Tuesday, May 20.

SECOND DIVISION.

[Lord Ormidale.

STEUART *v.* FRASER.

8 *and* 9 *Vict. c.* 83, § 40, 89—*Parochial Board—Suspension and Interdict—Assessment.*

Where a ratepayer in a rural parish applied for suspension of a charge for poor rates imposed for the current year, and for interdict to prevent the Parochial Board applying any part of the assessment to repayment of advances made by the bank beyond one-half of the whole of said assessment, but where the Parochial Board disclaimed any intention of making such an application of the assessment—suspension and interdict *refused.*

This was a suspension and interdict at the instance of Andrew Steuart of Auchlunkart against the Rev. Thomas Fraser, Inspector of the Poor of the parish of Boharm, setting forth "That the complainer is threatened to be charged at the instance of the respondent to make payment of the sum of £87, 6s. 1d., alleged to be due by him as poor's assessment for said parish for the year ending Whitsunday 1872, most wrongously and unjustly: And further, the complainer is under the necessity of applying to your Lordships for suspension and interdict against the said Parochial Board, as will appear to your Lordships from the annexed statement of facts and note of pleas in law.

"That the complainer is willing to consign the said sum of £87, 6s. 1d., and to find caution for expenses in common form.

"May it therefore please your Lordships to suspend the proceedings complained of, and to interdict, prohibit, and discharge the respondent from taking proceedings for the recovery from the complainer of the said sum of £87, 6s. 1d; and further, to interdict, prohibit, and discharge the respondent and the said Parochial Board from applying any part of the said assessment for said parish for the current year to the repayment of advances made by the Town and County Bank of Aberdeen beyond the amount of one-half of the whole of said assessment; or to do otherwise in the premises as to your Lordships may seem proper."

The material statements by the complainer were—"On 6th May 1871 a meeting of the Parochial Board of the parish of Boharm was held for the purpose, *inter alia*, of imposing an assessment for relief of the poor: and from the minute of said meeting, now produced by the respondent, it appears that they were of opinion that the sum of £700 would be required for the relief of the poor of the parish from Whitsunday 1871 to Whitsunday 1872. An assessment of that amount was accordingly imposed, one-half on owners, and the remaining half on the tenants and occupants of all lands and heritages in the parish.

"The Rev. Alexander Masson, minister of the parish of Boharm, is named in the said minute as chairman of the meeting, but Mr Masson is not a member of the Parochial Board. He was not legally qualified to act as chairman, and said meeting was not legally constituted for the transaction of business. Mr Masson, as minister of the parish, is in possession of the manse and glebe, which are entered in the valuation roll at the sum of £42, 12s., but his name does not appear in the assessment roll of the parish.

"In imposing the said assessment, and in making up the assessment roll, fixing the sums to be levied from each of the persons liable in payment thereof, the said Parochial Board acted illegally by allowing in many cases deductions to be made from the rateable value of the lands and heritages in the parish, which are not sanctioned by the statute. In particular, they allowed to the Earl of Seafield, and other heritors of the value of over £5000 a-year or thereby, deductions for property tax. The assessable sum was also reduced by sundry other deductions not warranted by law. There is no church officer in the parish, the heritors never having elected one; and as to the person referred to in the answer as appointed by the kirk-session, it is explained that the complainer and other heritors never employed or recognised him. Nevertheless, the payments made for this person were allowed as deductions. Parochial schools are neither assessed nor assessable, but deductions were allowed on account of these as well as the school buildings. Further, in violation of the statute, the sum allowed for repairs was in many instances extravagant. Mr A. Cameron, factor of Mrs Menzies of Arndilly, claimed, and was allowed, the sum of £50 on the rateable value of her mansion-house, which does not exceed £60 or £80. In this manner the assessment was imposed in such a manner as to be unequal in its operation, contrary to the Act of Parliament.

