Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Kerry and others v. *England, from the Court of Queen's Bench for Lower Canada; delivered 26th July* 1898.

Present:

LORD HERSCHELL.
LORD WATSON.
LORD HOBHOUSE.
LORD DAVEY.
SIR HENRY STRONG.

[*Delivered by Lord Hobhouse.*]

The Defendants in this suit, now Appellants, carry on the business of wholesale druggists in Montreal. The Plaintiff now Respondent is a physician in the same city. On the 8th or 9th February 1894 Mrs. England wife of the Plaintiff had an attack of influenza, and wanted to take bismuth for it. Dr. England thereupon applied to Messrs. Dart & Co. druggists in Montreal for two ounces of that material; and they sent him a packet purporting to contain subnitrate of bismuth. Mrs. England took some and immediately felt that there was something wrong. It turned out that she had taken tartar emetic or antimony. On the 19th February she died. Dart & Co. informed the Plaintiff that the stuff supplied by them to him was part of a larger quantity supplied to them by the Defendants as subnitrate of bismuth.

On the 25th January 1895 the Plaintiff sued the Defendants for damages on the ground of negligence. He sued not only in person for

his own loss, but also as tutor to his minor son for the loss accruing to him, alleging that each had suffered damage to the amount of $20,000. On the 26th February 1896 Mr. Justice Archibald having previously settled a number of questions to be put to the jury proceeded to try the case. The questions material to the present Appeal with the answers of the Jury are as follows :—

"3rd. Was the death of said Carrie Ann Galer caused by "her taking a dose of tartar emetic in mistake for subnitrate "of bismuth, on or about the 9th day of said month of "February?—It was accelerated but not to any appreciable "extent.

"4th. Was the said tartar emetic supplied to the Plaintiff by "Henry J. Dart & Company, druggists, upon an order for "bismuth, and was the package in which the same was "contained marked 'Bismuth Sub-nit, 2 ounces'?—Yes.

"6th. Was the supply of the said tartar emetic in said "package marked 'Bismuth Sub-nit' by the Defendants to "the said Henry J. Dart & Company due to neglect, care-"lessness, want of skill and fault of the Defendants or their "employees?—Yes.

"8th. At the time of the administration of the dose "mentioned in question 3, and previous thereto, was the "Plaintiff's wife suffering from an illness known as 'La "Grippe'?—Yes.

"9th. Was the death of Plaintiff's wife caused by last men-"tioned illness or by disease, independently of said dose of "tartar emetic?—From previous disease, but accelerated by "the tartar emetic.

"10th. Has the Plaintiff suffered any damages by reason "of the death of the wife, and if so, to what amount?—"No.

"11th. Has the Plaintiff's minor child suffered any damages "by the death of his mother, and if so, to what amount?—"Yes. $1,000, one thousand dollars.

"E. A. WHITEHEAD, Foreman."

On the 13th April 1896 the Plaintiff moved for a new trial (Rec. p. 63) on grounds relating to the 3rd and 9th questions. As to question 3 :—

"The said answer is inconclusive and inconsistent, and in "so far as the same states that the death of the late Dame "Carrie Ann Galer was not accelerated to an appreciable "extent by the taking of the said dose of tartar emetic, the "said answer is unsupported by proof, and is contrary to the "evidence adduced.

" The answer to the ninth question, in so far as it purports " to show that the death of the Plaintiff's wife was caused by " previous disease, is unsupported by proof, and is contrary to " evidence adduced."

There are other grounds which need not be stated. At the same time the Defendants moved in arrest of judgment, and also to dismiss the action notwithstanding the verdict returned in favour of the Plaintiff as tutor to his son (Rec. p. 66).

On the 20th November 1896 the Superior Court sitting in review (Rec. p. 7) granted the motion of the Defendants and dismissed that of the Plaintiff, and also dismissed his action with costs. The ground assigned by them was want of privity (*lien de droit*) between Defendants and Plaintiff. Mr. Justice Archibald the trial Judge, one of the three who sat in the Court of Review, did not dissent from this judgment (Rec. p. 320); though at the same time he stated that in his opinion the jury's answer No. 3 was contrary to the evidence, and that it would be to the interest of justice to order a new trial in order that the important question of law might be put in due course of decision.

