of the premises in the sense of the statute. That sub-section does not apply here at all.

In my opinion the Sheriff-Substitute's judgment was right, and ought to be affirmed.

LORD YOUNG—I am of opinion that what the Sheriff informs us that he held in point of law was rightly so held by him, and that we do not need to concern ourselves with the questions of law put to us. The Sheriff tells us what he held in point of law. I do not need to read his findings at length. I think he was right, and that the appeal should be dismissed.

LORD TRAYNER—I arrive at the same result. I am not prepared, as at present advised, to say that I concur in the Sheriff's second finding in law, but I assume it to be correct. It is sufficient to say that I entirely agree with his third finding. I think that the defenders were not in the occupation of a factory.

LORD MONCREIFF — I am of the same opinion. The crucial points which the appellant has to establish are that the premises were "a factory" in the sense of the Act, and that the respondents were the occupiers of them, and "undertakers." She cannot establish this without the aid of section 23 of the Factory Act of 1895. I greatly doubt whether that section applies at all—[*His Lordship read sub-sections* (*a*) *and* (*b*), *quoted above*]. I do not think that these premises come within any of those definitions. But even if they did, those engineers who were simply fitting up this machinery cannot be said to have been occupying the premises temporarily within the meaning of sub-section (*b*) of section 23 of the Act of 1895. I think that the temporary occupiers there referred to are persons who occupy premises for the purpose of carrying on some trade or manufacture in them. Here the respondents were merely fitting up and testing machinery which was to be used in carrying on the trade for which the premises were designed, and any ice which was made incidentally in the process of fitting up and testing became the property of the owners of the premises, the North British Cold Storage and Ice Company, Limited.

On the whole matter, I am of opinion that the Sheriff-Substitute's findings are right, and that the appeal should be dismissed.

The Court answered the first and second questions in the negative, found it unnecessary to consider the other questions, affirmed the dismissal of the claim, and decerned, and found the respondents entitled to their expenses of the stated case.

Counsel for the Claimants—Baxter—Guy. Agents—Clark & Macdonald, S.S.C.

Counsel for the Respondents—W. Campbell, Q.C.—Glegg. Agents—Anderson & Chisholm. S.S.C.

*Tuesday, May 22.*

## SECOND DIVISION.

[Lord Pearson, Ordinary.

## RUSSELL *v.* FARRELL.

*Fraud—Misrepresentation—Concealment—Duty to Disclose—Essential Error Induced by Fraudulent Misrepresentation and Concealment—Discharge of Debt for Part Payment.*

A person who is negotiating for the discharge of a debt in consideration of a part payment is not bound to make a full disclosure to the creditor of the true state of the debtor's affairs, and a discharge will not be reduced upon an allegation that he has failed to do so.

In an action for reduction of a discharge of a debt, granted in consideration of a part payment, upon the ground of fraudulent misrepresentation and concealment, and essential error induced thereby, the creditor averred that it had been represented on behalf of the debtor that he was insolvent and absolutely without the means wherewith to settle the claim, whereas he had received and then possessed £700 from the estate of a relative who had died, and that the fact of his succession to this sum had been fraudulently concealed from the creditor. *Held* that these averments were irrelevant.

The agent of a creditor who was negotiating with reference to the discharge of a debt received a letter from the debtor's agents offering £45, and stating that the debtor was utterly unable to do anything for a living. In reply he wrote saying that he assumed it to be represented that the debtor was absolutely impecunious, and "had no hope or expectation near or remote," and offering to take £50. The debtor's agents replied that they were told £50 was really more than could be afforded, but that the creditor must not rely on them, because they could not be responsible in the matter. The creditor's agent telegraphed to send the £45, and it was sent to and received by him. In the discharge he inserted a statement to the effect that the discharge was given in respect that the present and prospective circumstances of the debtor were stated to be such as to make it impossible for him to pay a higher sum. The debtor's agents replied saying that they could give no assurance of any kind, and that the discharge was granted without any personal responsibility on their part. The creditor retained the money sent. *Held* that there was nothing in this correspondence importing a representation by the debtor or his agents regarding the debtor's pecuniary position upon which the creditor was entitled to rely as a condition of his accepting the composition.

This was an action at the instance of Jemima Russell, Stonehaven, against

Frederick Charles Loosley Farrell, and against J. & A. Edmond, advocates, Aberdeen, for any right or interest they might have.

The pursuer concluded for reduction of a discharge, dated 16th November 1898, of a decree which she obtained in the Sheriff Court of Kincardine in 1885.