"In the accounts of the said Parochial Board for the year ending May 1871, the total amount of the assessment imposed is entered at £601, 13s., of which £562, 6s. was recovered; and after crediting the whole of said sum as paid into bank, together with £15, 11s. 3d. of arrears, a debt remained due by the Board to the bank, as at said 14th May 1871, of £600, 12s. The Board thus commenced the financial year 1871-2 with a debt equal to or exceeding the whole assessment of the year. It is understood that this debt has been contracted by a persistent violation for many years of the clause in the statute forbidding the Board to anticipate by borrowing any part of the assessment due and unreceived to an amount greater than one-half of such part of such assessment. For no part of said debt are the ratepayers of the parish legally liable. Since said 14th May 1871 the inspector, being without funds, has been obliged to borrow to a still greater extent from the bank, and the total debt must now exceed the sum of £800. The deficiency of income has not been occasioned by extraordinary distress, the expense of litigation, or some exceptional cause, but by the manner in which the statute has been persistently administered in the parish. Relief was given to persons who had relations well able to maintain them, and no proper account was kept of the application of the church-door collections. The Board have been well aware for some years that they were practically in a state of insolvency, but no step was taken, by a supplementary assessment or otherwise, to reduce the debt. The complainer, as a member of the Board, objected to any operation by the respondent on the bank account, or to any recognition by the Board of such account; but in defiance of his protests, and those of the elected members, the Board, by a majority, adopted resolutions to the effect that the inspector be instructed 'to operate on the bank account to the extents' re-

quired for the purposes of the parish. The complainer has reason to believe that the current year's assessment, as soon as received by the respondent, will be applied, not to the purposes for which it was imposed, but to reduce the debt contracted, in violation of the statute, to the bank, or to allow the bank to retain the assessment in credit of the balance claimed by them, and for which the ratepayers are not liable."

The respondents admitted that the Rev. Mr Masson acted as chairman at the meeting on 6th May 1871, being a member of the Board in virtue of his manse and glebe. With regard to the deductions, &c., they stated that "the per centage of deductions to gross rentals allowed to the principal heritors of the parish of Boharm, has been as follows, viz.—In 1869-70, Arndilly 19·42; Major Duff 18·46; the complainer 18·43; and Lord Seafield 18·18. In 1870-71, the complainer 15·83; Arndilly, 15·27; Major Duff 14·75; and Lord Seafield 13·87; and in the current year, Arndilly 19·06; the complainer 15·23; Major Duff 14·78; and Lord Seafield 14·56. It thus appears that the Earl of Seafield has invariably got the least of all the heritors in the shape of deductions, and the complainer last year got the most. The complainer always declined giving in any note of deductions, and the Board in their anxiety to deal fairly with him gave such deductions as in their opinion were fully above those of the other heritors. By the assessment complained of no surcharge was laid upon the complainer, either in respect of deductions allowed to other heritors or otherwise. With regard to the church officer, it is explained that it is true that the heritors did not formally elect him, he having been chosen by the kirk-session; but he has been employed as such by the heritors, and paid by them for many years, and they have long homologated his appointment to the office. It is further explained that there are two parochial schools in the parish, a first and a second, and it is in respect of these alone that the claims for deductions are made, and not for the school under the Privy Council, which also exists in the parish. In regard to the repairs to the mansion-house of Arndilly, in point of fact these cost Mrs Grant, during the past year, £1000 instead of £50, without which the house would have been uninhabitable." As to the accounts, they stated as follows:—"Admitted that at 14th May 1871 the Board were in debt to the bank to the extent stated. The debt to the bank has been occasioned by the fact, that in each year since 1864 there has been an excess of expenditure over income, notwithstanding the assessment having been from time to time increased. The Board abstained from increasing the assessment to the full extent necessary, in the hope that the excessive expenditure of each year had been exceptional and temporary. The whole money due to the bank has been spent exclusively in proper parochial purposes. There is produced in process by the respondent a statement showing how much of an additional assessment would have been required to be imposed by the Board in each year in order that their income should have just equalled their expenditure, and another showing how much of this would have had to be paid by the complainer, both as owner and occupier. From this latter statement it will be seen that had the full sum required to meet all demands been imposed each year, the complainer would have had to pay between 1st January 1865 and 1st January 1872 (including interest to 1st January 1872), the sum of £75, 15s. 10d. The total arrears at Whitsunday 1871 for the seven preceding years, which he objects to being assessed for, amount to £605, 16s. 3½d., according to the statement already referred to, and the complainer's share of these arrears, according to the assessment roll for the current year, is only £61, 3s. 1d. or thereby as owner, and £14, 7s. or thereby as occupier—together £75, 10s. 1d., being 5s. 9d. less than these parochial burdens would have cost him had he been charged in the way he maintains that he should have been. It is explained that if the demands upon the Board's funds this year equal those of the last two years, the assessment imposed would not be sufficient to pay off a single farthing of the old debt, but, on the contrary, would be unequal to the current expenditure." And they further stated that "they had no intention, and never meant, to apply the present year's assessment to anything but strictly parochial purposes, in so far as the assessment was required for such purposes."

