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KATE DOUGLAS MOORE.....APPELLANT;

*June 14, 16.
*Dec. 13.

AND

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY OF HARTFORD..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Life Insurance—Power of Court to set aside verdict and enter another—37 Vic., ch. 7, secs. 32 & 33 Ont.—secs. 264, 283, ch. 50 Rev. Stats. Ont.—38 Vic. ch. 11, secs. 20, 22—New trial.

In an action on a life policy tried before a judge and a jury, in accordance with the provisions of 37 *Vic.*, ch. 7, sec. 32, *Ont.*, the learned judge, in place of requiring the jury to render a general verdict, directed them to answer certain questions, and the jury having answered all the questions in favor of the plaintiff, the judge entered a verdict for the plaintiff. Upon a rule *nisi* to show cause why this verdict should not be set aside and a non-suit or a verdict entered for defendants, pursuant to the Law Reform Act, or a new trial had between the parties, said verdict being contrary to law and evidence, and the finding virtually for the defendants, the Court of Queen's Bench made

*PRESENT.—Ritchie, C. J., and Strong, Fournier, Henry, Taschereau and Gwynne, JJ.

the rule absolute to enter a verdict for the defendants. The appellant then appealed to the Court of Appeal for *Ontario*, and the court being equally divided, the appeal was dismissed.

Held 1. (*Taschereau*, J., dissenting), that the Court of Queen's Bench had no power to set aside the verdict for the plaintiff and direct a verdict to be entered for the defendants in direct opposition to the finding of the jury on a material issue.

2. That the court below might have ordered a new trial upon the ground that the finding of the jury upon the questions submitted to them was against the weight of evidence, but they exercised their discretion in declining to act, or in not acting on this ground; and therefore no appeal to the Supreme Court of *Canada* would lie on such ground, under sec. 22, 38 *Vic.*, ch. 11 (1).

3. That if an amendment to a plea was authorized by the court below, but such amendment was never actually made, the Supreme Court has no power to consider the case as if the amendment had in effect been made (2).

Per *Gwynne*, J., That the plaintiff never could have been non-suited in virtue of 37 *Vic.*, ch. 7, sec. 33 *Ont.*, as it is only where it can be said that there is not any evidence in support of the plaintiff's case, that a non-suit can be entered; and that in this case, the proper verdict which the law required to be entered upon the answers of the jury was one in favor of the plaintiff (3).

(1) "When the application for a "new trial is upon a matter of "discretion only, as on the "ground that the verdict is "against the weight of evi- "dence, or otherwise, no ap- "peal to the Supreme Court "shall be allowed."

Amended by Supreme and Exchequer Court Amendment Act, 1880, sec. 5:

"Section twenty-two of the Su- "preme and Exchequer Court "Act is hereby repealed, and "the following section is sub- "stituted therefor:

"22. In all cases of appeal the "court may, in its discretion, "order a new trial, if the ends "of justice may seem to re- "quire it, although such trial "may be deemed necessary "upon the ground that the "verdict is against the weight "of evidence."

(2) Now by the Supreme and Exchequer Court Amendment Act, 1880, it is provided that:

"At any time during the pend-" ing of any appeal before the " Supreme Court, the court " may, upon the application of" any of the parties, or without" any such application, make " all such amendments as may" be necessary for the purpose" of determining the existing " appeal, or the real question " or controversy between the " parties as disclosed by the " pleadings, evidence or pro-" ceedings."

(3) This case was appealed and the Lords of the Judicial Committee of the Privy Council

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APPEAL from a judgment of the Court of Appeal for *Ontario*, dismissing an appeal to that court from a judgment of the Court of Queen's Bench for *Ontario*.

The action, which was brought by one of the children of the late *Charles Moore*, on a life policy issued by the respondent company, was tried before *Moss*, C.J., and a jury at the *Toronto* Assizes, on the 23rd of April, 1877, when a verdict was entered for the plaintiff which, in the learned judge's opinion, the answers of the jury to the questions put to them, required to be entered. A rule *nisi* was afterwards obtained to set aside the verdict for plaintiff and to enter a non-suit or verdict for the defendants, pursuant to the Law Reform Act, or for a new trial, which was made absolute to set aside the verdict for plaintiff and enter a verdict for defendants.

The appellants then appealed to the Court of Appeal for *Ontario*, and that Court being equally divided, the appeal was dismissed.

The facts and pleadings are fully stated in the judgments hereinafter given (1).

Mr. *James Bethune*, Q.C., and Mr. *Rose*, with him, for appellant:—

The warranty in the application and policy was

affirmed the first holding of the Supreme Court. As to the second holding it was held that the Supreme and Exchequer Court Act, sec. 38, gives the Supreme Court power to give any judgment which the court below might or ought to have given, and amongst other things to order a new trial on the ground either of misdirection or the verdict being against the weight of evidence; and that power was not taken away by sec. 22 in this case in which the court below did not exercise any discretion as to the question of a new trial, and where the appeal from their judgment did not relate to that subject.

See Report of Case, 6 App. Cases, 644. The judgment of the Judicial Committee will also be found printed as an appendix to the Supreme Court Report.

(1) See also Report of Case in 41 U. C. Q. B. 497, and in 3 Ont. Appeal Rep. 331.

merely "that the applicant's answers were fair and true." Whether these answers were fair and true was a question of fact for the jury.

The respondents did not object to the questions being put to the jury, and if the Court of Queen's Bench have done what they had no right to do, we are entitled to have our verdict restored. We contend that there was evidence to be left to the jury, and the *Ontario* stat., 37 *Vic.* c. 7, did not give the Court of Queen's Bench the power to substitute their verdict for that of the jury.

Then all that respondents can now argue is that no questions should have been put to the jury. Now, if the questions were improperly put, the respondents should have objected to them. This was not done and they have no right to do so now. Appellants further contend that the questions were properly put to the jury, and that although it is for the court to construe a contract, it was for the jury to say whether the injury received was such as to be material to the risk.

[The learned counsel then argued that the statements in the application were not warranties but merely representations. That in any case the insured only warranted that the answers were "fair and true," and the jury having found that he had given "fair and true" answers, it could not be said he had received any personal injury which he might fairly have been expected to communicate to the insurers.]

Mr. *Robinson*, Q.C., and Dr. *McMichael*, Q.C., for respondents:

[The learned counsel, after having argued that the evidence showed beyond all doubt that the breaches of warranty alleged in the pleas were proved, therefore the plaintiff could not recover on the policy, continued:] The motion we made was to set aside the verdict, and

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to have a non-suit or verdict entered for the defendants, pursuant to the Law Reform Act, or a new trial had between the parties; also that we were entitled to a verdict under the answer of the jury to the seventh question. Now, when the judge proposes to leave certain questions to the jury, he does not necessarily leave the whole case, and the verdict which is entered is in the form of a general verdict.

Respondents contend that in this case, the questions put were partly relevant and partly irrelevant, and the the answers given to the relevant part, viz., to the fact of the insured having received a blow on the head and the consequent injury to the skull, and whether he had been attended by other medical aid, were in our favor. Moreover, if, as a matter of fact, all questions answered were irrelevant, the answers so given would not exclude the operation of sec. 283, of ch. 50 of the Revised Statutes, which declares that every verdict shall be considered by the court on 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.

At the trial also respondent's counsel submitted that there was no question for the jury, the warranty being that the statement is true.

It will not be denied that the judge in this case did not leave to the jury the fact that a personal injury had been received, and this fact being proved, it is a breach of a warranty, and on this finding the respondents are entitled to succeed. The qualifications put to these questions by the judge were not warranted by the contract.

THE CHIEF JUSTICE:—

The state of the pleadings, the issue raised, the finding

of the jury, and the action of the court below, in setting aside the verdict for the plaintiff and ordering a verdict to be entered for the defendants, prevents our dealing with the case in any other manner, in the view we take of the case, than by ordering the restoration of the original verdict. We have no power to amend, or right to interfere with the record in the court below, and we are precluded by the Supreme Court Act from granting a new trial on the ground of the verdict being against the weight of evidence.

The most important question in this case was, in my opinion, as to the answer given by the applicant to the eighth group of 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?" Answer: "No."

Here are four distinct questions put, each requiring a separate and distinct answer, if the first is answered in the affirmative; the three last would seem most important to enable the medical officer of the company to advise, and the company to determine, how far such illness, disease or personal injury, as the case may be, ought to affect the proposed risk. With reference to the first it cannot be that the illness or disease referred to was intended to apply to any slight, trivial indisposition of a temporary character, which no one in the ordinary intercourse of life would treat or speak of as an illness in the sense that term is ordinarily used in the common parlance of life, and as distinguishable from indisposition, or that by personal injury was intended every trifling injury, such as a simple cut, or burn of a slight character, producing, perhaps, a little temporary pain, possibly a little inconvenience, but no serious consequences, nor effects of a character likely to cause the injury to be remembered; but injuries

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of a substantial character, such as impair the body, or health, or as would be considered serious at the time, or which in their immediate effect might possibly jeopardize life, or tend, in their ulterior consequences, to affect longevity, or leave the person injured more open to the effect of subsequent disease, though not proceeding necessarily, immediately, or directly, from the wound or injury itself; in other words, leaving what might be considered a weak spot in the system, which might be productive, in the future, of consequences detrimental to longevity, either proceeding from the injury itself, or in connection with disease or injury to which the person may become subject from other causes, all of which it would be the proper province of the medical adviser of the company to determine when he should know the nature of the personal injury, how long since it occurred, and what the subsequent effect had been on the general health. Though it is certainly not necessary that such injury should contribute to the death of the assured, it is sufficient if it is such an injury as he should have disclosed in his answer, so that the insurers should have been placed in a position to institute any necessary enquiries in reference thereto, and on the result accept or reject the risk, the object of these questions being to obtain such information as to any personal injuries of a substantial or serious character as will enable the insurers, not the assured, to judge of its effect on the proposed risk, and, as Mr. Justice *Patterson* says, it may not be easy to define the limits between mere hurts and ailments and injuries or diseases; but in this case the injury is of so decided a character, and so clearly, to my mind, a personal injury within the policy, that a critical definition is unnecessary to be attempted.

