Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Thomas Albert Samuel Manley v. *John Thomson Palache from the Supreme Court of Judicature of the Island of Jamaica; delivered 27th July* **1895.**

Present:

THE LORD CHANCELLOR (LORD HERSCHELL).
LORD WATSON.
LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD MORRIS.
SIR RICHARD COUCH.

[*Delivered by Lord Watson.*]

The Appellant, who carries on business as a pen-keeper and produce-dealer at Roxburgh, in the Parish of Manchester and Island of Jamaica, appears at one time to have been involved in a considerable amount of litigation. Before June or July 1891, the Respondent, who practises as a solicitor and advocate at Mandeville, in the Parish of Manchester, acted for many years as his law-adviser, agent and counsel. On the 10th June 1892, the Appellant brought the present action, before the Supreme Court of the Island, in which he claims 5,000*l.* as damages in respect of injury alleged to have been sustained by him through the professional negligence of the Respondent.

In his Statement of Claim, the Appellant charges the Respondent:—first with failure to exercise due care, diligence, and professional skill in the conduct of three litigations, in all of

87319. 100.—8/95.

which the Appellant was unsuccessful, and was condemned in costs, these being (1) *Nias* v. *Manley*, before the Supreme Court, in which the Appellant was defendant, (2) *Manley* v. *Bourke*, also before the Supreme Court, in which he was plaintiff, and (3) *Atkinson* v. *Manley*, which was brought against him in the Resident Magistrate's Court for the Parish of Clarendon; secondly with having, unlawfully and without cause, withdrawn from his agency for the Appellant on the 11th July 1891; and thirdly with his having unlawfully and improperly refused to deliver up certain papers and documents to the Appellant. In his defence, the Respondent denied all allegations of negligence and breach of professional duty; and counterclaimed for 84*l.* 9*s.* 4*d.*, as the balance due to him on account by the Appellant.

The case was tried before Mr. Justice Lumb and a special jury. The trial occupied nine consecutive days, and the whole questions raised by the pleadings were submitted in detail to the jury, who returned a general verdict for the Respondent upon the claim, and for 38*l.* 5*s.* 7*d.* upon his counterclaim. The presiding Judge entered judgment for the Respondent in terms of the verdict, with costs both of the claim and counterclaim. Against that order the Appellant appealed, and moved the Court either to enter judgment in his favour or to allow a new trial. The appeal was heard before a Full Appeal Court consisting of the late Chief Justice Ellis, Mr. Justice Lumb, who presided at the trial, and Mr. Justice Jones, the junior Puisne Judge. Lumb and Jones J.J. were of opinion that the motion for a new trial ought to be dismissed, subject to these qualifications:—(1) that a verdict should be entered for the Appellant for 5*l.* 5*s.*, upon his claim in relation to the action *Manley* v. *Bourke*; (2) for 4*l.* 11*s.* 6*d.*, upon his claim in respect of

the Respondent withdrawing from his agency in July 1891; and that the Appellant should have his costs of these issues on the same scale as if the sums found to be due had been sued for and recovered in a resident magistrate's court. The Order of the Appeal Court was drawn up in accordance with the views of these learned Judges, who constituted the majority of the Court. The late Chief Justice did not altogether concur in the Order, being of opinion that a new trial ought to be allowed of the Appellant's claim, founded on the negligence of the Respondent in conducting the Appellant's defence in the case of *Nias* v. *Manley*.

In the present appeal, the Appellant has not insisted in all the points which were raised by his notice of motion in the Supreme Court. He maintained here that the case ought to be sent back for new trial of his claims (1) in reference to the case of *Nias* v. *Manley*, (2) in reference to the Respondent's wrongful termination of his employment in July 1891, and (3) in reference to the Respondent's counter-claim. The Respondent has not presented a cross-appeal against the alterations made upon the verdict of the jury by the Order of the Appeal Court, which involve a very small pecuniary amount.