The pleas in law for the complainer were—"(1) Said assessment having been imposed at a meeting of the Parochial Board, which, contrary to the provisions of the statute, proceeded to business without a chairman, and before being lawfully constituted, the same is illegal, and ought to be suspended. (2) In imposing said assessment, the Board having failed to fix and determine the amount payable by the persons liable, according to the annual value of the lands and heritages in the parish, as the same is defined by section 37 of the Poor Law Act, and having allowed deductions in the particulars specified, which are not sanctioned by the statute, said assessment is illegal, and ought to be suspended. (3) The said Parochial Board and the respondent having, contrary to section 89 of the statute, borrowed money on the security of such part of the assessments as were still due and unreceived to an extent greater than one-half of the amount thereof, the debt thus contracted is illegal, and the Parochial Board or the respondent are not entitled to apply the current year's assessment in payment thereof. (4) In the circumstances, the complainer is entitled to suspension and interdict as craved, with expenses."

The pleas in law for the respondent were—"(1) The statements of the complainer are not relevant or sufficient to support the prayer of the note. (2) The complainer is barred from objecting to payment of the bank's debt, in respect that he acquiesced in and homologated the proceedings by which it was incurred. (3) The complainer's objections to the legality of the meeting of 6th May 1871 are unfounded, and ought to be repelled, in respect—(1.) The Reverend Mr Masson was a member of the Board, and entitled to act as chairman; (2.) The minutes of said meeting were approved of at the next general meeting of the Board, and duly authenticated by the chairman of that meeting; (3.) The objections are irrelevant in respect of the provisions in the 28th section of the Poor Law Act. (4) The complainer's objections to the assessment imposed at said meeting are unfounded, and ought to be repelled—1, Under the 40th section of the said Act he has no title to object thereto, except in so far as he is thereby surcharged; and 2, No surcharge has been laid upon him. (5) The complainer is not entitled to object to payment of the said debt, in

respect the same was incurred for proper parochial purposes, and the complainer will suffer no injury by the application of the assessment in payment thereof. (6) The statements of the complainer being unfounded in fact, the note ought to be refused, with expenses."

After a proof, the Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 22d October* 1872.—The Lord Ordinary having heard counsel for the parties, and considered the argument and proceedings, including the proof, Finds that the complainer has failed to establish the grounds upon which his reasons of suspension and interdict are founded: Therefore repels said reasons: Finds the letters and charge orderly proceeded, and decerns: Finds the respondent entitled to expenses; allows him to lodge an account thereof, and remits it when lodged to the Auditor to tax and report.

"*Note.*—The present note of suspension and interdict relates to the proportion due by the complainer of the assessment for the poor in the parish of Boharm for the year ending Whitsunday 1872. That assessment was, according to his own showing (Reason 2) imposed on 6th May 1871, at a meeting of the Parochial Board, held of that date, to which the complainer was summoned in the usual way, although he did not attend. It is also proved that the assessment and the proportion thereof payable by the complainer were duly intimated to him. Yet notwithstanding all this, it was not until January last, when about two-thirds of the year for which the assessment was imposed had expired, and after the same must have been in a great measure expended, that the complainer presented his note of suspension and interdict.

"Whatever may have been the irregularity, if any, of the mode in which the parish has proceeded for some years back, in reference to the obtaining of money from a bank to meet parochial purposes, and whatever may be the remedy, if any, which the complainer has against such irregularity, the Lord Ordinary has determined nothing. All he has now done is to find that no sufficient ground of suspension and interdict has been established by the complainer in the present process, entitling him to suspension and interdict in relation to the assessment, which is alone in question.

"The complainer has endeavoured to support his application on grounds partly technical and formal, and partly of a more substantial character.