It is difficult for me to understand how this could have escaped the recollection of the assured, and so been

overlooked by him, when it is clear from the evidence that the injury must have been present to his eye every time he looked in the glass, and he could not pass his hand over that part of his head without feeling the indentation. But whether it affected his general health, or was present to his mind at the time he answered the question, or was overlooked by him, in my view, is wholly immaterial. A personal injury, such as a fracture or depression of the skull, with loss or exfoliation of a part of the bone of the skull, is, I think, a personal injury of the most severe and serious character, and was a personal injury within the meaning of the policy which the assured was bound to have communicated, whether resulting from accident or disease, and not having done so, and not having truly answered the question, there was a breach of his warranty, and, as a consequence, a forfeiture of the policy would be the necessary result, if defendants chose properly to raise the question by their pleadings. But for what has taken place on the trial, and the finding of the jury, I should not have supposed it possible that any ordinary reasonable man of common understanding could be found to say that an injury, which left comparatively exposed such a vital part as the brain, which nature has in a sound man so strongly and carefully guarded, was not a personal injury within the terms of the application. Can it be said that a person who had received such an injury as to fracture his skull and remove a piece of it, or that accident or disease had caused exfoliation, so as to produce an indentation and absence of a piece of the skull, whether it apparently affects his general health or not, has not received a very serious injury, or had such an illness as left him less sound and more liable to serious consequences in the event of receiving other injuries on, or affections of, his head than a person whose head had never been

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fractured or exfoliated, and was in a perfect state to fulfil its functions and protect the brain? I think the company stipulated for and were entitled to information with respect to the injury, to enable them to judge whether it might or might not affect the health, strength, or longevity of the assured, or whether, though of itself not affecting the general health, it might not, in connection with other diseases or injuries which might occur, possibly have an ulterior injurious effect, whether, in other words, it might not affect the risk. Was he not rendered by that injury practically unsound, in that his skull was broken or defective, and the brain was therefore not covered and protected as nature provided it should be?

In view of the purposes for which these questions are asked, to say he was not, and to treat this as a slight or trifling injury and class it in the category of simple bruises, sprains, cut fingers and such like, would be, in my opinion, a most unreasonable construction to put on the language of this question. In view, however, of the doubt raised by the evidence, which I cannot help saying I think very unsatisfactory, as to whether the injury resulted from disease or accident (for I cannot think there was any reasonable ground for supposing under the evidence it resulted from natural causes), if the question was a proper one to be submitted to the jury, then in view of the only issue raised, and the finding of the jury on that issue, a verdict should not have been entered for defendants, but a new trial ordered.

Had the pleadings raised properly the question as to disease as well as to accident, I think the verdict must have been in favor of the defendants, inasmuch as the serious injuries on applicant's head, whether resulting from disease or accident, not having been communicated, would have invalidated the policy, but the jury having

found on the issues as raised, in favor of the plaintiff, and having been matter proper to be submitted to them, and the question as to whether or not the verdict was against the weight of evidence not being open to us, we have no power to deal with the case otherwise than to say that the Court of Queen's Bench should not have ordered a verdict for the plaintiff on the findings of the jury to be converted into a verdict for the defendants. If the pleadings did not properly raise the substantial points on which the case should turn the record should have been amended, or if the court below were dissatisfied with the finding of the jury on the issues as raised as being against the weight of evidence, a new trial should have been ordered.

STRONG, J., concurred in the judgment delivered by *Gwynne*, J.

FOURNIER, J. concurred.

HENRY, J.:—

This is an appeal from a decision of the Appeal Court in *Ontario*. It is an action on a life insurance policy which was tried before the learned Chief Justice of *Ontario*, and a verdict for the plaintiff entered by him for the present appellant on answers to certain questions submitted to the jury. A rule *nisi* was granted to set aside the verdict and to enter a non-suit or verdict for the defendants, or to grant a new trial. On argument the rule *nisi* was made absolute to enter a verdict for the defendants.

The plaintiff appealed from that judgment and after argument before the Appeal Court it was ordered that the appeal should be dismissed without costs. From the latter judgment the plaintiff appealed to this court, and it was fully and ably argued in June last.

The policy is fully set out in the declaration, and to it

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the pleas raising the only issues necessary to be considered, are the second and fourth. It appears that on the trial an amendment of the fourth plea was conditionally allowed, but whether an amendment was really made appears to have been doubted by one or more of the judges of the Appeal Court, and I think there is no evidence that it was finally allowed. A difference of opinion, too, existed as to the power of either that court or the Court of Queen's Bench, where the verdict was entered by the presiding judge, as in this case, upon special findings of a jury, to order a verdict to be entered for the defendants, or a non-suit, some of the judges holding, correctly as I think, that the court could only, in such a case, order a new trial. Entertaining the views I do, on the issues otherwise raised, it is not necessary, in my opinion, to consider either the matter of the amendment referred to or the power of the courts to order the entering of a verdict for the defendants; but if my judgment were to rest solely on one or both of the two points named I would decide them in favor of the appellant.

The second plea, to which I have referred, alleges that the negative answer to the question in the application; "Have you had any other illness, local disease or personal injury, and, if so, what nature? How long since? And what effect on your general health?" was untrue.

That the said Charles Moore had some twelve years before the time when he signed the said application and answered the said question in 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 some degree of inflammation of the brain. That the said 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 reason of

such untrue answer and breach of warranty the said policy was forfeited.

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In view of the law and the principles governing such cases, I feel no difficulty in asserting that if the plea had been sustained by sufficient evidence, and that the injury was of the description stated in it, the plaintiff's case would have been met, and the verdict should have been for the defendants. It would then have been, I think, such an injury as the applicant was bound to disclose in his answer. There is no doubt in my mind of the law, that the company had the right to propound the question, and to require thereto a truthful answer on pain of the forfeiture of the policy. The general proposition of law to warrant this decision is well established, and the authorities need not be cited in favor of it. A material misrepresentation avoids a policy as well as a warranty. In case of the former the materiality is generally essential, but in the latter it is not an element to be considered. We have not here the necessity of deciding as to the materiality of the subject-matter, as I have no doubt there was, in this case, a warranty of the truthfulness of the answers in question. The court is to judge of the sufficiency of the plea, but it is for the jury to decide upon the facts proved in support of it. The province and duty of the presiding judge is to expound the law to the jury, and it is for the jury in view of the law so expounded to find their verdict upon the facts. In the case of a general verdict it is final between the parties, if the rulings and charge are unexceptionable, unless the verdict is against the evidence or the weight of it. In the former case courts do not hesitate to set aside a verdict; but in the latter it is done only in cases where the preponderance is very great. Judges should not usurp the functions of a jury any more than a jury those of the court. In an argument for a new trial on the ground that it is against

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evidence or the weight of evidence, a judge is not to consider himself a juryman, or to inquire what his verdict, as a juryman, would have been. The law in such cases calls upon him to review the finding with a due appreciation of the prerogatives of the jury, but not to take their place. This distinction is sometimes forgotten, and I am inclined to the opinion that the present case is not an exception.

Without going into unnecessary prolix detail, I may say that after much reflection I have arrived at the conclusion that the charge to the jury in this case contained a full and correct view of the law bearing on the issues. The answers to the questions were held to be warranties and not mere representations, and the attention of the jury was properly directed to the nature of the issues and the law applicable to them. The only question open for discussion is therefore, in my opinion, as to the nature and extent of the finding of the jury upon the questions submitted to them. Objection has, however, been taken to the wording of some of the questions put to the jury. It may be that in one or two of them, taken separately, there were terms used which were not critically exact as defining legal propositions, but taken together with the other questions, and in view of the law expounded to the jury, they, in my judgment, fairly covered the necessary ground; and the answers, I think, were sufficient, as a whole, to amount to a general verdict for the plaintiff. The several questions were obviously put to the jury, so that the answers—not to any one or more, but to them all—might enable the judge to find his verdict. They contained no proposition of law by which the jury would be perplexed, or by which their finding on one question would be affected by their answers to others. Some of them were, to my mind, unnecessary; but in putting them, in the way adopted, no injury

could have resulted to the defendants. The very first question was unnecessary, as other questions made the same inquiry, only in a different form; for it differed, in legal effect, from the others referred to, in no respect; and otherwise only as to the question of a false statement wilfully made. A negligent misrepresentation would be as fatal as a wilful one. The answer in the negative to that question was not, however, taken by the learned Chief Justice as sufficient; for the second question is propounded to further the inquiry in another aspect. He, therefore, in the second question, asked the jury "Had he any serious or severe personal injury which, through forgetfulness or inadvertence, he did not communicate to the company?" to which the jury replied in the negative. These two answers, then, find that no misrepresentation, either intentionally, or through forgetfulness, or inadvertence, was made. Instead of the two, one general question might have included both propositions, but there was nothing wrong in dividing the inquiry. They then substantially found that up to the time of the application the insured had received no serious or personal injury.

Looking, too, at the third question put to the jury, with the law, as I hold, properly explained, what do we find? That third question asks, "Had he any personal injury, which he might have been fairly expected to communicate for the information of the defendants?" With the law before them the jury answer "No."

In the absence of any proof to the contrary, we must conclude the jury accepted the law so laid down for their government; and kept it in view when answering the questions. The answer to the fourth question being in the negative is unimportant, as the substance of it is otherwise found. It was, however, for the interest of the defendants that it was put, as, if the question had been affirmatively answered, it would have

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negatived some of the other findings. Lastly, as to the eighth question, which is the only other one which refers to the issue on the second plea, it is a general one, which again covers the whole ground. "Did he give fair and true answers to the question 'Have you had any other illness, local disease or personal injury?' The jury answer 'Yes.'" With the law before them, as I before stated, the answer to that question settles the whole issue; and, even if some of the other questions could be accepted to, the answers to them are not important, unless, from the putting of them, we felt the jury were misled as to the law, of which there is no evidence whatever.

Before referring to the evidence, I think it right to say that, in my opinion, the learned Chief Justice expounded the law properly on the trial. He very properly excluded the consideration of slight injuries and attacks of illness. Where questions are asked by companies as to specific diseases, they are likely to cause reflection and the exercise of memory on the part of the applicant; but when a man is asked generally whether he ever had a personal injury, no company can reasonably require (what in most cases would be impossible) that a man or woman of forty or fifty years of age should report every time they fell off of a horse, or were upset from a carriage, or in their younger days had been upset or tumbled down and were slightly hurt. The company no doubt had the right to ask the question in any form they thought proper; but having asked it in such general terms and to cover a whole lifetime it is not for them to construe it and the answers to it. That duty devolves on the courts who have, under the circumstances, to say what is reasonably included in and covered by the questions, and whether the answers were fairly and truly given. That every slight injury or attack should be notified is not

only preposterous, but would in the great majority of cases be impossible. A line must, therefore, be drawn somewhere, but the crossing point has been found difficult to determine. In fact none has yet been drawn of general applicability, and I am of opinion that none such can be drawn. Each case must, to a large extent, be governed by the facts peculiar to it. It has been contended that the company should get every information that would enable it to judge of the probable effects of any sickness, disease, or accident that might subsequently by any possibility affect the life of the applicant. This is, however, in view of medical knowledge or want of knowledge, too sweeping a proposition. There is in many cases a difficulty of correctly ascertaining the exact connection between a previous illness or injury and the immediate cause of death. Because a person meets with accidents which at the time and up to the time of his application do little or no injury, that the mere possibility that, from some one or other of them, injurious effects might result in after life, should make it necessary that he should report them, is, to my mind, most unreasonable, and not such as any company expects or could reasonable expect. If, however, an applicant has received an injury calculated according to medical evidence to affect his general health or the length of his life, he, I think, who fails to report it does so at the risk of forfeiting his policy. The question then is has it been clearly proved that the applicant in this case had received, and failed to notify the company of, such an injury as set out in the plea. Did he, in the words of that plea, receive a blow "which produced a fracture or depression of his skull, and which was followed by exfoliation of the bone of the skull," and which was of so aggravated an injury as to cause "some degree of inflammation of the brain." The defendants substantially say to the

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plaintiff: "The applicant through whom you claim had sustained that specific injury which he did not report, and we will prove it and so avoid the policy." On reading that plea—so specific as it is—one would reasonably expect to receive positive evidence—first of the blow, next the fracture, then the exfoliation of the bone of the skull, and, lastly, the inflammation of the brain.

