Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, v. Kate Douglas Moore, from the Supreme Court of Canada; delivered July 7th, 1881.

Present:

SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.
SIR RICHARD COUCH.
SIR ARTHUR HOBHOUSE.

THIS is a suit by one of the children of Mr. Charles Moore deceased against the Connecticut Mutual Life Insurance Company, upon a policy of insurance on the life of Charles Moore, the Plaintiff claiming the share to which she is entitled under that policy. The declaration set out the policy, together with the questions and the answers that were made to them, and concluded with a general statement that all things had happened which were necessary to entitle the Plaintiff to recover. The Defendants pleaded several pleas, of which the most material are the 2nd and the 4th. The 2nd plea is in these terms:—"The Defendants say that the answer "given in the negative by the said Charles "Moore, as in the declaration mentioned, to the "question, 'Have you had any other illness, "'local disease, or personal injury; and if so, "'what nature, how long since, and what "'effect on general health?' was untrue,— "that the said Charles Moore had, some 12 "years before the time when he signed the said "declaration and answered the said question in

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" the negative, received a blow on the head " which produced a fracture or depression of the " skull, and which was followed by exfoliation " of the bone of the skull, and which also caused " to some degree inflammation of the brain,—that " the blow was a personal injury within the " meaning of the said question,—and that the " answer 'No' given to the said question was " untrue, and was a breach of the warranty " contained in the said application; and that by " reeson of such untrue answer and breach of " warranty the said policy was forfeited." The 3rd plea, which relates to dyspepsia, was disposed of in the Court below, and need not be here referred to. The 4th plea was to this effect:— " The Defendants say that the answer given to " the question, 'How long since you were " attended by a physician?' namely, 'About 30 " years ago,' was untrue, to the knowledge of " the said Charles Moore,—that the said Charles " Moore had, previous to the making of the said " application, and a much shorter period than " 30 years, received a severe blow on the head, " the effects of which remained until his death, " and that whilst he was suffering under such " injury he consulted and availed himself of the " skill of a medical man, one Dr. Lizars, and " that he concealed the said fact that he had " so consulted the said medical man." This plea is said to have been amended at the trial, and there has been some controversy as to whether that amendment was actually made or only taken to have been made; but their Lordships will assume it to have been made. It runs thus:— " The Defendants say that the answer given to " the question, 'How long since you were " attended by a physician?' namely, 'About " 30 years ago,' was untrue, to the knowledge of " the said Charles Moore,—that the said Charles " Moore, previous to the making of the said

" application, and at a much shorter period than " 30 years, had been attended by, and had " consulted and availed himself of, the skill of " other medical men," whose names are mentioned. Those were the pleas.

The policy is very much in the usual form of such policies, the material part of it being this :— " This policy is issued and accepted upon the " following express conditions and agreements : " First, that the answers, statements, repre- " sentations, and declarations contained in or " endorsed upon the application for this insurance, " which application is hereby referred to and " made a part of this contract, are warranted " by the assured to be true in all respects." The form of application contains a number of questions relating to a variety of diseases, such as apoplexy, diphtheria, fistula—and a number of others. The eighth question, which is material, is this :—" Have you had any other illness, local " disease, or personal injury ? and if so, of what " nature, how long since, and what effect " upon general health ?" to which the answer was, " No." Their Lordships agree with the remarks which have been made by some of the Judges of the Courts in Canada that this is a question of a somewhat embarrassing character, and one which the Company could hardly reasonably have expected to be answered with strict and literal truth. They could not reasonably expect a man of mature age to recollect and disclose every illness, however slight, or every personal injury, consisting of a contusion or a cut or a blow, which he might have suffered in the course of his life. It is manifest that this question must be read with some limitation and qualification to render it reasonable ; and that personal injury must be interpreted as one of a somewhat serious or severe character. Their Lordships may observe, in

passing, that the next question but one, "Are you, "or have you ever been, addicted to the use" (not to the abuse or excessive use) "of alcholic "beverages, opium, or other stimulants," could be answered in the negative with literal truth only by a person who was never in the habit of drinking wine or beer or tea or coffee (tea and coffee being stimulants); that is to say, by very few persons in Canada.

The next material question is, "How long "since you were attended by a physician; for "what disease? Give name and residence of such "physician." The answer is, "About 30 years "ago: lake fever: Dr. Sampson, of Kingston, "who is now dead." Then:—"Name and resi- "dence of your usual medical attendant?" "Dr. Berrick, of Toronto, who attends my "family, has known me some years." These answers would seem to distinguish between attendance by a physician for a serious disease and an ordinary medical attendant for trifling ailments.

