Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Moffatt v. Bateman, from the Supreme Court of the Colony of Victoria, delivered 15*th December*, 1869.

Present:—

Lord Chelmsford.
Sir James W. Colvile.
Sir ~~Joseph Napier.~~ Robert Phillimore
Lord Justice Giffard.

THE question to be determined in this Appeal is whether there was any evidence to go to the Jury of the Appellant having been guilty of that degree of negligence, for which, under all the circumstances of the case, he was responsible?

The following are the material facts proved at the trial. The Respondent, who is a decorator and ornamental gardener, had entered into an agreement with the Appellant to serve him at the rate of £300 a year for three years, in laying out his gardens at his residence at Hopkin's Hill. On the day of the accident, the Appellant asked the Respondent to go to a place called Willis Station, which belonged to the Appellant, to paper some rooms for him, and he proposed to drive him there in his buggy. The Respondent, in his evidence, stated that after making many objections, he consented to go; that his objections to accompany the Appellant were with reference to his mode of driving; that he made excuses, but did not like telling him what his real motive for refusing was. The Appellant, in his evidence, said that the Respondent refused to accompany him to Willis Station because the morning was wet. The accident happened within a mile of Willis Station. The Respondent described the buggy as old and rusty, and one that he would not have been seen in near town, and the horses as a very spirited

pair, and he stated that the Appellant whipped up the horses to make them gallop, and that at the time of the accident they were going very fast, but he could not say they were galloping. When they came to a spot where there were three tracks, the Appellant took the one on the left, and the Respondent was suddenly thrown out about two yards on the left-hand side of the buggy. When he came to himself, he found that the horses and the fore wheels of the buggy were gone; that there was the branch of a tree across the road, whether the whole way across he could not say, and that the hind wheels had stopped at this branch. This is the whole account which the Respondent is able to give of the accident by which he certainly received very serious injuries.

Before considering the evidence to prove negligence on the part of the Appellant, it will be proper to determine for what degree of negligence he is responsible. It is admitted that he was not carrying the Respondent for profit in the ordinary meaning of that term, but Mr. Mellish argued that as the Respondent was going to Willis Station on the Appellant's business, and for his benefit, he must be taken to have contracted for a greater degree of skill and care than would be required from a person who was driving another gratuitously. But their Lordships cannot adopt this view. The Respondent was not obliged to go with the Appellant, but might have found his way to Willis Station in some other manner, and the case amounts to no more than this, that the Respondent having agreed to paper the rooms at the Station, the Appellant offered to drive him there, which imposed no higher duty upon him than in the case suggested during the argument, of a person offering another a seat in a carriage which he is driving, who certainly if liable at all for an accident afterwards occurring, could only be so for negligence of a gross description.

Is there, then, any evidence of the Appellant having been guilty of gross negligence,—a term which is sufficiently descriptive of the degree of negligence which renders a person performing a gratuitous service for another, responsible? There is no evidence at all of the mode in which the accident took place. It is probable that it might have

been occasioned by running against the branch of the tree which is described by the Respondent as lying upon the road, but no further description is given by the Respondent of the accident, than the fact of its occurrence, and the place where it occurred.

The Counsel for the Respondent contended that a case of *primâ facie* negligence being shown, the Appellant was called upon to relieve himself from it, and they cited the case of Scott *v.* The London and St. Katherine's Dock Company, where it was held that "in an action for personal injury caused "by the alleged neglect of the Defendant, the "Plaintiff must adduce reasonable evidence of neg-"ligence to warrant the Judge in leaving the case "to the Jury, but that where the thing is shown "to be under the management of the Defendant or "his servant, and the accident is such as in the "ordinary course of things does not happen, if those "who have the management use proper care, it "affords reasonable evidence in the absence of ex-"planation by the Defendant that the accident "arose from want of care." Now, that was a case in which the negligence proved was that the Plaintiff, who was an officer of the Customs, whilst in the discharge of his duty, was passing in front of a warehouse in the dock, and six bags of sugar fell upon him. Undoubtedly in that case there was the strongest *primâ facie* presumption of negligence, because it is not in the ordinary course of things that loaded bags should fall out of a warehouse on a person below. But this case is very different. There is nothing more usual than for accidents to happen in driving without any want of care or skill on the part of the driver, and therefore no *primâ facie* presumption of negligence having been raised, their Lordships think that it was necessary for the Plaintiff in the case—the Respondent—to give affirmative evidence of there being gross negligence on the part of the Appellant occasioning the accident.

The Respondent endeavoured to prove this degree of negligence on the part of the Appellant by means of admissions made by the Appellant to two witnesses. The first of them, Smith, a nurseryman, said, "That night" (that is the night of the accident) "or the next morning, the Defendant said that he

"had to blame himself for what had occurred, that "he had not examined the vehicle, that after the "accident he discovered the defective state of the "kingbolt." And the same witness said that on another occasion, on his way to Willis Station, Defendant said that he never would go out with one of the horses,—that he had served him the same trick before, and had ruined the other horse besides. This witness, on being cross-examined, said the Appellant said "the horse had bolted before on "previous occasions, that he had bolted and made "the other horse to bolt too." The other witness, Margaretta Perry, said, "The Defendant said it was "neglect; the buggy was not looked to. He said "the kingbolt had broken." She also heard the Defendant say that he could scarcely drive those horses, and she added that she had heard him tell the boy to be ready to jump out, as he could not manage them.

With regard to the proof of negligence by the admission of the Appellant that he had not examined the vehicle and discovered the defective state of the kingbolt, their Lordships are of opinion that this amounts to no proof whatever of negligence. It appears that the carriage was regularly examined by a blacksmith every three months, and it is very unlikely that the Appellant before going out for a drive or using the buggy would examine very strictly and carefully what was its state with regard to its bolts and fastenings, or that he could fairly be accused of negligence for not having done so.

Then as to the evidence of the Appellant's admissions with respect to the horses. Undoubtedly, if the accident had happened by reason of any of those circumstances to which the Appellant spoke in his admissions to the witnesses, if the horses had bolted, if they had become unmanageable, if they had been too much for him, and the accident could be referred to the occurrence of any of these circumstances, there might have been a case made out against him.

But so far from this being proved, it appears from the Respondent's evidence, who had been driven with these horses by the Appellant before, that "On "the road to Willis Station he did not observe any-"thing unusual, except the Appellant's whipping "up the horses, as he said they were sluggish. "And the Respondent made no special complaint at

"the rate at which they were going, or of the "vehicle in which they were going, or of the "horses."

Under these circumstances, there really is no evidence whatever of any negligence of any description on the part of the Appellant. The whole case against him is that in the course of driving to the Willis Station the horses and front wheels of the carriage separated from the hinder wheels, possibly from coming in contact with the branch of the tree; but even that is mere conjecture. But that the accident occurred from any negligence which would have rendered the Appellant liable is entirely destitute of proof.

Their Lordships are very unwilling to interfere with the Judgment of the learned Judges who decided in this case that there was proof of negligence sufficient to entitle the Plaintiff to recover; but they cannot help coming to the conclusion that the case ought to have been withdrawn from the Jury at the close of the Plaintiff's case, on the ground that he had offered no evidence to establish a case of gross negligence against the Defendant.

Under these circumstances, their Lordships will recommend Her Majesty to reverse the Judgment. The costs will follow the usual course.