advanced by her to her husband *animo donandi;* but even if it had been so, the transaction was revocable, and she is now entitled to claim a ranking.

At advising—

LORD PRESIDENT—As regards the main question here, the whole matter seems to me so clear that it is not necessary that I should give any detailed expression of opinion upon it. The proceeding by which the money found its way into the hands of the husband was fully investigated in the last case of *Newlands* v. *Laidlaw's Tr.*, and there can be no doubt that he got it either as a loan or as a donation from his wife. It is no matter which is the true state of the case, as either would afford a good ground of claim. But it is now said that this money was really settled by the terms of Mr and Mrs Laidlaw's marriage-contract, and that the husband was entitled to a liferent of it, and that that right attaches to any salvage the wife may receive from her husband's estate. I think that there is no ground whatever for that contention. The spouses by mutual consent took this sum out of the marriage-contract trust, or rather they never permitted it to get into it, for they intercepted it between the trustees of the late Mr Stewart and the marriage-contract trustee. They then discharged Stewart's trustees, as they were quite entitled to do, and thereafter the money was, I think, quite free of any conditions under the marriage-contract. The condition under which, if it had ever got into the hands of the marriage-contract trustee, it would have been held, was that the husband should have *stante matrimonio* the use of it *ad sustinenda onera matrimonii*, but there was also constituted a security to the wife against her husband and against his creditors. If, then, on the one hand, the wife gave up her security, it can never be maintained that the husband can still keep his corresponding advantage of getting the interest of the money. If that is so, then the marriage-contract can have nothing whatever to do with this money; and no right which the husband would have had under that contract can be given effect to.

LORD MURE—It is quite clear, when our decision in the former case is looked at, that the circumstances are very distinctly put by the Lord Ordinary in those passages of his opinion where he refers to the question of loan or donation. By William Stewart's settlement this lady got the sum in question, which was covered by the provisions of her marriage-contract, but belonged to her exclusive of her husband's *jus mariti* and right of administration, and the spouses received the money and discharged Stewart's trustees, as they were quite entitled to do. That being so, we held that the marriage-contract trustee could not claim for it in Mr Laidlaw's sequestration. The Lord Ordinary says that it was conceded that the question in the present claim is not ruled by our judgment in the former case. Now, what was the nature of the transaction by which this money passed into the hands of the husband's creditors? If we refer to the evidence, we find that that money was taken from the wife, without her knowledge or consent, and applied in payment of her husband's debts. But even if it had been otherwise—if, as the Lord Ordinary says, she had given the money to her husband, or allowed him to receive it *animo donandi*—the gift would be revocable as a donation *inter virum et uxorem* notwithstanding the insolvency of the husband; but the assumption of donation is excluded by the evidence. I concur in that view of the Lord Ordinary, and think this claim should be allowed.

LORD SHAND concurred.

LORD DEAS was absent.

The Court adhered.

Counsel for Reclaimer—Mackintosh—Wallace. Agents—Millar, Robson, & Innes, S.S.C.

Counsel for Respondent—J. P. B. Robertson—Shaw. Agent—Andrew Newlands, S.S.C.

Saturday, December 16.

SECOND DIVISION.

[Sheriff of Fife.

MITCHELLS *v.* MOULTRYS.

Process—Proof—Husband and Wife—Writ or Oath—Reference to Oath—Debt Contracted by Wife before and after Marriage—Competency of Reference to Oath respectively of Husband and Wife—Act 1579, *c.* 83.

It is competent to refer to the oath of the husband the constitution and resting-owing of a debt incurred by the wife before marriage. But where the husband is sought to be made liable for a debt incurred by his wife after marriage, it is competent to refer to her oath only the constitution of the debt; the resting-owing must be referred to his oath.

Terms of letter *held* (distinguishing case from *Fiske* v. *Walpole*, 22 D. 1488), not to satisfy the requirements of the Act 1579, c. 83, as to proof of debt by writ.

