

on her failure to state that the debt has been paid, I know of no principle or authority for holding that a debt which the husband himself may have paid is still resting-owing. The doctrine of *præpositura* is not limited to the case of a wife, but extends to any factor or commissioner, and to hold the principal as confessed on the failure of the agent is a proposition for which we were referred to no authority, and I know of none.

I propose to your Lordships that the judgment of the Sheriff-Substitute should be recalled, and that the pursuer should have an opportunity, if so advised that he cannot otherwise prevail, of making the reference. I propose that we should recal the Sheriff-Substitute's interlocutor, and allow the pursuer to put in a new reference to the defenders' oath, and allow the defenders to appear and depone upon it.

LORD CRAIGHILL.—I concur. With reference to the part of the debt sued for which was contracted before the marriage, the plea of prescription under the old Act of Parliament plainly applies, and therefore the pursuer must bring forward proof by writ or oath of the constitution of the debt. The only writ produced is the letter dated March 18th 1880, and the Sheriff-Substitute has found that that is sufficient to prove the subsistence of the debt. Now, the letter of itself does not show that any debt subsists; but that is not conclusive, for if it be, as is alleged, in answer to a letter from the pursuers, which speaks of the debt as still unpaid, then there would be no difficulty in reading into the answer what is contained in the original letter in reference to the debt. But no such letter has been produced, and so we are as much at a loss to determine what the debt is as if there had been no letter at all. And if we are to refer to parole evidence on that point, the consequence would be that nearly every reference to writ or oath would be determined, not by the oath of the party or his writ, but by the parole evidence of third parties. It seems to me that every case of this kind is to be decided on its own circumstances, and in *Fiske's* case the circumstances were fully set forth in the record, but here there is not a record to throw light on the matter in controversy at the time the letter was written. That being so, I think that we can and ought to come to the conclusion (without going back on the case of *Fiske*) to recal the interlocutor of the Sheriff-Substitute finding that this letter establishes the subsistence of the debt, and that operating as a recal of all subsequent interlocutors, I need say nothing further.

LORD RUTHERFURD-CLARK.—As to the proper effect of the letter of March 18th, I confess I have more doubt than your Lordships, but I am not disposed to differ from the result of your Lordships' judgment.

The LORD JUSTICE-CLERK was absent.

The Court recalled the Sheriff-Substitute's interlocutor, and allowed the pursuers to give in a reference of the whole cause to the oaths of both defenders.

Counsel for Pursuers (Respondents)—Nevay. Agent—Robert Broatch, L.A.

Counsel for Defenders (Appellants)—M'Lenan. Agent—James Skinner, Solicitor.

Tuesday, December 19.

FIRST DIVISION.

STEWART AND MANDATORIES, PETITIONERS.

Arrestment—Ship—Recal of Arrestment.

In a petition at the instance of a mortgagee in possession of a ship for recal of arrestments laid on the ship *jurisdictionis fundandæ causa*, and on the dependence of an action, the Court ordered the petitioner to consign a sum sufficient to cover the claim of the arresting creditor as a *surrogatum* for the ship, subject to the same extent as the ship to his existing claims and rights in competition with creditors, and on this being done, recalled the arrestment to the effect of allowing the ship to sail.

This was a petition presented by George Charles Stewart, merchant, Liverpool, the mortgagee of the ship "British India," of Glasgow, conform to mortgage in his favour by Wilhelm T. N. Jost, shipping agent, Newport, Monmouthshire, the registered owner of the said ship, dated 12th and registered at Liverpool the 14th October 1882, for recal of arrestments laid on said ship *jurisdictionis fundandæ causa* while lying at Yorkhill Wharf, Glasgow.

The petition set forth that on 28th November 1882 the petitioner entered into possession of the ship by placing a person on board to take charge on his behalf; that the ship had been chartered on 23d September for a voyage from Glasgow to Trinidad; and that at the date of presenting this petition the whole cargo was on board.

The petition further set forth that Messrs Macbeth & Gray, ship chandlers, Glasgow, by virtue of two warrants, dated 12th and 13th December respectively, obtained by them from the Sheriff of Lanarkshire on applications at their instance against Wilhelm T. N. Jost, as owner of the vessel, and Thomas Toft, shipping-clerk, Newport, had arrested the vessel on the above dates. The arrestment on the 12th December was to found jurisdiction; that on the 13th was on the dependence of an action for £73, 19s. 6d. The petitioner set forth that he, as mortgagee in possession, had acquiesced in the lading of the ship, and that unless she was allowed to sail immediately large claims for delay would arise under the charter-party, and that heavy dues were being incurred daily.

The petitioner offered to consign, in the joint names of his agents and Messrs Macbeth & Gray, the sum of £100 as a *surrogatum* for the ship, without prejudice to the rights of parties—*Malcolm v. Cook*, December 20, 1853, 16 D. 262.

The respondents Messrs Macbeth and Gray appeared by counsel at the bar, and refused to agree to any consignment which would reserve any preference to the petitioner.

