It would be difficult to trace the death of the schoolmaster to the cause alleged, with the certainty which the law requires in every case of reparation. The claim is one of a very sweeping character, and would involve many others which would be scarcely presentable. The heritors are bound to keep the parish church in repair for the benefit of the parish; but the Court could scarcely sustain an action at the minister's instance, for the consequences of a bad cold alleged to have been caught through the gustiness of the edifice. The heritors are bound to keep up the schoolhouse, as well as the schoolmaster's dwelling-house; but an action would scarcely lie for the defects of education caused by the non-attendance of the juvenile parishioners in a ruinous schoolhouse. Many such cases may be figured. But the Lord Ordinary thinks it unnecessary to pursue the consideration, for he conceives the want of a constituted obligation sufficient to cast the action.

"If the Lord Ordinary is right in this conclusion, it will not vary the case that the word 'maliciously' is strewed over the summons. There is no substantive averment of malice; but an alternative charge of 'being actuated by personal malice *or* being entirely and culpably negligent of their duty.' There is no statement of any facts, out of which malice is to be implied, which would seem in any view necessary in such a case. If the Lord Ordinary is right in holding that no legal obligation had arisen, there could be no breach of obligation, either malicious or any other."

The pursuers reclaimed.

CAMPBELL SMITH, in support of the reclaiming note, argued:—The Lord Ordinary is wrong in holding that there can be no claim of damages for the breach of a statutory obligation. Further, such a claim does not require to be constituted further than to be brought to the knowledge of the parties. Under the Railway Clauses Act there are provisions by which, by application to the Sheriff or to Justices, wrongs may be redressed, and yet a claim lies for damages. Earl of Kinnoul *v.* Ferguson, March 5, 1841, 3 D. 718; Reay *v.* Chalmers, July 1, 1834; 12 S. 860; Wright *v.* Earl of Hopetoun, 29th Nov. 1855, 18 D. 118, 8 and 9 Vic., c. 33, sec. 57, 60, 61.

FRASER and LANCASTER, for the respondents, were not called upon.

At advising,

The LORD JUSTICE-CLERK—I am quite satisfied that the Lord Ordinary is right in finding this action irrelevant. But I do not proceed upon the same grounds. I take a simpler view. This is an action of damages by the representatives of a person who is said to have been killed by the fault of the defenders, and that is sought to be made out by the allegation that they kept him as schoolmaster in the parish in which he lived in a house so unfit for human habitation that his health was destroyed, and that that led to his death. I have two objections to that action as so laid—(1) If that was the nature of the house supplied to him, he entirely mistook his remedy, which was not to live there, and thereby found a claim of damages, but to leave it and live elsewhere, and then bring his action of damages for the expense and annoyance to which he had been subjected. In that way he would have saved his life and filled his pockets. (2) The action is necessarily laid on *culpa* and therefore the *species facti* alleged must be such as to amount to culpable homicide. But there is no allegation of such *culpa* here. All that is said is that they failed to give him a sufficient house. That may be a breach of obligation, but it is not an allegation of *culpa* as the cause of death.

The other Judges concurred, Lord Benholme adopting the view of the Lord Ordinary that the damage claimed was consequential.

The action was accordingly dismissed as irrelevant.

Agent for Pursuers—J. Somerville, S.S.C.
Agents for Defenders—H. G. & S. Dickson, W.S.

THE NORTH-WESTERN BANK (LIMITED) *v.* BJORNSTROM & BERGBOMS.

Shipping—Advances to Master Abroad—Liability of Owners. A charter-party entered into in this country provided that a certain sum for ship's disbursements should be advanced in a foreign port. The charterers' agents abroad made an advance, within the limits of the charter-party, to the master, and took from him a bill of exchange drawn upon the charterers. The charterers having become insolvent, held that parties who had acquired right to the bill by indorsation could not recover the amount from the owners.