Such being the answers, it is now necessary to refer shortly to the evidence, in order to make the summing up of the learned Judge, the questions which he put to the jury and their answers to them, intelligible. The task of analysing it completely has been ably performed by some of the Judges of the Courts below. It is enough for the present purpose to say that Mr. Moore died of an injury to the head caused by striking against an iron bolt. The blow did not produce fracture of the skull, but inflammation attended by suppuration and extravasation of blood; the suppurated matter and extravasated blood pressing on the brain caused paralysis, from which death resulted. The medical men in examining this injury, and trephining, discovered that in the immediate proximity of their operation a portion of the bone of the skull was

missing, that the brain in that point was covered only by skin and membrane, and that there was a slight depression into which the tip of the finger could be introduced. The great contention on the part of the Company was to prove that the absence of this piece of bone resulted from a blow which Mr. Moore had received some 10 or 12 years before, on falling from his horse or being thrown from a carriage; that his skull had then been fractured; that an operation was performed by a medical man whereby the missing portion of the bone was removed.

Although evidence was adduced which was well worthy of the consideration of the jury, and on which they might properly have found, if they had been so minded, that this case on the part of the Defendants was proved, that evidence was by no means of a conclusive character. The medical man, Dr. Lizars, who is said to have attended Mr. Moore at the time of the accident, was dead. His assistant or partner was called, who spoke of a fall of Mr. Moore from his horse about 12 years before, when he said that Dr. Lizars attended him; but he also said that at that time Mr. Moore was only suffering from a contusion, and that no injury to the bone was discoverable. He spoke of no other accident to Mr. Moore. There was the evidence of other medical men to the effect that it was probable that the injury might have been caused in the manner suggested by the Defendants, but that evidence fell far short of direct proof, and indeed some portion of it was not irreconcilable with the hypothesis that the loss of the piece of bone might have resulted from causes other than external violence—indeed, from congenital malformation. On the other hand, there was the evidence of a brother of Mr. Moore that neither on the occasion in question, nor indeed on any other occasion, was he ever

so seriously injured as not to be able to attend to his business as usual. If that evidence was believed by the jury, it would go far to disprove the possibility of any surgical operation having been performed whereby a portion of the bone of his skull was removed.

The learned Judge, in summing up, commenting on the questions put by the Company, observes: "They have stipulated that his answers shall "form part of the contract which he is "about to enter into. They say to him in "effect: 'You must answer these questions "'correctly; if from forgetfulness or inadver-"'tence you answer a question incorrectly, "'we hold the policy void.' They have "a right to make that stipulation; but it is, in "my judgment, a stipulation that should be "construed with great strictness. When they "put a very general question under a stipu-"lation of that kind, it is only reasonable and "just to put on that general question a fair "construction; for instance, take the question "they put with reference to any other illness, "local disease, or personal injury; I think that "question must be read in a fair and common-"sense way. If the applicant had had a "headache the very day before, and had not "stated it in his application, it could not be "said that this policy was good for nothing "simply because he had not stated that; and "yet a doctor would tell you that a headache "was an illness, and that it came, strictly "speaking, within that term. Subject to that "limitation, that the questions are to be read "in a fair and common-sense way, having "regard to all the circumstances surrounding "the man, and all the information that the "Company may reasonably expect to receive, "I tell you that, in my view, the Company have "required the applicant to give correct answers

" to the questions they put." After some further remarks the learned Judge put these questions to the jury: "1st. Had Mr. Moore " any personal injury which must have been " present to his own mind as something coming " fairly within the term 'personal injury,' and " which he did not communicate to the Defen- " dants." 2ndly. "Had he any serious or " severe personal injury which, through forget- " fulness or inadvertence, he did not communi- " cate to the Company?" Thirdly: "Had he " any personal injury which he might have " been fairly expected to communicate for the " information of the Defendants?" Fourthly: " Had he any personal injury which had any " effect upon his general health?" Then he refers to those questions which relate to attendance by medical men, with reference to which the evidence was but slight. There was some evidence that Dr. Lizars had attended Mr. Moore, but the partner of Dr. Lizars said that attendance was for a contusion and bruises; and there was evidence of other attendance, but not for serious illnesses. With reference to that evidence the learned Judge observes: — "Now the term 'attended' in a " policy of this kind must also be read in a " reasonable manner. The mere circumstance " that a man had gone to a physician for " some trifling ailment, and had received some " care or attention from him, would not, it " appears to me, render him the attendant of " the applicant in such a sense that it would " be necessary to state that he had been his last " medical man, or that he had last attended " him. It appears to me that the attendance " meant is an attendance for something that " deserves consideration, and might be expected " to be present to the mind of a man when he

