SCOTLAND.

(COURT OF SESSION.)

Mrs. JANE LINWOOD, Widow of JOHN LINWOOD, late Farmer at *Freugh*, and her Six Children, ELIZABETH, JANE, HANNAH, JOHN, THOMAS and GEORGE LINWOOD, lawful Children of the said JOHN LINWOOD,—*Paupers* } *Appellants*;

VANS HATHORN, Esq. of *Garthland*, Writer to the Signet, and others - - - - - - - - - } *Respondent.*

AN appeal, in which the essential parties are not served with the peremptory order to answer, and do not appear at the hearing, cannot proceed as against one of the Respondents.

Whether according to the practice of the House the hearing of the cause may be adjourned for the purpose of serving the absent parties, on payment of the ordinary costs.—*Quære.*

Agents and servants acting under general orders, but without the special direction of their master, having cut a tree on the side of a public road, which in falling killed a passenger, the widow and children of the person killed brought an action for damages against the master and the servants, in which action there was a judgment for the defendants. On appeal against this judgment, the agents and servants, as well as the master, were named as parties in the appeal, but were not served with the peremptory order to answer the appeal, nor brought before the House as parties at the hearing. The proceeding was held defective on this ground, as it would deprive the master of the remedy over or relief against the agents and servants, in case of a reversal of the judgment as against the master alone.

Semb. that under the circumstances of the case, if there had been no such defect of parties, damages ought not to have been given.

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THIS action was instituted in the Court of Session in Scotland, by the Appellants, in order to obtain an assythment or reparation for the loss which she and her children have sustained by the death of John Linwood, which was occasioned by the fall of a tree cut down upon the estate of Garthland, belonging to the Respondent, Mr. Vans Hathorn.

The tree was about eighteen inches diameter, and situated on a part of the property of Garthland, only a few feet removed from the public highway leading from the Mull of Galloway to the market-town of Stranraer. It was cut on the 27th November 1812, which happened to be a market-day at Stranraer. Mr. Linwood was riding along the road about mid-day on his way to the market, in company with three neighbouring farmers. No person was placed upon the road, or elsewhere, to give notice of danger, and no rope or other instrument employed to direct the fall of the tree; M'Kie and Graham were in the act of cutting it, and a strong wind was blowing from the east, on which side of the road the tree was standing, when Mr. Linwood and his companions rode up; the tree giving way at the moment when he was passing, fell upon him and bruised him so severely, that he expired in less than an hour after the accident.

The Appellants, the widow and children of Mr. Linwood, instituted an action, in which they called as defenders Mr. Vans Hathorn, the proprietor, together with John Hathorn, William Reid, Peter M'Kie and John Graham, who, as the Appellants

alleged, were all concerned in the transaction as the agents and servants of Mr. Hathorn.

The summons concluded, that these several persons "ought and should be decerned and ordained "to make payment, conjunctly and severally, to "the pursuers, of the sum of 2,000 *l.* sterling as "a reparation to them of the great loss and damage "which they have sustained, and will sustain, by "the said John Linwood being deprived of his life "in manner aforesaid," besides expenses of process, and of extracting the decree.

Parties having been heard, and the Appellants having put in a condescendence by appointment, which was followed with answers, Lord Craigie, (Ordinary) allowed them a proof of their allegations. Accordingly a proof was led as to the facts founded on in support of the action.

The proof given on the part of the pursuers related, 1. To the situation, and the fact of cutting the tree; the improvident manner in which it was done, and the accident consequent upon it. 2. That the other parties acted under the orders of Mr. Vans Hathorn. On this point the proof did not go to any particular order as to the tree in question, but only as to general agency and management. 3. As to the situation, character and circumstances of Mr. Linwood, as a foundation to estimate the damages sustained. This part of the proof consisted chiefly of his skill as a farmer; his age; the duration of an unexpired lease, and his average farming profits.

Distinct from the pecuniary damage, the Appellants claimed consideration of a *solatium* due to the family for the loss of a husband and parent.

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The proof having been concluded, and the term for proving circumduced, the Lord Ordinary appointed the parties to prepare memorials upon the whole cause, and thereafter he pronounced the

January 16, 1816. following interlocutor: "Having considered the "memorial for the pursuers, also the memorial "for the defender, Mr. Vans Hathorn, separate "memorial for William Reid, another of the de- "fenders (no memorial having been given in for "Peter M'Kie and Matthew Graham, also de- "fenders, nor for John Hathorn, who is now dead), "with the proofs brought by the parties, writings "produced, and former proceedings, appoints the "parties to prepare, print, and box informations, "betwixt and the first sederunt day in February "next, and makes avizandum with the cause to the "Lords of the Second Division of the Court; and "at the same time appoints the proofs and writings "founded on by the parties, to be printed and "annexed to the information for the pursuers; the "expense of printing the proofs and writings "founded on, in the mean while, to be defrayed "equally by the parties*."

Informations were prepared in obedience to appointment; and thereafter the following interlocutor was pronounced: "The Lords, on report of "Lord Craigie, and having advised the informations "for the parties, sustain the defence, assoilzie the "defenders, and decern."

14 May, 1817. The Appellants submitted the case to the review

* A note, explanatory of his view of the case, was subjoined by the Lord Ordinary to this interlocutor. For the argument in the Court below, and the opinion of the Judges, see Fac. Coll. 1815. 1819, No. 115.

of the Court in a reclaiming petition, which was appointed to be answered, but "The Lords having "advised this petition, with the answers thereto, for "the defenders, adhered to the interlocutor re- "claimed against, and refused the desire of the "petitioners."