The Court pronounced the following interlocutor:—

"Recal the arrestments of the ship 'British India,' formerly of Liverpool, now of Glasgow, and now lying at Yorkhill Wharf there, dated and used at the instance of the said Macbeth & Gray on 12th and 13th December 1882, to the effect of allowing the said ship to proceed on her voyage to Trini-

dad, upon the petitioner consigning in Court the sum of £100 as a *surrogatum* to the said Macbeth & Gray for the said ship, said consigned sum being subject to the same extent as the said ship to the existing preferable claims and rights of the petitioner as mortgagee of the ship, and in possession thereof, in competition with the said Macbeth & Gray, as these may be ascertained, and decern."

Counsel for Petitioner—Jameson. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for Respondents—Dickson. Agents—J. & J. Ross, W.S.

Thursday, December 21.

FIRST DIVISION.

[Lord Lee, Ordinary.

ALLAN V. MARKLAND.

Landlord and Tenant—*Damnum Fatale*—*Fire*—*Lease, Abandonment of.*

Subjects let on a lease of seven and a-half years from Martinmas 1876, as a boot and shoe shop, were injured by fire on 17th January 1881. The tenant abandoned them on 1st February following. The repairs occupied about six weeks, but they could if necessary have been executed in a very much shorter time. *Held* on a proof (*diss.* Lord Deas) that the business might have been carried on during the repairs, that the tenant had failed to show that he would have suffered anything more than a certain amount of inconvenience by remaining on the premises, and that he was therefore not warranted in abandoning the lease.

Observations on the case of Duff v. Fleming, May 18, 1870, 8 Macph. 769.

James Allan, ironfounder, Glasgow, was proprietor of a tenement situated at the corner of Possil Road and Fleming Street, Port Dundas, Glasgow. By lease, dated 9th and 22d February 1877, he let a portion of this tenement, forming No. 4 Possil Road, and consisting of a double shop, to James Markland, wholesale boot and shoe maker, Glasgow, on a seven years' lease. He also fitted up the shop at a considerable expense to make it suitable for Markland's business. Markland occupied the premises under the lease from November 1876 down to 1st February 1881, when he sent the keys back to Allan, and intimated that he intended to abandon the lease. The cause of this action on the part of Markland was a fire which broke out in the shop on the 17th January preceding, and which according to his contention so damaged the shop as to render it impossible for him to carry on his business in it during the time needful for having the damage done by the fire repaired. Markland's business, which in the shop in question was largely of a mending and repairing character, required two shops—a back and a front shop—the former being that in which the repairs were executed, and the latter that in which the customers waited, and in

which the stock was kept. Within a week of the fire Markland had taken a new shop, much smaller than the one injured by the fire, and the whole area of which was much smaller than the space he could have obtained in his old shop by screening off the portion uninjured by the fire.

Allan raised the present action against Markland, concluding for a year's rent of the subjects which Markland had abandoned. The defender pleaded that as the subjects had been rendered unfit for the purposes for which they were let he was entitled to abandon them. After a proof relating to the nature and extent of the damage done by the fire, and to its effect on the defender's business, and the time within which the premises might have been restored, the import of which is fully detailed in the opinion of Lord Shand, the Lord Ordinary pronounced the following interlocutor on 22d June 1882:—"Finds that the defender was tenant of the shop mentioned on record, under the lease, when on 17th January 1881 the said shop was destroyed by accidental fire to the extent of being rendered unfit for occupation: Finds that the defender on or about 1st February 1881 sent the keys to the pursuer, and intimated his intention not to re-occupy the shop: Finds that the shop was not rendered fit for occupation again until on or about 15th March 1881: And finds in law that the defender was entitled to abandon his lease: Therefore assoilizes the defender from the conclusions of the action, and decerns: Finds the pursuer liable in expenses," &c.

The pursuer reclaimed, and argued—The damage caused by the fire was not such as to warrant the tenant in abandoning his lease. Abandonment is an equitable remedy which the Court gives when the subjects have been rendered useless for the tenant's business. There was no undue delay in executing the repairs, for the landlord could not commence operations until the assessors for the insurance company had completed their investigation. The tenant really wished to get rid of his lease, and of the high rent which he had to pay under it.

Authorities—*Fleming v. Baird*, March 18, 1871, 9 Macph. 730; Bell's Prin., sec. 1208; Hunter's Landlord and Tenant, vol. ii. p. 261; More's Notes to Stair, vol. i. p. xiv.

Argued for respondent—The shop was rendered useless for defender's business by the fire. It required two months to repair the damage, and by that time his customers would have left him. Owing to the nature of the defender's business he could not have acted otherwise than he did. As the shop was by the fire rendered useless for the purpose for which it was let, the defender was entitled to terminate the lease.

Authority—*Duff v. Fleming*, May 18, 1870, 8 Macph. 769.

At advising—

LORD SHAND—This case is one of some interest and importance in the law of landlord and tenant. The action is at the instance of Mr James Allan senior, ironfounder in Glasgow, concluding for payment of two half-years' rent, each amounting to £35, 7s. 4d., due at Whitsunday and Martinmas 1881 respectively, of a double shop in Possil Road, Port Dundas, Glasgow, and which was held under lease by the defender James Mark-