"1. He says the assessment cannot be maintained against him, whatever may be his liability otherwise, on the ground that it was irregularly and illegally imposed, in respect that at the meeting of 6th May 1871 the Reverend Mr Masson, the minister of the parish, acted as chairman, although he was not assessable for poor rates as the owner or occupier of lands or heritages. Now, although it is true that Mr Masson was chairman of the meeting referred to, and that it has been held (*Forbes* v. *Dickson*, 1 Macqueen, p. 106) that a parish minister is not assessable for the poor as the owner and occupier of lands and heritages in respect of his manse and glebe, it does not appear to the Lord Ordinary necessarily to follow that he may not be a member of the Parochial Board and chairman of its meetings. Mr Masson is minister of the parish, and of course a member of the kirk-session, while, by section 22 of the Poor Law Amendment Act it is provided, in reference to such a parish as Boharm, that the Parochial Board shall consist among others of the kirk-session, or of six of them elected for the purpose, where it consists of more than that number. The complainer has not made it clear, by the proof or otherwise, that under this statutory provision Mr Masson may not have been legally a member of the Board. Besides, by the same section of the Act, while it is provided generally that the Parochial Board shall consist of the owners of lands and heritages of the yearly value of £20 and upwards, it is not provided that such owner must be actually assessed or assessable for the poor. Mr Masson, it has been proved, stands on the valuation-roll applicable to the parish as the owner, in respect of his manse and glebe, of lands and heritages to the extent of £42, 12s. of yearly value, and this is substantially stated by the complainer himself in his 3d Reason of Suspension. The Lord Ordinary, having regard to these provisions of the Act, is not prepared to hold that Mr Masson cannot be taken to have been a member of the Parochial Board, and, as such, competent to be its chairman. But whether this be so or not, the Lord Ordinary thinks that any objection which might be held to attach to the position of Mr Masson can have no effect on the validity of the assessment in question, in respect that the minutes of the meeting at which it was imposed were confirmed at a subsequent meeting, at which Mr Hendrie, who was undoubtedly a member of the Parochial Board, presided; and in respect also of the principle illustrated by the case of *Livingstone* v. *The Presbytery of Hamilton* (in Court of Session, 26th June 1846, 8 D. 808, and House of Lords, May 1849, 6 Bell's App. 469) that the actings of a public body at one of their meetings, even although of a *quasi* judicial character, are not to be held as invalidated by the circumstance that one or more of the parties taking part at the meeting had not the requisite legal qualification to be a member of such body, provided they were holden and reputed at the time on reasonable grounds to be qualified, and had a colourable title to act as they did. It is impossible, the Lord Ordinary thinks, fairly to dispute that the Reverend Mr Masson was in the present instance holden and reputed to be qualified, and had a colourable title to act as he did.

"2. The next ground on which the complainer has challenged the assessment in question is, that deductions were erroneously allowed to the heritors but although he states (Reason 4) that in this way the assessment was imposed in such a manner as to be unequal in its operations, contrary to the Act of Parliament, he nowhere explains how or to what extent this has prejudicially affected him; and, in particular, he does not aver that it has had the effect of creating any surcharge whatever upon him. In point of fact it has been proved that the deductions complained of had been allowed equally to the complainer as to the other heritors. It has been proved, indeed, that they have been allowed to the complainer to an extent larger in proportion than the other heritors, and it has been further proved that he has taken the benefit of the deductions so allowed him, by paying his proportion of the assessment in question after deducting their amount. Independently of all this, it does not appear to the Lord Ordinary that the deductions founded on are, with one exception, exposed to the objections taken against them by the complainer: —(1) One of the deductions, viz., that made on account of a very trifling payment to the church

officer, was not insisted in at the debate, and therefore need not be further noticed. (2) The second, which relates to the allowance to Mrs Menzies of Arndilly for repairs on her mansion-house, is sufficiently obviated by the evidence of Mr Reid of Elgin, and besides is manifestly of such a character as not to be entertained in this Court in such a process as the present. All that the complainer says about it (Reason 4) is, 'that the sum allowed for repairs was in many instances' (that in question being the only one particularised) 'extravagant.' The parochial board was surely the proper judge of that, and at any rate the complainer has entirely failed to prove that there was any extravagance in the matter. (3) The third deduction objected to by the complainer is that allowed for school buildings. It has been proved that there are two parochial schools and two parochial teachers in the parish, and that the deduction related to these schools, and not to a third school, which is not a parochial one. Now there can be no doubt, the Lord Ordinary thinks, that the heritors were entitled to deductions in respect of the school buildings in question, and the salaries of the two parochial schoolmasters, and on this point the Lord Ordinary has to refer to Mr Duncan's Treatise on Parochial Law, p. 800. (4) The only other deduction complained of is that on account of income tax, and in regard to this the Lord Ordinary understood the respondent to admit that an error had been fallen into. But then the complainer has got the benefit of it equally with the other heritors, and so he cannot say, and he has not said, that he has been unequally or unjustly dealt with. It might have been different if the deduction had not been allowed to him while it had been allowed to others, But, as the matter stands, the complainer has been unable to show that he has any surcharge to complain of. Although, in terms of section 40 of the Act, he might have had a remedy against the assessment imposed on him, 'but only to the extent and effect of exempting himself from payment of any surcharge which may have been made upon him,' the complainer has not, by his proof or otherwise, afforded the Court any means of ascertaining whether any surcharge has been made upon him, or, if any, what its extent is.

