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 assoilzies 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-

land, wholesale boot and shoe maker in Glasgow, for a period of seven and a-half years from 7th November 1876.

The defence is that by an accidental fire which occurred on the 17th of January 1881 the premises which had been let to Markland had been destroyed, and had therefore become unfit for occupation; and as the result of the proof the Lord Ordinary has assoilzied the defender.

As to the law applicable to this case there appears to be no dispute. The law of this country is much more favourable to a tenant than the law of England. In England it appears to be the rule that even if the premises let should be wholly destroyed by fire the tenant must continue to pay rent for the term of his lease, unless he had expressly stipulated that in that case his obligation shall cease. In Scotland a much more reasonable and equitable rule prevails. If the premises let have been so destroyed or seriously injured that they have become no longer fit for occupation for the purpose for which they were let, the tenant being deprived by *damnum fatale* of the subject for which he agreed to pay rent, is free from the obligation to do so. This equitable rule, however, must be taken subject to conditions, or perhaps I should say more correctly, subject to explanations. The destruction of a part of the subject of the lease will not release the tenant, unless the part be essential for the purpose for which the premises were let; and in determining the question whether the subject was either entirely or in a material part so destroyed as to make it unfit for the purposes for which it was let a case of destruction is not made out by showing that the premises have been made uncomfortable and, I would add, unsuitable for the purpose of the lease for a short time. The question whether the premises have been made unfit for the purpose of the tenant's occupation is one of degree. While, on the one hand, if a dwelling-house or shop has been so destroyed as to be either permanently unfit for occupation, or to be unfit for occupation for such a length of time that it would be obviously unreasonable to require the tenant to continue his possession, the tenant shall be free, yet, on the other hand, when such a calamity as a fire, affecting both parties, has accidentally occurred, a tenant may reasonably be called on to submit to considerable inconvenience as the natural and often necessary consequence, and if the injury to the premises be short of destruction, and the damage may be repaired within such a time that the term "considerable inconvenience" would fairly describe all that the tenant has to undergo, he is not entitled to throw up his lease, but is in my opinion bound to give his landlord an opportunity of having the damage repaired, insisting, as he is no doubt entitled to do, that no time shall be lost in having the premises restored to their former condition.

The difficulty in such cases arises not so much in regard to the general principles of the law, but—the question being one of circumstances and often of degree—in determining how these principles apply in the particular case. In the present case the Lord Ordinary has held the defender was entitled to be free from the lease, but after a careful consideration of the evidence I am unable to concur with his Lordship in that view.

The fire occurred on the 17th January 1881, and the remainder of that month was occupied in the necessary surveys and examinations of the premises and stock with a view to the settlement of the claims against the companies with whom the stock and premises were respectively insured. Both parties are agreed that until the 1st of February nothing could have been done towards beginning to repair the premises, because it was necessary in the defender's interest that the stock should be left in the condition in which it was when the fire was extinguished. On 31st January the defender removed his whole stock of boots and shoes to another shop he had in Glasgow, to be sold as goods damaged by fire, without any hint previously given to his landlord or his clerk or factor, with whom he had on several occasions been in communication, that he intended to hold his lease at an end. He locked up the premises and sent the keys to the pursuer; and on the following day he sent to the pursuer a letter in these terms:—"I returned the keys of the shop at No. 4 Possil Road yesterday, and I do not intend again to occupy the premises. I send you a cheque p. £16, 1s. 2d., being the amount of rent up till to-morrow, less 5s. for water-rates, and 27s. 6d. for property-tax. Please send me a receipt for same, and oblige." The pursuer having in reply intimated in letters of the 1st and 4th of February that he would hold the defender bound by the lease, that the premises would be reinstated, and that the repairs were being pushed forward as rapidly as possible, the defender's law-agents replied by letter on 4th February:—"The shop which our client took is now no longer in existence, and this lease will not apply to any new shop which you may put in its place. As has been already intimated to you, Mr Markland no longer holds himself as tenant of the premises referred to, and he will take no concern with the rebuilding and fitting-up thereof." It further appears from the proof that the defender, without any notice to the landlord, took another shop in Garscube Road within a week after the fire, not for a temporary purpose, but for permanent occupation, aud as a substitute for the shop in question—a circumstance which with other facts appearing in the proof has rather led me to think that he endeavoured to take advantage of the fire to get rid of a lease which he thought unfavourable to him.

