BIRRELLS *v.* ANSTRUTHER AND OTHERS.

*Reparation—Culpa—Relevancy—Consequential Damage.* An action of damages at the instance of the representatives of a parish schoolmaster against the heritors, in which it was alleged that his death had been caused by failure on the part of the defenders to provide him with a sufficient dwelling-house, dismissed as irrelevant in respect (1) the deceased was in error in voluntarily continuing to reside in the house; (2) there was no relevant allegation of culpable homicide; and (3) the damage claimed was consequential.

This was an action of damages brought by the widow and children of the late Rev. Alexander Gibb Birrell, schoolmaster of the parish of Pettinain, in the county of Lanark, for reparation of the injury caused to them by his death, which the pursuers allege was caused by the defenders, who are the heritors of the parish, not providing him with a suitable dwelling-house. It is averred that on account of the damp and cold of the house acting on his constitution, Mr Birrell's health gave way; that in 1857, he was attacked by violent rheumatism, which afterwards set in in his right ankle with such severe effects that his foot had to be amputated, and that he died in 1864. It is further alleged that all the proper steps were taken by Mr Birrell to have his house put into proper condition, but that his request was set aside by the heritors, on pretence of its being expressed in such terms as to preclude its being acted upon. The pursuers found on the provisions of the Acts 43 Geo. III., cap. 54, sec. 8 and 9, and 1 and 2 Vic., cap. 87, sec. 3, under which it is alleged that Mr Birrell, in his capacity as parochial teacher, was by law entitled to the use and possession of a habitable house. They then make the following averments:—

"Notwithstanding of their said duty to provide a house for the schoolmaster, the defenders, or one or more of them, being actuated by personal malice to the said Rev. Alexander Gibb Birrell, or being entirely and culpably negligent of their duty, did fail to provide a house for him and his family that was fit for human habitation, though they knew well that they ought to have done so, and that the house provided by them or their predecessors for the schoolmaster was in such a state of disrepair as to be unfit for a human being to live in; and this neglect they persisted in, though they were repeatedly applied to by the said Alexander Gibb Birrell, and others on his behalf, on purpose that they might drive him from his situation, or render him unfit to hold it from bad health."

"The pursuers all depended on the said Rev, Alexander Gibb Birrell for their support, and they are now in so great poverty that they have been obliged to apply for parochial relief. The ill-health and consequent death of the said Rev. Alexander Gibb Birrell were due to the fault and culpable negligence, or failure in duty, on the part of the defenders in not providing him with a house that was fit for a human being to live in, and which could be inhabited without danger to health and life, or to their wicked and wilful resolution to render his existence in the house so miserable, as to compel him to resign his situation and leave the parish, which resolution they persisted in, regardless of his failing health, knowing well that by their wicked, culpable, and malicious conduct, his life was in great danger, and his existence in health and comfort was impossible. The pursuers also suffered in health from the same cause. They are entirely destitute, and they have been deprived of their natural protector and provider, by the fault or culpable conduct of the defenders."

The Lord Ordinary (Kinloch) dismissed the action as irrelevant. His Lordship made the following observations in the note appended to his interlocutor:—

"The Lord Ordinary is of opinion that no legal ground of action is here set forth. The pursuers do not libel on any breach of contract, or on any failure to fulfil a constituted obligation, such as might have existed had the Quarter-Sessions made an order for the repairs said to have been necessary. Their ground of action is an alleged failure to fulfil a certain statutory duty. Now, whether this duty lay on them or not—in other words, whether the repairs alleged were necessary and due—was a matter to be determined by the judgment of the Quarter Sessions. It by no means follows that every schoolmaster is in the right who complains of an unrepaired house. However high-coloured is the present statement, it might at the time be matter for legitimate difference of opinion whether the repairs sought were legally exigible or not. On this matter the Legislature intended that the Quarter-Sessions should be exclusive judges. It speaks but little for the justice of the schoolmaster's claim that he did not take the simple and easy remedy provided by the statute. But, however this may be, the Lord Ordinary is of opinion that no right to have the repairs sought by him executed arose to the deceased schoolmaster, except under a decree of the Quarter-Sessions. Unless by the decree of the Quarter-Sessions, there was no constituted obligation imposed on the heritors. The pursuers are here suing for alleged breach of a statutory obligation, where the statutory obligation never came into operation. The whole foundation of the action therefore falls. Nothing can be conceived more inconsistent with the intendment of the statute 43 Geo. III. (on which they themselves libel) than the present proceeding of the pursuers. For whilst the statute provides that the Quarter-Sessions should be exclusive judges of what repairs were necessary, what the pursuers now propose is, to send the question of repairs to the arbitrament of a jury, and according as *they* shall find repairs to have been necessary or not, to subject the defenders in an alleged breach of obligation. The Lord Ordinary thinks that this cannot be allowed consistently with the plain reading of the Act.

"The Lord Ordinary dismisses the action on the ground that it is founded on an alleged breach of obligation, where the steps were not taken by the deceased schoolmaster necessary to raise the obligation, and the obligation, therefore never arose.

"Another objection was pleaded against the relevancy of the action—viz., that the damage stated is not direct but consequential damage, which the law does not recognise. The Lord Ordinary is disposed to think this objection is also well founded. If a house which a particular individual is bound to keep in repair, falls down and injures the inhabitants for want of the repair stipulated, this may be considered direct damage, raising a claim of reparation. But it is a different thing to say that the insufficiency of the house brought on a fit of rheumatism; still more, that this rheumatism led to a supervening malady, and that this malady issued in death. Doubtless, rheumatism is very likely to arise out of a cold, damp house, but it also attacks those who are, in this respect, situated unexceptionably. And rheumatism, however painful, is, in its nature, by no means a mortal disease.

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