No. 19 of 1952.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF JUDICATURE OF JAMAICA.

BETWEEN

LAWRENCE ADRIAN MOODIE (Plaintiff) . . *Appellant*

AND

LENNOX M. JOHNS (Defendant) . . . *Respondent.*

Case for the Respondent.

RECORD.

THE PROCEEDINGS.

1. This is an appeal by leave of the Lords of the Judicial Committee of the Privy Council from an Order of the Court of Appeal in Jamaica (Cluer and McGregor P.JJ., Hearne C.J. dissenting) dated the 1st of April, 1949, which reversed a Judgment of Mr. Allen the Resident Magistrate for the Court of Kingston, Jamaica, made on the 20th of November, 1948. pp. 56–61. p. 42.

2. The Appellant, Lawrence Adrian Moodie, was the Plaintiff in an action begun by a Plaint in the Resident Magistrate's Court for the parish of Kingston. In the said Plaint the Appellant claimed against the Respondent to recover the sum of £97 13s. alleged to be due and owing by the Respondent to the Appellant for professional services. Of this amount the sum of £31 10s. was actually claimed by the Appellant for his own services and the balance was claimed in respect of the services of Medical Consultants. This appeal is only concerned with the fees claimed to be due to the Appellant himself. p. 1. p. 3. p. 3.

3. The Appellant is a registered Medical Practitioner and a practising gynæcologist. The Appellant owned and managed a Nursing Home at all material times. p. 3.

4. The Respondent is a Civil Servant (of the grade of first class) employed to the Government of Jamaica. The Respondent was sued in respect of a contract made between himself and the Appellant for the care of his wife during her pregnancy and for her admission to the Appellant's p. 20. p. 17.

Nursing Home at the time of confinement and for medical attendance at the confinement and up to the time when the Respondent's wife would be fit to return to her home.

5. The Plaint came on for trial before the Resident Magistrate for Kingston on the 14th of September, 1948, and after Counsel for the Appellant had opened his case the Respondent was (pursuant to section 189 of the Resident Magistrate's Law) required to state shortly his defence.

In this connection it is to be pointed out that the Resident Magistrate's Court is not a Court of Pleading. The Defence is stated shortly and orally and where further particulars are thereafter sought the particulars are given as a rule, and as was the case here, by oral statement made before the Court and not by reference to any prepared draft. New points frequently arise in the course of the trial and provided there is proper opportunity given to the other party to deal with them it is the practice of the Court to allow them to be raised in compliance with section 195 of the Law so that the real question in controversy between the parties may be determined.

p. 2. 6. The defence was stated orally as follows :—

"(1) Services rendered were rendered in negligent manner.

"(2) Defendant's wife did not have benefit of that degree of "skill that a proper medical man has and should have possessed "and used.

"(3) Claim for other Doctors : Defendant does not admit that "Plaintiff can in case take an action on their behalf. Doctor's "claim given cannot be dealt with in this case."

p. 3. 7. Thereupon Appellant's Counsel asked for particulars of the alleged negligence to be stated and particulars were given orally as follows :—

"(1) Plaintiff employed to attend Defendant's wife in her "expected confinement with view to safe delivery of the child. "As a result of Plaintiff's error child not safely delivered—died "prior to delivery.

"(2) By reason of Plaintiff's failure to diagnose true condition "of Defendant's wife and his delay in taking appropriate measures "—ordering Cæsarean operation—child died within womb and "mother's life gravely imperilled.

"(3) On the day of expected confinement Plaintiff absented "himself from Kingston, was unavailable to Defendant for 24 hours "after onset of symptoms which required medical attention.

"(4) Plaintiff when requested to call in a consultant refused or "failed to do so and assured Defendant no need for consultant, "when in truth and in fact the condition of Defendant's wife was "in fact a serious one.

"(5) Plaintiff, when after undue delay did decide to call in "consultant—delayed in securing the attendance of a consultant— "until it was too late to save life of child.

"(6) Plaintiff was so negligent that he failed to discover the "symptoms at the onset of death of child, that child died in there ; "Plaintiff being unaware of fact, imperilling life of mother and "aggravating her subsequent illness and suffering.

"(7) Plaintiff failed to recognise that the case was one in "which a Caesarean operation might be necessary, took wrong "measures for a case in which such an operation might be necessary. "Failed to take any steps to secure Defendant's wife removal to "institution where such an operation could be performed rapidly "if such operation became necessary ; failed to advise such operation "until it was too late to save life of the child and caused further "delay which gravely imperilled the life of the mother."

8. During the course of the evidence given by the Appellant he made certain statements concerning one Miss Waite, the Head Nurse at his Nursing Home, and as a result of that it was suggested in cross-examination that the conduct of the Nurse was negligent. The negligence then suggested and thereafter alleged was that the said Nurse had failed to give proper advice to and to secure medical attention for the Respondent's wife after the onset of symptoms on the day of her expected confinement which required medical attention. p. 4. p. 9. p. 16. p. 39.

9. The Appellant's case was closed at the conclusion of his own evidence and his Counsel did not call the Nurse as a witness. The case as opened for the defence raised the question of the Nurse's negligence specifically and it was made clear that it was being treated as an issue in the case as arising out of the statements and admissions made by the Appellant himself. Counsel for the Appellant then and there submitted that he would claim the right to give rebutting evidence in regard to the conduct of the Nurse if he thought fit at the close of the case for the Respondent. This does not appear in the Notes of Evidence. p. 16.

10. At the close of the case for the Respondent, the Appellant not having made any application to call further evidence or to rebut any of the evidence given by the Respondent or his witnesses in relation to the conduct of the nurse and the case having been argued before the Magistrate, judgment was at the conclusion of the arguments delivered orally on the 20th day of November, 1948. The reasons stated orally were brief and do not appear on the record. p. 39. p. 39, 44. p. 42.

11. Notice of appeal having been given on the 2nd day of December, 1948, the Resident Magistrate pursuant to the requirements of the Resident Magistrate's Law (Chapter 362 of the Revised Laws of Jamaica) filed his reasons for judgment on the 23rd day of December, 1948. p. 43. p. 44, 45.

12. Grounds of Appeal were delivered on the 3rd day of January, 1949, and the appeal came on for hearing in the Court of Appeal in Jamaica on or about the 28th day of February, 1949, when at the end of the argument judgment was reserved. p. 50.

13. The record does not contain any note of the arguments in the Court of Appeal.

p. 60, 67. 14. Judgment was delivered by the Court of Appeal on the 1st of April, 1949, when Cluer and McGregor, P.JJ., allowed the appeal and ordered judgment to be entered in favour of the Respondent. Hearne, C.J., dissented stating that he would have been in favour of varying the p. 57. judgment delivered by the Magistrate by ordering that judgment be entered in favour of the Appellant for the sum of £31 10s.

15. An application for leave to appeal to the Privy Council came on p. 69. for hearing before the Court of Appeal in July, 1949, when the Court p. 70, 73. refused to grant leave.

16. Special leave to appeal was granted by the Lords of the Judicial Committee of the Privy Council in October, 1950.

THE COURT OF THE MAGISTRATE IN JAMAICA

17. Those portions of the Resident Magistrate's Law which are relevant to any matter that may arise in this appeal and show how proceedings are commenced, how the defence is stated, and how appeals are taken and the powers of the Court of Appeal are attached as Appendix I to this Case.