Having given my view of the law, I must now consider the evidence in relation to the findings of the jury. The onus of proving the issue, it must not be forgotten, was on the defendants. I have read over the evidence carefully and fully considered it, and I must say it falls far short of what in my opinion was necessary.

In the first place, as to the fracture or depression caused, as alleged, by a blow, in the technical meaning of the word, no "blow" was proved; but it is alleged the applicant was once thrown off his horse when hunting, and on another occasion was thrown out of a sleigh. Here the direct evidence as to the injury ceases as far as the *fracture* is concerned. None is given of any fracture. It appears, from the evidence, that after one or other of those falls he spoke to a doctor, but the latter could find nothing wrong with him and did not prescribe for him. Would it not, therefore, be unwarrantable to conclude his skull was then fractured? Besides, we have the evidence of Dr. *Nicholl*, who says that when at the time of his last and fatal injury, having heard that he had had one or more falls, one of which had injured his head, he concluded from the appearance of the skull, after the trephining operation had been performed, that the missing bone had been removed by an operation. That no such operation had been performed is abundantly shown; for it is proved by more than one witness that the injury was

so slight that he attended to his business as usual and never complained of any injury. What then does the absence of part of the bone prove? Simply that it was a defect from his birth, or from disease, and if from the latter what disease? Was it the result of an external injury or not? If it was it has not been traced or proved. To say, without further evidence, the disease was the result of an injury would be the wildest guessing. The doctors substantially admit that they could not account for the absence of part of the bone. They say there are many such cases known without any external injury; that such cases are often found to have existed from birth, and others as the result of disease producing necrosis, exfoliation or wasting of the bone. How then could a jury reasonably be expected, from the evidence, to jump at the unreasonable conclusion that the absence of the bone must have been from the fracture alleged. Had there been a fracture and exfoliation of the bone, the subject must necessarily have felt it for a long time, and the soreness and pain must have been severe, and known to his brother and those around him, and to the doctor, and to have necessitated medical treatment. A fracture of a man's finger would be known to his whole household, and that of a leg would likely be the subject of a newspaper paragraph, but the fracture of a man's skull, of the extent to result as before mentioned, is asked to be presumed, without any medical man of the place (one of whom was spoken to at the time it is alleged to have taken place) or any one else hearing or knowing of it, and in the face of his brothers and the doctor's testimony, that the fall did not injure him. The medical men all say, the absence of the bone may have been from malformation, or the result of disease, and is no sufficient proof of any fracture. Without information as to a previous injury

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they would, without doubt, have attributed it to malformation or disease; and even with the "rumors" they had heard, with the addition of what one of them thinks the applicant told him, none of them ventured to decide whether it was from malformation, or was the result of disease, or of an external injury. None of them said, that, from all he saw and heard, he was of opinion the loss of bone was caused by an external injury. The onus to prove the fact was on the defendants, and I maintain the evidence wholly failed to establish it. The medical men may have erred in their views, but they were the witnesses of the respondents, and if they failed to establish their defence they must bear the consequences. The verdict must be founded on evidence, and a jury cannot set up their crude ideas against scientific evidence. From the evidence of the medical men, I am justified in the conclusion that, had they, when considering the case, before them the evidence of *Edward Moore* and Doctor *Valentine*, they would have concluded the absence of the bone was from malformation or the result of disease. I have already referred to the testimony of the former, but will now quote what the latter says:

> And the injury to the head—the contusion—there was nothing done at all in that case. He was simply directed to call and keep himself under observation in case anything did occur. It was simply a contusion of the skin. He was kept under observation, and no cerebral symptoms arose. This was in 1865, I think; it was not earlier than 1864 or later than 1866.

In another place, he says no injury to the bone was discoverable.

That was, no doubt, the time referred to in the plea, and the very identical injury referred to in it. That taken with *Moore's* evidence, apart from the improbabilities from other known facts, establishes beyond all reasonable doubt, that there was, at that time (as

positively above stated) no fracture of the bone, but "simply a contusion of the skin," without any "cerebral symptoms;" and, I presume this was the contusion which left the marks of the cross-cuts spoken of by one of the witnesses. I cannot conceive how, with such evidence before them, any jury could be expected to presume that a fracture of the bone had taken place, or how any one could expect the court to set aside a verdict in accordance with that evidence, or, what would be worse, to order a verdict for the defendants. Juries are permitted, and sometimes required, to found their verdicts on presumptions of certain facts: and the law distinguishes as to the nature of them. Juries are not, however, permitted to act upon them in the face of reliable evidence that rebuts them. Such, I hold, is the case here; and I go the length of saying that had the verdict been otherwise it ought to be set aside.

The judgment delivered by the late learned and lamented Chief Justice of the Queen's Bench as to this issue, was founded wholly on the, I think, mistaken assumption that the plea was proved. While agreeing with his statement of the law, I differ with him entirely as to the evidence. If it had been necessary to submit the matter to the jury to presume a certain fact from the circumstantial evidence adduced, it was their province alone to do so or not; but if they do not we cannot control them. If they do, and the presumption was at all justified by the evidence, the court has, in my opinion, no right to interfere. I feel bound to say that the judgment was erroneous, for it is not only contrary to the evidence but an invasion of the prerogative of the jury.

Before concluding my observations on this part of the case, I consider it proper to remark upon one part of the evidence of Dr. *Wright*, the consulting physician

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of the company, upon which I think improper stress has been laid. Speaking of the insured at the time of the application, he says:

> After he had signed the paper he passed it back again, rose from his chair and was about leaving, when he spoke of a fall he had had upon his head; he said he was not injured by it. The question was repeated to him, and he again asserted that he had had a fall upon his head, and that it had not injured him.

It is possible I may be wrong, but, if so, I have been under an hallucination during all my professional life, if you can take against a man an admission made against his interest, and discard what he adds to qualify and control it. A man may admit that at one time he was indebted to another, but, at the same time, alleges that he had paid the debt. Such a statement would not be evidence of present indebtedness, and would not be received as such. A man could not be convicted of an attempt to commit murder who admits the administration of deadly poison to another, but adds that he did so with the intention of immediately giving a sufficient antidote—that he did administer also the antidote, and no harm was done by the poison. The party might be blamed for unnecessarily tampering with human life, but the presumption of malice, from the admission of the administration of the poison, would be rebutted by taking the whole, and not a mere part, of his statement. So in this case, the addition of the words "that he was not injured by it" (the "fall") must be taken with the admission of having had a fall. Even if the fact of the fall were otherwise shown, the admission, as I take it, could not be received, even as corroborative evidence, except by taking the result of the whole statement. The admission in question was adopted by one of the judges of the Court of Appeal contrary to the principle I have stated, and I think his doing so was an error.

Taking the whole statement there is no evidence whatever from it that the applicant was guilty of any misrepresentation or concealment which would legally avoid the contract.

The defence on the ground that the applicant had suffered from dyspepsia has been, I think, very properly found by all the judges as not proved.

I will now give my opinion as to the remaining issue which is on the amended fourth plea, but which I think is not regularly a part of the record.

"That the answer given to the question, 'How long since you were attended by a physician?' Namely: 'about thirty 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 a much shorter period than thirty years had been attended by and had consulted and availed himself of the skill of other medical men, to wit, Dr. *Lizars*, Dr. *Nichol*, Dr. *Barrick*, Dr. *Russell*, and Dr. *Valentine*, and that he had concealed the said fact. That he had consulted the said medical men and gave no reference to the said medical men, and that the answer given to the said question was untrue, and was a breach of the warranty contained in the said application."

This plea charges an untruthful answer to the knowledge of the applicant It therefore includes not only a false representation, but a fraudulent one. Had the plea founded a defence on a false representation not amounting to a warranty, the onus on the defendants would include proof of the knowledge that the answer, when given, was false. The evidence in that case would have been here wholly insufficient. This plea was put in on the trial and raised an issue wholly different from that in the original plea; and if the amendment was forced on the plaintiff without further time given to permit rebutting evidence and the ques-

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tion of that amendment were open, I would feel inclined to reject it. The defence on the original plea was what the plaintiff came prepared to meet, and we are, I think, at all events, permitted if necessary to consider the amended plea under the circumstances in which it was admitted. It does not, however, appear to me there is any necessity for doing so.

I will commence the consideration of this part of the case by saying that as regards this issue I adopt the views of the learned Judges *Burton* and *Galt*, of the Court of Appeal. I concur with them in their ruling that the questions having been prepared by the company they must take the consequences of any ambiguity in them. Their questions should be plainly put, and the whole difficulty has arisen in this case from the absence of one of two words, "first" or "last" "How long since you were (first or last) attended by a physician?" The company may very properly say we meant the applicant to read the question as if it contained the word "last." Still it is open to the charge of ambiguity, calculated to mislead. The indefinite question might, not without some reason, be understood by many as intended to inquire as to the time the applicant first required medical treatment. In my opinion that inquiry would in many cases be quite as important as one in reference to the last preceding employment of a medical man. In his early days many a man has had injurious complaints and diseases which have so far passed away which a physician more recently employed might never have known about, but about which it would be desirable for the company to be informed. By a reference to his first doctor information might be obtained that a later one could not furnish. I mention this not to prove that such a construction would be the correct one; but to show how ambiguous the question was and how likely to mislead,

and when we know that uneducated persons and others not accustomed to such inquiries, are called upon, very often without much time for reflection, we should not too readily decide that the answer, by mistaking the term, was necessarily untrue to the extent of avoiding the policy. A mistake as to the meaning of the question does not necessarily make the statement in answer untrue. If it be not untrue, there is no breach of warranty, and consequently no defence. To prove there was not any untruth, as ordinarily understood in the answer, let me suppose it had been "How long since you were *first* attended by a physician?" The answer, "about 30 years ago," would have been strictly correct. That, it is patent, is the way the question was understood; but the defendants say he should have understood it to mean "last," instead of "first"—but that does not negative the truth of the answer he gave to what he supposed the question asked. The proper conclusion, I think, is that he answered a question he supposed to have been put; but did not answer at all the question as understood or intended by the company. The mere failure to answer the question as intended by the company, when done in good faith, and in the belief the answer he gave was what was asked for, would not, in my judgment, be a breach of the warranty under the circumstances.