It cannot, I think, be doubted (indeed the contrary was not maintained) that the view presented by the agents of the defender in their letter which I have just read was highly exaggerated. It was absurd to say that this shop was no longer in existence. But it was maintained for the defence that the injury to the shop was of so serious a character that the defender was entitled to regard it as no longer fit for the defender's occupation. If I were of opinion with the Lord Ordinary that it became necessary for the carrying on of the tenant's business that he should absolutely leave the premises for two months, I should have been of opinion with his Lordship that the defender was entitled to succeed in the action; for I agree in thinking that in a business of this kind if the tenant were deprived of the premises for so long a time the injury would have been so serious as to entitle him to say that he was no longer to remain tenant. I am satisfied, however, on the evidence, that there was no necessity for the de-

fender leaving these premises, even for a single day, for although he would have been subject to some inconvenience—indeed to considerable inconvenience—I am of opinion that he could have quite satisfactorily carried on his business, and that the case was not one in which he was entitled to treat the occurrence as being one of a total destruction of the premises. The shop which he had taken consisted of a large front shop or warehouse and a back shop. The business which was carried on in it consisted of the retail business of selling boots and shoes, and of executing repairs. For the purpose of these repairs the back shop was used, two and sometimes three men being employed there for that purpose. It appears from the evidence that the back shop was rendered unfit for occupation, but not, I think, for any great length of time. The injuries were so great that until a considerable sum was expended in restoring it it could not be used for the purpose of repairs, for which it had been previously used. But I think the proof clearly shows that the restoration of the back shop could have been perfectly well carried out in a very few days. Some of the witnesses say it could have been done within six days. I do not say it could have been done in that time, but I think it certainly might have been done within eight days, or ten days at the most. That would undoubtedly have been an inconvenience to the defender, but it is clear he would have had no difficulty in carrying on his business subject to that inconvenience, but without any loss. While the fire had seriously injured the back shop, the front shop was perfectly uninjured. It appears that a gasalier had fallen in the course of the night of the fire, and by the smoke which had passed over the partition which separated the back and front shops, and the great heat, the paint in the front shop had been a good deal blistered. With that exception the front shop was uninjured. A large counter which extended all down the centre of it was uninjured in any way. I am satisfied from the evidence of the principal witnesses that there would have been no difficulty whatever in the defender, if he had really desired to retain the shop, getting a screen put up across the back part of the large front shop, and carrying on his repairing business there for eight or ten days while the work of renewal was going on, if he desired to do so, while at the same time he might have carried on his usual business of selling his goods in the front. The shop to which he moved was smaller than the space which would have been in front of this screen, and he had no back shop at all. This goes strongly to show that the back shop was not of the importance now represented. Moreover, if he had desired it, I do not doubt he could have got from his landlord the temporary occupation of the adjoining shop, then standing empty. The insurance company had agreed at once to reinstate the premises, and that inferred, no doubt, that in addition to the plaster and joiner-work in the back shop there should be a painting of the front shop. The circumstance that Mr Markland was to get his shop entirely repainted, which could have been done after the back shop was made fit for occupation, was an inconvenience merely. It is just one of those things that a tradesman in the occupation of such premises has from time to time to submit, and, generally speaking, is only too willing to submit to, in the knowledge that his shop will look so much better and brighter after it. I see nothing in the evidence to indicate that he would have suffered any more inconvenience in the painting of his shop after the fire than in the case of the paint having given way in the course of time and requiring to be restored, as frequently happens in the ordinary course of business. The work of painting could have been entirely completed in about three weeks.

These being the facts of the case, I feel myself constrained to differ from the Lord Ordinary. It is said on behalf of the tenant that he took the new shop he did because of a conversation he had with one of the men who were measuring the premises with reference to the reinstatement of the premises, and who gave him to understand that the repairs would require six weeks or two months. But if so, all I can say is that he was not entitled to act upon any such casual conversation. I think he was bound to state his intentions before the landlord, to give him an opportunity of stating his proposals, and if he had done so there might have been an arrangement made which would have reduced the inconvenience to its smallest limits, and at least it would have been shown that there was no necessity or justification for throwing up the lease. Again, it is said that in point of fact the repairs would have taken seven weeks to do, and that the time actually employed rather exceeded this. Before the repairs and work were begun, however, the defender had shaken himself free of the property and had taken another shop. There was no need on the part of the pursuer to push the work on, and the tradesmen explain that they proceeded leisurely on this account. I am satisfied there would have been no difficulty in repairing the back shop in a much shorter time than was occupied, and that all material injury could have been set right in about a week, during which some inconvenience but no loss would have been sustained by the defender, after which the painting alone remained to be done.

