

Mar. 14. 1821. Hope's M. Prac. 406; 2. St. 3. 38; 3. Mack. 8. 17; 1. Bank. 587. § 149; 3. Ersk. 8. 29; Hepburn, Feb. 15. 1732, Aff.; Campbell, June 17. 1746, (15505); Sinclair, Nov. 9. 1749, (15383); Weir, Nov. 8. 1752, (4314); Nisbet, Nov. 1763, (15516); Case of Tillicoultry, Nov. 1763; Kemp, Jan. 17. 1769, (15528); Stewart, July 8. 1789; Brown, May 25. 1808, (No. 19. App. Tailzie);—(3.)—1449, c. 18; Lord Adv. March 30. 1762, (15196. Rev.); Jordanhill, Dec. 9. 1747, (Elchies' Notes, No. 32. Tailzie); Kilk. 395; 2. St. 9. 26.

J. RICHARDSON,—J. CHALMER,—Solicitors.

(*Ap. Ca. No. 11.*)

No. 6. Mrs. LINWOOD and Children, Appellants.—*Baird—Fullerton.*  
V. HATHORN, Respondent.—*Romilly—A. Bell.*

*Reparation—Assythment.*—A landed proprietor residing at a distance from his estate, held not liable in assythment to the widow and children of a person who was killed by the fall of a tree growing on his property, and which his servants were cutting without his orders.

Mar. 19. 1821. ON the 27th of November 1812, while John Linwood was riding along the highway from the Mull of Galloway to Stranraer in company with several other persons, he was killed by the fall of a tree. This tree was upon the estate of Gartland, belonging to Mr. Vans Hathorn, writer to the signet, who resided in Edinburgh. The road ran from north to south, and the tree was on the east side of it, with an inclination in the same direction. At the time when Linwood and his party were approaching on horseback, (which was about mid-day,) Matthew Graham was employed in cutting the tree, under the inspection of one Mackie, who was the servant of Mr. Hathorn. He had cut it in part with a hatchet on the east side, and when the party were passing, he was occupied in cutting it on the west side. At this moment, the tree, by the effect of the wind, which was blowing from the east, fell towards the west, across the road, upon Mr. Linwood, and bruised him so, that he expired within an hour thereafter. No precaution had been taken by ropes or otherwise to make the tree fall in any particular direction; but the operation was perceptible to all who were passing along the road, and it had been expected from the inclination of the tree, that it would have fallen towards the east, or from the road. Graham was indicted at the Ayr Circuit for culpable homicide, but was acquitted in consequence of a verdict of not guilty. Thereafter the widow of Linwood and his children brought an action against Mackie, Graham, and certain other persons alleged to have been directly concerned in

1st DIVISION.  
Lord Craigie.

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the cutting of the tree, and also against Mr. Hathorn, the proprietor of the estate, as responsible for these persons. Appearance was made for all the parties, but the litigation took place chiefly with Mr. Hathorn. In defence he stated, that although Mackie was his servant, yet Graham was not; that he had given no orders to cut the tree, and that Linwood's death had been occasioned by a *casus fortuitus*, for which no person could be responsible; and he pleaded, that even if it were established that any negligence was imputable to the persons who were cutting the tree, no responsibility could attach to him. Lord Craigie, after allowing a proof, and issuing a note in which he expressed an opinion that negligence was imputable, and that Mr. Hathorn was liable, reported the case on informations. In support of their claim against Mr. Hathorn, Mrs. Linwood and her children pleaded, that the death of Mr. Linwood had been occasioned in consequence of no precautions having been taken to prevent the tree from falling towards the road, and no notice being given that the operation was going on: That when a proprietor employs other persons under him to do his work, he is bound to select those who will do it properly, and use every possible precaution to prevent injury to third parties: That this is an implied contract, under which every man acts and possesses, and that his obligation to the public is not merely that he personally shall not commit injury, but that his acts of administration shall be so exercised, that injury shall not be sustained. To this it was answered, 1. That no blame or negligence was imputable to the persons cutting the tree, and consequently Mr. Hathorn could not be responsible for what was a pure accident; and, 2. That even supposing negligence were established, still he could not be made liable, because he neither knew of, nor authorized the cutting of this particular tree, nor of any other tree on his property; and if he had known of any design to do so, he would not have allowed it; that he gave no general discretionary permission or authority to cut down trees in his absence; and that he could not be made liable for the delict of his servants, by which the misfortune had been occasioned. The Court, by a majority, on the 19th of November 1816 and 14th of May 1817, assoilzied all the defenders.\* Mrs. Linwood and her children having thereupon entered an appeal on the above grounds, the House of Lords 'Ordered and adjudged that the appeal be dismissed, and the interlocutors complained of affirmed.'

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\* See Fac. Coll. Vol. 1815-1819, No. 115.—Lords Justice-Clerk, Glenlee, and Robertson concurred in the judgment; Lords Bannatyne and Craigie dissented.

Mur. 19. 1821. *Appellant's Authorities*.—9. Dig. 3. 1; 1. Blackstone, c. 14. ad fin.; 1669, c. 16; Innes, Feb. 6. 1798, (13189); Black, Feb. 9. 1804, (13905); Brown. Feb. 25 1813, (F. C.); L. Keith, June 10. 1812, (F. C.); M'Manus, Nov. 26. 1800, (East's Rep.)

*Respondent's Authorities*.—9. Dig. 2. 30; 1. Bank. 2. 30; 1. St. 9. 5.

J. CHALMER,—SPOTTISWOODE and ROBERTSON,—Solicitors.

(*Ap. Ca. No. 13.*)

No. 7. DENNISTOUN, BUCHANAN, and COMPANY, Appellants.—*Sol.-Gen. Wedderburn—Romilly—Cranstoun.*

D. LILLIE and Others, Respondents.—*Wetherell—Denman.*

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*Insurance*.—Held (affirming the judgment of the Court of Session,) that although it was innocently represented to insurers that a vessel was to sail from New Providence on the 1st of May, and a policy was thereupon executed; yet, as she actually sailed on the 23d of April preceding, and was captured on the 11th of May, this was a material misrepresentation to the effect of liberating the insurers.

April 5. 1821.

2<sup>D</sup> DIVISION.  
 Lord Pitmilley.

ON the 19th of March 1814, William Duff and Company, merchants at New Providence, addressed a letter to Dennistoun, Buchanan, and Company, merchants in Glasgow, in which they stated, that 'at a prize sale of a South Sea whaler, and her cargo of oil, that took place here yesterday, we purchased on your account about 40,000 gallons of spermaceti oil, at 3s. 9½d. sterling per gallon; 14,000 gallons of which we intend to ship upon that remarkable fast sailing schooner Brilliant of 157 tons burden, mounting six nine-pounders, to sail, with or without convoy, about the 1st of May, and on the value of which shipment you will please to make insurance;' and they ordered insurance on the Brilliant herself to Greenock for £1400. In another letter of the 24th, they mentioned that the Brilliant would be cleared out as bound to Greenock and a port on the continent. Copies of these letters (the originals of which had been transmitted, but not received) were inclosed in one of the 2d of April, in which it was stated, that 'the Brilliant will sail on the 1st of May, a running vessel, and in which the writer of this (one of the partners) will take his passage.' These letters were received by Dennistoun, Buchanan, and Company on the 17th of June thereafter, and on the following day they effected a policy of insurance with Lillie and others 'from Nassau to Clyde, with leave to call at all ports and places whatsoever for convoy, or for any other purpose whatever, without being deemed a deviation,