Besides, the other questions and answers were such as to notify the company of the construction put on the question by the applicant. After stating in his answers that his complaint was "lake fever" and giving the name of Dr. *Sampson*, who attended him at *Kingston*, then dead, and being asked for the name and residence of his medical attendant, he replied, "Dr. *Barick* of *Toronto*, who attends my family—he has known me for seven years." He thus pointed out Dr. *Barick* as his physician, with an intimation or sugges-

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tion from which it might reasonably be presumed he had been such for seven years previously. If, therefore, the company wished information as to how long since he was *last* attended by a physician, they got it fully in the answer to that question. They were told who his first physician was, and they were referred to Dr. *Barick* as the one then attending him. If Dr. *Barick* was then, at the time of the application, his medical attendant, was not the answer sufficient to start any necessary inquiry? The mistake, if any, as to the question to which "about 30 years ago" was given as the answer, must have been patent to the company if they at all considered the answers, for that answer, as alleged to have been intended by them, was wholly inconsistent with that which notified the company that Dr. *Barick* was then his medical attendant. The discrepancy as to the first question was therefore fairly notified to the company before they issued the policy, and as the error, if any, was largely the result of their own ambiguous words, I don't think it lies with them now to seek shelter from their liability for that for which they have themselves to blame.

There is no ground for thinking that the question was framed intentionally ambiguous as a trap, but it certainly was one into which the uninitiated were not unlikely to fall, and was equally dangerous as if it had been. When it was so easy to have made the question plain to ordinary minds, such as generally had to answer it, there is no excuse for a company deliberately to frame and print such an ambiguous one, and one so much calculated to produce mistakes. According to the principles laid down by Lord *St. Leonards*, and quoted by Mr. Justice *Burton* in this case, and by *Willes*, J., as quoted by Mr. Justice *Galt*, I feel that the ambiguity which has caused the difficulty under the issue raised by the amended plea was the act of the de-

fendants, and that in consideration of the peculiar facts and circumstances of this case, it would be gross injustice to deprive the appellant of her rights under the policy.

The evidence, however, does not establish the fact that the applicant was attended by any of the physicians named in the plea or any other for any serious illness or injury. The same principles should be applicable to this plea as to the second, and when the question is asked: "How long since you were attended by a physician?" I think it was not intended to cover every unimportant ailment or injury, but something that, in the opinion of a medical man, might have some effect on general health, and I am helped to this construction by the concluding part of question eight, which, in case any other illness (besides those enumerated in question seven), local disease, or personal injury, is reported "and what effect on general health?", which shows, to my mind, that the attendance of a physician inquired about was only in cases more serious than any which the doctors say they attended him for, and for one of which (occasional indigestion) one of the doctors recommended "a ride on horseback." Another doctor on one occasion attended him for a slight attack of the liver and bowels, which he supposed was from the heat of the weather. He says: "Of course it was nothing serious." Dr. *Valentine* stated that he had treated him for a local disease of a temporary character, of which he was cured in 1865, or the end of 1864, from which no permanent constitutional disturbances remained; and for slight derangements of the stomach. If then the answer had been that the last attendance upon him of a physician for anything more than trifling causes not at all affecting his general health, or probable longevity, it might not improperly be said when he replied, "Dr. *Chapman*, 30 years ago,"

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was strictly true. The evidence shows him to have been particularly healthy and active, and it would, I think, be straining words from their true bearing and meaning to say that the attendances last referred to were such as were contemplated or required by the questions. Because differences of opinion have been expressed in the lower courts and here, I have considered it proper to be thus minute in dealing with the issues involved.

For the reasons given by Mr. Justice *Burton* and Mr. Justice *Galt* before referred to, and for those I have myself given, I think, that on the fourth issue also our judgment should be for the appellant. I have not failed to consider the effect of the statute under which the questions were propounded to the jury, and I think I am justified in saying, as I now take occasion to do, that in a case like the present the court could not enter a verdict for the defendant or a non-suit, and that the power in such cases is limited to making an order for a new trial. As therefore the order was not justifiable all we can do in that respect is to reverse the judgment.

I am of opinion that the judgments of the Court of Appeal and the Queen's Bench should be reversed, the appeal allowed and judgment entered for the plaintiff on the verdict, with costs up to and since the rendering of the verdict.

TASCHEREAU, J.:—

Upon the fourth plea, I am of opinion that the question, "How long since were you attended by a physician?" was not clear and may have been understood by *Moore* as meaning, "How long since you were first attended by a physician?"

Why did not the company, if they meant to know who attended him last, ask him plainly, "When were you last attended by a physician?" I am inclined to

think with the Court of Appeal, that the applicant misunderstood the question put to him, and that his answer is not then untrue, and I would be for the the plaintiff on this part of the case.

I come now to the consideration of the questions raised on the second plea. This part of the case is not free from difficulty. This plea is as follows :—

And for a second plea 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 twelve years before the time when he signed the said application and answered the said question in 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 said 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 reason of such untrue answer and breach of warranty the said policy was forfeited.

At the trial, the learned judge presiding, instead of taking a general verdict, directed the jury to answer certain questions. It is, perhaps, better to give here those questions with the remarks and directions of the learned judge.

The first four questions that I shall put to you relate to the personal injury which it is alleged by these defendants that the applicant, *Charles Moore*, sustained, and the existence of which was not disclosed to them on his application. The defendants' contention is that they put to the applicant this question, 'Have you had any other illness, local disease, or personal injury, and if so, of what nature, how long since, and what was the effect of it on your general health;' that he answered in the negative, as in fact he did; that that answer was untrue, and vitiated the policy, because he had received, many years before, a severe injury to his head, amounting to a fracture; and which they say in the plea—although there is no evidence upon that point—was succeeded by exfoliation. It is to that question and answer, and to the circumstances which actually

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existed, as far as you can make them out from the evidence in connection with this injury, that I direct your attention. (The learned judge here referred in detail to the evidence.)

Bearing that evidence in mind, I ask you to reply to the following questions:—

"1. 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 defendants?"

You will perceive from the terms of this question the idea present to my mind in framing it. It appeared to me that it might possibly be held that any "personal injury" must be one that would be fairly present to the mind of a person making such an application as something that an ordinary man would understand as a personal injury that he ought to communicate to the Company; and if you think that, you will of course answer this question "Yes." In other words, if you think that this injury to his head, whatever its extent and origin, did fairly come within the term "personal injury," and was present to Mr. *Moore's* mind, then the answer should be "Yes." If you think it was so slight, and made so little impression upon himself and his own mind that he could not accept it as coming fairly within the term, then you will answer "No."

2. "Had he had any serious or severe personal injury which, through forgetfulness or inadvertence, he did not communicate to the Company?"

I have already pointed out to you that in my construction of these questions in this application the applicant must at his own peril answer the questions correctly, and that forgetfulness or inadvertence will not excuse him. If he makes a slip the Company can, if found consistent with fair dealing or necessary for the protection of its own interests, set it up; but I want to get your answer to this question.

3. "Had he any personal injury which he might have been fairly expected to communicate for the information of the defendants?"

That is almost another form of one of the preceding questions, but raises a point slightly different.

4. "Had he any personal injury which had any effect on his general health?"

It is contended by the learned counsel for the plaintiff that that is the fair meaning of the question put in the application with reference to any other personal injury, illness, or local disease. The words must have some limitation: and it may be that the propor limitation is that they should be confined to injuries that affect the general health. In considering this question you will bear in mind

what all the witnesses said as to the state of health Mr. *Moore* had after the accident, and consider the medical evidence as to the effect which it might have. Although the medical men would be no doubt the first themselves to admit that, it is not comparable with evidence of the actual state of health which he did enjoy. That is the last question in relation to the personal injury.

To these four questions the jury answered "No."

To another question, as follows:—

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?

the jury answered "Yes."

Now, as to the evidence on this part of the case, the following is a correct synopsis of it, as given by Mr. Vice-Chancellor *Blake* in the Court of Appeal.

Dr. *Nicol* says: When I was first called in to see him in his last illness, he was apparently suffering from a species of low fever with some head affection; then, I think on the night following the day he was attacked, he was attacked with paralysis of the left side, and then after that he became semi-comatose.

Q. Did you find on examination any evidence of personal injury?

A. Yes; just on the parietal bone on the right side of the head there was a depression that I could just put my little finger into.

Q. What examination was made to enable you to judge of the injury to the skull?

A. Trephining. There was a deficiency in the bone, perhaps the space of my little finger, perhaps a little more. It was not a very recent injury . . . . . The depression I mentioned was easily discoverable to any person who had reason to suspect its presence, or who searched the head carefully; the depth was slight, not more than a tenth or an eighth of an inch; you would hardly have noticed it . . . . . I think that one day I had some conversation with him in reference to this injury to the head . . . . . It was on one of these two occasions, 1869 or 1870 . . . . . I do not remember what he said about it, except that it was from a fall from a horse, or from his horse falling on a furrow. I had not seen the injury to his head at that time. I have some idea that I put my finger in the place where he told me, but I could not say positively. I think there was something said about a piece of bone being lost, but whether he volunteered it, or whether it was in answer to a question from me, I cannot say. There was a loss of bone. I cannot say positively, but

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I think there was; when I put my finger in, as I think I did, I found the depression. He spoke of that as a fall from a horse.

Q. Then he was under the impression that that kind of injury caused it? A. Yes; but if the bone perished and exfoliated, it would be equally from this injury as if he had the bone fractured, and the surgeon removed the bone at the time. I supposed at that time he had had the skull fractured, and that some surgeon or another had removed the piece of bone. If an examining physician had passed his fingers at all carefully over Mr. *Moore's* head he would have detected the depression in the skull; if he merely passed his hand over it he would not have discovered it.

Dr. *Aikens*, in answer to the question, "What was the condition of the skull before you commenced the operation? says: There was a depression there. Mr. *C. Moore* had for years past kept his hair very short, and, as far as I can remember, the depression could be seen, but there was no difficulty whatever in feeling it; the point of the little finger could be easily buried in the depression; perhaps the index finger, just the point of it. This was the first time I had attended Mr. *Moore*, but I was in the habit of seeing him often. If I had been aware of the depression before that evening I had forgotten it; there was a piece of bone absent then, there was a part of the skull gone; no matter what had happened to it, whether it never was there, or was the result of disease or injury, the piece was gone, and we planted the trephine so that the edge of the instrument just came over the edge of this deficiency. I would not expect to find an opening there, although I have seen children born with an opening in the bone where no opening ought to be, but I would come to the conclusion, from looking at his head, that he had lost a piece of bone, either from fracture or disease; of course some diseases would kill bone; I have seen men with no fracture who have lost a part of their skull. I could hardly suppose that the absence of the portion of skull was natural; it is only just possible.