" was making an application of this kind. The " object of the question, I presume, is to enable " the Company to communicate with the last " medical man of the applicant, so that if he " pleases to give them information they may get " it. At any rate they would know who he is " then, and have an opportunity of seeing him; " but they would not require that, if the appli- " cant had got from him a piece of sticking " plaster for a cut finger, his name should be in " the application. There are a number of " diseases named in the application. I ask " you then, in the first place:—Had Mr. Moore " been attended by a physician for any of the " diseases detailed in the application? They " were all gone through by Dr. Vallentine, and " dyspepsia is the only one he named; this you " have dealt with in the previous question. The " next question is a more serious one:—Had he " been attended by any physician but Dr. " Sampson for any disease whatever, or only " for some trifling ailment not amounting " to a disease?" The learned Judge proceeds:—" Then I put to you, to cover the " ground as far as possible, these two questions: " 'Did he give fair and true answers to the " 'questions:—Have you had any other illness, " 'local disease, or personal injury? and if so, " 'of what nature, how long since, and what " 'effect on general health?' Did he give fair " and true answers to the questions:—'How " 'long since you were attended by a physician; " 'for what disease? Give name and residence " 'of such physician.'" The answers of the jury may be thus described:—They answer every question in favour of the Plaintiff. With respect to question 7,—" Had he been attended by any " physician except Dr. Sampson for any disease " whatever, or only for some trifling ailment not " amounting to a disease," they say: "No;

only for some trifling ailment," thereby negativing that he had been attended for a disease.

Such were the questions, and such the finding of the jury. Their Lordships observe that the learned Judge makes this remark:—"There have been no other questions suggested to me." That certainly would indicate that the learned Judge was open to any suggestion from either side as to any further question to be put; and neither side appears to have suggested any other question. The Judge upon these findings directed a verdict for the Plaintiff. It was indeed objected at the trial that he ought to have told the jury that they were bound to find for the Defendant; but, assuming that the question was one proper to be left to the jury, no objection was made to the manner in which he left it.

A rule was obtained in the Court of Queen's Bench to this effect:—"It is ordered that the "Plaintiff, upon notice to be given to her "attorney or agent, do show cause why the "verdict obtained in this case should not be "set aside, and a nonsuit or verdict entered for "the Defendants pursuant to the Law Reform "Act, or a new trial had between the parties, "said verdict being contrary to law and evidence, "and under the answer of the jury to the "7th question, that he had been attended "by other physicians than the one he named, "though only for trifling ailments, was virtually "a finding for the Defendants; and for mis-"direction of the learned Judge in not directing "the jury that, on the evidence of the untruth of "the answers to the 8th and 14th questions, they "should find for the Defendants." The only objection on the ground of misdirection is that the Judge ought to have directed the jury to find for the Defendants.

Upon the case coming before the Court of Queen's Bench, that Court set aside the verdict

for the Plaintiff and directed a verdict to be entered for the Defendants. From that judgment there was an appeal to the Appeal Court of Ontario. That Court was equally divided; therefore the appeal failed, and the judgment of the Queen's Bench stood. Thereupon there was a further appeal to the Supreme Court of Canada. The Supreme Court reversed the judgment of the Appellate Court of Ontario and of the Court of Queen's Bench, and directed the original verdict found for the Plaintiff to stand, being of opinion that they had no power to direct a new trial on the ground of the verdict being against the weight of evidence.

The first question is whether or not the Court of Queen's Bench were right in setting aside the verdict for the Plaintiff, and directing a verdict for the Defendants. Their Lordships have no doubt that the Court of Queen's Bench were wrong. In the Law Reform Act of Canada there is a provision that a Judge may direct the jury to make certain special findings, and himself enter the verdict; and section 33 directs that:— "Every verdict shall be considered by the "Court in all motions affecting the same as if "leave had been reserved at the trial to move "in any manner respecting the verdict, and in "like manner as if the assent of parties had "been expressly given for that purpose." It was under that power that the Court of Qneen's Bench acted. Undoubtedly, that Court had power to enter the verdict in accordance with what they deemed to be the true construction of the findings, coupled it may be with other facts which were taken as admitted or were so clearly proved that no controversy could arise about them. But it is not in the power of a Court to enter a verdict in direct opposition to the finding of the jury upon a material issue; and that is what the Court of Queen's Bench

have done. Putting aside for the moment the other questions, their Lordships refer to one question only:—"Had he any serious or severe "personal injury which, through forgetfulness or "inadvertence, he did not communicate to the "Company?" The jury answer that question, "No;" that is to say, they find that the assured had no serious or severe personal injury. The Court of Queen's Bench, in direct contradiction to the finding of the jury, in effect find that he had had a serious or severe personal injury. So again with respect to the other issue: The jury find that he had not been attended by any physician other than Dr. Sampson, the person mentioned, for any disease, but only for trifling ailments as distinguished from diseases; and they further state that he answered the question relative to his attendance by medical men truly. The Court of Queen's Bench in effect say that he had been attended for disease, and that he did not answer the questions truly; again a finding in opposition to the finding of the jury. Their Lordships are clearly of opinion that the Supreme Court of Canada was right in reversing the judgment.

