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

for the purpose of making Cameron a partner. It was never signed, but it was freely enough discussed by Mr Hosie, and he mentioned Cameron as his partner on various occasions. On one occasion he mentioned the fact in responding to the toast of prosperity to the firm at a dinner; and in letters signed by Mr Hosie for the company he speaks of "our Mr Cameron." Then, was the defender Waddell aware of this? He swears he was, and so does Cameron. The defender had previously transacted with Cameron as the representative of the company. It can, therefore, hardly be doubted that the defender was entitled to deal with Cameron as a partner. It was once intended that he should be one, and there was no intimation of any change of intention that could possibly have reached the defender. The bills were taken on 20th October, Mr Hosie having died on the 13th. The works were carried on after Mr Hosie's death. Cameron and Haldane were both there. The defender goes and offers to Haldane, who had been in the habit of uplifting accounts due to the company, £25 in cash and the two bills. It was said that between the date of the bills and their acceptance there had been a surreptitious carrying off of the bills by Cameron. I see no evidence of that, and no reason to suppose anything of the kind. The two bills having been accepted by the defender, one of them is paid to Cameron, the other is not paid yet. In regard to the unpaid bill it is quite clear that the defender cannot be compelled to pay it without being guaranteed against claims by Cameron if he pays to Mrs Hosie. In regard to the other bill which was paid there is more difficulty, because the defender paid it before it was due in consequence of receiving a letter from Cameron asking him to cash it. Cameron says that the bill he meant to pay with the defender's money was not a foundry bill, but one of his own; but he did not tell this to the defender. If it had appeared that the defender knew that Cameron was asking premature payment of a bill due to the firm in order to pay off a private debt, that would be a serious circumstance against *bona fides*. There are just two other circumstances in the case. One is the *Gazette* notice, which I put entirely out of view, because it does not apply to the debtors of the company. The other is the evidence of Haldane, which is very peculiar. It is plain that his first statement was not that he communicated to the defender that Cameron was not a partner. He says—"I *think* I *would* tell him my *opinion* that Cameron was not a partner." That is a very peculiar expression and does not amount to much. Subsequently he is got with some pressure to extend his statement, and he ultimately says he did tell him that Cameron was not a partner. But looking to his evidence as a whole, I am of opinion that his subsequent statement must be taken with the qualification suggested by his first. If the defender had the belief that Cameron was a partner when he accepted the bills, the pursuer was bound to make out that that belief had been changed. This she has not done. I think, therefore, we must hold that the defender has made a *bona fide* payment of this bill. To set aside that payment now on the statement made by the pursuer would be to allow her to plead a latent defect against a *bona fide* payment, which is inconsistent with all rules of equity.

The judgment of the Court was to assoilzie the defender in regard to the amount of the paid bill, and to dismiss the action in regard to the amount of the other, with expenses.

Agents for Pursuer—Wilson, Burn, & Gloag, W.S.

Agent for Defender—James Finlay, S.S.C.

Tuesday, Nov. 13.

FIRST DIVISION.

BROWN *v.* BROWNLEE.

Reparation—Wrongful Poinding—Relevancy. Averments in an action of damages for alleged wrongful poinding, which held irrelevant.

This was an action of damages for wrongful poinding of goods belonging to the pursuer, for payment of a debt not due by him, but by his father.

The pursuer's allegations were as follows:—On 22d September 1865, he had purchased from his father, who was tenant of a farm at Balerno, certain articles of farm stock and produce and household furniture, and he produced a deed of assignation thereto, executed by his father on that date, and bearing that the price, £398, had been "now and formerly advanced and paid." On 16th September 1865, six days before the assignation, the defender had charged the pursuer's father to pay £120, 16s., in virtue of an extract registered protest on a bill accepted by him; and on 16th October 1865, notwithstanding the assignation to the pursuer, he caused a portion of the effects thereby assigned to be poinded for payment. On 21st October he obtained a warrant to sell the poinded effects on 3d November. On 2d November the pursuer applied for and obtained from the Lord Ordinary an interdict of the sale on caution, which he was unable to find. There was no averment that a sale had taken place, but it appeared in the course of the discussion that it had. The effects assigned to the pursuer had never been delivered to him, but he founded upon section 1 of the Mercantile Law Amendment Act, 19 and 20 Vict., c. 60, which enacts that "where goods have been sold, but the same have not been delivered to the purchaser, and have been allowed to remain in the custody of the seller, it shall not be competent for any creditor of such seller, after the date of such sale, to attach such goods as belonging to the seller, by any process of law, including sequestration, to the effect of preventing the purchaser, or others in his right, from enforcing delivery of the same."

The defender pleaded that the action was irrelevant, and averred that the pretended assignation founded on was a collusive device betwixt the pursuer and his father to defeat the diligence of the latter's creditors, and that no *bona fide* sale ever took place.

The pursuer proposed an issue, which the Lord Ordinary (Barcaple) reported, with the following

"*Note.*—The defender maintains, on grounds which the Lord Ordinary inclines to think well founded, that the pursuer has not set forth a relevant case for damages, and is not entitled to an issue. The case of the pursuer is that the defender having given a charge to the pursuer's father for a debt due to him, the document printed in the appendix was executed on the sixth day after the charge. It bears to constitute a sale and conveyance by the pursuer's father to the pursuer of the farm stock, implements, and household furniture there enumerated, on the farm occupied by the former. Though this document was exhibited to the officer, and brought to the knowledge of the defender, the defender proceeded to poind the