The Appellants, conceiving themselves to be aggrieved, appealed against the above-recited interlocutors.

For the Appellants, the following authorities were cited, on the general liability for direct or consequential damage arising from negligence:—Inst. lib. 4, tit. 3, s. 5. Bankton, B. 1, tit. 10, s. 41. Stair's Inst. 1. 9. 7. Balfour's Pract. 516. Fountainhall's Decis. Index. Ersk. b. 4. t. 4. s. 105. That the civil remedy is not excluded by a decision upon a criminal charge for the same act.—The Creditors of *Buchanan* v. *Buntein*, Kilk. p. 495; *Ker* v. *Agent for the Sun Fire Office*. Fac. Coll. 17 Dec. 1793. That the owner of property is liable for the act of his agents and managers, Dig. lib. 9, tit. 3, l. 1; Blac. b. 1, c. 14, *ad finem*; Scotch Stat. 1669, c. 16; *Innes* v. *Magistrates of Edinburgh*, Fac. Coll. 6 Feb. 1798; *Black* v. *Caddell*, 9 Feb. 1804; *Drummond Mc Gregor*, 26 Feb. 1813; *Keith* v. *Keir*, 10 June 1812; *Macmanus* v. *Crickett*, 1 East; *Smith* v. *Milne*, 8 March, 1810, Elch. Dec. 218, and in D. P. *

For the Respondents were cited, on the general question of responsibility, the exception to the rule

* *Laugher* v. *Pointer*, K. B. Trin. Term, 1826; a case not reported.

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stated from the Digest, for the Appellants, viz. the *casus fortuitus*, as a sudden gust of wind, which was stated to be the cause of the accident in this case.—Dig. lib. 9, tit. 2, l. 30, s. 3. That assythment is only due upon the crime, and when that is established in a competent court, and cannot therefore be due after an acquittal.—Hume on Crimes, vol. 1, p. 448. That masters are not liable for the acts of servants where they exceed the authority given.—Bankton, b. 1, t. 2, s. 30. Stair, b. 1, tit. 9, s. 5. Kaime's Principles of Equity, b. 1, p. 1, c. 1, s. 2, p. 63. *Macmanus* v. *Crickett*, *qua supra*. Dict. of Holt, C. J. in *Middleton* v. *Fowler*, Salk. 282. That assythment is a civil reparation in damages to the party for an act which, as to the public, is a crime, and is due from the criminal only.—*Lady Leithhall* v. *L. Fife*, Kaime's Sel. Decis. No. 25, Act. 1593, c. 174.

For the Appellants, *Mr. Wetherell*, *Mr. Oliphant*.

For the Respondents, *The Attorney-General*, *Mr. C. Warren*.

All the parties in the suit below were named in the petition of appeal; but none of them had been served with an effectual order to answer the appeal; and on the hearing of the appeal Vans Hathorn only appeared. There was, therefore, no effective appeal against the other Respondents: Graham, the party immediately concerned in the act, was one of them. In this state of things it was urged, on the

behalf of the Appellants, that the condition of the summons being joint and several, relief might be had against any one or more.

[During the argument, the Lord Chancellor made the following observations.]

The case must be considered as heard *ex parte* against all the parties but Vans Hathorn. With respect to the other parties, the peremptory order has not been served or applied for; they are not before the House, and the Appellants are not entitled to be heard as against them. The summons says that Graham was acting for the behoof or under the directions of Vans Hathorn, or John Hathorn, or W. Reid, or P. M'Kie: of such an allegation the sufficiency might be questioned. Proof that Vans Hathorn gave authority to any of them makes a different case. Where a judgment is given against several defendants, the plaintiff may take execution against one, and for the one who pays the damages the judgment itself and the fact of payment is evidence against the others for the purposes of contribution; but where there is a judgment of acquittal, the difficulty is great. The Master, in such a case, could never proceed against a servant who has been absolved by verdict. The conclusion of the summons is joint and several. But suppose an action against a coachmaster and a coachman, and an acquittal by verdict, could the master afterwards proceed against the servant? There is another way of viewing the case: if Vans Hathorn is liable, Graham also may be liable to him, and he might recover over against

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Graham; if, therefore, the appeal is given up as against Graham, how can it proceed against Vans Hathorn?

A question then arose, Whether the Appellants paying the costs of the hearing should have liberty to bring all the parties before the House? The Respondent's counsel, the question being put to them by the Lord Chancellor, were not willing to assent to this proposal, and the cause having been fully argued, stood over for consideration.

19 March 1821.

The *Lord Chancellor*:—In the course of hearing this cause a question presented itself, Whether it was possible that we could proceed to determine it without bringing before the Court third persons who were not effective parties to the appeal at the time when the cause was heard at the Bar? It was at first thought by the House that the cause might stand over, with liberty for the solicitor to apply for leave to bring those parties before the House; that suggestion being made without prejudice to the question, Whether, according to the course of practice of the House, such a petition could now be available? Upon further consideration, however, it seemed expedient to go on to the extent to which the argument could go at the Bar, as it might turn out that the opinion of the House might be, that if those parties had been here the judgment could not be reversed. Having attended to all the circumstances of the case, with all the feeling which belongs to it, and the consequences to the Appellant of the unfortunate accident out of which the cause

arises, it does not appear to me that there is sufficient reason to advise the House to reverse the judgment; and I think we may venture to proceed in the present state of the cause, in respect of parties. It would probably have made no difference, as to the result, if the other parties had been here; because, in the circumstances of the case, it appears to me that the same judgment would have followed. The ordinary question being put, that the judgment should be reversed, I must humbly express my opinion that it ought to be affirmed.

Judgment affirmed.