This is an action laid upon a bill, and arises out of the following circumstances:—The defender Bjornstrom is master of the ship Tahti of Russia, and the other defenders are its owners. In November 1863, the vessel being at Liverpool, the master and the owners entered into a charter-party with Messrs Ogle and Co., London. By this contract it was provided that sufficient cash at current exchange, not exceeding £1000, was to be advanced on account of freight for ship's disbursements at Calcutta, free of interest and commission, but subject to insurance. The vessel arrived in Calcutta, and when there in July 1864, the master applied to the charterers' agents in Calcutta, Messrs John Ogle and Co., and having received £800 on account of disbursements for the ship, drew a bill on the charterers in London, in favour of their agents in Calcutta, Messrs John Ogle and Co. The bill is in the following terms:—

"2767. 23d Nov. 23d Nov.
A 5978. No. Exchange for £800, 0s. 0d.
Calcutta 9th July 1864.

At three months after sight, pay this our First of Exchange (second and third of same tenor and date not paid) to the order of Messrs John Ogle and Co., the sum of eight hundred pounds sterling, value received, and charge the same to account of freight, per ship Tahti.

(Signed) M. BJORNSTROM,
To Master of the Ship Tahti.
Messrs Ogle & Co.,
21 Great St Helens, London, E.C.
B 357. Refer to acct.

Indorsed on back——
John Ogle & Coy.,
Walker, Cotesworth, & Coy.

Pay Messrs Barclay Bevan & Co. for the North-Western Bank (Limited), Liverpool.
A. Edmondson, *Manager.*
Barclay & Co."

The bill was indorsed by John Ogle and Co. to Walker, Cotesworth. and Co., and by them to the pursuers, the North-Western Bank (Limited). It was accepted by Messrs Ogle and Co. of London, but ultimately remained unpaid in consequence of their insolvency. The pursuers, therefore, brought their action for the amount of the bill against the parties and the owners of the ship. Besides maintaining their non-liability, the defenders aver

that a bill was fraudulently obtained from the master in place of a receipt, and that he signed it under essential error as to its nature, and under false representations on the part of John Ogle and Co., but the judgment of the Court did not turn on these averments. The Lord Ordinary (Kinloch) assoilzied the defender, the master, on the ground that the Court had no jurisdiction over him, he being an undomiciled foreigner; and the owners, on the ground that the master was not entitled to bind them in that manner. The following are the parts of the Lord Ordinary's note explaining his judgment :—

"It appears to the Lord Ordinary that, in the circumstances set forth by the pursuers themselves, the master had no authority whatever to draw this bill. He was, of course, bound to provide for the ship's necessary disbursements at Calcutta. But the charter-party expressly stipulated that, in order to make these disbursements, the charterers' agents were to pay in cash a sum not less than £1000. The sum so to be paid was to be a payment on account of freight. The master had no authority to do anything but receive the amount, grant a [receipt for it on behalf of the owners, and then expend the sum on behalf of the ship. He had no authority whatever to draw a bill for the amount on the charterers in London. This was contrary to the terms of the charter-party, which stipulated, not for a bill drawn from Calcutta, but for cash paid down at Calcutta. The effect of his drawing this bill, and by implication making his owners parties to it, was just that, if the charterers failed (as in point of fact they did), a claim for the amount would be made against the owners (as it is now), and if this claim were made good, the owners would have simply to pay back out of their pockets the sum which they lawfully received under the charter-party.

"In the view of the Lord Ordinary, it is unnecessary in the present case to consider what authority the master might have had to draw a bill for necessary furnishings, not otherwise provided for. The proper bill to draw in that case would have been a bill on his owners. The present is not a bill on his owners. It is a bill on the charterers for a sum to account of freight, a thing in which the master had no right whatever to mix himself up. The question is not now raised as to whether a master in want of necessary furnishings, and supplied by a house abroad with the sum required, can pledge the credit of his owners by a bill which may be indorsed away to an onerous holder, as the bill was in the present case. The general rule is that a ship-master cannot bind his owners in a bill-debt, and that to raise the obligation requires some extrinsic ground of liability—London Joint-Stock Bank Co. *v.* Stewart, 15th July 1859, 21 D. 1327. But the special circumstances of the present case exclude the general question. It is enough that the master had no right or authority to draw such a bill as that now sued on. The pursuers cannot succeed in their present claim unless by making good such authority.