Q As a physician you formed an opinion?—A. I perhaps was guided by the information that was given to me at the time, that he had some injury previously. My opinion at that time was that he had had a fracture of the skull, and lost part of the bone . . . . . The bone had either been removed by the surgeon, if it had not been knocked out by the cause of injury, or had necrosed, died. Exfoliation is throwing off in thin scales or leaves. I do not think there had been anything of that sort; it is not at all likely . . . . . That is a sort of wasting away . . . . . I received information then and there about a past injury. The skull has inner and outer densities, and a spongy structure between the two. It is my belief that the

whole had disappeared, the entire thickness of bone had gone. In such a case the bone fills in a little from the edges, but leaves a little deficiency in the centre; then the centre will fill with dense tissue resembling sclerotic tissue covered with scalp; that was the case here.

Q. Was he as well prepared to resist the effects of another blow over this spot?—A. No, he was not.

Dr. *Barrick* says: I first saw him, I think, about ten days before his death; he was then complaining of a pain in his head, at some distance from the old depression; that was the burden of his complaint. I was aware of the depression in the head before that time. I took notice of it before anything was said about it, because his hair was thin and cut short, but I could not tell how long that was before. He said that he had had several tumbles and accidents, and from some of them he led me to believe that this depression arose.

Q. Did you speak to Mr. *Moore* at all about that injury before you called in the other doctors to consult?—A. He mentioned that to me, I think, when he was attacked last time; he complained of pain in the head about an inch and a half from this old place; he then commenced and related to me again that he had received an injury and that his impression was that the depression had arisen from that injury. That is what he told me in his last illness. He told the other medical men that the object in taking in part of the old injury was to see the condition of the bone at that part. We were anxious to include part of the old depression to see what the nature of that part was.

Edward Moore, the brother of the deceased, says: I felt his head after the last accident in the store, the hurt was about two inches from the old injury, on the same side of the head. I saw the old injury then. You could not help but see it. I had been aware of it before. It had been cut and healed up. I felt the new injury to see if the skull was broken.

From the evidence of Drs. *Nicol* and *Aikins*, there can be no doubt that by some means a piece of the bone of the skull of the deceased had been removed. As to the manner in which this was lost, Dr. *Nicol* says: "I supposed at that time that he had had the skull fractured, and that some surgeon or another had removed the piece of bone;" and Dr. *Aikins* says: "I would come to the conclusion, from looking at his head, that he had lost a piece of bone either from fracture or disease."

That the conclusion arrived at by these medical gentlemen is correct, is evident from the family physician of the deceased, Dr. *Barrick*, who says that—

His patient informed him that he had had several tumbles and

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accidents, and that from some of them he led him to believe that this depression arose; and at another time he says: He then commenced and related to me again that he had received an injury, and that his impression was that that depression had arisen from that injury. That was what he told me in his last illness.

In my opinion this evidence establishes clearly that *Moore* had, some years before he made his application to the company, received an injury on the head. The plaintiff contends that this depression of the skull may have been caused by disease or may have been natural. Now, I can't see how we can attribute it to disease. 1st. Because if it was so the plaintiff could have easily proved it; 2nd. Because the doctors examined do not think it was caused by disease; 3rd. Because *Moore* himself, in his application to the company, stated that he never had any other disease than the lake fever. As to the possibility of this depression in the skull being natural, I can't see my way to support the plaintiff's contention in this respect. 1st. Because the doctors examined say this was most unlikely. 2nd. Because the plaintiff would have been able to prove it, if it had been natural; 3rd. Because *Moore* himself said it was caused by a fall on the head; and all the witnesses, including *Moore's* brother, speak of it as "the old injury." It is impossible, in my opinion, after reading the evidence adduced, to doubt that *Moore* had, at some time or another, before he made the application to the company, received an injury by which he had lost a portion of his skull. It appears to me to be proved beyond a doubt, and, as said by the late Chief Justice of the Court of Queen's Bench, the question in its naked form as to this fact, was not submitted to the jury, for the reason that there was no dispute about it. The jury have not found that *Moore* had received no personal injury; but that he had received no personal injury which must have been present to his mind as something coming fairly within the term "personal injury";

that he had no serious or severe personal injury, which through forgetfulness or inadvertence he did not communicate; that he had no personal injury which he might fairly be expected to communicate for the information of the defendants, and that he had not any personal injury which had any effect on his general health. They never found, and they could not find in face of the evidence, that he never received any personal injury whatever. By finding that he had not received any personal injury which had any effect on his general health, they have not found for the plaintiff. On the contrary, as the case was given to them, all parties at the trial, judge, jury and counsel (as said by *Burton*, J, and *Patterson*, J, in the Court of Appeal) assuming that there had been a personal injury, this answer of the jury seems to me to mean "Yes," he had received a personal injury, but it did not affect his general health. Now, his statement to the company was that he had never received a personal injury. This was, it seems to me, untrue. The jury also answered "No" to the third question put to them, as follows: "Had he any personal injury which he might have been fairly expected to communicate for the information of the defendants?" But that is not finding that he never had any personal injury whatsoever. It seems to me, that it was for the court to decide whether any injury received should have been communicated to the defendants. The second question to them speaks of a serious or severe personal injury. Now, what he stated to the company was, not that he had never received any serious or severe injury, but that he had never received any personal injury. The answer of the jury to the first question put to them does not either say that *Moore* never received any personal injury whatsoever, so that, without disregarding the answers of the jury to the questions submitted to them, it seems to me,

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that, as a matter of law, the plaintiff is not entitled to recover. The basis of *Moore's* contract with the company was that each and every one of his answers to their questions was strictly true. It being established that one of them was not true, the company is freed from all obligations under this contract, whether this untrue answer was given to them fraudulently or not(1), and whether this untrue answer was on a material fact or not (2). I fully admit this proposition that the words "illness, local disease or personal injury," do not include such trifling ailments as influenza, or toothache, or a black eye, but I cannot avoid the conclusion that a fracture in the skull, by which that vital portion of the human frame, the brain, is not as well protected as it otherwise would have been, is a personal injury, and, in *Moore's* case, should, as such, have been communicated to the company.

I am of opinion to dismiss this appeal with costs.

GWYNNE, J. :—

The position in which this case at present stands, is certainly not satisfactory. The learned judge before whom the case was tried, entered a verdict for the plaintiff, as the verdict which, in his judgment, the answers of the jury to the questions put to them required to be entered. The Court of Queen's Bench reversed that verdict and has ordered one to be entered for the defendants upon the issues joined on the second and fourth pleas.

In rendering this judgment the Court of Queen's Bench seems to me to have arrived at the result which they did arrive at, by reading the evidence rather in connection with the questions and answers endorsed on the application for insurance than with regard to

(1) *Macdonald v. Law Union Insurance Co.* L. R. 9 Q. B. 328.

(2) *Anderson v. Fitzgerald*, 4 H. L. C. 484.

the issues joined between the parties which they went down to try, and this is the more unfortunate, as much of the evidence relied upon by the late learned Chief Justice of that court in his judgment was irrelevant to those issues, and consequently inadmissible. This is pointed out by Mr. Justice *Patterson* in the Court of Appeal, who, while concurring in the judgment of the Court of Queen's Bench upon the second plea, was of opinion that the fourth plea was by no means so clearly proved as to warrant interference with the verdict entered thereon for the plaintiff, even if the plea had followed the language of the question on the application with respect to which it was framed, which, in his opinion, it did not. He therefore was not disposed to disturb the verdict for the plaintiff upon that issue. Two of the other learned judges of the Court of Appeal were of opinion that the plaintiff was entitled to judgment upon all the issues, and the fourth was of opinion that a new trial should be granted, but as the other members of the court did not consent to this, and thinking the plaintiff not entitled to succeed, he concurred with Mr. Justice *Patterson*, and the court being divided, no rule followed on the appeal, and so the case comes before this court.

Much of this difference of opinion has arisen, I think, from the want of sufficient attention to the issues joined. The declaration alleged that the policy of insurance declared upon was issued and accepted upon certain express conditions and agreements which are set out in the declaration, containing among others the following:—

1st. That the answers, statements, representations and declarations contained in or endorsed upon the application for this insurance, which application is hereby referred to and made part of this contract, are warranted by the assured to be true in all respects, and that if this policy has been obtained by or through any fraud, misrepresentation, or concealment, then this policy shall be abso-

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lutely null and void; and, further, that no answer, statement, representation or declaration made to any agent, solicitor, or any other person whatever, and not contained in said application, shall be taken or considered as having been made to, or brought to the notice or knowledge of this company, and this company shall be held and considered as having no notice or knowledge of such answer, statement, representation or declaration, and the said application, a copy of which is hereto annexed, shall be taken and held to be, and to contain the only answers, statements, representations or declarations made to this company on behalf of this insurance.

The application so referred to was for a policy of insurance for $25,000 upon the life of *Charles Moore*, aged 50. Upon this application, which was in one of the company's printed forms, were endorsed certain questions to be answered by the applicant, among which were the following, which are the only material ones to be set out, namely:

7th. Have you ever had any of the following diseases? Answer, Yes or No, opposite each. Here follow thirty-six particular diseases enumerated, and among them dyspepsia, and the question concludes as follows: "If you have a rupture, state whether you habitually wear a truss?"

"State the number of attacks, character and duration of all the diseases which you have had?"

To this question the applicant answered by inserting "*No*," after each particular disease mentioned in the question.

This question was immediately followed by the 8th, namely: "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?" To which the applicant also answered "*No.*"

14th. "How long since you were attended by a physician? For what diseases? Give name and residence of such physician?"

"Name and residence of usual medical attendant? Name and residence of an intimate friend."

This question the applicant answered as follows:

To 1st part. About 30 years ago, Lake fever. Dr. *Sampson*, of *Kingston*, who is now dead.

To 2nd. Dr. *Barrick*, of *Toronto*, who attends my family; has known me some years.

To 3rd. Mr. *Dunbar*; has known me some years.

Upon this application and the answers to the questions thereon endorsed the policy sued upon was issued by the defendants upon the 27th March, 1875, and in August, 1876, after having paid two premiums, amounting together to $2,347.00, *Moore*, the insured, died from the effects of a blow then recently received upon his head.

The plaintiff, as one of the children of *Moore* for whose benefit, among others, the policy was effected, brings this action, to which the defendants plead in bar:

1st. That they did not make that policy in the declaration mentioned.

2nd. And for second plea 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, of what nature? How long since? And what effect on general health?" was untrue. That the said *Charles Moore* had, some twelve years before the time when he signed the said application and answered the said question in 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 said blow was a personal injury within the meaning of the said question, and that the answer "No,"

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given to the said question was untrue and was a breach of the warranty contained in the said application, and that by reason of such untrue answer and breach of warranty the said policy was forfeited.