The decree was pronounced in an action which she raised in 1885 against the present defender Farrell, concluding for damages for reduction, and for inlying expenses and aliment. The aliment decerned for was for six years, and the total sum in the decree, including damages and expenses, was £72, 1s. 6d., besides dues of extract. No money had ever been paid under the decree except the sum of £45, which was paid in November 1898 for the discharge now under reduction.

The pursuer pleaded—"(1) The pretended discharge referred to having been obtained by false and fraudulent misrepresentations and wilful concealment of material facts as to the defender Farrell's means, and having been granted under essential error induced by such false and fraudulent misrepresentations and concealment, it ought to be reduced."

The representation alleged to have been made by the defenders was—"(1) That the debtor was insolvent, and absolutely without the means wherewith to settle the claim;" and (2) "that any sum to be paid would have to be as an act of grace by his friends or relatives."

The pursuer averred that "at the time the foresaid representations were made by the defenders J. & A. Edmond about the defender Farrell being impecunious, they knew the latter had received, as he *de facto* had received and possessed, about £700, being a portion of £1865, which fell to the said defender *ab intestato* on the death of his aunt; that money was in the hands of the defenders J. & A. Edmond for the defender Farrell at the time they negotiated for and obtained the discharge now under reduction; that "those facts were suppressed by the defenders acting collusively and in concert; that they knew, as is the fact, that the pursuer and her agent had at the time no knowledge of them, and had no means of ascertaining them from any source;" that the discharge was accordingly obtained in ignorance on the part of the pursuer and her agent of the fact that the defender Farrell was solvent, and had at the time the means wherewith to pay the whole debt; and that it was obtained under that essential error of believing and assuming the defender Farrell's absolute want of means induced by false and fraudulent representations and wilful concealment as aforesaid.

The pursuer also averred that in 1894 she had made efforts to obtain a settlement, but the defender represented that he was unable to pay. A letter written by the defender Farrell was produced in support of this averment, in which he stated that he had no means; that he was unable to obtain employment owing to his defective hearing and eyesight, and that he was indebted to friends for his maintenance.

The defenders admitted that early in 1896 an aunt of the defender Farrell died leaving considerable moveable estate; that in 1897, after litigation, the share falling to him was ascertained to be about £600, but that this was reduced by legal and other expenses to not more than £350, which was all he possessed in 1898, and was inadequate for his support.

For the representations and concealment founded on the pursuer referred to and produced a correspondence which passed between the law-agents of the respective parties during the months of September, October, and November 1898. It was admitted at the bar that there were not in 1898 any verbal negotiations between the parties or their agents, and that there were no representations by the defender or his agents other than those contained in the correspondence.

On 28th September 1898 the defenders J. & A. Edmond wrote offering £25 for a full settlement. The pursuer's agent replied that the debt with expenses was now £145, and offered to advise acceptance of one-half of that sum for a settlement. In answer the defenders' agents stated that they had communicated with their clients, and that it was 'impossible to offer anything like the sum you name,' but that they would advise an increase of their offer to £35 if that would lead to a settlement. The pursuer's agent having pointed out that this sum would not cover costs, the defenders' agents on 8th November replied—"We are asked to write you that £45 will be paid, but that no more can be given. Seeing that Mr Farrell is blind and deaf and utterly unable to do anything of any kind for a living, we trust your clients will see your way to accept this sum." They added that Mr Farrel had recently had an accident, and had been unable to do anything since. On 9th November the pursuer's agent replied as follows:—"I have your letter of 8th instant. I assume that you put it thus:—Mr Farrell is absolutely helpless in his prospect of earning anything, and that he is equally impecunious, and has no hope or expectation, near or remote. In that view, and on the faith of your word for it, you can send me your cheque for £50 in settlement of the claim." . . . On 14th November Messrs Edmond wrote to the pursuer's agent:—"We have communicated your letter of the 9th, but we are not authorised to increase the amount to £50. We are told that it is more than really can be afforded. You must not rely on us, because we cannot be responsible in the matter. If you will take the £45 we shall send it on at once on hearing from you, either by telegram or letter." On 15th November the pursuer's agent telegraphed to Messrs Edmond "Send the forty-five," and on the same day Messrs Edmond wrote to the pursuer's agent enclosing a cheque for £45, as in full of all claims under the decree or in any way connected with the said claim. On the same day the pursuer's agent wrote confirming his telegram, and further, as

follows:—"I rely on the assurance expressed in my letter of 9th current. As I read your letter of yesterday you acquiesce or your client does so."