THE FACTS OF THE CASE AND THE COURSE OF THE TRIAL

18. The Respondent's wife, Gloria Mercedes Johns, a woman of p. 3. 39 years of age, became pregnant after having been married for 15 years p. 17. and consulted the Appellant in April, 1947. She and her husband, the Respondent, contracted with the Appellant to attend her during the pregnancy and thereafter to receive her at the Appellant's Nursing Home for the delivery of the child. From time to time during the pregnancy the Respondent's wife attended at the Appellant's surgery and was advised p. 8, 17. that she might expect the arrival of the child on the 20th day of November, 1947.

19. On the day when the child was expected, to wit, Thursday, the p. 4. 20th day of November, 1947, the Appellant left Kingston at about 1.40 p.m. for Morant Bay a town distant about 34 miles from Kingston. He did not return to Kingston until 10.00 p.m. that night.

20. The Appellant himself stated in evidence that he left instructions with his Head Nurse, one Nurse Waite, that if anyone came in she was to p. 4. ring him at Dr. Stephenson's home in Morant Bay or if the matter was very important to call Dr. Stockhausen.

21. The Appellant stated in his evidence that on his return after p. 4. 10.00 p.m. he received a report from Nurse Waite that she got a telephone call at 3.30 p.m. from a person who said he was Mr. Johns and was told that his wife, whenever she passed urine and used tissue, saw traces of

blood. The Appellant said that the Nurse further told him that she asked if there were any pains and was told there were no pains and said that if the pains started Mrs. Johns was to be brought in. The Nurse said further that the person on the telephone had enquired if the Doctor had gone to the country and that she replied that he had already gone down to King Street (where he had an office in Kingston) and that she could not tell when he would be back but that he was expected about 6.00 p.m. She had got a further call at about 8.30 p.m. when a voice speaking for Mrs. Johns had asked if the Doctor had returned.

22. The Appellant said in evidence that upon receiving this report he rang the telephone number which he knew to be the Respondent's but got no answer. Next morning, 21st November, at about 7.30 a.m. the Respondent called him on the telephone and told him that any time his wife uses tissue she sees traces of blood. He told the Respondent that he would come down as soon as he could, and as soon as he had completed an operation which he had to do that morning he went to the Respondent's home and arrived at about 8.30 a.m. There he was told by the Respondent's wife, so he said, that she had been perfectly alright and had gone for a motor drive the day before and after she came back saw traces of blood whenever she used tissues. p. 4.

23. He then and there examined her and found that the blood was coming not from the vagina but from the bladder. He recognized that this was an abnormal condition and symptomatic of pre-eclampsia, a dangerous toxæmic condition, which is frequently fatal both to mother and child. p. 5.

24. The Appellant gave directions that the Respondent's wife was to be brought into the Nursing Home and on her arrival there he at once commenced to treat her for the condition from which she was suffering. The condition did not improve although by the following morning there was some improvement in the condition of the urine. After labour commenced on that day it soon became difficult because of the toxæmic condition and later the patient became hysterical and uncontrollable and developed a condition of rigidity of the uterus. The Appellant attempted to deliver the baby by forceps but this attempt failed and it became necessary to effect delivery by Cæsarean section. This was successfully done by a consultant who was called in and it was found that the child was dead. p. 5. p. 28, l. 29. p. 6. p. 7.

25. The Respondent's Counsel had stated at the commencement of the hearing as one of the particulars of negligence that "on the day of expected confinement the Plaintiff absented himself from Kingston, was unavailable to Defendant for 24 hours after onset of symptoms which required medical attention." This plea was intended to cover the following matters :—

(A) That when the Respondent and others communicated with the Nursing Home on the 20th of November, 1947, they were told by the Nurse that the Doctor was not available and would not be back until about 6.00 p.m. ;

(B) That the Respondent asserted that he did not receive any communication from the Appellant until after he rang him on 21st November, and that the Appellant did not arrive to examine his wife until about 11 o'clock that morning.

Consequently the foregoing plea covered the period of 24 hours from the first time that Respondent's wife observed a symptom which was consistent with blood coming from the kidney and was believed by her to be caused by blood in the urine and not from the vagina.

26. It was not until the Appellant gave evidence that the Respondent was aware of the fact that the very Nurse who spoke with him over the telephone had been left in charge of the Nursing Home and had been given
p. 4. instructions to ring the Appellant in Morant Bay or to call another Doctor, to wit, Dr. Stockhausen, if any important communication came for the Appellant. It transpired on that evidence that it was not correct to charge the Appellant with negligence for having absented himself from Kingston and being unavailable after the onsent of symptons requiring medical attention. The fact was that the Appellant had provided for another Doctor to do his work in his absence and had instructed a Nurse whom he believed to be competent and experienced and who was admittedly acting on his behalf to communicate with him or to send for that Doctor if any of his patients reported a matter which required the services of a Doctor.

27. Accordingly, the Appellant was very shortly after his cross-examination commenced, cross-examined with a view to establishing that
p. 9. the Nurse had been guilty of negligence in not reporting to him or to his *locum tenens* that she had heard from the Respondent that " every time his wife urinated and used the tissue she saw blood " and that Respondent had been trying to find out where the Appellant was in order to consult him about this symptom.

28. The Respondent's case was that the Nurse on being told of the finding of blood after urination had said it was only a " show " (meaning the ooze of blood *per vaginam* that occurs at or before the actual onset of labour); further it was his case that the Appellant admitted that the Nurse never gave him the message at all. The cross-examination as recorded is to be understood in the light of those two facts.

29. The notes of the cross-examination are incomplete in that it does not clearly appear (as is the fact) that it was put to the Respondent that the Nurse upon being spoken to had replied that it was only a "show"
p. 17, 20. (as was testified by the Respondent's wife—page 17 and by the Respondent —page 20). That this was put, however, is corroborated by, and can be
p. 9. inferred from the note of the cross-examination at page 9, lines 2 and 3.

Further it was put to the Appellant and admitted by him that it was wrong for the Nurse to have said so and that if he himself, a person with all the knowledge of a qualified man had upon the receipt of the message replied that it was only a " show " it would have been even more wrong than for the Nurse to have said so as was alleged.

30. The actual course of the cross-examination on this matter was as follows :—

(A) First the Appellant was asked if he had admitted to the Respondent (as was alleged) that the Nurse never gave him " the message " at all. This he denied. p. 9. p. 20.

(B) Next he was asked if the Respondent had not told him that when the Respondent's wife had rung up (the reference was to the message she sent which the Nurse admitted receiving) the Nurse had replied that it was only a " show." This he denied. The denial obviously had particular reference to the use of the expression " show."

(C) Then he was asked if such a message ought to have been given to him. This he admitted. The message was the message testified to by the Appellant himself. The word " such " emphasised the character and significance of the message. The suggestion that the Nurse should have given the Appellant the message rather than have passed it on to the *locum tenens*, Dr. Stockhausen, was based on the fact that Respondent alleged that it was at 11.30 a.m. and again at 12.30 p.m. and not at 3.30 p.m. as the Nurse alleged that the first messages were sent. At those times the Appellant was at his surgery in Kingston. Moreover the Appellant himself says that the Nurse told the Respondent not that the Appellant had already gone to the country but that he had already gone to his surgery which suggests that the message was first received before he left for the country at 1.40 p.m. p. 9. p. 20. p. 4. p. 4. p. 4.

(D) After this admission of breach of duty on the part of the Nurse the Appellant was asked if it was wrong for the Nurse to have said it was only a "show" (if she did say so as was alleged) and when he said it was he was then asked if it would have been even more wrong if he himself had said so on getting such a message, and this too he admitted. This last question was directed to the point that the Nurse with her limited knowledge to have assumed that the symptom reported had no possible dangerous implication was wrong but that such was the character of the report that the Doctor himself with his greater knowledge would have been entirely wrong in assuming that the symptom reported could be ignored as being consistent only with a normal incident in labour.

