Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Council of the Municipality of Brisbane v. *Patrick Martin, from the Supreme Court of Queensland; delivered April* 24, 1894.

Present:

LORD HOBHOUSE.
LORD ASHBOURNE.
LORD MACNAGHTEN.
SIR RICHARD COUCH.

[*Delivered by Lord Ashbourne.*]

THE Respondent, who was the Plaintiff in this case, is a hansom cab proprietor. He commenced an action in the Supreme Court of Queensland against the Appellants in the month of September 1892, whereby he claimed damages from them for having so negligently made a drain across Ann Street, in the town of Brisbane, as to be dangerous to persons lawfully passing over and along the street; and in the alternative he alleged that the Appellants had neglected to put the street into a proper state of repair and suffered it to remain in a dangerous condition. The Appellants denied that they were guilty of any negligence.

The action was tried before Mr. Justice Harding and a Jury in the month of October 1892, when evidence was adduced on the part of the Respondent to prove, and on the part of the Appellants to disprove, the alleged negligence. The Jury found by their verdict that there was no negligence on the part of the Appellants, and thereupon judgment was entered for them. On a motion by the Respondent for a new trial, the Full Court made an order setting aside the

a 81666. 100.—5/94. Wt. . E. & S.

verdict and judgment, and directing a new trial. The present appeal, which has been heard ex parte (the respondent having intimated that want of means prevented his appearing), is from that order.

The result of the evidence may be shortly stated thus: It appears that in October, 1888, a drain was commenced, by the orders of the appellants, under Ann Street, which was completed in the following April; and it was not until nearly four years afterwards that anything occurred to indicate that the drain was not in every respect properly constructed, and capable of satisfying all the purposes which it was intended to fulfil. On the 28th of May, 1892, the respondent was driving along the street at the rate of about six miles an hour, when his horse fell down, and he was thrown from the top of his cab on to the road, and severely injured. It appeared that the horse had put one of its feet into a hole about fifteen inches deep, and, to use the expression of the respondent, "about the size of an ordinary sized dinner plate." The ground had apparently broken away and sunk under the horse's feet, and it was ascertained that the hole had formed over the place where the drain had been constructed.

The case of the respondent was that the appellants were responsible for the hole, and were guilty of negligence in respect of it, either because there was an original defect in the construction of the drain—the ground over it not having been sufficiently rammed—or because they had failed to foresee and provide against the soakage which afterwards took place, and which removed a certain quantity of soil, and thus caused the cavity.

The appellants, in reply to the respondent's case and witnesses, adduced a considerable body of evidence to shew that the drain was originally

constructed in a proper manner. Mr. Rogers, their engineer, said that as far as he saw it "it "could not have been done better," and that when the trench and tunnel were opened out he saw nothing to indicate a soakage. Mr. Everingham, who was manager of the Brisbane Tramway Company from January 1888 until October 1890, said that he remembered the drain being constructed across Ann Street; that he took particular interest and special care that it was properly constructed underneath the tramway, seeing that he was connected with the Tramway Company; that he saw the tunnel being filled up; that according to his idea it was properly rammed; that he saw people ramming it; and that he was perfectly satisfied with the way in which it was done. Mr. Gailey, who was an architect and surveyor, and who examined the drain after the accident, said:—"No person in "making a drain of this sort in dry weather "could foresee that there would be underground "flow in wet weather. My opinion is that the "cavity was caused by the percolation of "water after rain washing away the fine sand "or pipeclay and lodging it into beds of sand "of coarser quality in or near the formation of "the drain. * * * If the tunnel "had been loosely rammed I don't think it "would have stood for 4 years."

Mr. Kirk, a civil engineer and contractor, gave evidence of a similar kind.

It may therefore be taken that there was evidence both ways as to the circumstances in which the cavity was caused which led to the accident. Their Lordships have not had the advantage of seeing at any length the summing up of the learned Judge who heard the case, from which they might have been able to gather his view of the evidence, although that would have been only an element in the case. They

must deal with the matter according to the settled rule which has prevailed for a great number of years in this country. Was this verdict one which the jury, reasonably viewing the whole of the evidence, could properly find? It is not necessary for their Lordships to say how far they concur in the verdict. That is not the question. There being evidence both ways, it cannot be said that the jury might not reasonably arrive at the conclusion at which they did arrive. Their Lordships will therefore humbly advise Her Majesty to discharge the order for a new trial.

The appellants do not ask for their costs of the appeal, and their Lordships will direct accordingly