impliedly agreed to pay the increased rent. But on 5th April the landlords' agents wrote a letter in which they intimated distinctly that the letter of 30th March contained the conditions upon which alone the tenant would be allowed to occupy the premises for another year. The tenant did not answer that letter and repudiate the terms named, and continued to occupy the premises. What is the fair inference? I think that the reasonable inference is that he agreed to the landlords' terms, and that he is now bound by them.

The Court dismissed the appeal, and of new decerned against the defender for payment of £55, with interest at 5 per cent. per annum from Martinmas 1899 till payment, with expenses.

Counsel for the Pursuers—Jameson, Q.C. — A. S. D. Thomson. Agents — George Inglis & Orr, S.S.C.

Counsel for the Defender — Hamilton. Agents—Clark & Macdonald, S.S.C.

Wednesday, May 30.

FIRST DIVISION.

[Lord Kincairney, Ordinary

JACKSON *v.* BROATCH.

Prescription — Triennial — Law-Agent's Account — Written Obligation — Letter Requesting Agent to Act—Act 1579, *c.* 83.

A client by letter requested a law-agent to act for him in a particular action, and the agent replied undertaking to do so. *Held* (*aff.* Lord Kincairney, Ordinary, *dub.* Lord M'Laren) that the agent's account for his services did not fall under the triennial prescription, in respect that as the client's letter imported an obligation to pay for the agent's services according to the table of fees, the account was a debt founded on "written obligation" within the meaning of the Act 1579, cap. 83.

Robert Broatch, Solicitor, Edinburgh, brought this action against Thomas Jackson, Solicitor, Kirkcaldy, concluding, *inter alia*, for payment of £297, 19s. 7d., which he alleged to be due to him for business charges in respect of three actions, in which he had acted as agent on Mr Jackson's instructions, and in which Mr Jackson was personally interested. In reference to these actions he made the following averment—"(Cond. 2) The defender employed the pursuer to act as his Edinburgh agent in three actions in which he was personally interested, namely, (1) an action of count, reckoning, and payment against the defender at the instance of the late Alexander Malcolm; (2) making up a title under the Presumption of Life Limitation Act in name of William Hutton, with reference to a heritable property in Leith and rents thereof, to which the defender had acquired a right; and (3) a multiplepoinding, *Youden* v. *Rodgers and Others*, in which the defen-