(E) It was only after these questions were put and answers given that it was asked whether if it was reported that blood was found in the urine it would be the gravest negligence not to examine the patient then and there. The question it is submitted meant and was understood to mean that a report signifying the patient's belief that blood was (or might be) in the urine required an immediate examination of the patient to determine if that was the case because, if it was, the matter was from a medical point of view of the utmost gravity. p. 9.

31. At no time whatever at the trial in the Court of first instance or in the course of the argument in the Court of Appeal was there any controversy as to any part of this cross-examination as hereinbefore set forth.

At no time was it disputed on behalf of the Appellant that the reference to " such a message " was a reference to the message which he told the Court was what the Nurse said she received, that message being substantially identical with what the Respondent said was the message delivered. The word " message " was used because it was the Respondent's wife who had asked others to telephone the Appellant. There was no other " message " in the case and there was no controversy as to what the message was.

32. At no time was it disputed for the Appellant that the Appellant admitted that because of the character of the message it was the duty of the Nurse to have transmitted the message to him when she received it and it followed that if he was already gone and could not be reached the duty remained but related to Dr. Stockhausen, his *locum tenens* for the rest of the day.

33. In the Court of Appeal the Respondent's Counsel referred to the Appellant's statement that it was wrong for the Nurse to have called it a "show" and that it would have been worse even if he (the Appellant) had treated the message in that way. Counsel for the Appellant did not dispute that these admissions had been made at the trial.

34. Counsel for the Appellant did not re-examine the Appellant in relation to his statement that it was the duty of the Nurse to have communicated the message she received to him and that it was wrong for her to have said that it was only a "show." It was well understood that it was claimed that the Nurse was guilty of negligence in not reporting to a doctor a symptom which was plainly suggestive of the possibility of blood being in the urine and consistent with that condition. The Appellant's admission that it would have been wrong to have said it was a " show " was a simple and self-evident admission of the obvious fact that, if a woman who is expecting her confinement notices blood only when she urinates and thinks that the condition requires to be reported (as it was reported on several occasions) with a view to getting the opinion of the Doctor in charge of the case, it becomes the duty of the Doctor to make an examination as soon as possible. The symptom though by possibility consistent with normal bleeding from the vagina is evidence that the blood may be coming from the kidney and is therefore found in the urine. The examination must be made with a view to determining which of the two possibilities is correct. The duty is imperative because if it turns out that the blood is in the urine the condition is grave, will probably result fatally and requires to be treated at the earliest possible moment.

p. 9.
p. 31.

p. 16. 35. When the Appellant's evidence was concluded the Nurse was not called to deal with the suggestion that not only had she failed to report the message about blood being seen whenever the Respondent's wife urinated and used tissue but also that she had brushed the matter aside by saying that it was only a "show," meaning a bleeding from the vagina.

36. Counsel for the Respondent in opening the Defendant's case in
p. 16, ll. 33-35. the Magistrate's Court made the point in the plainest way and contended that the Nurse's conduct had been negligent. Counsel for the Appellant

made no objection then as to the right of the Respondent's Counsel to raise the issue of the Nurse's negligence as it had come into the case in consequence of the evidence given by the Appellant himself but he claimed that he would have a right to give rebutting evidence after he had heard in detail what was alleged in regard to the Nurse's conduct. Counsel for the Respondent then submitted that it was the duty of the Appellant to call the Nurse at once having regard to the serious allegations that were made and were going to be made about her conduct. But neither Counsel invited the Court to make a ruling on the point and it was understood that the matter would be left open for argument when, if ever, the question actually arose.

37. The case for the Respondent developed round three matters arising on the facts. First, it was claimed that the Nurse was guilty of negligence in not reporting the message received to the Appellant or to the Doctor left by him to do his work; second, it was claimed that the Appellant, when he returned and heard from the Nurse that messages had been received about blood being noticed whenever the Respondent's wife urinated, had failed to do anything about it. It was claimed that he had never telephoned because it was said that if he had telephoned the Respondent and others were awake and would have heard. Third, it was sought to be shown that the conduct of the Appellant in the course of his dealings with the Respondent's wife after her condition was known was negligent.

38. The evidence as a whole did not support the allegation that the Appellant had been personally guilty of any negligence after he had commenced treatment for the pre-eclamptic condition which was diagnosed some time in the morning of the 21st day of November. No point was made in the Court of Appeal as to this matter and it was there admitted that the Appellant himself had not been guilty of negligence after that time and no such contention was advanced in the hearing of the Appeal. pp. 72, 73.

39. The evidence for the Respondent in regard to the other matters must be dealt with and is as follows :—

(A) *The Respondent's wife* said that she noticed blood in her urine from about 11.00 a.m. and was inclined to urinate frequently and only saw blood when she urinated. She said that the Respondent telephoned the Nursing Home and that a nurse replied and said the Appellant was not there and that it was only a "show." She went on to say that her sister (this was a reference to Mrs. Neale, a witness in the case on her behalf) said (meaning said to the Nurse): "No I have four children and it was not like that." In cross-examination it was not suggested to the Respondent's wife that she did not at the time think that the blood was coming from the urine nor was it suggested to her that that was not the reason why an attempt was made to communicate with the Doctor. p. 17. pp. 18, 19, 20.

(B) *The Respondent.* The Respondent said that his wife saw certain signs when she returned home in the forenoon of 20th November. The reference was to what she saw, namely blood whenever she urinated and used tissue. He did not say, nor was pp. 20-25.

he asked, what the signs were because at that stage of the case there was no question nor dispute as to what the signs were, nor would it have been strictly proper for the Respondent to have given evidence of what he had been told by his wife. He went on to say that he telephoned to the Nursing Home at his wife's request and that a Nurse answered him and said that the Appellant was out of town, and that she did not know when he was returning. This conversation he alleged, took place at 11.30 a.m. About an hour later he said that he again rang up and asked for the Nurse in charge and that the person told him that his wife was having a "show" and should not be brought in till she started to have pains.

p. 37. (c) *Evidence of Mrs. Gilda Elaine Neale :* This witness was the sister of the Respondent's wife. She said that she visited the Respondent's wife on the 20th of November between 11·00 a.m. and 12 noon and found that she passed blood when urinating and suffered from pains at the back of the head and in the back. She personally telephoned the Appellant's Maternity Home and a Nurse spoke to her—that was shortly after 12 noon. She asked for the Doctor and the Nurse said that he had gone to the country and she enquired who had been left to act for him and was told nobody. She went on to say that she told the Nurse the symptoms. This was a reference to what she said she had seen, namely, that the wife passed blood when urinating and suffered from pains in the back of the head and in the back. She went on to say that the Nurse asked her if she thought they were the usual sumptoms and that she replied : " No, I think it is far from it. I had nothing like it " and I have had children " and finally she says that the Nurse told her to hold on because the Doctor would soon be there. She asserted that she had telephoned on several occasions and had asked that the Doctor be telephoned when he came in because she thought the condition of the Respondent's wife serious.

