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.

may add that he is rather strengthened than shaken in the opinion he has now expressed by what he must characterise as the incredible and shuffling statements made by the pursuer Paterson and his clerks in relation to the letter of 29th January. They almost go the length of denying that it was ever received or seen by any of them, although it was recovered from or produced in process by themselves.

"These are the grounds upon which the Lord Ordinary has proceeded in holding that the agreement in question has been sufficiently established, and in respect of which he has now assoilzied the defender."

The pursuer reclaimed.

Authorities cited—*Barber*, 4 L. R. (H. L.) 317; *Dobbie*, 1 Macph. 63: *Bryant*, 4 M. and W. 775.

At advising—

LORD JUSTICE-CLERK—The main question here is, Whether the ground of judgment which the Lord Ordinary adopts is sound? He assumes the law contended for by the pursuers, that the first indorsee of a bill of lading has a right to the property represented by it; but he holds that here the first indorsee has parted with and discharged his right. I am of opinion that the arrangement on which the Lord Ordinary founds his judgment has been made out, and that Paterson and Dalziell must be held to have given up their security. With regard to the question how far the right of a prior indorsee may be affected by long delay, I reserve my opinion.

LORD COWAN—I concur. We are not required to go into the general law, because, whatever may be preference of a prior indorsee, there is no doubt he may by a special bargain exclude himself from the benefit, and I think he does so here.

LORD BENHOLME—I concur, on the ground that here there was an agreement to give up the bill of lading.

LORD NEAVES—I concur.

The Court adhered, with additional expenses.

Counsel for Pursuers—Thorburn and G. Smith. Agents—Boyd, Macdonald, & Lowson, S.S.C.

Counsel for Defender—Rutherford and M'Laren. Agents—Jardine, Stodart, and Frasers, W.S.

Friday, May 23.

SECOND DIVISION.

[Sheriff of Renfrew and Bute.

BALLENY *v.* CREE.

Master and Servant — Accident—Collaborateur—Damage.

Circumstances in which *held* that a master was not liable in damages for injuries sustained by one of his workmen owing to a defect in the machine at which he was employed.

The summons in this action concluded for £500 in name of damages sustained by the pursuer through the fault of the defender, "and as *solatium* to the pursuer in consequence of his having, on or about the 25th day of August last, 1871 years, and while in the service and employment of the defender, and while working at a machine or apparatus for making paper, sustained a severe injury to his right hand, necessitating its being amputated, and the loss of his right hand and a portion of his right arm, through the fault, negligence, or carelessness of the defender, or those for whom he is responsible, in having failed to provide the pursuer with a sufficient and complete and proper machine for his use while at said work,—the machine at which the pursuer required to work being without rollers, or having only imperfect rollers, and being otherwise defective and insufficient; and the pursuer, by and through said injury, was confined in the Glasgow Infirmary for two months, and thereafter was within the Bothwell Convalescent Home for another month, and has since been unable to work, and has also by said injury been permanently rendered unfit to follow his trade of a papermaker and earn a livelihood, and has also had to endure great bodily sufferings, and been maimed and disfigured for life; with expenses."

The facts of the case are fully disclosed in the interlocutor of the Sheriff-Substitute.

On 18th June 1872 the Sheriff-Substitute (COWAN) after a proof, delivered the following interlocutor:—"Having heard parties' procurators, and considered the closed record, proof adduced, and whole process—Finds, in fact, that on 25th August 1871 the pursuer, who was machineman in the employment of the defender, had his arm caught between the felt-roll and cylinder of defender's paper-making machine, in consequence of which the pursuer's arm was amputated, and he has not since been able to obtain any employment. That the said accident was caused through the pursuer's own carelessness and inattention—(1) In not making the tail-end, by means of which he was at the time leading the paper towards the felt-roll and cylinder, in such a way that it would project beyond the end of the cylinder and felt-roll; and (2) In suffering his hand to come in contact with the felt-roll at all. That at the time of the accident the machine was, and for a fortnight had been, wrought by a wooden guide-roll placed on the same bracket as the felt-roll, and distant from the cylinder about 10 inches. That the usual mode of working said machine was by means of a brass guide-roll, the position of which was 1 foot higher than the felt-roll, and distant from the cylinder $1\frac{3}{4}$ inches, and the purpose of which was to bring the paper into contact at once with the hot cylinder before it reached the felt-roll, thus obtaining more drying power. That with the said brass guide-roll in position the accident to pursuer's hand would not so readily have occurred. That in so far as the accident to pursuer is attributable to the machine being at the time worked by the wooden guide-roll, and not by the brass guide-roll, this was owing to the fault either of Benjamin Stewart, the mechanic at defender's works, whose duty it was to see that all the machinery was in good working order, and to repair anything that was out of order, or of Peter Baillie, the manager, who had a general superintendence over the works, and whose duty it was, if Stewart failed to perform his work, to have seen that he did so—the brass guide-roll in the present instance having been removed owing to the journal being loose, which might have been repaired in a day's time. That the defender's works had only one paper-making machine, and said machine was wrought by one machineman and a boy under him, the only other persons who had to do with said