On 16th November 1898 the pursuer's law-agent wrote to Messrs Edmond:—"I have your letter of 15th instant enclosing your cheque on the North of Scotland Bank (West End Branch), Aberdeen, for £45 sterling in settlement of principal, interest, and expenses due to the pursuer Jemima Russell, sometime residing at Mill of Garvock and county of Kincardine, under or by virtue of decree dated 13th August and 23rd December 1885 against the defender Frederick Charles Loosley Farrell, sometime residing at Davo House, in the parish of Garvock; and the said decree is accordingly discharged. The discharge thus given is in respect (as mentioned in recent negotiation and correspondence on the subject) that the present and prospective circumstances of the defender are stated to be such as to make it absolutely impossible for him to pay any higher sum than is now acknowledged for a settlement as in full of all claims." This letter bore a penny stamp.

In reply to this letter the Messrs Edmond on 17th November wrote as follows:—"We have your letter of yesterday. As we wrote you on Monday, we could give you no assurance of any kind, and would not think of doing so in any other person's matters, so that the discharge is granted without any personal responsibility of any kind on our part."

The defenders pleaded—"(2) The pursuer's averments being irrelevant and insufficient in law to support the conclusions of the summons, the action should be dismissed."

They also pleaded (1) that the pursuer was not entitled to insist in the action, in respect that she had not repaid or consigned the sum of £45 paid for the discharge, but they ultimately intimated from the bar that they did not desire to found upon this defence.

On 12th February 1900 the Lord Ordinary (PEARSON) pronounced an interlocutor allowing a proof before answer.

*Opinion.*—[*After summarising the averments and the correspondence*]—"Now, I confess I was disposed at first to allow much weight to the warnings contained in Messrs Edmond's letters, and to hold that the pursuer ought at once to have returned the money and recalled the discharge when she saw that they repudiated the condition which she sought to impose. But a careful examination of the averments and of the correspondence has convinced me that this view could not be adopted at this stage without the risk of doing injustice. Be it remembered that according to the pursuer's distinct averment, the defender was, during these negotiations, possessed of about £700, which was actually in the hands of Messrs Edmond for his behoof. It appears to me a question of some delicacy how far, if that be so, the Messrs Edmond were justified in answering the pursuer's agent as they did, and withdrawing from responsibility. The latter had, of course, no power to impose his own assumptions of fact upon the other party to the negotiations. But he was entitled to make them aware of the assumptions on which he was proceeding, and, in one view, his statement of those assumptions was no more than a pointed and rather peremptory way of asking questions on the subject. It may be that he did not obtain the warranty which he desired that his assumptions of fact were well founded. But they were (as I read the correspondence) transmitted to and not repudiated by Messrs Edmond's clients; and Messrs Edmond's statement that they (as distinct from their clients) did not undertake any responsibility as to the facts does not cover the whole ground. It does not involve a statement that their clients also declined to commit themselves—a statement which might have amounted to notice that the £45 was to be accepted without any guarantee or representation at all as to how the facts stood in the matter of the defender's ability to pay. On the contrary, they transmit statements as from their clients to the pursuer (as in their letters of 14th November); and as they were the only channel of communication open to the pursuer, the fact that in the later letters they show anxiety to separate off their personal responsibility from that of their clients, rather emphasises the liability of the latter for what the letters conveyed to the pursuer either explicitly or as matter of just and reasonable inference. It is because I think that in one possible view of the case the defender, or those who obtained the discharge in his interest, are committed to the truth of the assumption, on which the pursuer was proceeding, and which indeed is set out expressly on the face of the discharge, that, in my opinion, the surrounding circumstances ought to be cleared up by a proof.

"The question whether the discharge (which is really operative only as a receipt for money) requires a reduction was not argued, and I am not to be taken as expressing any opinion upon that.

"The defenders' first plea-in-law is, that the pursuer, not having repaid or consigned the £45, is not entitled to insist in the action. This plea, which touches questions of considerable importance, was but slenderly argued on either side. I do not feel bound to sustain it as excluding the pursuer's right to insist. A plea founded on *restitutio in integrum* may avail a defender at the earlier stage of a reduction founded on similar grounds to the present; for if *restitutio in integrum* be shown to be impossible, the remedy of reduction may be barred. But in this case it seems sufficient at this stage to say that *restitutio in integrum* may be imposed on the pursuer as a condition of obtaining decree."