40. The medical evidence for the Respondent was largely concerned with the allegation that the treatment of the Respondent's wife after her condition was known and in particular the steps that were taken to deal
pp. 28, 30, 31, 36. with the difficult labour which resulted from that condition were negligent. Aside from that it was not in dispute and was agreed by all the medical witnesses that delay in treating the toxæmic condition which is evidenced by the passing of blood in the urine was a serious matter and gravely
p. 31. lessened the chance of a live child being born. It was stated by Doctor Don that he had sat in Court during the whole of the case and heard the evidence of the Appellant, and the other two Doctors. He said that it was the duty of a Doctor who engaged to give pre-natal care and to look after the confinement to try to be in reach of the patient on the expected day of confinement, if possible, and if he could not be in reach to arrange for another Doctor to do his work for him. He went on to say that he had heard the history of the Respondent's wife. He added that when it is certain that blood is coming not from the vagina but in the urine it is a serious condition and that she should see a Doctor as early as possible. He said it was the duty of a Maternity Nurse, when a patient had a Doctor, to inform the Doctor of such a condition. He added that he would

instruct his Head Nurse that if she was informed about such a condition she should tell the Doctor or the person answering for the Doctor. In summing up the matter he said as follows: "Where symptoms are p. 31.
"recognized, then 24 hours delay might materially lessen the safety of pp. 24–28.
"child or mother. The earlier the treatment the better the chances.
"In this case, having heard the facts, condition notified early Thursday
"morning (the 20th) that the Nurse brushed it aside, if treatment had
"been given then the mother and child would have had a better chance."

Reference to the cross-examination of this witness will show that pp. 32, 33, 34.
10 it was never suggested that the foregoing statement was not warranted of the facts, nor was any attempt made to suggest even an excuse for the conduct of the Nurse.

41. The Respondent's case being closed, Counsel for the Appellant did not seek to call the Nurse as he had intimated he might do. It is p. 41.
noteworthy that it was never suggested that the Respondent's wife did not believe that her condition on the 20th was abnormal and that she was suffering from blood actually present in the urine. It was never suggested that she telephoned for any other reason. It was not suggested, when Mrs. Neale was under cross-examination, that it was not true that she had
20 telephoned and said that she did not think it was the normal bleeding referred to by the expression "a show" (meaning an ooze of blood from the vagina) but that it was blood in the urine and something abnormal and grave. Mrs. Neale's evidence on this point is corroborated by the Respondent.

42. In the Reasons for Judgment at paragraph 21, the Magistrate p. 49.
said that there was nothing on the night of the 20th of November to suggest that the blood was coming from the bladder and that in fact this was not discovered until the Appellant examined Mrs. Johns on the morning of the 21st November, 1947. In paragraph 25 of his Reasons he stated that p. 49.
30 he accepted the view that the negligence of the Nurse could be laid to the Doctor in charge of the case yet he said "I do not think the authorities
"go as far in view of my findings of fact and inferences drawn to establish
"the allegations of negligence on which the Defendant based his claim
"that the Plaintiff was not entitled to recover."

43. It is submitted that the Magistrate plainly erred when he said that there was nothing on the night of the 20th of November to suggest that the blood was coming from the bladder.

It was not disputed that that is exactly what the Respondent's wife and Mrs. Neale thought and it was clear that it was because of that that
40 the frequent communications with the Nursing Home were made.

It was obvious that blood seen after urination (there being no suggestion of its being seen at any other time or of its being constantly present) was indicative of the fact that the blood was coming from the bladder. Indeed Counsel for the Appellant in referring in the Court of Appeal to this part of the Magistrate's Reasons for Judgment conceded that "perhaps this was an overstatement."

44. Dr. Parboosingh himself (and it is submitted that he was scrupulously fair and helpful to the Appellant though a witness for the Respondent) said that the Appellant said to him—" When I was told there was blood in her urine etc., which indicates that Appellant himself understood the telephone messages received as meaning or suggesting that there was blood in the urine.

p. 28.
p. 29.

45. Finally, it is submitted that the Appellant's conduct on the 21st of November (when on receipt of exactly the same message he went as quickly as he could and examined with a view to confirming whether or not the blood was coming from the bladder) is decisive to show that the symptoms reported was indicative of blood being in the urine and coming *via* the bladder from the kidneys.

46. It was not necessary to show that the report could only have meant that blood was in the urine. It was sufficient to show that it ought to have been understood to indicate that state of affairs as a probability or even as a possibility. In fact as it turned out, it was exactly as feared—it was blood in the urine.

MATTERS NOT APPEARING IN THE RECORD

47. A copy of the Affidavit made by Counsel for the Respondent in support of what is alleged in paragraphs 9, 29, 30, 31, 32, 33 and 36 hereof in so far as any matter is not apparent on the face of the records and also in support of what is alleged herein in regard to the course of the appeal in Jamaica in paragraphs 52, 55, 70 and 71 hereof is attached as Appendix II.

THE COURSE OF THE APPEAL IN JAMAICA

48. At the hearing of the Appeal in Jamaica Counsel for the Respondent (Appellant in the Court in Jamaica) informed the Court that he would accept the finding in the Court of trial that the Doctor was not personally negligent in his treatment of the patient once he had seen her and diagnosed her condition correctly.

49. Counsel for the Respondent however contended that the Nurse was negligent and the Doctor affected by her negligence :—

(A) Because he left her in charge with instructions how to act on his behalf.

(B) Because she admittedly received a message which ought to have been communicated to the Appellant if he was still in Kingston or otherwise to his *locum tenens* and wrongly brushed the matter aside by saying it was only a " show " and thereby was negligent.

50. The basic contention for the Respondent was that the Appellant had undertaken services which were to continue until the confinement of the Respondent's wife was ended and she was fit to be discharged from the Appellant's Nursing Home ; that it could not be predicted what the services undertaken might involve nor could it be forecast as a

certainty that the Respondent's wife would be safely delivered of a live child ; and that in those circumstances the basic obligation of the Appellant was at all times and in all circumstances so to act as to secure to the Respondent's wife as good a chance of the safe delivery of a live child as reasonable care and skill could secure.

If the conduct of the Nurse acting for the Appellant was such that the Respondent's wife did not have as good a chance of the safe delivery of a child as she would have had if the Nurse had not been negligent in the manner alleged, then there was a breach of an essential element or term of the contract and the services were to be deemed worthless.

51. There was an argument on the law and the following cases were cited and relied on :—

R. v. *Bateman*, 19 C.A.R. 8 ;

Hill v. *Featherstonehaugh*, 7 Bing. 569, 573 ;

Vigers v. *Cook* [1919] 2 K.B. 475 ;

Godefrey v. *Joy*, 7 Bing. 412.

52. In reply Counsel for the Appellant relied on the following main points :—

(A) That the issue of the negligence of the Nurse was not embraced in the particulars given at the commencement of the trial and did not arise until the end of the case.

(B) That there was no onus on the Appellant to show that despite his negligence the patient had suffered no damage but that the onus was on the Respondent to show that his wife had suffered damage because where negligence is a defence to a claim for services rendered the defence must show that as a fact the negligence rendered the services useless. (Vol. 22 Hailsham, at page 318 was cited, also *Dakin* v. *Lee* [1916] 1 K.B. 560, and *Faithful* v. *Kesteven* (1910) 103 L.T. 50.

(C) That the Nurse was not negligent because she was only employed by the Doctor in the Home and owed no duty to the Respondent's wife.

(D) That the Nurse should not in any event be held negligent merely because she failed to advise or act correctly when the matter had arisen so suddenly and could not reasonably have been foreseen.

(E) That it was wrong to suggest that the Appellant was personally negligent in not making a visit on the night of the 21st after his return to Kingston when he rang and got no reply, because not only had the point been raised before but no questions had ever been put to the Appellant or any other Doctor about it and there might be a perfectly good reply.

53. In reply Counsel for the Respondent dealt with the points set out in paragraph 52 (A), (B), (C) and (D). In answer to the argument as to whether the issue of the Nurse's negligence was open, he pointed

to the course of the trial and asserted, as was the fact, that he distinctly raised the issue both in the cross-examination of the Appellant and in his opening of the case and argued that until the Appellant himself gave his history about the Nurse and her position it was not possible to have known that her duties made her conduct in relation thereto negligence that affected the Appellant.