J. & D. Mitchell, drapers in Pathhead, sued Mrs Moultry and her husband David Moultry, in the Sheriff Court of Fife, under the Debts Recovery Act 1867, for an alleged debt of £26, 5s. 8d. The pursuers averred in a minute given in by them, as appointed by the Sheriff-Substitute, that prior to her marriage, which took place in June 1875, the female defender had incurred a debt to them amounting at that date to £27, 17s. 3½d., and that after her marriage she and her husband had incurred a further account of £13, 9s., ending 17th July 1876. The minute referred to went on to state that the defenders had since the date of their marriage made several payments to account to the amount of £19. These payments having been made indefinitely, the pursuers claimed to be entitled to apply them to the least secured part of their debt, being that contracted prior to the marriage.

They produced the following letter from the female defender:—

"Mr Mitchell. *Pathhead, 18th March* 1880.

"Dear Sir—It is with the deepest sorrow at heart I answer your letter. I am truly sorry that I can't spare anything before six weeks, as it takes

us all our time to get along just now, having so many odds and ends to pay up, which I want to clear off. Many a time I don't know which way to turn, we have been such a long time on short hours. I was getting on very well just before the Fast-day, and then other three days; and then the New Year, three at that time, besides other losses. I counted over £2 a loss to us, and it is taking me all my time now. I will keep my promise; I am too honourable to do any dirty action. You can rely on my word; there are brighter days in store for me, if I am spared after a very dear relation of mother's. I come in for a good deal of money at their death; so you need not be afraid, if all is well. I know I have done wrong, but it was for want of the money—with my brother getting so much and my sisters, and never getting it back again. I have wrote this to you because I could not come to the shop for fear of anybody hearing anything. I have explained all."

They also produced a letter from the male defender bearing to be in reply to one from them demanding payment of the account, in which he repudiated liability for the debt.

The note of pleas-in-law for the defenders was to the following effect:—1. For the female defender —(1) She being a married woman residing with her husband, the action was incompetent, in respect he was not called *qua* administrator-in-law of his wife. (2, 3) No ground of joint and several liability against herself and husband was stated in the summons, and if such ground existed the action was incompetent in the Debts Recovery Court. (4) The account was not due. (5, 6, 7) No liability could attach to her personally for any part of the debt, since she had no separate estate in respect to which liability could attach to her for that part alleged to have been incurred before marriage, and consequently liability for that part alleged to have been incurred after marriage attached only to her husband. (8) Prescription. (9) The writ or oath of the husband could not subject the wife in liability. 2. For the male defender (in addition to prescription and not resting-owing)— "(5) The defender cannot be subjected to any liability for said account, or at least for any portion thereof alleged to have been contracted by his wife prior to their marriage on 5th June 1875, in consequence of any writ or oath emitted or to be emitted by his wife *stante matrimonio.*"

On 24th May 1882 the Sheriff-Substitute (GILLESPIE) found that the female defender being a married woman, was not properly called, and continued the case to enable pursuers to call her husband as her administrator-in-law.

The male defender then entered appearance by minute as administrator-in-law of his wife, and on 7th June the Sheriff-Substitute sisted him in that capacity. On 14th June the Sheriff-Substitute found that the account had undergone prescription, and on 28th June he pronounced the following interlocutor:—"Finds with regard to the part of the account alleged to have been contracted by the female defender before her marriage, that the same is provable by her writ or oath, but only to the effect of entitling the pursuers to decree of constitution to be operative against her after the dissolution of the marriage, or against any estates which she may have from which the *jus mariti* is excluded; that the female defender's letter of 18th March 1880 satisfies the requirements of the Act 1579, cap. 83, and establishes that at its date the said defender was resting-owing an account to the pursuers, and although the said letter does not contain an admission of the amount of the debt, this is not a matter as to which probation by the said defender's writ or oath falls within the requirements of the statute: Allows the pursuer a proof *prout de jure* of the amount of the sum due by the female defender at the date of her marriage, and to the defenders a proof, if they desire it, that the same has been paid, and continues the cause to this day fortnight for this purpose, and grants diligence against witnesses and havers: Finds, with regard to the articles alleged to have been supplied to the defenders after their marriage, that the female defender is not liable to any effect for the same: Finds that the liability of the male defender for articles supplied to the female defender before her marriage cannot be established by her writ or oath, and that the letter of the said defender, dated 9th December 1880, is not an admission that the account sued for, or any part of it, was incurred: Allows the pursuers, if so advised, to give in a minute of reference to the oaths of the defenders, so far as the same is competent.