On appeal by the Plaintiff the Court of Queen's Bench quashed the judgment of the Court of Review, and dismissing both of the Defendants' motions ordered a new trial (Rec. p. 207). The formal motives introductory to their order may be thus expressed. There exists a *lien de droit* between the parties. And as in the answers of the jury it is declared that the Plaintiff personally has suffered no damage, but that his son has suffered damage to the extent of $1,000, there is a contradiction neither explained nor justified by the evidence, and the answers cannot form a logical basis of a judgment justified by evidence.

The reasons of the learned Judges were expressed by Mr. Justice Bossé. He states fully (Rec. p. 320) the grounds on which the Court differs from the

Court of Review on the question of privity. Then turning to the grounds assigned for new trial, he says the fact that the jury differ from the Judge presiding at the trial or from the appeal Judges is not sufficient, but that the verdict must be without any foundation, and so opposed to the evidence that it can only be explained by some motive other than the desire to do justice. In this case there are contradictions in the evidence touching the death of Mrs. England, and the acceleration of that death, but whatever might be their opinion on those two points they thought it competent for the jury to come (*le jury a pu en arriver*) to the conclusion to which it had come. He then adverts to the contradiction stated in the formal motives for the order, and proceeds. The position is made more difficult by the fact that Plaintiff has not moved for judgment of $1,000 according to the verdict. If the new trial for which alone he moved is refused, the result will be, as regards the father no damages, and as regards the son the damages awarded. That result, he says, will not be logical because it will be contradictory as between the two Plaintiffs.

Their Lordships are not called upon to pronounce any opinion as to the question of privity, nor has it been argued at the Bar. It may be assumed on this occasion and for the purpose only of this judgment that *a lien de droit* has been established between the parties. The question is whether any right to damages by the complaining parties has been established by the findings of the Jury. The sole reason assigned for ordering a new trial is that the findings of the jury Nos. 10 and 11 are contradictory and illogical. Their Lordships cannot see the contradiction. What the jury find is that Dr. England suffered no damage by reason of the death of his wife, while his son suffered thereby to the amount of $1,000. Why should not those two findings stand together?

They may be wrong or against evidence, but that is not the ground taken for the new trial. It is easily conceivable that the death of a woman may cause pecuniary loss to her child and none to her husband; and that is what the jury have found.

Their Lordships cannot agree with the learned Judges that the jury have awarded $1,000 to the boy. They have awarded nothing. It is common enough to take the opinion of a jury as to the amount of damage suffered, leaving it for the Court to say whether on all the facts of the case the Plaintiff can recover it from the Defendant. That is the effect of the proceedings at this trial. If the findings do not establish the requisite connection between the Defendants and Plaintiffs, as held by the Court of Review, no damage can be recovered. If they do, as the Court of Queen's Bench hold, there ought to be a judgment for such damages as the other findings justify, and for no more. As the jury have found that the death of Mrs. England was not accelerated by the poison to any appreciable extent, it follows as a legal consequence that the damage attributable to the Defendants is inappreciable. It cannot be appreciable for the boy any more than for his father. As regards the father, he suffered no pecuniary loss by the death of his wife; the son suffered loss estimated at $1,000, but the extent to which the Defendants have caused it is inappreciable; or in other words is nothing at all which a court of justice can recognize. No damages being recoverable, it is right to dismiss the action as the Court of Review has done.

A large part of the argument for the Plaintiff was taken up with an attempt to displace findings Nos. 3 and 9 on the ground that they are against evidence, and their Lordships' attention was called in detail to the

evidence on the point. They do not feel it necessary to comment on it in detail. They agree entirely with the position taken by the Court of Queen's Bench; that whatever might be the opinion they would form if they were the jury, the conclusion to which the jury have come was quite open to them on the evidence and cannot properly be disturbed.

Their Lordships will humbly advise Her Majesty to discharge the order appealed from with costs, and to restore that of the Court of Review. The Respondent must pay the costs of this appeal.