54. The only question affecting the Appellant personally that arose in the Court of Appeal in Jamaica was whether the Appellant ought to have gone to the Respondent's home when he rang the telephone at 10·00 p.m. on the night of 20th November and did not get a reply.

No questions had been directed to this in the Court below because it was the case for the Respondent that he did not ring the Respondent's home.

The point was not taken in the Grounds of Appeal.

The point was raised by Cluer, J., at the closing stage of the Opening Address of the Respondent's Counsel in the Court of Appeal and was accepted and adopted by that Counsel.

The Appellant's Counsel contended that the point was not open since no question had been asked in the Court below in relation to the Appellant's failure to visit that night and the Appellant might have had a good answer and a satisfactory reason to give had he had the opportunity so to do.

55. At no time in the Court of Appeal did Counsel for the Appellant contend that there was any doubt as to what was the message referred to by the Appellant when he said that " such a message " should have been given to him. It was not disputed that the Appellant had admitted that if his Nurse had said it was only a " show " it would have been wrong and more wrong if he himself had got the message and dealt with it in that way.

Reference will hereafter be made to the judgments in the Court of Appeal when it will be submitted that the case was dealt with in the said judgments and particularly in the judgment of the Chief Justice on a basis not argued by Counsel and in relation to which immediate and full explanation could and would have been made by Counsel on both sides.

SUBMISSIONS ON THE FACTS AND THE LAW

56. It is submitted that the Appellant is faced with a simple dilemma.

It was his duty on the day of the expected confinement of the Respondent's wife to be available to give advice, to investigate reports and to take whatever action might be required to ensure that both mother and expected child had as good a chance of safe delivery as care, skill and foresight could reasonably ensure.

If he was unavoidably absent then it was his duty to procure that the same services would be available and for the same ends as if he himself had been personally in charge.

57. In fact he was unavailable. In fact the machinery he provided for securing services for the Respondent's wife proved inadequate in the situation that developed.

In fact the Appellant's patient suffered during his absence from Kingston and till the following morning from an undiagnosed and developing condition that thereafter nearly ended her life and killed the unborn child. In fact the condition was reported in terms of the only symptom which the patient could observe and report.

In fact the report was not investigated either by proper questions or by examination. In fact, if it had been investigated, there would have been an examination and the truth would at once have revealed itself and the patient would have had a far better chance of the successful delivery of her child.

58. If the Appellant had been in Kingston when the symptoms were reported he would no doubt have visited the patient exactly as he did when he received the report the next morning.

59. Aside altogether from any admission made by the Appellant in regard to the Nurse's conduct, it is submitted that once it was proved :—

(A) that the Appellant was absent on 20th November, 1947 ;

(B) that on that day a symptom was observed—the presence of blood evidencing itself every time the patient cleansed herself after urination ;

(C) that the symptom was reported ; and

(D) that the report was brushed aside without even asking a question to elucidate its possible significance or to apply any obvious criteria for determining what it might or might not imply

then it was established that the patient failed to get the services of investigation and advice to which she was entitled and there was a breach of an essential obligation of the contract.

60. In any event, however, it was admitted by the Appellant that it was the duty of the Nurse to have reported the message she received to him and by inference to his *locum tenens*, he being absent ; and that she was wrong to have dismissed the report by telling the patient it was only a " show."

61. Those errors constituted negligence and involved a breach of the contractual obligation directly involving the Appellant himself.

62. Attention is called to the failure of the Appellant to place his Nurse in the witness box to give her own evidence as to what occurred. It is submitted that the inference is irresistible that the Nurse would not have been in a position to contradict the gist and substance of the Respondent's case as far as she was concerned which was that she well knew that the persons who were telephoning her believed and feared that the blood which was mentioned was in the urine and not the normal

bleeding which might come from the vagina and would have been forced to admit that, having been told of a fact which was a symptom of a grave condition demanding medical treatment, she was wrong in not sending for a Doctor so that he could proceed at once to diagnose the condition and decide what ought to be done.

63. It is submitted that it was clearly established that the Respondent's wife and Mrs. Neale and the Respondent himself all suspected and feared the blood was in the urine, and that, when they telephoned about the only symptom which could be observed, namely that blood was only seen immediately after urination, the Nurse well knew that what was being reported was a condition which they thought meant that blood was in the urine. It is submitted that no finding of the Magistrate that he accepts the evidence of the Plaintiff where it is in conflict with the evidence of the Defendant and that he is not impressed with the evidence of Mrs. Neale can alter the plain and evident facts of the case and the irresistible inferences to be drawn from them, namely that all these parties feared and suspected and indeed believed that blood was found in the urine and reported in terms that made it clear that that was what they thought.

64. It is submitted that where a patient expressly and for the purpose of receiving advice reports a symptom which is consistent with a dangerous condition though susceptible by possibility of innocuous explanation, and where, as here, that symptom is the symptom which would be all that in normal circumstances the patient could see or report upon, it at once becomes the duty of the medical adviser or his agents to make such investigations as are necessary to determine what the symptom really involves. When the Appellant was told by the Respondent on the morning of the 21st of November that every time his wife used the tissue she saw blood, he immediately said that he would come and see her as soon as he could. And he did go to see her and the first thing he did was to make an examination with a view to determining whether the traces of blood seen every time she urinated were the result of blood coming from the bladder or the result of blood coming from the vagina. The best evidence that that was the duty of the Doctor is the fact that that is what the Doctor did in this case. And the best evidence that it was necessary for him and his duty to do that is the fact that when he did do it he then and there discovered that the blood was coming from the bladder and that the condition was a grave and serious one.

65. Once it is shown that a symptom reported by a patient is consistent with a grave and serious condition requiring immediate medical investigation and once it is shown that as a fact upon the report of the symptom the Doctor engaged in the case did in fact make the necessary investigation and did in fact discover that it was a grave and serious condition as the symptom indicated it might be, it is not necessary to have medical evidence to state specifically what the duty of a doctor is in such circumstances. The facts speak for themselves and the duty is disclosed by the circumstances established in this case and by the conduct of the Doctor himself who was engaged in the case.

66. As to the legal position, it is submitted that no fees are payable to a medical man who contracts to give a continuous series of services up to the termination of a specific event if by reason of a failure to provide the required services at a critical moment the other contracting party is put in greater jeopardy as to the issue of the event which in fact fails of its purpose.

67. Where a service contract involves acts which cannot be foreseen and relates to an event which cannot be predicted with certainty the basic obligation is to give such services as will reasonably secure the best chance of a successful event.

If there is a failure to give the required services at any given time, and if that failure reduces the chance of a successful event to any significant extent, then if the event fails it is for the party in breach to show that even if he had done his duty the result would have been the same.

If he fails to show this, then his breach of duty renders his services worthless or absolves the other party from payment in a case where a lump sum is to be paid for all the services.

68. Whilst it cannot be said that the child would have been born alive if treatment had been started 24 hours sooner or even eight hours sooner, it can be said, and it is indisputable, that the Respondent's wife would have had a much better chance of having a live child.

69. Reference is made to the cases cited in paragraphs 51 and 52 hereof and to *Hoenig* v. *Isaacs* [1952] T.L.R. 1360. The principle in *Vigers* v. *Cook* [1919] 2 K.B. 475 that a failure to perform a substantial element or part of a contract for services discharges the obligation to pay for them is a flexible one and of general application. It is recognised in *Hoenig* v. *Isaacs* (cited above) and is not inconsistent with that case.