The defenders appealed to the Sheriff, who dismissed the appeal as incompetent, and remitted to the Sheriff-Substitute to dispose of the cause.

On 4th October the pursuers gave in a minute of reference "to the oath of the male defender in so far as regarded that part of the account contracted prior to the date of the defenders' marriage; and as regarded that part of it incurred subsequent to the date of their marriage, to the oath of the female defender."

No appearance was made for the defenders at the diets of deponing or proof, and the only witnesses examined were John Mitchell, one of the pursuers' firm, and their shopman. The former deponed to the account as correctly taken from their books. With regard to the letter from the female defender the evidence bore only— "(Shown letter dated 18th March 1880)—I received that letter." The shopman deponed to the female defender's dealings at pursuers' shop both before and after marriage. The pursuers did not produce any letter written by them to either of the defenders, to which the above-quoted letters from the latter were alleged to be an answer.

On 18th October the Sheriff-Substitute, in respect of the defenders' failure to appear, and also in respect of the proof of the amount of the debt led for the pursuers, held the defenders as confessed, and found them conjunctly and severally liable for the balance due prior to the date of the marriage; the male defender liable in the balance contracted after the marriage; and both defenders conjunctly and severally liable in expenses; but superseding execution against the female defender *stante matrimonio,* except as regarded her separate estate.

The defenders again appealed to the Sheriff, who again dismissed the appeal and adhered to the interlocutor of the Sheriff-Substitute.

"*Note.*—In this case, which is brought under the Debts Recovery Act, the procedure has been unusual. In defence to the action it has been pleaded that the account sued for was prescribed. On 28th June 1882 the Sheriff-Substitute pro-

nounced an interlocutor in which he found that the female defender's letter 'satisfies the requirements of the Act 1579, cap. 83, and establishes that at its date the female defender was resting-owing an account to the pursuers;" and further, he allowed the pursuers a "proof *prout de jure* of the amount of the sum due by the female defender at the date of her marriage," and to the defenders a proof that the same had been paid. Against this interlocutor an appeal was taken, and after hearing the parties the Sheriff came to be of opinion that the appeal was incompetent,—the 10th section of the Act providing that it shall not in any case be competent to appeal until judgment has been pronounced finally disposing of the cause. The case was remitted back to the Sheriff-Substitute. All the subsequent procedure took place in the absence of the defenders; indeed their agent intimated to the agent for the pursuers, both verbally and in writing, that there was to be no appearance for them. Accordingly on 18th October the Sheriff-Substitute pronounced a final decree which proceeds, 'in respect that the defenders failed to appear at either of the diets of deponing or proof appointed to take place.' Against that interlocutor the defenders appealed, and at the hearing which took place before the Sheriff it was maintained for them that the finding in the interlocutor of 28th June, above quoted, was erroneous. The Sheriff has now considered the question disposed of by that finding, and he concurs with the Sheriff-Substitute. The Sheriff is further of opinion that the defenders having, after due consideration, resolved not to appear at the diets for deponing and proof, he would not be warranted in going back upon these proceedings. It appears to the Sheriff that the defenders have perilled their case on the objection to the finding in the interlocutor of 28th June."

The defenders appealed to the Court of Session.