Then as to the position which the landlord took up—I confess this is the only point which seems to me to suggest a difficulty in the case. I need not read his letter, but with regard to it I may say that it certainly was neither courteous nor conciliatory. Instead of simply stating that he held the defender bound by his lease, and that the repairs were being pushed forward as rapidly as possible, it certainly would have been better that he had expressed his regret for the inconvenience that would be caused to the defender, and stated that the back premises would be ready within a definite short time, and the painting completed to suit the defender's convenience. That would not only have been more courteous, but would more correctly and distinctly have expressed what was incumbent on him. The peremptory terms of the defender's letter and the return by him of the keys of the shop are, however, not to be kept out of view, and probably account for the terms of the reply. As I have said, the defender held from the first and acted on this assumption, that the premises had been destroyed, and that he was not bound to enter into the occupation, and so the landlord may have fairly thought he was not legally bound to say anything more than that he held the defender to the lease, and that the repairs would be at once proceeded with, without

indicating the precise time within which these would be completed. I shall only say further, with reference to the cases to which we have been referred as bearing on this branch of law, that each case is one simply of degree, and that the case of *Duff* v. *Fleming* is to be clearly distinguished from the present, because there it was proved that the premises were so seriously injured that the tenant was obliged to leave them entirely and was shut out of them for two months. In a case like the present I think the tenant's duty is to put himself in communication with his landlord in order to see within what time the premises will be set right. He is not entitled to throw up the lease, and if he does so without the assent of his landlord he must be prepared to justify his course by showing that there was such a destruction of the premises as to entitle him to abandon them. The defender is in that position, but has in my opinion failed to justify his abandonment of the subjects let. I have come to the conclusion that the interlocutor of the Lord Ordinary should be recalled, and that the pursuer should obtain the decree he asks.

Lord Deas—This is a case of great importance, for the subject destroyed is of considerable value, and the rent is substantial, but there is above all a very important principle of law applicable to it. The premises destroyed were let on a seven years' lease to the defender, and were used by him for his business as a boot and shoemaker. It is to be observed that he did not carry on here a wholesale trade; he had a front and a back shop, and he both made and mended shoes. The mending was done while the customer waited, and the back shop was used for the purpose of these repairs. It is not disputed that this back shop was thus as important for the defender's business as the front shop. Nor is there any question that this back shop was entirely destroyed and the front shop seriously injured. Thus for a considerable time no business could be done, for the fire took place upon the 17th of January 1881, and the workmen did not leave the shop until 15th of March following. Thus for a period little short of two months the defender would have unable to carry on his business. Now, it appears to me that if a tradesman is to be deprived for two months of his place of business he is entitled to abandon his lease. But the question comes to be, who was to blame for this delay—for the pursuer alleges that the repairs could easily have been executed in a much shorter time—was it the tenant, or did it arise from the action of the fire? I do not think that it is necessary that the subject be destroyed to entitle the tenant to abandon his lease. If it be rendered unfit for the carrying on of his business, that is enough. Now surely that was the case here. The tenant was informed by competent men that two months would be required to put the place in order, and he accordingly did what in my opinion he ought to have done, viz., he gave intimation to his landlord and took his stand upon his rights. Now, it seems that for some time the landlord did nothing at all. I do not say that the conduct of either party is to be commended, but the one stands upon his legal rights and the other does nothing. The landlord makes no offer of another shop; he is so confident in his view of the law that he does nothing. It is not said that the tradesmen who were employed to repair and restore the shop unduly delayed, and it is clear that two months were occupied in the work. If the repairs could have been executed more speedily, it is clearly the landlord's fault that that was not done. The present case is quite distinguishable from that of the destruction of a dwelling-house or offices, for here the tradesman risks the loss of his very means of livelihood—his customers. This case appears to me to be ruled by the case of *Duff*, and I consider the principles there laid down to be the principles of the law of Scotland, and to depart from these would be to go upon principles never before acted upon in the law of Scotland. The maxim *Res perit domino* applies when the tradesman is deprived by an accident such as this of the means of carrying on his business. I therefore agree with the Lord Ordinary, who has pronounced a clear and distinct judgment on the subject.

Lord Mure—The question in this case comes to be, whether the damage done by this fire was of a sufficiently serious character to warrant the defender in throwing up a seven years' lease, of which the most part was yet to run? Was the shop in question so damaged as to make it useless for the defender? If so, then he was entitled to throw up his lease, and the principle laid down in the case of *Duff* is applicable to the present circumstances. But if the defender's business could without much inconvenience have been carried on, and if the repairs on the building could have been executed within a reasonable time, then the tenant cannot be freed from his obligations. In the present case I do not think that the tenant was justified in acting as he did. The fire no doubt took place about the middle of January, but it was some time before access could be obtained to the premises owing to the examination necessary prior to a settlement with the insurance company. But within a week the defender had taken a new shop, before, in fact, any reliable information could have been obtained as to how long it would take to repair the damage caused by the fire. In doing this I think that the defender made a mistake, and he followed it up by writing a peremptory letter to the pursuer giving up his lease. It is a curious fact too that the new shop was so much smaller than the old one was—so much so, indeed, that by throwing a screen across the front part of the old shop while the back part was being repaired the same amount of space would have been obtained for the defender to carry on his business as he has in his new premises. This appears most conclusively on the evidence and plans produced.