The principle of *Vigers* v. *Cook* applies with peculiar appropriateness to cases where the services cannot be precisely defined and the event cannot with certainty be predicted. The general nature of the continuing duty and the character and consequence of the alleged breach determine when this principle is to be applied.

THE JUDGMENTS IN THE COURT OF APPEAL

70. All the judgments in the Court of Appeal are alike in one respect. None of them deals with the arguments of Counsel save and except for the last page of the judgment of McGregor, J. (pp. 66 and 67 of the Record) and, incidentally, two passages in the judgment of Hearne, C.J., at p. 53, lines 1 to 12, and lines 43 to 44.

The judgments are almost entirely devoted to a controversy as to what, if anything, the Appellant admitted in the passage of his evidence under cross-examination relating to the Nurse's conduct. The passage is set out in the judgments of Hearne C.J. at p. 53 lines 40 to 50 and of McGregor J. at p. 62 lines 23 to 34.

71. If these points had been raised while Counsel was arguing they would have been met by reference to the actual facts of the trial and to the full note of that portion of the evidence which was taken by the Solicitor instructing Counsel for the Respondent and by the Appellant's Counsel himself. Furthermore both Counsel well knew what happened at the trial and Counsel for the Appellant did not raise these points in argument at all, nor did he contradict Counsel for the Respondent when he said that the Doctor admitted—

(A) that the Nurse ought to have communicated the message she received (meaning the message the Appellant said he learnt of from the Nurse herself) to him ;

(B) that the Nurse was wrong to have told the Respondent it was only a "show," if she did so tell the Respondent.

72. In relation to the judgment of the Chief Justice submissions are made as follows :—

p. 51, ll. 30–40. (A) The Chief Justice suggests that weight should be given to the failure to plead the Nurse's negligence at the outset of the case. He ignored the fact that it was not until the Appellant stated that the Nurse in question was his *Head Nurse* and the person left in charge that it became possible to charge her with negligence affecting the Appellant. The Chief Justice at page 52 line 10 appears to forget that the Nurse there referred to was the same as the Head Nurse referred to at page 51 line 13.

p. 52. (B) The Chief Justice says that the reason why Counsel for the Respondent founded his argument in the Court of Appeal on the statement made by the Appellant of the terms of the message he had received from the Nurse was because the trial judge took an unfavourable view of his client's evidence. This was a mistaken suggestion and ignored the fact that that was the burden of the argument in the Court below as appears at page 40 lines 20 to 26, page 41 lines 4 and 5 of the Record being portions of the argument by the Respondent's Counsel, and as further appears in paragraph 25 of the Magistrates Reasons for Judgment.

p. 52. p. 53, ll. 13–29. (C) After citing the critical passage in the Appellant's evidence which is set out at page 52, the Chief Justice reaches the conclusion that it is impossible to be sure what was the message the Appellant was referring to. It is obvious that there is something missing in the note of this part of the Appellant's evidence as it appears on the Record, and it was never disputed in the appeal that "such "a message" was, and was understood to be, the message which the Appellant himself spoke of. Having made this error, the statement at page 53 lines 30 to 42 followed as a matter of course.

(D) It is submitted that his analysis of the facts (based in any event on a misreading of what the Appellant said) is unreal. It was unreal to argue that the statement that blood was found on the tissue every time the patient urinated merely suggested "blood on

" tissue." The reference in the message to blood being noticed after urinating plainly indicated that the patient thought it was or might be blood in the urine, or else the reference to urinating, and indeed the fact that a message was sent to all, was meaningless.

Dr. Don was stating what was obviously medically correct when he said that when it is certain (i.e. ascertained) that blood p. 31.
is coming not from the vagina but in the urine it is a serious condition. It followed from that evidence that when it was uncertain whether blood was coming from the vagina or in the urine then it was vital to make a diagnosis in the only way possible by drawing a specimen of the urine direct from the bladder.

Dr. Don had been in Court and heard all the evidence and said p. 31.
" In this case having heard the facts, condition notified early " Thursday morning, that the Nurse brushed it aside, if treatment " had been given then (i.e. Thursday morning) the mother and " child would have had a better chance." He was there referring to what was told to the Nurse and indicating that her conduct was negligent. It is repeated that when the Appellant was told on the morning of the 21st of the symptom that blood was noticed every time on using tissue after urination he went as soon as he could to find out where the blood was coming from. That and the fact that examination after report of that single symptom revealed blood in the bladder is the best evidence of what such a symptom may mean and of what a Doctor should do in those circumstances.

(E) The passage at page 56 line 40 to page 57 line 1 discloses pp. 56, 57.
in full the fallacy of the reasoning. To suggest that a message about blood on tissue (observed every time patient urinated) might not have indicated even as a possibility that blood was coming from the kidney in a case where that very symptom did in fact indicate that it was coming from the kidney is, it is submitted, unreal. To suggest that it was not a matter of common prudence and ordinary practice for a medical man to examine his patient on receipt of such a message when the fact was that Appellant on receipt of that very message on the morning of the 21st did examine the patient for the very purpose of finding out if the blood was coming from the kidney and found out that it was, is to ignore the facts of the case entirely. If, as is pointed out, a discharge of blood is normal in the early stages of labour, then clearly such a discharge would be continuous and would of necessity be observed sooner or later, and would be quite different from the observation that would lead to the message, " every time I urinate, etc."

(F) If as is suggested there may be no duty on getting such a message at such a time to investigate, then the facts of this very case indicate medical possibilities of an extraordinary character.

Here is a case of a patient who reports an observation which as it turns out indicated the existence of a most dangerous physical condition. The matters observed and reported are precisely and

exactly what would be seen every time a similar condition existed. If the Chief Justice is right, that patient may be left to die and yet medical men might say that the possibility of the existence of the dangerous condition could not reasonably have been inferred. The argument negates the concepts of modern medicine.

Neither the Appellant nor any medical witness was asked by the Appellant's Counsel if on the receipt of such a message a Doctor would not ordinarily have thought or suspected that it might have a serious significance.

The fact is that it never was in dispute in any significant way that the report plainly indicated a possibility of blood being in the urine which was a condition of the gravest urgency and danger.

73. The judgments of Cluer and McGregor, JJ., are, it is submitted, based upon a realistic approach to the evidence.

As to the judgment of Cluer, J., it is submitted :—

(A) That he is right in emphasising—

p. 58. (i) the failure to call the Nurse ;

p. 59. (ii) the positive character of Mrs. Neale's evidence which is corroborated by the other evidence for the defence and by the probabilities inherent in the circumstances ; and

p. 60. (iii) the error in the Magistrate's comment " there was " nothing to suggest blood coming from the bladder " when manifestly the message to the Nurse could have no meaning or purpose save to suggest that very possibility.

(B) That he is right when he says that the Appellant's admission in cross-examination might well be said to have concluded the case because the obligation of a Doctor to examine at once on a report of blood being found in the urine obviously and necessarily included an obligation to examine on a report which suggested that blood was in the urine and based the suggestion on a fact consistent with that and later proved to demonstrate it. Unless the Appellant was reasonbly certain either from the nature of the report or from other inquiries that might orally have been made that the condition could not and did not indicate blood in the urine his own conduct and concept of obligation established what a prudent and skilful doctor would have done.

74. As to the judgment of McGregor, J. it should be noted :—

p. 61, ll. 19–29. (A) His express finding that the issue of the Nurse's negligence was fully and fairly raised at the trial.

(B) That he nowhere suggests (nor does Cluer, J.) that any real point had been argued as to whether " such a message " meant

the message the Appellant himself had testified to in his evidence in chief. The judgment proceeds throughout on the basis that " the message " was in fact the message spoken of by the Appellant.