"The Lord Ordinary has therefore had no difficulty in assoilzieing the defenders Bergbom, the owners of the vessel, with whom the question is competently tried through an arrestment *jurisdictionis fundandæ causa* laid on the vessel. Excluding the claim against the owners, there remains a claim against the master, Mathias Bjornstrom, individually. It is only in his individual capacity, not in that of master, that the claim can lie if the owners are not bound. This defender may probably be bound as a subscribing party to the document. But the Court has no jurisdiction to give decree against him. The arrestment of the vessel was not an arrestment of individual property of his. He is an undomiciled foreigner. It is said that the summons was executed personally against him. But this will only give jurisdiction where the contract was made in this country. It was not so made in the present case."

The pursuers reclaimed.

The Lord ADVOCATE and LEE, for them, argued —The owners are liable both under the bill as drawers, and also in respect the money was advanced for necessary and proper charges and disbursements on account of their ship. Having obtained the advance of the sum concluded for by means of the bill they are not entitled to resist payment on the ground that the master had no power to bind them in that form. The pursuers are in the same position as indorsees of the bill—as the pursuers in the cases of London Joint-Stock Bank Co. *v.* Stewart, 15th July 1859, 21 D. 1327; and Drain & Co. *v.* Scott, Nov. 25th 1864, 3 Macp., 114. The case as against the ship-master was not insisted in.

MILLAR and GUTHRIE SMITH, for defenders, answered—The action is laid entirely upon the bill, and the defenders, the owners of the vessel, are no parties to it. Further, the master of a ship is not entitled to bind the owners by a bill debt.

At advising,

The LORD JUSTICE-CLERK, after shortly stating the case—If the defenders of the action were parties to the bill, the case would be simple enough. But the defenders are not parties, and consequently they cannot be made responsible in this action as debtors in a proper bill debt. But what is it that the pursuers obtained by means of this indorsation further than the character of ordinary indorsees? It seems to be imagined that they necessarily obtained by the indorsation an assignation to the disbursement debt said to be owing by the owners of the vessel to the Calcutta house. But that is an entire mistake. And in that respect it differs from the case of the London Joint-Stock Banking Company against Stewart and the case of Drain *v.* Scott. In both of these cases the master drew on the owners at home, in favour of the party who made the disbursements, and when the payee indorsed the accepted draft to the bank, he gave to the bank his claim against the owners. That was a claim for the disbursements, and the master's draft was a good one, and the owners were bound to answer it if the disbursements were made. But there is no assignation to a claim against the owners here. The only claim is one by the payee against the charterers, and therefore, when the payee indorsed to the bank he only assigned the claim of the payee against the charterers. If the master had made the owners drawers, they would have been liable. But they are not here sued as such. It is only said that as owners of the vessel they are liable for the disbursements made on account of it in a foreign port. But even supposing that, by the operation of the indorsation of this bill of exchange, the pursuers had got into the position of the London Joint-Stock Banking Company, the next question would be, have they stated a relevant case against the owners of the vessel? That depends on a consideration of the different parties, and of their relative position when the advances were made. And the facts, or at least the main facts, are undisputed. The charter-party was made in London between the

master and owners of the vessel and Ogle & Co., of London ; and that charter-party contains an obligation that "sufficient cash at current exchange, not exceeding £1000, to be advanced on account of freight for ship's disbursements at Calcutta, free of interest and commission, but subject to insurance." The obligation under the charter-party, therefore, was that money should be forthcoming at Calcutta on account of the ship's disbursements to the amount of £1000. The outward cargo was deliverable at Calcutta, and was deliverable to the charterers' agents there, the vessel having been addressed to them. When the vessel arrived at Calcutta, we see that the cargo is delivered to John Ogle & Co., the charterers' agents, who acknowledged delivery by indorsing the bill of lading. The next step is the undisputed fact that money being required for the ship's disbursements, it is obtained from the charterers' agents. Down to that time the facts are undoubted, and the natural interpretation of these facts is that money was advanced by the charterers' agents in fulfilment of the obligation in the charter-party. It is impossible to put any other construction on them, and that being so, it surely requires a very special case to be averred to avoid that construction. Now, what do the pursuers say? It is all contained in the 4th article, which is as follows :—

"The sum contained in the said bill was necessary, and was advanced by the charterers' said agents, Messrs John Ogle & Co., for the purpose of paying necessary and proper charges and disbursements on account of the said ship or vessel. It was received and employed by the defender Bjornstrom for that purpose. The advance could not have been obtained, and the necessary and proper furnishings and disbursements could not have been made otherwise ; and the drawing of said bill was a necessary and proper measure on the part of the defender, Captain Bjornstrom. It is quite usual and customary for agents making advances in such circumstances, on account of a ship in a foreign port, to take the master's bill for the amount, and for masters to grant bills for the amount of such advances."

