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

"After a full and careful consideration of the case, the Lord Ordinary has arrived at the conclusion that the agreement in respect of which he has assoilzied the defender has been sufficiently established. The delay which the pursuers allowed to elapse, not only after the 19th of September 1871, when they obtained right to the bill of lading on which they found, but again, and especially after the 29th of January following, till the insolvency of Noble & Company, without making the slightest inquiry at Newcastle as to whether the 'Doris' had arrived or not, is wholly unaccountable, except on the footing that in consequence of some such agreement as that in question they had ceased to have a right to the bill of lading or any interest in the cargo. And that an agreement in relation to the pursuers' debt was entered into by them and Noble & Company about the 29th of January 1872 is beyond all doubt, and was not disputed. The testimony of Junner, their own managing clerk, and that of Miller, Noble & Company's managing clerk, concur to this extent. Not only so, but it appears to the Lord Ordinary to be sufficiently proved that by the agreement so entered into the pursuers must be held to have engaged to return to Noble & Company the bill of lading in question, and to give up or renounce all right or interest they had in it. That this was so is also stated by the witness Miller explicitly enough. The Lord Ordinary, however, must own that he is not disposed to place much, if any, reliance at all upon that individual's testimony, except in so far as corroborated and confirmed by other unexceptionable evidence. He thinks that there is such other evidence. There is Miller's letter, written by him as Noble & Company's managing clerk to the pursuers on 29th January 1872, in these terms:—'In accordance with the arrangement come to between us and your clerk as acting for you, whereby you were to accept payment of your claim against us by a present payment of £45 to account, and by our acceptance at 2 months for the balance of £100, we beg to hand you herewith a cheque for £45, and shall be glad to have draft for £100 for acceptance. We shall also be glad to have B./L. p. "Doris" as agreed.' And there is what appears to be the only answer to this letter that was returned by the pursuers, of date 3d February 1872, in these terms:—'We beg to hand you enclosed our draft upon you @ 1 mo/d., amounting as per account, also enclosed, to £101, 0s. 4d., which please return at once, provided with the needful.' In this answer the pursuers do not deny or contradict in any way the statement of Noble & Company, that it was part of the arrangement between them, or, in other words, that it had been 'agreed,' that the bill of lading in question should be returned; and this being so, the Lord Ordinary thinks they must be held to have admitted it. They not only do not deny or contradict Noble & Company's statement that it had been agreed that the bill of lading was to be returned, but they also kept the payment of £45 which Noble & Company sent them in implement of their part of the arrangement; or, in other words, they retained and profited by the consideration agreed to be given by Noble & Company for a return of the bill of lading. The Lord Ordinary is of opinion that the pursuers were not entitled so to act, except on the footing of their acquiescence in the statement made by Noble & Company in their letter of 29th January. If they had intended to repudiate that statement in any material respect, they were bound to have said so at once; and if they had done so, Noble & Company would, unless the matter were then otherwise arranged, have been entitled to insist on a return of the £45. It is no doubt true that the pursuers obtained an acceptance from Noble & Company for the balance of their debt at one in place of two month's date, and so far Noble & Company must be held to have released their rights under the agreement; but there is no sufficient reason, in the Lord Ordinary's opinion, for holding that they had also given up their right to a return of the bill of lading. It may be said that there is no very reliable evidence of Noble & Company having insisted or pressed for a return of the bill of lading, probably because they believed, as their managing clerk says, and on the assumption that there was such an agreement as that in dispute, as was the fact, that the bill of lading was no longer of any avail. And, in perfect consistency with this view, it has been proved that the pursuers did not, subsequent to the agreement, attempt to proceed in any way whatever to enforce the right they now pretend they had under the bill of lading. It was only after the insolvency of Noble & Company, in March 1872, that they gave any indication of their having such a right, or of their holding any bill of lading at all; and yet by that time six or seven months had elapsed from its date and the time when the 'Doris' was to have commenced her voyage from Seville—a voyage which it is proved does not usually take more than between two or three months at the longest, and which in the present instance did not take more than two months to accomplish. The extraordinary supineness on the part of the pursuers, especially after the date of the agreement in question, is altogether unaccountable, except on the assumption that they knew they had given up or renounced all right they ever had to the cargo of the 'Doris,' and had agreed to return the bill of lading in question to Noble & Company.

"Independently indeed of the statement in Noble & Company's letter to the effect that the bill of lading was to be returned—a statement which the pursuers, if they did not in so many words acknowledge to be correct, must be held by their silence to have acquiesced in—there is sufficient evidence otherwise in the letter to foreclose the pursuers from maintaining their present claim. The Lord Ordinary thinks, that having regard to the whole of Noble & Company's letter, and supposing that it contained no express allusion at all to the bill of lading, it must be held that it was arranged the pursuers were to accept payment of their claim 'by a present payment of £45,', which they received, and by the acceptance of Noble & Company, which they also received, for the balance of their debt. Such appears to the Lord Ordinary to be the only fair and reasonable meaning and effect of Noble & Company's letter to the pursuers of the 29th of January 1872, taken in connection with the pursuers' answer to that letter of 3d February, and the state of debt referred to in that answer, in which no reference whatever is made to the bill of lading, or any security or other right held by them under that document. And this view is also supported by the fact that the pursuers, in their affidavit to their debt in Noble & Company's sequestration, allude to the bill of lading as of no use to them, and evidently do not value it as a security held by them. And the Lord Ordinary

"*Edinburgh, 23d August* 1872.—The Sheriff having considered this process, dismisses the appeal for the pursuer, adheres to the interlocutor appealed against, and decerns: Finds no expenses due from the date of the Sheriff-Substitute's interlocutor.