And it is submitted :

(c) That the pith and essence of the case appears in the passage at the end of page 64 line 45 " In my judgment when it was reported " that a state of things existed, the cause of which may have been " *either unimportant or so grave as to seriously affect the life of the* " *patient*, then her (the Nurse's) duty was to have taken all necessary " steps to ascertain the cause. These steps should have been to " Dr. Stockhausen immediately to examine Mrs. Johns as she was " instructed by the Respondent (Appellant here) to do." p. 64, l. 45.

75. The course of the appeal in Jamaica and the real issues dealt with in that Court are stated with great clarity and simplicity in the Judgment of Hearne, C.J., Carberry and McGregor, JJ., on the application in Jamaica for leave to appeal to the Privy Council :—

" We were heavily pressed by the Appellant's Counsel to " consider the application in the light of the unsubstantiated " allegation of unskilful service which had been pleaded in the " Court below, which we were told placed a stigma on the professional " skill of the Applicant. But before the Court of Appeal the " allegation of negligence in the way the Applicant performed his " professional services was abandoned and the appeal was argued " on two grounds of negligence : (1) negligence by the Nurse in " the employment of the Applicant in that while the Applicant " was out of town she was informed of symptoms which were being " shown by the Defendant's wife which might have indicated a " grave condition requiring immediate medical attention and she " failed to communicate with the Applicant's locum tenens, and " (2) negligence in the Applicant in that when he returned from " the country and was told by the Nurse of the report she had " received of the symptoms of the Defendant's wife he failed to " immediately examine the patient to ascertain whether the " symptoms indicated the necessity for immediate medical treatment. pp. 72, 73.

" We have given anxious and careful consideration to all that " has been urged on behalf of the Applicant. In our opinion the " issues decided by the Court of Appeal do not involve any stigma " on the character or professional ability of the Applicant. An " allegation of negligence was made against the Applicant which " the majority of the Court of Appeal considered was established, " but this view turned on the particular facts and circumstances " of this case which largely resulted from the fact that when the " Applicant's services were required by the Defendant's wife the " Applicant was out of town, apparently engaged on another case. " The decision has no bearing on the Applicant's general method " of conducting his profession, and certainly does not question his " skill or professional competence."

76. The Respondent humbly submits that the judgment of the majority in the Court of Appeal was right and should be affirmed for the following amongst other

REASONS

(1) BECAUSE the Magistrate was unreasonable in his finding that the Appellant's Nurse was not negligent and in ignoring or rejecting the uncontradicted testimony given for the Defence.

(2) BECAUSE the issue of the Nurse's negligence was clearly and properly raised at the first opportunity and fought out at the trial on a basis well understood by Counsel on both sides.

(3) BECAUSE her negligence was established by all the facts of the case including the self-evident and intrinsic circumstances, the admissions of the Appellant and other medical testimony.

(4) BECAUSE her conduct resulted in a delay of 24 hours at most or 18 hours at least before the Respondent's wife was treated for a dangerous condition.

(5) BECAUSE the delay was occasioned by her failure to see that the Respondent's wife received medical examination and assistance when that was demanded by the existing circumstances.

(6) BECAUSE that delay materially lessened the chances of the birth of a live child and involved the Respondent's wife in a dangerous illness.

(7) BECAUSE the Appellant was under a contractual duty to secure and preserve for his patient the best chance of the successful delivery of a live child that reasonable skill and knowledge could provide.

(8) BECAUSE the Nurse was acting for the Appellant under such orders and with such responsibilities imposed by him that her negligence affected his legal position and involved him in the consequences of her conduct.

(9) BECAUSE by reason of the Nurse's negligence there was a breach of the essential element in the contractual relationship and the contract failed in its main purpose.

(10) BECAUSE the Appellant, being unable by reason of the very nature of the case to show that the ultimate result would have been the same even if there was no negligence, cannot in law recover anything for the services rendered in the period covered by his claim.

L. M. JOHNS.

R. O. C. STABLE.

APPENDIX I.

THE RESIDENT MAGISTRATES LAW.

(Chapter 432 of the Revised Laws of Jamaica).

FORM AND COMMENCEMENT OF ACTION.

149. All actions and suits in a Resident Magistrate's Court which, if brought in the Supreme Court, would be commenced by writ of summons, shall be commenced by the party desirous of bringing such action, or some person on his behalf, lodging with the Clerk or Deputy Clerk or any Assistant Clerk, at the office of the Clerk of the Court, or at any Court held within the parish, a plaint, stating briefly the names and last known places of abode of the parties, and naming a post office to which notices may be addressed to the plaintiff (to be called the plaintiff's address for service), and setting forth the nature of the claim made, or of the relief or remedy required in the action, in such short form as may be prescribed by any rules in force under this Law (or as nearly in such form as circumstances admit), and the Clerk or Deputy Clerk, or Assistant Clerk, shall note on such plaint the day of the lodging thereof, and shall file the same in his office, and shall as soon as possible enter the same in a book to be kept for this purpose in the office, and to be called the plaint book, every one of which plaints shall be numbered in every year according to the order in which it shall be entered ; and thereupon a summons embodying the matter of the plaint, and accompanied by the particulars of the claim, if any, and stating the plaintiff's place of abode and address for service, and bearing the number of the plaint on the margin thereof, shall be issued by the Clerk of the Court under his hand and the seal of the Court and shall be served on the defendant so many days before the day on which the Court shall be holden at which the cause is to be tried, as shall be prescribed by rules now or hereafter to be in force ; and delivery of such summons to the defendant, or in such other manner as shall be specified in the rules now or hereafter to be in force, shall be deemed good service ; and no misnomer or inaccurate description of any person or place in any such plaint or summons shall vitiate the same, if the person or place be therein described so as to be commonly known.

* * * * *

189. On the day in that behalf named in the summons, the plaintiff shall appear, and thereupon the defendant shall be required to answer by stating shortly his defence to such plaint ; and on answer being so made in Court, the Resident Magistrate shall proceed in a summary way to try the cause, and shall give judgment without further pleading, or formal joinder of issue.

* * * * *

195. The Resident Magistrate may at all times amend all defects and errors in any proceeding, civil or criminal, in his Court, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not ; and all such amendments may be made, with or without costs, and upon such terms as to the Resident

Magistrate may seem fit; and all such amendments as may be necessary for the purpose of determining the real question in controversy between the parties shall be so made.

* * * * *

APPEAL.

256. Subject to the provisions of the following sections, an appeal shall lie from the judgment, decree, or order of a Resident Magistrate's Court in all civil proceedings, upon any point of law, or upon the admission or rejection of evidence, or upon the question of the judgment, decree, or order being founded upon legal evidence or legal presumption, or upon the question of the insufficiency of the facts found to support the judgment, decree, or order; and also upon any ground upon which an appeal may now be had to the Court of Appeal from the verdict of a jury, or from the judgment of a Judge of the Supreme Court sitting without a jury.