The argument of the Appellant's Counsel was mainly directed to the first of the three points which he desires to have re-tried. In order to appreciate their argument it is necessary to refer, in some detail, to the nature of the suit *Nias* v. *Manley*, and also to the procedure which took place in connection with it during the trial of the present action.

The Plaintiff, Mrs. Nias, was an elderly widow, to whom her husband, at his death in 1875, had bequeathed the fee-simple of a small property called Breadland Pen, which she occupied personally. The Appellant, on the 7th October

1887, recorded a deed bearing date the 22nd September 1887, by which, in consideration of the sum of 400*l.* paid to her on that day, Mrs. Nias conveyed the property in absolute terms to the Appellant. Upon that document there was endorsed an acknowledgment of her receipt of the 400*l.*, signed by her and one Thomas Patterson, who also attested her signature of the conveyance. The Appellant founded a claim to the property upon a second deed, bearing to be a memorandum of agreement between the widow and himself, dated the 16th May 1889, which ran in these terms:—
"In consideration of the sum of four hundred "pounds (400*l.*) purchase money for Breadland "Pen as per title on record I Thomas A. S. "Manley for myself heirs and executors do "agree to pay Mrs. Catherine P. Nias the sum "of six per cent. annually on the said amount of "four hundred pounds (400*l.*) for the balance of "her life. At the expiration of which term the "said property is both free to me my heirs or "executors. I further agree that the said "property cannot be sold during her lifetime. "Also subject to the following proviso that "Mrs. Nias shall live for her life on the property "to run her own stock and cultivate her own "grounds free of all charges to her the said "Thomas A. S. Manley shall have all rights and "managements of the property unmolested." The document was signed by Mrs. Nias and the Appellant, and their signatures were attested by two men named Alexander Eastwood and John Smikely.

On the 14th June 1890, Mrs. Nias, who had all along remained in possession of Breadland Pen, brought an action in the Supreme Court, against the Appellant, for the purpose of setting aside both these documents, upon the grounds, that she had no independent advice and did not

understand their true purport and effect, that she had received no consideration whatever, and that she signed them in reliance upon misrepresentations fraudulently made to her by the Appellant. The case was tried by the late Chief Justice Ellis, who, on the 8th May 1891, gave judgment, finding that the deeds which she challenged were entered into by Mrs. Nias on the faith of misrepresentations falsely and fraudulently made by the present Appellant, and declaring them null and void.

There are two observations which occur to their Lordships on reading the documents set aside by the late Chief Justice, and the pleadings of the parties to the cause. The documents themselves are unquestionably of a very suspicious character; but that is not a circumstance of importance in this appeal. It is however a material circumstance, for the purposes of this appeal, that the nature of the charge brought against him, and the terms of the statements which he made in defence to it, clearly show that the whole material facts of the case, including communings with respect to both documents, the preparation of the documents and their execution, were necessarily within the personal knowledge of the Appellant. He knew what was said and done on these occasions; he knew what persons were present on occasions when he and Mrs. Nias were not alone; and he knew what these persons could depone to, if they availed themselves of their opportunity of observing, and were prepared to tell the truth. It is sufficiently obvious, and it was not disputed by his Counsel, that the only other witnesses whose testimony could be of any real service to the Appellant, were persons who could give evidence to the effect that the considerations specified in the deeds under challenge adequately represented the market value of Breadland Pen.