3rd. And for the third plea to the said declaration the defendants say that the said *Charles Moore* had before the time when he made the said application been afflicted with "dyspepsia," and that the answer "No" given by the said *Charles Moore* to the question, "Have you ever had any of the following diseases, among others dyspepsia?" was untrue and a breach of the warranty contained in the said application, and was untrue to the knowledge of the said *Charles Moore*.

4th. And for fourth plea 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 at a much shorter period than 30 years, received a severe blow on the head, the effects of which remained until his death, and that while 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, and gave no reference to the said medical man, and that the answer given to the said question was untrue and was a breach of the warranty contained in the said application.

The plaintiff joined issue upon these pleas.

A motion was made by the defendants, and leave was given to them at the trial to amend this fourth plea, subject, however, to a special reservation to the court in which the action was pending to the question whether, under all the circumstances, the amendment should be allowed.

If we were now considering the question whether the amendment in the terms proposed should be allowed, I confess that the propriety of allowing it seems to me to be more than doubtful. When we consider the extremely rigorous and partial terms in the interest of the defendants in which this policy is framed, terms which, if construed literally, would seem to be open to a construction that it would be impossible for the most honest insurer to comply with them; and which would leave it in the power of the defendants, upon the discovery after diligent enquiry, of some old forgotten disease or injury which the applicant had had and which had passed away years previously without leaving a trace behind, to avoid the policy when called upon to fulfil their undertaking, while retaining, nevertheless, the premiums which they may have been receiving punctually for many years; and when we consider that the effect of the amendment (although this was not the object at all in view when it was authorized) would be to enable the defendants to set up as a defence in avoidance of the policy the non-communication by the applicant of a private disease which he had had in a mild form (not being one of the thirty-six diseases particularly inquired after) and which had been cured more than eleven years previously, leaving no trace or effect whatever behind,—I do not think that the indulgence of permitting the defendants to make an amendment which would open to them a road for avoiding the policy by proof of the existence of such a disease, the fact of the existence of which was otherwise inadmissible, should be granted. However, we are not called upon to consider that question, because as matter of fact it appears by the judgments of the learned judges in the court below that the amendment, although authorized, subject to the above reservation, was never actually made; and we must

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consider the case as it was considered and dealt with in the court below as it stood upon the original pleadings; indeed I must do the defendants the justice to say that in the argument before us, I did not understand them to urge at all or rely upon the fact of the existence of this disease as avoiding that policy, but that they rested upon what they insisted upon as a good and meritorious defence, namely, the injury to the applicant's head relied upon both in the second and fourth pleas. But however that may be, we must deal with the record upon the original pleas as without any amendment having been actually made.

At the trial the plaintiff produced the policy which, upon production, was admitted.

Upon this record then, whatever opinion a judge trying the case might form of the sufficiency of the evidence offered by the defendants in support of their pleas, it seems to me to be very plain that the plaintiff never could have been nonsuited either in virtue of anything contained in the *Ontario* stat, 37 *Vic.*, ch. 7, s. 33 or otherwise. That statute only authorizes the court to enter a nonsuit upon a motion after verdict without leave reserved under the circumstances and in a case where a nonsuit might properly have been entered under the old practice, upon leave reserved with the plaintiff's consent, and the rule as laid down in *Campbell* v. *Hill* (1), (referred to by the late learned C. J. of the Queen's Bench in his judgment) and in the cases upon which *Campbell* v. *Hill* proceeds, has only been applied to cases wherein the plaintiff fails to adduce such legal evidence in support of his case as entitles him to have his case given to the jury, or, which seems to me but another expression for the same thing, to cases in support of which the plaintiff

(1) 22 U. C. C. P. 526.

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has given no evidence sufficient to warrant a verdict in his favor, or which the defendant would not be entitled *ex debito justitiæ* to set aside. It is only where it can be truly said that there is not *any* evidence in support of the plaintiff's case that a nonsuit can be entered. When the question is as to the value or weight of the evidence it must be submitted to the jury. Here, as it seems to me, the question was wholly as to the value or weight of the evidence as bearing upon the issues joined, and was in fact, eminently one for the jury, but in a case like the present, or in any case where issues are joined upon pleas the onus of proving which lies on the defendants, I do not think it has ever been held or suggested that the court would be justified in withdrawing the issues joined from the jury and in entering a non-suit because, in their opinion, the defendant has proved his pleas beyond all rational controversy. The only way therefore in which the case can be constitutionally disposed of is by a verdict determining the issues joined upon the pleas, either in favor of the plaintiff or of the defendants.

The learned judge before whom these issues were tried availed himself, as it was competent for him to do, of the *Ontario Act*, 37 *Vic.*, ch. 7, sec. 32, being sec. 264 of ch. 50 of the revised statutes, which enacts that—

> Upon a trial by jury in any case, except an action for libel, slander, criminal conversation, seduction, malicious arrest, malicious prosecution, false imprisonment, the judge, instead of directing the jury to give either a general or special verdict, may direct the jury to answer any questions of fact stated to them by the judge for that purpose; and in such case the jury shall answer the questions, and shall not give any verdict, and on the finding of the jury upon the questions which they answer, the judge shall enter the verdict, and the verdict so entered, unless moved against shall stand, and be effectual as if the same had been the verdict of the jury.

Now, under this act, the judge is not invested with

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the character and responsibility of a juror to find facts himself in any respect. He has no power to do anything of the kind—his plain and simple duty is as a judge to enter the verdict in the manner in which the law requires that it should be entered upon the answers of the jury and upon nothing else. The questions put to the jury ought therefore to be such as expressly, or by implication, to involve all the points necessary to be determined in order to enter a verdict upon all the issues joined upon the record. I say expressly or by implication to meet the case suggested by Mr. Justice *Patterson*, in his judgment, wherein he says:

> Take for an example an action on a deed in which the pleas are *non est factum*, and special pleas such as fraud or duress or release. The deed is produced at the trial, and its execution admitted or proved by the attesting witness and not denied. No judge would think it necessary under sec. 264 to go through the form of directing the jury to answer the question: Did the defendant make the deed?

In this case it is obvious that questions as to whether the deed was obtained to be executed by fraud, or under circumstances of duress, involve an admission of the existence in fact of the deed; so likewise a question as to whether a release was executed as pleaded involves an admission of the existence of the deed as good and valid in law unless the release was executed, so that it might perhaps be competent for a judge upon answers being given to questions relating to the circumstances attending its execution, or to the question as to its having been released after execution, to record the verdict upon the issue of *non est factum* as well as upon the other issues. But unless in such a case, and indeed in that case and in all cases, unless there be the consent of parties that the verdict be entered one way or the other upon issues as to which the evidence is admitted to be conclusive, the proper course to be pursued as it

appears to me in submitting questions to the jury under this clause, in order to enable the court to dispose of all the issues by the verdict to be entered, is to submit to the jury all such questions that their answers thereto will cover all the issues, although, in order to arrive at the points really in contest, it may be necessary to put questions which upon the evidence, or by admission, can only be answered in one way. This is the course which I have always pursued when acting under this clause, and for the reason that it has always appeared to me to be very clear that in acting under this section a judge has no power whatever to do more than to enter the verdict in the manner in which, in his judgment, the law requires that it should be entered, upon the answers given by the jury and upon nothing else. The learned judge who tried this case appears to have taken this view, and in consequence to have submitted all such questions as appeared to him sufficient to elicit answers which alone would enable him to enter the verdict required by law. I omit for the present to enquire whether any of these questions were well or ill framed, or whether they were accompanied with proper directions to enable the jury to arrive at a just conclusion in answering them. My present purpose is merely to enquire whether the proper verdict which the law requires to be entered upon those answers as they stand, is one in favor of the defendants? as has been ordered by the Court of Queen's Bench, setting aside the verdict which, upon the same answers, the learned judge who tried the cause had entered for the plaintiff. If a verdict for the defendants is not that which the law requires to be entered upon those answers as they stand, treating them as undoubtedly true in every particular, for their truth cannot upon this enquiry be called in question, then it is plain the

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verdict as recorded by the Court of Queen's Bench cannot stand.

The answers then of the jury upon the questions submitted to them are, that the applicant for insurance had had no "personal injury" which must have been present to his mind as something coming fairly within the term "personal injury," which he did not communicate to the defendants; that he had had no serious or severe personal injury which, through forgetfulness or inadvertence he did not communicate; that, in fact, he had had no personal injury which he might have been fairly expected to communicate, or which had any effect upon his general health; that he had not been afflicted with any of the diseases enumerated in the seventh question endorsed upon the application, nor, in particular, with dyspepsia; that he had not been attended by any physician for any of the diseases detailed on the application, nor for any disease whatever by any physician whatever other than Dr. *Sampson*, nor for anything other than a trifling ailment not amounting to a disease, and that in fact he gave fair and true answers to all the questions involved in the issues joined.

It must be admitted that the declaration at the foot of the answers endorsed upon the application does, in the terms of the policy, constitute a warranty, and the warranty is stated expressly to be that the answers are fair and true answers to the questions put.

The only breaches of warranty alleged in the pleas (and it is only with these and the issues joined in respect of them, that the jury had to deal) are—

1st. That the applicant had committed a breach of warranty as to the truth of the answer that he had had no personal injury, for that he had had a blow on the head which produced a fracture or depression of the skull which was attended with exfoliation of a part of the bone of the skull, and which caused also, to some

degree, inflammation of the brain; and that so he had had a personal injury within the meaning of the question in that behalf, and that the answer "No" to that question was therefore untrue.

2nd. That the applicant had had one of the diseases enumerated in the seventh question endorsed on the application, namely, "dyspepsia," and that therefore the answer "No" set after "dyspepsia" one of the diseases there enumerated, was untrue, and a breach of warranty; and

3rd. That the applicant had committed a breach of warranty in his answer to the following question, namely: "How long since you were attended by a physician? For what disease? Give name and residence of such physician." For that within a much shorter period than 30 years he had received a severe blow on the head, the effects of which remained until his death, and that while he was suffering under such injury he had consulted, and availed himself of the skill of a medical man (one Dr. *Lizars*), and had concealed such fact, and gave no reference to such medical man. This issue, it will be observed, is, in substance, the same as that joined upon the second plea, with this difference, that the same injury, for there is no warrant for regarding them as being different, is relied upon as constituting a breach of the warranty of the truth of the answers to both the eighth and the fourteenth questions endorsed on the application.

Now, upon the question of breach of warranty, the sole enquiry before the jury was whether those pleas or any and which of them were proved to be true, for, if not, there was nothing else alleged, and therefore nothing else legally before the jury raising any question which could be enquired into by them, impeaching the fairness and truth of the answers.