And the Court of Appeal may either affirm, reverse, or amend the judgment decree or order of the Resident Magistrate's Court; or order a nonsuit to be entered; or order the judgment, decree or order to be entered for either party as the case may require; may assess damages and enter judgment for the amount which a party is entitled to, or increase or reduce the amount directed to be paid by the judgment, decree or order; or remit the cause to the Resident Magistrate's Court with instructions, or for rehearing generally; and may also make such order as to costs in the Resident Magistrate's Court, and as to costs of the appeal, as the Court of Appeal shall think proper, and such order shall be final: Provided always, that no judgment, decree or order of a Resident Magistrate's Court shall be altered, reversed, or remitted, where the effect of the judgment shall be to do substantial justice between the parties to the cause: Provided also, that an appeal shall not be granted on the ground of the improper admission or rejection of evidence; or on the ground that a document is not stamped or is insufficiently stamped; or in case the action has been tried with a jury, on the ground of misdirection, or because the verdict of the jury was not taken on a question which the Resident Magistrate was not at the trial asked to leave to them, unless in the opinion of the Court of Appeal, some substantial wrong or miscarriage has been thereby occasioned in the trial, and if it appears to the Court that such wrong or miscarriage affects part only of the matter in controversy or some or one only of the parties, the Court may give final judgment as to part thereof, or some or one only of the parties, and allow the appeal as to the other part only, or as to the other party or parties.

* * * * *

261. The appeal may be taken and minuted in open Court at the time of pronouncing judgment, but if not so taken then a written notice of appeal shall be lodged with the Clerk of the Court, and a copy of it shall be served upon the opposite party personally, or at his place of dwelling or upon his Solicitor, within fourteen days after the date of the judgment; and the party appealing shall, at the time of taking or lodging the appeal deposit in the Court the sum of ten shillings as security for the due prosecution of the appeal, and shall further within fourteen days after the taking or lodging of the appeal give security, to the extent of ten pounds for the payment of any costs that may be awarded against the appellant, and for the due and faithful performance of the judgment and orders of the Appellate Court.

Such last-mentioned security shall be given either by deposit of money in the Court, or by the party appealing entering into a bond, with two sureties to be approved by the respondent, or, in case of dispute, by the Clerk of the Court with an appeal to the Resident Magistrate. No stamp duty shall be payable on such bond.

There shall be no stay of proceedings on any judgment except upon payment into Court of the whole sum, if any, found by the judgment, and costs, if any, or unless the Resident Magistrate, on cause shown, shall see fit to order a stay of proceedings.

On the appellant complying with the foregoing requirements, the Resident Magistrate shall draw up, for the information of the Court of Appeal, a statement of his reasons for the judgment, decree or order appealed against.

Such statement shall be lodged with the Clerk of the Court, who shall give notice thereof to the parties, and allow them to peruse and keep a copy of the same.

The appellant shall, within twenty-one days after the day on which he received such notice as aforesaid, draw up and serve on the respondent, and file with the Clerk of the Court, the grounds of appeal, and on his failure to do so his right to appeal shall, subject to the provisions of section 269 of this Law, cease and determine.

If the appellant after giving notice of appeal and giving security as aforesaid, fails duly to prosecute the appeal, he shall forfeit as a court fee the sum of ten shillings deposited as aforesaid.

If he appears in person or by Counsel before the Court of Appeal in support of his appeal, he shall be entitled to a return of the said sum of ten shillings, whatever may be the event of the Appeal.

* * * * * * *

269. The provisions of this Law conferring a right of appeal in civil causes and matters shall be construed liberally in favour of such right ; and in case any of the formalities prescribed by this Law shall have been inadvertently, or from ignorance or necessity omitted to be observed it shall be lawful for the Appellate Court, if it appear to them that such omission has arisen from inadvertence, ignorance, or necessity, and if the justice of the case shall appear to them to so require, with or without terms, to admit the appellant to impeach the judgment, order or proceedings appealed from.

APPENDIX II.

IN THE PRIVY COUNCIL.

ON APPEAL

From the Supreme Court of Judicature of Jamaica.

BETWEEN

LAWRENCE ADRIAN MOODIE (Plaintiff) . . Appellant

AND

LENNOX M. JOHNS (Defendant) . . . Respondent.

AFFIDAVIT OF N. W. MANLEY, Q.C.

I, NORMAN WASHINGTON MANLEY, being duly sworn make oath and say :— 10

1. My true place of abode and postal address is at " Drumblair," Half-Way-Tree Post Office, Jamaica, B.W.I., and I am a Barrister-at-Law of the Honourable Society of Gray's Inn and a Queen's Counsel for Jamaica and practise as such in Jamaica, at No. 21 Duke Street, Kingston.

2. I was Counsel for the Respondent in the above-named Appeal and conducted the proceedings before the Magistrate and in the Court of Appeal in Jamaica.

3. I assisted the Respondent in the preparation of his Case for the Privy Council and am responsible for what is therein set out. 20

4. In so far as any amplification of matters appearing on the face of the Record is made in the said Case and in so far as assertions are made which do not appear in the Record itself as to matters happening at the trial before the Magistrate or at the hearing in the Court of Appeal, I vouch that the said matters are fully and correctly stated in all respects in the said Case.

5. More particularly and referring to special paragraphs in the said Case and without prejudice to the generality of the last preceding paragraph I state as follows :—

(A) The word " not " should appear after the seventh word in line 1 at page 9 of the Record. 30

That part of the evidence is quoted in the judgments in the Court of Appeal in Jamaica at page 52 line 44 and page 62 line 24. The reason is that it was expressly agreed in the Court of Appeal between myself and Mr. Evelyn, Counsel for the Appellant in the proceedings in Jamaica, that the word " not " had been erroneously left out of the Notes of Evidence as taken by the Magistrate.

(B) The matters stated in paragraphs 9 and 36 of the Respondent's Case in regard to the question of the nurse's negligence and the claim by Counsel to give rebutting evidence in regard to that matter if he thought fit, correctly state what took place at the trial.

(C) The account of the cross-examination of the Appellant as set out in paragraphs 29 and 30 in the Respondent's case is correct.

(D) In regard to paragraphs 31, 32 and 33 which deal with the admission alleged to have been made by the Appellant in regard to the nurse's conduct, the facts and matters therein set out are correct. Paragraph 52 states the arguments which were in fact raised on behalf of the Appellant in the Court of Appeal in Jamaica and paragraph 55 correctly states that Counsel for the Appellant did not raise any point in the Court of Appeal as to what the Appellant meant by his answer in regard to the message and did not dispute that the Appellant had admitted that his nurse was wrong in dealing with the message in the manner in which it was dealt with.

(E) As to the course of the Appeal, the contents of paragraphs 48 to 54 and paragraphs 70 and 71 are correct.

6. On the 7th day of April, 1953, I conferred with Mr. Evelyn, Appellant's Counsel in Jamaica, and he agrees that it is correct to state :—

(A) That the word " not " ought to be inserted at page 9 line 1.

(B) That it was never contended by him, either before the Magistrate or in the Court of Appeal in Jamaica, that there was any doubt as to what was the message the Appellant referred to when he said " I agree that such a message should have been given " to me," and that it was not disputed that " the message " was the message testified to by Appellant himself as having been reported to him by the nurse on his return from Morant Bay on the night of November 20, 1947.

(C) That the Appellant did say in Cross-Examination that if the nurse said, on receipt of " the message " that " it was only a " show " that would have been wrong and that it would have been wrong if he himself had got such a message and dealt with it by saying " it was only a show."

Mr. Evelyn informs me that he has no recollection one way or the other of what is alleged in paragraph 5 (B) hereof.

Sworn by the said Norman Washington Manley at Kingston, Jamaica, B.W.I., on the 21st day of April, 1953, before me :—

(Sgd.) N. W. MANLEY

(Sgd.) J. P. FRASER.

In the Privy Council.

ON APPEAL

From the Supreme Court of Judicature of Jamaica

BETWEEN

LAWRENCE ADRIAN MOODIE
(Plaintiff) . . . *Appellant*

AND

LENNOX M. JOHNS
(Defendant) . . *Respondent.*

Case for the Respondent

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