It also appears that if any necessity had been made out the repairs on the back shop could easily have been executed within a week, while the mending part of the defender's business could without any difficulty have been carried on for that time behind a screened-off partition. There would have been some inconvenience no doubt, but in repairing the damage caused by a fire there must always be more or less inconvenience suffered by the parties.

In these circumstances I agree with Lord Shand in thinking that the conduct of the defender was unreasonable, and that he was not justified in abandoning his lease.

Lord President—I so entirely concur in the

opinion of Lord Shand that I think it necessary to advert to one or two points only. As to the nature of the defender's business, there can be no doubt that the defender carried on a large wholesale business, and that his daily bread did not depend upon what he made in the shop in question. That I consider to be a most material point. It is stated in the condescendence both that the defender has a wholesale business, and also that he carries on his trade in other parts of the town. The defender also in his own evidence admits that he has shops in different localities, and he is borne out in this by his foreman, from all which it appears that he is a wholesale trader, and has several places of business. The other point upon which I wish to say a few words is the case of *Duff* referred to by your Lordships. I do not think that there is any difference among us as to the principle of law there laid down. Lord Cowan in *Duff's* case says—"Of the general principle that the destruction of the subject for the purpose for which it was let, by accidental fire, or from other fortuitous events, puts an end to a contract of lease, there can be no doubt. . . . It must always be a delicate task to apply this principle to particular cases, and it comes very much to be a question of degree. If, for instance, the fire had only deprived the tenant of the temporary use of a room, I could not have held him entitled to abandon." And Lord Benholme says—"The only nice point is as to the extent of destruction which entitles the tenant to abandon. Now there was here substantial destruction."

The facts in *Duff's* case were very strong, and influenced considerably the result arrived at by the Judges. There were three floors and attics, and the two top floors and the attics were completely destroyed, while the ground floor was also seriously injured and the building rendered completely useless for the tenant's business, while the cost of the repairs amounted to more than a half of the value of the subjects. Now, these facts are in obvious contrast to the circumstances of the present case. Here the tenant does not appear to have been deprived absolutely of the use of his premises for a single day, while it seems that his business could have been carried on, with some inconvenience and discomfort no doubt, but still could have been kept going, while the repairs were being executed.

The Court recalled the interlocutor of the Lord Ordinary, repelled the defences, and found in terms of the conclusions of the summons.

Counsel for Pursuer—Trayner—Rhind. Agent—R. P. Stevenson, S.S.C.

Counsel for Defender—Mackintosh—Wallace. Agents—Dove & Lockhart, S.S.C.

Thursday, December 21.

SECOND DIVISION.

[Sheriff of Lanarkshire.

M'LAUGHLAN *v.* COLIN DUNLOP & COMPANY AND ANOTHER.

Reparation — Master and Servant — Dangerous Machinery—Master's Liability for Negligence of Fellow-Servant of Servant Injured.

In an action of damages at the instance of the widow of a workman who had been killed by an accident (happening prior to the passing of the Employers Liability Act 1880), which took place through the alleged defective condition of plant used in the service of the employer, it was proved that the plant in question had been under the charge of a competent person, and that the employer had provided all sufficient material and appliances for making any repairs which might be necessary. *Held* that, assuming the condition of the machinery to be defective, the employer was not liable in damages, in respect that he had discharged all the obligations incumbent on him at common law.

Servant's Implied Contract to Bear the Risks of Service—Employers Liability Act 1880.

Observed that the effect of the Employers Liability Act 1880 is to alter the rule of the common law by which the servant is held content to bear such risks of the service as the carelessness of a fellow-servant, and that result of the case might have been different if the Act had applied.

This was an action of damages in respect of the death of Michael M'Laughlan, the husband of the pursuer Mrs Helen M'Laughlan. The defenders were Colin Dunlop & Co., ironmasters, and the individual partners of that firm, and James Galt, manager of the furnaces of the firm at Quarter, Hamilton. The pursuer averred that the death of her husband was caused by the fact that a clasp and chain used in the works of the defenders Colin Dunlop & Co., and the breaking of the latter of which caused the accident by which her husband was killed, were not of sufficient strength or efficiency for the purposes to which they were applied, or were otherwise defective in construction or material, and she alleged that the defenders, or one or other of them, or those for whom they were responsible, had culpably failed to supply good and sufficient machinery. The defenders denied fault, and averred that the action was a *damnum fatale* for which they were not responsible.

The death of the pursuer's husband occurred prior to the commencement of the Employers Liability Act 1880 (43 and 44 Vict. c. 42), which came into force on 1st January 1881, and which provides (sec. 1)—Where after the commencement of this Act personal injury is caused to a workman by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer. . . the workman, or in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation