Judgement of the Lords of the Judicial Committee of the Privy Council on the appeal of of The Commissioners for Railways v. *Brown from the Supreme Court of New South Wales; delivered December* 10*th*, 1887.

Present:

LORD FITZGERALD.
LORD HOBHOUSE.
SIR BARNES PEACOCK.
SIR RICHARD COUCH.

THERE is no doubt about the principles of law which have been brought under the notice of their Lordships by the Appellant's counsel, and which ought to govern this appeal. Chief Justice Tindal, about 50 years since, laid down a rule to this effect:—that where the question is one of fact, and there is evidence on both sides properly submitted to the jury, the verdict of the jury once found ought to stand; and that the setting aside of such a verdict should be of rare and exceptional occurrence. Their Lordships are not aware that the rule thus laid down has been abandoned.

In this particular case the proceedings appear to be according to the system of practice prevailing in England. The plaint alleges negligence on the part of the Defendant. The Plaintiff was bound to give some evidence sufficient if believed to sustain that allegation. Their Lordships assume, for the purposes of the appeal, that there was evidence of negligence in the absence of the stoker, whose duty was to keep on the look out if he was not otherwise engaged in his duties as stoker. But it may be a subject of question whether the absence of the stoker led to

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the accident. The driver says that he had a clear view in front, and that he saw the head of the horse the Plaintiff was driving immediately when it emerged from Elizabeth Street. If the stoker had been beside him, he could not have seen more than the driver saw. So that although their Lordships assume that there was evidence proper to be submitted to the jury that there had been negligence on the part of the Defendant which may have led to the calamity, it does not go beyond that.

Then on the other hand there was what appears to their Lordships to be very clear evidence proper to be submitted for the determination of the jury, and properly received under the plea of not guilty, that the Plaintiff by his own negligence had contributed to the calamity. The law in such a case is that the two questions are to be submitted to the jury, and they are to determine, first whether there is negligence on the part of the Defendant materially leading to the calamity, and secondly whether there was contributory negligence on the part of the Plaintiff but for which the calamity would not have occurred. It is conceded that the case was properly submitted to the jury and that the summing up of the case was correct in all respects and not objected to in any particular. Mr. Justice Fancett is represented to have said :—" Under these circumstances what is the " evidence? That the Plaintiff was coming out " of this street at a rapid pace, slashing his horse " as he came to the tramway. He saw that his " horse was frightened by the children, and he " lost his head, and slashed away to cross the " line. The tram came slowly up, not rapidly, " to the place where it was to stop." That sentence alone, containing the learned judge's view of the evidence, affords the amplest and most persuasive proof of contributory negligence on the part of the Plaintiff. What really took

place seems to have been probably that the Plaintiff was driving down Elizabeth Street, and his horse got into an excited state from the noise of some children. One of the witnesses says that when the Plaintiff could have seen the motor coming up he rose in his seat and commenced slashing the horse. The object of that was that, having a spirited horse, he thought that spirited horse would have carried him clear of the motor by being a little accelerated, and then he commenced accelerating the pace of the horse so as to rush past the motor. He had no business to do that. When he saw there was danger of collision his duty was at once to have held his horse in. It was a matter of seconds. The delay of a few seconds would have prevented this calamity, but he chose to make a rush across, and, in fact, instead of the motor running into him he ran into the motor.

Under such circumstances the case was fairly submitted to the jury. There is no objection to the summing up. The learned judge who tried the case does not disagree with the verdict, and their Lordships are of opinion that the verdict, not unreasonable or unfair, and which was warranted by the evidence, once found ought to have been permitted to stand. Their Lordships therefore will humbly advise Her Majesty that the verdict ought to be suffered to remain as it was, and that the order setting aside that verdict should be discharged; and the Appellants will have the costs in the Court below and of this appeal.