Authorities — *Rennie* v. *Urquhart*, June 25, 1880, 7 R. 1030; *Fiske* v. *Walpole*, July 19, 1860, 22 D. 1488; *Hamilton* v. *Hamilton*, Nov. 13, 1824, 3 S. 283; *Stewart* v. *Duff*, Jan. 17, 1882, *ante*, vol. xix., p. 343; 30 and 31 Vict. c. 96, secs. 8 and 9.

At advising—

LORD YOUNG—This is an unusually complicated case in what is substantially a small-debt action. The pursuers are drapers in Dysart, and seem, according to their own statement, to have given credit to a young woman to the extent of some £14 prior to June 1875, when she was married; and they thereafter gave credit to her husband to the extent of £11. Indeed, they say that they gave credit to the young lady before her marriage for a much larger sum, but they impute certain sums which they received after the marriage in payment of the account incurred before marriage, and thus for an account ending in 1876 they bring in 1882 this action against her and her husband as jointly and severally liable for the whole debt, whether incurred before or after marriage. But the account being prescribed, it was necessary that the pursuers should prove their debt by writ or oath, and in respect to the debt incurred before marriage they produce a plaintive letter, written by the lady in March 1880, which the Sheriff-Substitute, probably relying on the case of *Fiske* v. *Walpole*, to which reference has been made, has held to be proof by writ of the constitution and resting-owing of this debt, subject only to the amount being proved by parole evidence, and he has allowed a proof by parole evidence of the amount of the debt thus held to be constituted and resting-owing. Proof was taken accordingly, two witnesses only being examined, the pursuer and his shopman. And in this proof the letter founded on was not referred to at all, except that the pursuer being shown the letter merely says, "I received that letter." This letter bears to be in answer to the one from the pursuer demanding payment, but the other letter is not produced, and cannot be found, and the pursuer is not asked a word about it; he only refers to his shop account; and so the evidence only goes the length that this account as charged is correctly taken from his books.

In these circumstances I am of opinion that the case is not governed by *Fiske* v. *Walpole*. It relates indeed to the same subject, but the letter here is much weaker, and that decision cannot be followed. The letter here contains no reference to any account or debt at all. It is a plaintive, sorrowing letter, and it may be a very plausible conjecture that it was such a letter as might be written by a married woman called on to pay a debt which she had incurred before her marriage, but it does not bear that on the face of it. In *Fiske* v. *Walpole* the debt is referred to as "my debt,"—as still outstanding. The letter there does refer to the account sued on, and so the Court held that the letter, *prima facie*, must be received as referring to the only debt alleged to exist. I should advise your Lordships not to hold that the letter and parole proof are sufficient to entitle the pursuer to a decree against this lady for the debt incurred before her marriage, which should be operative against her in the event of her widowhood, or so as to affect her separate estate, if she has any, and so far I think that the Sheriff-Substitute's judgment is not well founded.

With respect to the husband, it is of course competent to refer to his oath the constitution and resting-owing of the wife's debt incurred before marriage. The pursuer was pleased to peril his case on the reference to oath. Unfortunately the husband was advised not to appear, and so the Sheriff, proceeding on a competent reference, held him as confessed, and gave decree against him. This mistake was candidly admitted by the defenders' counsel, who threw himself on the indulgence of the Court in asking to be reponed against the results of the erroneous advice of his clients' agent. I am disposed to listen to this appeal, as the case has got out of shape somehow, and not to hold hard by this decree as upon a confession.

As to the wife's debt incurred after marriage the case stands differently; it was referred not to his oath but to the oath of his wife. I am not disposed to doubt that the reference to the wife's oath was competent to prove the constitution of the debt. But the question of resting-owing is different, and if the husband is still to be made liable, the question of whether there has been payment or not must be referred to his oath, not his wife's. Although on the doctrine of *præpositura* the constitution of a debt may competently be referred to the oath of the wife, and, I assume in the present case, is to that extent competent, yet

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'Lennan. 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 consignation 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-