"3. The complainer has further, in his 5th Reason of Suspension, complained that the Parochial Board has contracted a large debt to a bank, for which the ratepayers are not liable; and he then goes on, not positively and distinctly to aver, but merely to say that he has 'reason to believe,'—but what the reason of his belief is he does not specify—that it is the intention of the board to apply the present year's assessment, being that in question, towards payment of that debt. He has accordingly, founding on this very general and indefinite statement, applied for interdict against any such application 'beyond the amount of one-half of the whole of said assessment,' which, as the Lord Ordinary understood at the debate, was conceded to be permissible in virtue of the 79th section of the Act. The simple, and as it appears to the Lord Ordinary, the conclusive, answer to this branch of the complaint, is—independently of the question whether the contraction of the debt was legal or illegal, into which question it is unnecessary to enter—that there is no evidence whatever that a single farthing of the assessment in question has been applied, or was ever intended to be applied, in payment of the debt referred to. It is, on the contrary, distinctly proved that no such application has been made, or is intended to be made. It has indeed been made quite clear that not only the assessment in question, but those for many years previously, as far back, in short, as the inquiry has gone, or since the origin of the debt, have been applied exclusively to the relief of the poor of the parish in terms of the statute, and that accordingly, in place of a single farthing of the debt being paid off, it has been constantly increasing. The Lord Ordinary could not, therefore, with propriety grant the interdict now asked by the complainer, and thereby inculpate or appear to inculpate the respondent and the Parochial Board of Boharm, in the absence of all legitimate or sufficient ground for doing so. And the Lord Ordinary has only further to add, in regard to this point, that if the complainer should think it necessary to have the legality of the debt in question, as a burden in any shape or to any extent on the parish or the poor funds, determined, it may be well for him to consider whether a different form of action than the present will not be necessary for that purpose.

"All the points to which the proof has reference, or which were attempted to be supported by the complainer at the debate, have now been adverted to, and the Lord Ordinary is of opinion that all of them are ill founded, and insufficient to entitle the complainer to suspension and interdict in the present process, as prayed for."

The complainer reclaimed.

Authorities cited—*Archibald*, 18 D. 329; *Garrow*, 17 D. 200, 8 Macph. p. 26.

At advising—

Lord Justice-Clerk—I am for adhering to the Lord Ordinary's interlocutor. When a suspension of a charge for a current assessment is presented, the Court is entitled to ask how far the application is appropriate to effect its object. I do not think it is appropriate in this case. There are two grounds of suspension now insisted on—1st, It is said income tax was illegally deducted. Now, I hold suspension and interdict not to be the legal mode of ascertaining the views of the Court on such a matter. The Act provides a remedy if a surcharge is created, which is not alleged here. I give no opinion as to deduction for income tax. 2d, It is alleged that the Board intend to apply the present year's assessment towards payment of a debt to a bank, and the complainer seeks for interdict against any such application beyond one-half of the whole assessment. The inspector in January 1872 paid £300, one-half of the assessment, into the bank to replace an advance previously made to feed the paupers. The question with regard to the other half of the assessment is, Have we reason to suppose the Board intend to apply it to any but parochial purposes. The Board disclaim any such intention, and I see no evidence to the contrary. I think it very doubtful whether the inspector should be allowed to keep a bank account and operate upon it himself, as here.

Lord Cowan—I concur. No surcharge is alleged, and there is no evidence that the £300 was put into bank to pay the old debt.

Lord Benholme—I concur. Suspension does not present an instrument calculated to effect any practical object here. The complainer does not say he has been surcharged, which is the main point. I think it improper for a board to go on

increasing its debt from year to year; but I have always thought it was not the intention of the Legislature that the bank account should always square exactly with the assessment. Any margin over must be paid off before starting again. Here there was a constant increase from year to year on a system. I distinguish such an increasing debt from any small margin a board may take care to clear off, and so prevent parties who may come to a parish being assessed for debt not contracted in their time.

Lord Neaves—I concur, and I think the conduct of this Board, going on increasing debt, and allowing the inspector to operate on the bank account, highly irregular and dangerous.