As I have already said, it is of no importance upon

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the question I am now considering, whether the questions submitted to the jury were or were not proper questions to elicit answers upon which the court could give proper directions as to the entry of the verdict thereupon; nor whether the evidence supports the finding of the jury. The point to be determined simply is, whether upon the facts as found by the answers, assuming those answers for the present to be true, the verdict which the law requires to be entered is one in favor of the defendants? And to this question the only answer which can be given, as it appears to me, must plainly be: that upon those answers as they stand a verdict cannot be entered for the defendants without doing open violence to the facts found by the jury, which facts upon the present enquiry must be taken to be incontrovertibly true. Trial by jury, to use an expression of the late Lord *Denman*, would be a mockery, a delusion and a snare, if upon such finding of a jury upon the facts involved in the issues joined, it should be competent for a court to enter a verdict for the defendants.

The answers in the plainest language possible controvert the breaches of warranty alleged in the pleas, and these are all with which we have to deal. The warranty is that the answers were fair and true. The finding of the jury is expressly that they were so. The meaning of the jury, as plainly as that meaning can be expressed in words, is that in fact the answers were fair and true in every particular, in the judgment of the jury. No other meaning can be put upon their finding, they most distinctly say that the applicant had never received any personal injury whatever, whether of a serious or severe nature, or having any effect upon his general health, or which he might fairly have been expected to communicate; that he had never been afflicted with dyspepsia, or with any of the diseases enumerated

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in the seventh question, endorsed on the application; that he had never been attended by any physician for any disease other than by Dr. *Sampson* for lake fever, as stated in the answer endorsed on the application, although he may have been for a trifling ailment not amounting to a disease, and that in fact, in the words of his warranty, all his answers to the questions put were fair and true.

I confess that I cannot understand how it can be contended for a moment that upon these answers a verdict should be entered for the defendants, which would involve the entering of a judgment upon record that the answers which the jury expressly find to have been fair and true, were untrue. It is said that the answer of the jury to the seventh question put to them—namely, "Had he been attended by any physician but Dr. *Sampson* for any disease whatever, or only for some trifling ailment not amounting to disease?" requires a verdict for the defendants. So to hold would, in my opinion, be to strain and pervert the plain and manifestly expressed sense in which the jury have answered the questions put to them, and to do open violence to the language of the answers as a whole which wind up with an express finding which is incapable of this construction—that the answers to all the questions answered on the application which were involved in the issue joined were, in the terms of the applicant's warranty, "fair and true;" but, further, the amendment, which was provisionally authorized to be made to the fourth plea, not having been actually made, there is no plea upon the record upon which a verdict in favor of the defendants could be entered upon the answer of the jury to this seventh question submitted to them, assuming that answer to be one clearly in favor of the defendants.

The question was most probably framed to meet the event of the court approving, in case it should approve,

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of the amendment authorized to be made to the fourth plea, but which turns out now not to have been actually made, and the contention urged by the defendants, upon the evidence given bearing upon the plea, assuming it to be amended. The object of that amendment was for the express purpose of the defendants getting in evidence of the attendance of different medical men upon the applicant at divers times. At that time the private disease to which I have alluded had not been heard of—it came out quite accidentally and unexpectedly afterwards in the evidence of Dr. *Valentine*. After it did come out it does not appear to have been relied upon—the learned judge never drew the attention of the jury to it when submitting the questions to them, nor did counsel make any complaint of his not having done so. While the defendants appear to have laid no stress upon this piece of evidence, they did rely strongly upon evidence which, in virtue of the provisionally authorized amendment, they offered for the purpose of establishing that the applicant had upon different occasions been prescribed medicine for trifling ailments to which no specific name was given, and which the learned judge designated in his question as trifling ailments not amounting to a disease; and the contention of the defendants appears to have been, as appears by the frame of the fourth plea, that the gist of the fourteenth question lay in its first paragraph, "How long since you were attended by a physician?", insisting that it was wholly immaterial for what purpose the physician attended, if he attended at all, and that therefore, in proof of the breach of warranty contained in the answer to that question, they could rely upon these casual prescriptions The learned judge who tried the cause does not seem to have concurred in this view, and therefore he submitted this seventh question, putting an interpretation upon the

fourteenth question endorsed on the application which I confess appears to me the most correct and natural construction to put upon the question, although the applicant seems to have understood it as enquiring after his earliest and latest medical attendant, to which construction I understand, Mr. Justice *Patterson* to concur in thinking it may be open. The learned judge, however, who tried the case, plainly, and as I think correctly, drew a distinction between the case of a disease for which the applicant might have been attended by a physician and the case of casual advice occasionally given by his medical attendant when in attendance upon other members of his family, or otherwise, to take horse exercise, or some opening medicine, of which there was evidence given which was relied upon; and specially to meet this contention of the defendants, and to provide for the contingency of the amendment being approved by the court, the learned judge, as it appears to me, and for no other purpose, framed this seventh question thus: "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?" rightly, as I think, construing the fourteenth question on the application. The rule for interpreting these questions on the application is, that the language used by the company is to be construed in the sense in which it would be reasonably understood by the applicant, and that if there be any ambiguity, the language must be construed most strongly against the company who prepared the questions. The language also is to have a reasonable construction in view of the purpose for which the questions are asked, and these are fairly to be construed in the light of their immediate context. Now, the fourteenth question is complete in its parts, and all these parts must, as it appears to me, be regarded together in order to put such a construction upon

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the question as a whole as the person to whom it was addressed might reasonably have put upon it.—"How long since you have been attended by a physician; for what disease; give the name and residence of such physician; name and residence of your usual medical attendant?" This question, appearing in a long string of questions, pointing to every conceivable matter requiring medical or surgical skill (recognizing the distinction between the professions of physician and surgeon, as appears by question 4, paragraph E) almost immediately after question 12 enquiring specially after certain diseases that are termed hereditary, might well, I think, be understood to mean, "How long since you were attended by a physician for any and what disease? Give the name and residence of such physician and of your usual medical attendant." The question seems more naturally to point to, and to draw the attention of the person to whom it was addressed to, some disease for which he was attended by a physician, rather than to the case of his having been occasionally and casually, as he appears to have been, advised by his usual medical attendant, to take horse exercise, or to his having been attended for an ingrowing nail, or to his having been occasionally prescribed a little opening medicine; the learned judge taking this view, distinguished, in the question submitted by him to the jury, between a disease for which *Moore* may have been attended by a physician and what might be called casual advice in relation to something which could not, in the opinion of the learned judge, be termed a "disease," and for which he could find no better term than "a trifling ailment," not amounting to a disease; and when the jury in answer to a question so framed by the judge, expressly find that the applicant never was attended for any disease, nor for anything amounting to a disease, by any other phy-

sician than Dr. *Sampson*, although he may have been for some trifling ailment not amounting to a disease, their clear intention by this answer is to convey their finding to be, as plainly and as emphatically as they do in answer to the next question, that the applicant gave a fair and true answer to the question. This is the true intent and meaning of their answer to the seventh question, whether that answer be taken alone or in connection with, as I think it must be, their answer to the eighth question, but the amendment to the fourth plea never having been actually made, there is in truth, as I have already said, no plea upon which a verdict for the defendants could be entered upon the answer of the jury to this seventh question, assuming such answer to be clearly in favor of the defendants.

It is said, however, that upon the authority of a passage in the judgment of *Mellor*, J., in *Hollins* v. *Fowler* (1), it was competent for the Court of Queen's Bench to read the finding of the jury in connection with other matters which the court considered to be established facts, and upon these materials combined that the verdict should be entered for the defendants. Assuming for the present the duty of the court under sec. 264 of ch. 50 of the revised statutes to be identical with their duty under a reservation similar to that in *Hollins* v. *Fowler*, a proposition which I do not think it necessary at present to admit or to deny, still a careful perusal of *Hollins* v. *Fowler* has conveyed to my mind the conviction that there is nothing in that case analogous to the present one, nor is there anything in the observations of Mr. Justice *Mellor* therein which warrants a verdict in favor of the defendants in the case before us.

He says there distinctly that :—

The answers of the jury embodying the inferences which they

(1) 7 H. L. 772.

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have drawn are to bind the parties as being the true inferences to be drawn from the facts involved in the questions and thus control the court in considering how the verdict should be ultimately entered.

Here there is no ambiguity whatever, no doubt as to what the jury by their answers to the questions put to them intend to convey. There the question arose upon a doubt as to the proper construction to be put upon their answers—a doubt as to what the jury by their answers were to be taken as having intended to convey—and in order to arrive at their intention Mr. Justice *Mellor* was of opinion that undisputed facts not expressly stated in the answers, but which appeared in the case, might be looked at. In the case before us nothing can be more clear or explicit than the answers of the jury. They leave no doubt as to what they intended to convey; and no verdict can be entered for the defendants without laying them aside altogether, and acting upon a state of facts diametrically opposed to the finding.

What was done in *Hollins* v. *Fowler* was merely to read the answers of the jury in the light of undisputed surrounding circumstances, with the view of arriving at what the jury intended to convey by doubtful answers. Here nothing of the kind is necessary for, as I think I have already shown, the answers of the jury negative in the most explicit terms all the matters alleged by the defendants in their pleas, and upon which alone were issues joined.

Whether or not the questions were such as to elicit answers which would authorize a verdict to be entered in favor of the plaintiff upon the issues joined? or, whether the answers which have been given were or not justified by the evidence? are wholly different questions, and were the only questions which, in my judgment, were of sufficient weight upon which to raise a doubt; and these came up for consideration under that branch of the rule *nisi* in the Court of Queen's Bench which

asked that the verdict might be set aside and a new trial had between the parties, upon the ground that the verdict entered for the plaintiff was contrary to law and evidence, and for misdirection of the learned judge who tried the cause.

Whether the finding of the jury upon the questions submitted to them was or not against the weight of evidence, is a question not open to us upon this appeal.

The statute constituting this court, in its twentieth section, provides that an appeal shall lie from the judgment upon any motion for a new trial upon the ground that the judge has not ruled according to law; and in its twenty-second section that when the application for a new trial is upon a 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.