Now what does all this mean except that when the charterers' agents advanced this money they acted under the contract. It was an advance within the limits of the charter-party in return for the cargo delivered, and to say that the charterers' agents were not bound to make this advance seems to me absurd. I don't think that these gentlemen in Calcutta, getting the cargo and indorsing the bill of lading, would have ventured among mercantile men to say that they were not bound for the disbursements of the ship ; and I don't think, therefore, that they or their assignees, even supposing them to be assignees, have any claim against the owners of the vessel.

The other Judges concurred.

The interlocutor of the Lord Ordinary assoilzieing the defenders was accordingly adhered to.

Agents for Pursuers—Hamilton & Kinnear, W.S.
Agent for Defenders—John Leishman, W.S.

Saturday, Nov. 10.

FIRST DIVISION.

HOSIE *v.* WADDELL.

Discharge—Bona Fide Payment—Partner. Circumstances in which held that payment of a debt, due to a firm, made to a person who had been held out as a partner, and in the *bona fide* belief that he was one, was a good payment.

The pursuer is the widow and executrix of James Hosie, ironfounder and mineral lessee, Bathgate, and she sued the defender for payment of £55, 9s. 4d. for furnishings made to him by the Bathgate Foundry Company, of which firm she alleged that her deceased husband was the sole partner. Mr Hosie died on 13th October 1862.

The defence was that the sum sued for had been paid. The defender, on 18th October 1862, paid to Angus Cameron, who was, or at least was believed by him to be, a partner of the foundry company, the sum of £25 to account. For this sum the pursuer gave credit in her summons. A few days thereafter Mr Cameron waited on the defender for payment of the balance due by him. The defender on that occasion accepted two bills for £27, 5s. and £28, 4s. 4d. respectively, drawn upon him by "Pro. Bathgate Foundry Co., Geo. Haldane," and received in exchange the accounts against him discharged by Mr Haldane. The two bills were indorsed by Mr Cameron for the company. Mr Haldane was book-keeper and clerk to the company. The defender thereafter paid one of the two bills to Mr Cameron, and he stated on record his willingness to pay the other on the bill being delivered up to him.

The pursuer's reply to this defence was that Cameron never was a partner, but only manager, and that his authority, as well as Haldane's, to act for Mr Hosie, ceased on his death, after which the only persons entitled to uplift debts due were the pursuer and her agents. The pursuer also averred that the defender knew that neither Cameron nor Haldane had authority to act as they did.

Issues proposed for trial were reported by the Lord Ordinary (Ormidale) on 21st December 1864 ; but on 2d February 1865, the Court, of consent, and before answer, allowed "both parties to prove *pro ut de jure* the averments made by them respectively in the closed record." A proof having been led,

GLOAG (with him A. R. CLARK), was heard for the pursuer on the import thereof.

SOLICITOR-GENERAL and MAIR, for the defender, were not called upon.

The judgment of the Court was delivered by

Lord ARDMILLAN—The defence to this action is that the two bills were accepted in payment of the two accounts due by the defender, in the belief, on his part, that Mr Cameron was a partner of the Bathgate Foundry Company, and that Mr Haldane was the managing clerk. As matter of fact, the defender did accept the bills, and received discharged accounts. The questions raised are (1) whether there is evidence that Cameron was a partner ; and (2), supposing this to be doubtful, whether the defender, in accepting the bills and so making payment, acted in the *bona fide* belief that Cameron was a partner. I am of opinion that, supposing it doubtful whether Cameron was a partner, it would be sufficient to relieve the defender if he was held out by the late Mr Hosie as a partner, and the defender was, when he made the payment, in *bona fide* belief that he was one. [His Lordship here referred to the case of Gardner *v.* Anderson, Jan. 21, 1862, 24 D. 315.] The evidence of Mrs Hosie brings out, I think, what is otherwise clear enough on the proof, that Mr Hosie did at one time intend to make Mr Cameron his partner. The same thing appears from a letter from Hosie himself in 1856. It is proved also that there was a draft agreement prepared and revised