The defenders reclaimed, and argued—The pursuer based her case upon misrepresentation and concealment, and essential error induced thereby. There was here no misrepresentation on the part of either Farrell or his law-agents. It was not even suggested that Farrell himself

made any representation whatever. All that the pursuer had to found upon in the way of misrepresentation was a suggestion made by her own law-agent, and at once repudiated by the Messrs Edmond. He was told not to rely upon any such representation as he suggested, but nevertheless he asked for and accepted payment of the money offered. He must in these circumstances be held to have accepted the payment made in settlement without any such assurance. There was no duty of disclosure here, and therefore the pursuer could not obtain a reduction upon the ground of concealment. The pursuer could have no case unless it was the duty of a person negotiating for a settlement to make a full disclosure of his client's pecuniary position. No such duty was incumbent upon him. The inquiry which the pursuer demanded involved an investigation into the whole state of Farrell's affairs--his assets and his liabilities, his ability to earn a livelihood and what was required for his support. A person who had accepted a part payment in settlement of a debt was not entitled to have that settlement set aside upon proof (1) that he had agreed to it upon a statement by the other party that he could not pay more than was offered, and (2) that upon a full investigation into the debtor's affairs it would appear that he might have been able to pay more. That was really all that the pursuer proposed to prove here.

Argued for the pursuer—The pursuer here had abandoned all hope of obtaining payment of her debt in 1894 upon the assurance given by the defender that he was utterly impecunious. Negotiations were reopened by his law-agents when they knew that an inheritance had opened to him. No intimation of the change was given to the pursuer, but, on the contrary, her suppositions as to Farrell's financial position were strengthened by what his agents said in the letters. As to the alleged repudiation, they only repudiated the suggested assurance as for themselves but not for their client. They said that they were informed £50 was more than could be afforded. It might be that there was no absolute duty of disclosure here, but a statement was made which was, in the circumstances, at least such an inadequate statement of the real facts as to amount to a misrepresentation. There was here also essential error induced by the conduct of the defender Farrell and his law-agents. There was a case for inquiry, and the Lord Ordinary's interlocutor should be affirmed.

Lord Justice-Clerk — In my opinion this interlocutor cannot stand. There are two sets of circumstances in which there might be grounds for reducing a discharge in full granted in return for a partial payment. If a debtor enters into a negotiation with his creditor for a settlement, and if he puts a state of his affairs before his creditor, and the settlement proceeds upon the understanding that this state of his affairs is full, complete, and correct, there could be no clearer case for a reduction if in fact the statement is false. On the other hand, I can imagine a case in which a debtor, who had been very impecunious, has come into a large fortune, and thereupon proceeds to obtain a settlement on the footing that he is still impecunious. It is easy to conceive a case of that kind in which the settlement might be set aside. But in all cases in which a settlement has been arrived at for a part payment, it is a question of circumstances whether the settlement can be set aside. Where a party goes to settle a debt by making a part-payment, and says that he cannot pay any more, he does not mean, and cannot be taken to mean, that if he scraped up everything he has he could not pay more. He means, and is usually understood to mean, that it is all that he can reasonably afford. It is always to be remembered that in such transactions there is the element of compromise. Therefore even if the negotiations here had been with Farrell himself, I incline to think that the pursuer has not stated a relevant case, because nothing more is averred than that it was falsely represented that Farrell could not pay any more.

But the case is not so strong as that, for the fact is that the agents of the one party entered into the negotiations for the settlement with the agent of the other party. I suppose that is a thing which happens every day. A man who is not very well off gets his agent to go round to his creditors and see if they will take a partial payment and give a discharge, and the agent goes to the creditors and tells them that he is empowered to make this offer, and that they can take it or refuse it. The creditors accept it and give a discharge in full. Is there anything there of the nature of fraudulent misrepresentation? The negotiation does not take place on the footing that there is a full and complete disclosure and investigation of the debtor's affairs, but merely upon a statement that he cannot reasonably pay any more. The meaning of such a negotiation is that if some such arrangement cannot be made then creditors must just take their own course. But, moreover, here when the pursuer's agent attempted to put a representation as to the debtor's position into the mouth of his agents, it was at once repudiated, and it was distinctly stated that no such assurance could be given. In these circumstances the money was paid and accepted, and it has been retained. I think there is no ground for granting an issue of fraudulent misrepresentation or concealment, and that we should recal the Lord Ordinary's interlocutor and dismiss the action.

Lord Young—I am substantially of the same opinion. The pursuer was the creditor in a judgment-debt, the decree being dated in 1885. She was not able to get any payment from Farrell down to 1898, that is, thirteen years after the date of the decree. She then accepted a payment of £45 in full of her claims, and discharged the decree, and the present action is for reduction of

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.

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*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)