The question of a new trial remains; and a new trial has been contended for upon two grounds—misdirection, and the verdict being against the weight of evidence. With respect to misdirection it has been already observed that the Counsel for the Defendants, although he did insist that the learned Judge ought to have taken the case upon himself out of the hands of the jury, did not make any objection to the direction to the jury, assuming it to be a case for them; and it has been further observed that the rule does not point to any misdirection, except the not withdrawing the case from the jury. It seems to their Lordships, therefore, somewhat late for this objection to be taken; but assuming it to be open to the Defen-

dants, their Lordships, after carefully considering the summing up of tho learned Judge, and the questions which he put to the jury,—although, no doubt, those questions may be open to some criticism, and some form of words may be suggested which might, on the whole, be more apt,—are unable to see that the jury were in any way misdirected or misled. They are, therefore, of opinion that a new trial on that ground should not be granted.

The last question is, whether a new trial should be granted on the ground of the verdict being against the weight of evidence; and this is one of more difficulty. The Supreme Court of Canada were of opinion that they had no power to direct a new trial upon this ground, that power being taken away from them by section 22 of the Act of the 8th April 1875, being "An Act " to establish a Supreme Court and a Court of " Exchequer in the Dominion of Canada." That section is in these terms:—" When the appli- " cation for a new trial is upon matter of " discretion only, as on the ground that the " verdict is against the weight of evidence or " otherwise, no appeal to the Supreme Court " shall be allowed." It is necessary to refer to two other sections. Section 17 runs thus:—

An appeal shall lie to the Supreme Court " from all final judgments of the highest Court " of final resort, whether such Court be a " Court of Appeal or of original jurisdiction." Section 38 is in these terms:—The Supreme " Court shall have power to dismiss an " appeal or to give the judgment, and to " award the process or other proceedings which " the Court whose decision is appealed against " ought to have awarded." If the last two sections had stood alone, the Supreme Court of Appeal in Canada undoubtedly would have been entitled to make any order or to give any

judgment which the Court below might or ought to have given, and among other things to order a new trial on the ground either of misdirection or the verdict being against the weight of evidence. Their Lordships have to consider whether this power, conferred by those two sections, is taken away by the 22nd section, or, in other words, whether the 22nd section applies to a case of this kind. It is true that an application was made to the Court below for a new trial, but not only for a new trial; it was also an application, and this was the main point of the application, to enter a verdict for the Defendant. The Court of Queen's Bench were of opinion that the Defendants were entitled in point of law to have a verdict entered for them, and did not apply their minds to the question of the granting or withholding of a new trial, nor did they exercise their discretion upon that subject. No appeal is brought in this case against the exercise or non-exercise of the discretion of the Inferior Court. It seems to their Lordships that section 22 applies only where an appeal is brought from a judgment of the Court below in which they have exercised a discretion; and that as no such judgment was given, and no appeal on that subject has been brought in the present case, the power of the Court was the same as if no application had originally been made for a new trial, and that the Supreme Court could have ordered a new trial on the ground of the verdict being against evidence, if the Court of Queen's Bench ought to have done so. However, this question ceases to be of any general importance, an Act recently passed enabling the Court to exercise this very power. Their Lordships may observe that there is a section in the local Act, not precisely in the same terms, but to the same effect, limiting the jurisdic-

tion of the Appellate Court of Ontario, with respect to which they take the same view, in accordance, as they understand, with the view of the Appellate Court of Ontario. Be this as it may, it has not been disputed that their Lordships have the right, if they think fit, to order a new trial on any ground. It has been a question requiring serious consideration whether or not that power should be exercised in this case. Undoubtedly the verdict is not altogether satisfactory. If the only question for their Lordships were whether or not they take the same view of the evidence as the jury, they might be disposed to say that the evidence on the part of the Defendants somewhat preponderates. But this is not enough to justify them in granting a new trial; to hold it to be enough would be, in fact, to substitute a Court for the jury. In order to be justified in granting a new trial they must be satisfied that the evidence so strongly preponderates in favour of one party as to lead to the conclusion that the jury, in finding for the other party, have either wilfully disregarded the evidence or failed to understand and appreciate it. Their Lordships are unable to say in this case that the evidence is so clear and strong in favour of the Defendants as to lead them to this conclusion. Taking into consideration, moreover, that the Company have all along contended, not for a new trial, for which they appear to have insisted almost for the first time here, but that they were entitled in point of law to have a verdict entered in their favour, their Lordships do not deem it their duty to send the case to a new jury, and thus probably recommence a long litigation.

Under these circumstances, their Lordships will humbly advise Her Majesty that the judgment of the Supreme Court of Canada be affirmed, and that this Appeal be dismissed with costs.