Now the plain and literal meaning of these sections, as it appears to me, is that, whatever may be the action of the court below upon a motion for a new trial, in so far as the judgment of the court was rested upon the ground of the verdict being against the weight of evidence only, not involving any point of law, there can be no appeal to this court. If the Court of Queen's Bench had granted a new trial solely upon that ground it is plain there could be no appeal; but they equally exercise their discretion in declining to act, or in not acting, upon that ground, and we are equally excluded from all jurisdiction to interfere with such exercise of their discretion; and the reason of the thing coincides, as it appears to me, with the literal construction of these clauses of the statute. The power and functions of juries as the constitutional tribunal for the determination of questions of fact are well settled in our system, so likewise are the functions of courts of law as *judices juris*; and those of courts of original jurisdic-

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diction differ from those of appellate tribunals, and it is contrary to all our well settled ideas of the functions of an appellate court that in cases of trial by jury it should assume to weigh (it might be sometimes in over-nice scales) the proper weight which the constitutional *judices facti* should attribute to the evidence laid before them. Not that I consider very nice scales would be necessary to weigh the evidence in this case, but it is much better, and more in conformity with our constitution and with our system of trial by jury, that juries should sometimes render verdicts against the weight of evidence as estimated by trained judicial minds, than that their verdicts should too readily be set aside by the judgment of judicial minds, who in matters of fact are subject to the same infirmity as jurors are and not less liable to differ among themselves; but that an appellate court constituted as this is should interfere with the verdict of a jury as against the weight of evidence upon a case decided in the court below upon another ground (upon that judgment coming up in appeal), where it could not entertain an appeal from the judgment of the inferior tribunal upon the point as to the weight of evidence, would, as it appears to me, amount to a usurpation of jurisdiction. Although it appears to me that the Court of Queen's Bench would have done better if they had granted a new trial upon the ground that the findings of the jury were against the weight of evidence than to have ordered the verdict rendered for the plaintiff upon these findings to be entered for the defendants, which, I think, they had no right to do, still I must confess that the vague and uncertain manner in which the scientific testimony laid before them was given affords some cause for the jury finding the facts to be as they have found them.

That the plaintiff was entitled to a verdict upon the first and third pleas is not disputed; the only ques-

tions arise in respect of the issues joined upon the second and fourth pleas.

What then is the sense in which the applicant for insurance might reasonably have understood the eighth question on the application, the answer to which the second plea, for the reason therein stated, alleges to have been untrue?

The question coming after one which enumerates thirty-six diseases is: "Have you had any other illness, local disease or personal injury; if so of what nature; how long since and what effect on general health?"

What we have to deal with is only the term "personal injury" as here used. Now, it seems to me the that applicant might reasonably have understood this question as not intending to enquire, for example, as to an abrasion of the skin of the face, or an unseemly scar which might be disfiguring to the personal appearance, but not otherwise injurious; nor as to a black eye, a sprained wrist or ankle, a broken finger, or such like injuries, which might have been received years ago, but the ill-effects of which had long since passed away leaving no trace behind. He might not unreasonably think that, as the question was asked solely with reference to his application for insurance, all that was enquired after were such injuries only as from their nature or their continuing character might fairly be considered as affecting the health or strength of the applicant, or the insurable character of his life, or as affecting the rate of insurance to be demanded, so that in the language of *Cockburn*, C.J., in *Fowkes* v. *Assurance Association* (1), upon a question arising as to the truth of the answer, the materiality of the matter not communicated should fairly form the subject of enquiry by a jury. It was for the judge to construe the contract as meaning that

(1) 3 B. & S. 924.

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whatever the person to whom the question was addressed should reasonably understand as coming within the term "personal injury," was enquired after, but it is for the jury in each particular case to say whether or not the matter relied upon as a personal injury was such, having regard to its effects, that a reasonable man should have understood it to come within the term. In *Broom's* legal maxims (1), citing *Startup* v. *Macdonald* (2), and *Burton* v. *Griffiths* (3), it is said that all questions of reasonableness, reasonable cause, reasonable time and the like are, strictly speaking, matters of fact for a jury to determine. But in the case before us it is unnecessary to enquire what things the person to whom the question was addressed might reasonably understand to come within, and what not to come within, the term "personal injury," in the sense in which that term is used in the question, for the defendants have undertaken to dispense with that enquiry, and to narrow the issue by averring that the injury which they rely upon as establishing the untruth of the answer was of a particular nature, and upon the matter so averred they stake their defence, in so far at least as that plea is concerned, and if it should appear that the applicant had received other injuries, however serious they might be, if different from that relied upon in the plea, evidence of such injuries would be inadmissible under this plea. They say that the personal injury which they rely upon as having been suffered by the applicant was a blow on the head ; and not a blow on the head simply, without more, for even a blow on the head might be so insignificant as to be attended with no injury whatever, but a blow on the head attended with certain specific injurious consequences, namely : which produced a fracture or depression of the skull,

(1) P. 82.

(2) 7 Scott N. R. 280.

(3) 11 M. & W. 817.

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and which was followed, that is as a consequence of the blow, by exfoliation of the bone of the skull, and also to some degree by inflammation of the brain. Now upon the trial of the issue joined on this plea, it must be admitted, I think, it would be the duty of a judge to say to a jury, that if the applicant for insurance had received a blow on the head which produced the consequences in the plea stated, they, as reasonable men, should find that he should reasonably have understood such a blow to come within the term "personal injury" in the sense in which that term is used in the question, but that it would be for them to say whether or not it was proved to their satisfaction that the applicant had received a blow which was attended with the consequences alleged; and if the evidence left a reasonable doubt in the minds of the jury as to the proof of the allegations in the plea, they would be justified in rendering a verdict for the plaintiff upon the issue, or rather they should not render a verdict for the defendants. It must be admitted also, I think, that from the evidence offered upon this issue the jury might properly have drawn the inference that *Moore's* skull had been fractured as alleged in the plea, and that the loss of the piece of the bone of the skull and the depression of the skull were attributable to the blow which there was evidence that the applicant acknowledged he had received by a fall some years before, and not to disease or natural causes; but I cannot say that the evidence upon this point was so clear and satisfactory that a jury might not have entertained conscientious doubts as to the sufficiency of the proof.

All the witnesses spoke of the insured as a vigorous, strong, healthy man, all agreed that the old injury, whatever caused it, or whatever its nature, had no connection whatever with the cause of death, nor had it any effect upon *Moore's* general health; under these

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circumstances, in connection with the very rigid terms in which the company prepare their policies, so as to place them apparently in a position, while pocketing the premiums from year to year, to contest the most perfectly honest insurance, it is not surprising that a jury should hold defendants to the strictest proof of the allegations in their plea, or that if there should be any defect in such proof, or if the jury should entertain any conscientious doubt as to its sufficiency, that they should decide in favor of the plaintiff.

However, the Court of Queen's Bench have not thought fit to grant a new trial upon the ground that the finding of the jury was against the weight of evidence. If they had we could not as a Court of Appeal have interfered with such exercise of their discretion. So having exercised their discretion in not ordering a new trial upon the ground that the finding of the jury was against the weight of evidence, we have no jurisdiction now to interfere upon that ground.

But misdirection upon the part of the learned judge who tried the issues is also made a ground of complaint. Now, the rule as to misdirection is that a party shall not be heard to complain upon that ground unless he made the point at the trial. Here no objection was made at the trial as for any misdirection. The learned counsel for the defendants did, it is true, contend that there was no case to go the jury, for the reason that, as he contended, he had shewn two breaches of the warranty, in the untruth of the answers to two of the questions on the application for insurance. This was the assertion of a right to have a non-suit entered, not an objection for misdirection, and with that point I have already dealt. Upon the learned judge refusing to non-suit and proceeding to submit questions to the jury, no objection whatever to the frame of those questions was made. It was, I think, the

duty of the defendants then to have objected, if he had any objection to make to the frame of the questions, or to the directions of the learned judge to the jury accompanying them. None was made. Some or one of the questions should, perhaps, have been put in a slightly different shape, but on the whole, it must I think be admitted that substantially they were sufficient to elicit answers to enable the court to enter a verdict. All parties seem to have thought them sufficient for that purpose. The defendants probably expected them to be answered in a sense favorable to the defence; but having made no objection to their frame, or their sufficiency, I do not think they could now be heard to make any upon that ground, more especially when we find the answers to the questions to contain everything necessary to determine the issues joined; but, in truth, the point made is not one of objection to the sufficiency of the questions, nor is it one of misdirection. The real ground of complaint is that, as the defendants contend, the answers are not warranted by the evidence, and the precise objection taken by the rule is one of non-direction, not of misdirection—it is simply a renewal of the assertion of a right to nonsuit the plaintiff. It is that the learned judge did not direct the jury that upon the evidence of the untruth of the answers to the eighth and fourteenth questions endorsed on the application, they should find for the defendants. From what I have already said it will be seen that in my judgment if the learned judge had so directed the jury he would have laid himself fairly open to the charge, not only of having misdirected them, but of having wholly arrogated to himself their functions by pronouncing upon matters of fact it was the exclusive province of the jury to pronounce upon, namely: that the defendants had proved the matters alleged in their pleas.

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I can see no pretence for entertaining a motion for a new trial upon the ground of misdirection.

Then, as to the fourth plea, I entirely concur with the opinion expressed by Mr. Justice *Patterson*, that there is no good reason for disturbing the verdict for the plaintiff upon that plea.

The single point, therefore, upon which our judgment must proceed being that the Court of Queen's Bench erred when they ordered the verdict which was entered for the plaintiff upon the finding of the jury to be converted into a verdict for the defendants, the appeal should, in my opinion, be allowed with costs, and the rules of the Court of Queen's Bench discharged with costs. The amount recovered by the plaintiff is but a small part of the whole amount of the policy—little more than the premiums received by the company and interest thereon. The only course open to us, I think, is to let this verdict stand, and to leave the defendants to take the opinion of other juries upon their defence to the other actions which, as appears, have still to be brought for the residue of the amount of the policy. They had made no objection to the frame of the present action, if they could, as to which I express no opinion, the point not having been raised.

Appeal allowed with costs.

Attorneys for appellants: *Rose, McDonald, Merritt & Blackstock.*

Attorneys for respondents: *McMichael, Hoskin & Ogden.*

The Respondents, *The Connecticut Mutual Life Insurance Company of Hartford, Connecticut*, appealed from the judgment of the Supreme Court of *Canada* to the Privy

Council, and the following judgment was delivered by the Lords of the Judicial Committee (1):

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 second and the fourth The second 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 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

(1) The case will be found reported in 6 App. Cases 644.

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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 reason of such untrue answer and breach of warranty, the said policy was forfeited.

The third plea, which relates to dyspepsia, was disposed of in the court below, and need not be here referred to. The fourth 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, representations, 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.

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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 alcoholic 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 residence of your usual medical attendant?" "Dr. *Barrick*, of *Toronto*, who attends my family, has known me

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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 ten or twelve 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*,

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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 inadvertence 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 stipulation 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 be-

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fore, 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 defendants? 2ndly. "Had he any serious or severe personal injury which, through forgetfulness or inadvertence, he did not communicate to the company?" 3rdly. "Had he any personal injury which he might been fairly have expected to have communicated for the information of the defendants?" 4thly. "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 seeking him; but they would not require that, if the applicant 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. *Valentine*, 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

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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:

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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 non-suit 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 misdirection of the learned judge in not directing the jury that, on the evidence of the untruth of the answers to the eighth and fourteenth 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 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 defen-

dants. 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 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 Queen'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

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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 defendants, their lordships, after carefully considering the summing up of the 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 application 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 defendants. 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

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court. It seem 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 jurisdiction 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

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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.