"*Note.*—It is with very considerable hesitation that the Sheriff has arrived at the above decision, and in doing so he has to state that he does not concur in all the reasons assigned by the Sheriff-Substitute for his judgment. In the first place, the Sheriff is of opinion that there was no fault on the part of the pursuer, who is proved to be a skillful, attentive, and sober workman; and, therefore, while adhering to the judgment appealed from, the Sheriff cannot concur in all his findings, nor in a great part of the note. In the next place, it is of no moment that the defender himself, who had been a cotton broker in Glasgow before he took up the trade of paper-making, was practically not acquainted with the trade. He was bound to give to his workman a reasonably safe machine, and not increase the risk and hazard by allowing any defect that could be remedied to exist. In the third place, the accident was caused by the removal of the brass guide-roll, which ought to have been in its place, and without which the machine could not be worked with safety.

"The question then comes to be, Who was in fault?—and upon the evidence this must be laid to the door of Stewart, the mechanic. Of course every paper machine will get out of order now and then, and all that can be expected from an employer of labour is that he employ a mechanic or other person to do the necessary repairs. The defender in this case did employ Stewart, and it was his business to put the brass guide-roll into its place, which he did in the course of half-an-hour after the accident. He ought to have done it during the course of the previous week. But for this omission to perform his duty on the part of Stewart, the defender cannot be made liable in damages to a fellow-workman."

The pursuer appealed to the Court of Session.

Cases cited—*Falconer*, 1 L. R. Q. B. p. 33; *Allsopp* v. *Yeats*, Jan. 18, 1858; 27, L. J. Exchequer, 156; *Wallace*, 1 Macph. 748.

At advising—

Lord Justice-Clerk—I am for adhering. Two questions arise—(1) Is there any reason for saying that the pursuer went into the danger? (2) Is the master liable? I am clear there is no ground for saying the pursuer went into the danger with his eyes open. I cannot say he contributed to the accident by going on with his ordinary business. Is the master then to be held responsible for the defective state of the machine? I think personally he did nothing to make him responsible. There was no neglect or fault on his part. Is he responsible then for the gross neglect of Stewart and the manager—although I do not think the evidence amounts to disqualify Stewart for his place. The case turns on the fault of a fellow-workman, for which the defender cannot be made liable.

Lord Cowan—I concur. I am clear no blame attaches to the pursuer. I cannot go along with the Sheriff in the first part of his note, where he says it is of no moment that the defender was practically not acquainted with the trade. I think it is of moment when the question is of fault in not observing a defect in the machinery.

Lord Neaves—I concur. The fact of the defender being about the premises constantly gave the servant an opportunity of complaining, and not doing so his master might well believe there was no great defect.

Lord Benholme—I concur generally.

The Court pronounced the following interlocutor:—

"Find it proved that the injuries sustained by the pursuer were occasioned by the machine in question having become defective and dangerous in respect of the absence of the brass guide-roll: Find that this state of the machine was occasioned by the fault or negligence of the manager, Baillie, and of the mechanic Stewart: Find that the defender was not personally guilty of any fault or negligence in the matter: Find that he is not liable for the fault or negligence of those who were employed by him, seeing he took reasonable care to employ competent workmen: Find that the manager, Baillie, and the mechanic, Stewart, were fellow workmen with the pursuer in a common employment. Therefore dismiss the appeal; affirm the judgment appealed against, and decern: Find no expenses due in this Court."

Counsel for Pursuer—Mair. Agent—T. Lawson, S.S.C.

Counsel for Defender—

I. clerk.

Thursday, May 29.

SECOND DIVISION.

[Lord Ormidale.

RUSSELL AND BROUN (SMITH'S TRUSTEES).

Settlement—Vesting—Construction.

Terms of settlement under which *held* (1) that vesting of the fee of the residue was postponed until the death of the liferentrix; and (2) that no power was conferred upon A, one of the beneficiaries, to test upon her share prior to the period of vesting.

This was a competition with regard to the residue of the moveable means and estate left by the late Dr Peter Smith of Dunesk. Dr Smith died on 7th July 1833, leaving a trust-disposition and settlement, dated 20th May 1822, and various codicils. The 6th purpose of the trust was as follows:—"Sixthly, I hereby direct my said trustees to pay to my said wife, in case she shall survive me, during all the days of her lifetime, the residue of the free yearly interest or return arising from any monies or other moveable means and estate I may die possessed of, and that half-yearly, by equal portions, beginning the first term's payment thereof at the first term of Whitsunday or Martinmas that shall happen next after my decease, and so forth during all the days of her lifetime." The last purpose of the trust was as follows:—"And lastly, with regard to the fee and free residue of my moveable means and estate, as my said dear wife has declined to accept of a provision thereof which I had resolved to make in her favour, I hereby direct my said trustees to make over the same to and in favour of my said sisters Miss Jane Smith and the said