The Court pronounced the following interlocutor:—

"In respect that the complainer has not alleged that he has been surcharged in the amount of the assessment, and in respect the respondent has stated on the record, and now judicially undertakes at the bar, that he will not apply any part of the portion of the assessment referred to in the complaint to repay the advances by the bank, or to any purpose but those connected with the relief of the poor, Refuse the reclaiming note, and adhere to the interlocutor complained of, with additional expenses; and remit to the Auditor to tax the same and to report."

Counsel for Complainer—V. Campbell and G. Smith. Agents—Maitland & Lyon, W.S.

Counsel for Respondent — H. Moncrieff and Asher. Agent—A. Morison, S.S.C.

R., clerk.

Thursday, May 22.

SECOND DIVISION.

[Lord Ormidale.

PATERSON & DALZIEL *v.* SWAN.

Bill of Lading — Indorsation—Preference—Agreement.

Held that a prior indorsee of one of a set of two bills of lading had by especial agreement with the indorser excluded himself from a preference in an action with a second indorsee for the value of the cargo.

The facts of this case, which was a suit at the instance of the first indorsee of one of a set of two bills of lading, against a posterior indorsee for the value of the cargo, are sufficiently set forth in the interlocutor of the Lord Ordinary of 13th November 1872.—"The Lord Ordinary having heard counsel for the parties, and considered the argument and proceedings, including the proof, Finds it established that an arrangement was, on or about the 29th of January 1872, entered into between the pursuers and Messrs Noble & Company, from whom the pursuers had sometime previously acquired the bill of lading on which they found in this action, whereby the pursuers, for valuable considerations, agreed to deliver back to Messrs Noble & Company the said bill of lading, and whereby it must be held that they gave up or renounced all right or benefit they had under the same: Therefore assoilzies the defender from the conclusions of the summons, and decerns: Finds the defender entitled to expenses, subject to modification in respect of the reservation in the Lord Ordinary's interlocutor of the 7th instant: Allows an account of said expenses to be lodged, and remits it, when lodged, to the Auditor to tax and report.

"*Note.*—The pursuers, on or about the 19th of September 1871, obtained right from Noble & Company to one of a set of two bills of lading of a cargo of pyrites or copper ore, then on board the 'Doris,' on her voyage from Seville *via* Bremen to Newcastle, in security of a debt owing to them by Noble & Company. The vessel had sailed from Seville on the 2d of August, the date of the bills of lading, and arrived at Newcastle about the beginning of October thereafter, when her cargo was taken possession of and realized by the defender, in virtue of the other bill of lading, of the set which he had shortly before obtained from Noble & Company for an onerous consideration, in ignorance of the right which the pursuers had previously acquired.

"Noble & Company became insolvent, and were sequestrated in March last, and the present action has been brought by the pursuers, founding on the bill of lading acquired by them, and concluding against the defender for the value of the cargo of the 'Doris,' or at least as much of it as will satisfy the balance of debt still owing to them by Noble & Company.

"There can be no doubt that as a general principle of law, when goods are at sea, the parting with the bill of lading, which is the symbol of the goods, is parting with the ownership of the goods themselves; or, in other words, that the transfer of the bill of lading for value passes the absolute property in the goods. It is equally undoubted that in ordinary circumstances the person who first gets the bill of lading, though only one of a set of two, gets the property which it represents; that he need not do any act to assert his title, as that is rendered complete by the transfer of the bill of lading itself, and that any subsequent dealings with the other of the set are subordinate to the right passed by the transfer of the first. These well established principles of mercantile law were not attempted to be controverted at the debate; and at any rate are put beyond all question by the judgment of the House of Lords, affirming that of the Court of Common Pleas and Exchequer Chamber, in the case of *Barber and Others* v. *Meyerstein*, 21st February 1870, 4 Law Reports, English and Irish Appeal Cases, p. 317.

"It may be that a fraud was committed by Noble & Company in transferring, in the present instance, to the defender the second of the set of two bills of lading, after the goods which it was supposed to represent had been already transferred and made over by them for onerous causes to the pursuers. And had it not been for the agreement referred to in the preceding interlocutor, the Lord Ordinary might have felt himself constrained to decide against the defender, notwithstanding the good faith in which he appears to have acted, and the hardship which such a decision would have imposed upon him. The question, however, has come to be, whether or not the agreement referred to has been sufficiently established. If it has, the judgment of the Lord Ordinary assoilzieing the defender is right, and in that view it is unnecessary to enter upon a consideration of some other pleas which have been put forward by the defender.