Their Lordships will now advert to the specific

charges of negligence made against the Respondent, in connection with the case of *Nias* v. *Manley*. Certain evidence tendered at the trial, in support of that charge, was excluded by the presiding Judge. The opinion of the late Chief Justice, in favour of a new trial, was based upon the exclusion of that evidence, which he held to have been erroneous; and it formed the chief, if not the only ground upon which the Appellant's right to have a new trial of that part of the case was argued by his Counsel, before this Board. In article 3 (*c*) of the Appellant's statement of claim, the negligence of which the Respondent is said to have been guilty is thus set forth:—
"The Defendant wholly failed and neglected to "examine any of the Plaintiff's witnesses or to "take notes of their evidence or to provide the "Plaintiff's Counsel with briefs or proofs of the "evidence of the Plaintiff or of any of his "witnesses although frequently requested by "the Plaintiff so to do, in consequence whereof "the Plaintiff's Counsel were unprovided with "the proper material for conducting the cross-"examination of the witnesses for the said "Catherine Preddie Nias, and the due exami-"nation of the Plaintiff's witnesses at the trial "of the said suit." The Appellant did not in his pleadings state a single additional fact which could have been elicited from his witnesses if their statements had been taken down by the Respondent; but of that omission the Respondent is not in a position to complain, because he did not, as he might have done, ask for particulars.

The statements just quoted are admittedly inaccurate to a certain extent. The trial was conducted by the Respondent, as Counsel for the Appellant, and he did examine the Appellant himself and the other witnesses whom the Appellant desired to call. But, making due allowance for these inaccuracies, there remains a substantial

allegation of professional negligence in the conduct of the suit. In order to make out the charge, it was necessary for the Appellant to establish, at the trial, in the first place, that it was the duty of the Respondent to examine the witnesses personally, and to take notes of what they were prepared to state upon oath; and, in the second place, that such duty was not fulfilled. Unless the duty was incumbent upon the Respondent, the fact that he did not examine the witnesses, and take down their statements, could not constitute negligence.

At the commencement of the trial, and after the jury were empannelled, Counsel for the Appellant intimated that he "would "call the witnesses who were called (*i.e.* in "*Nias* v. *Manley*) but not examined before-"hand by the Defendant, to show what evidence "they would have given if notes of their "evidence had been taken beforehand." The presiding Judge thereupon announced that he held such evidence to be inadmissible. Witness after witness, who had been examined for the Appellant in *Nias* v. *Manley*, were then put into the box; and as soon as a question was put to them, for the purpose of eliciting what facts they could have spoken to, other than those as to which they were examined, the same ruling was repeated.

Their Lordships can entertain no doubt that these rulings by the learned Judge were erroneous, and that the evidence which might have been given and was not given by these witnesses in *Nias* v. *Manley* was wrongly excluded. But it does not necessarily follow that there must be a new trial, because Section 428 of the Jamaica Civil Code (Law 40 of 1888) enacts that "A new trial shall not be "granted on the ground of misdirection, or of "the improper admission or rejection of evidence,

" or because the verdict of the jury was not " taken upon a point which the judge at the " trial was not asked to leave to them, unless in " the opinion of the Court to which the " application is made some substantial wrong or " miscarriage has been thereby occasioned in " the trial."

The evidence rejected afforded the only means available to the Respondent of proving part of the averments upon which his action was founded. But, if it had been admitted, it could only have gone to establish the fact that the Respondent had failed in the performance of the duty which he is said to have owed to the Appellant, and to show the extent to which that duty, if it existed, had been violated. It could have thrown no light either upon the existence or upon the nature of the duty.

It therefore becomes necessary to consider whether the jury came to the conclusion, and, if so, whether they were justified by the evidence before them in coming to the conclusion, that the Respondent owed no such duty to the Appellant as is implied in the averments made by him upon the Record which was sent to trial. That the point was submitted to them for their consideration does not admit of doubt. Mr. Justice Lumb states that, in his charge, he directed the attention of the jury to these two questions :—" (1) Had the Defendant an oppor- " tunity of taking proofs of the witnesses before " the trial? (2) Did the Plaintiff's conduct " contribute to the non-taking of proofs? " The verdict returned by the jury was, in effect, a negative answer to the first, and an affirmative reply to the second of these questions.

What, then, was the evidence before the jury bearing upon the duty of the Respondent? Their Lordships have already noticed the circumstance that, from the very nature of the case,

the Appellant must have known what the material witnesses for him and against him, other than those who could only speak to the market value of Breadland Pen (in itself a very subordinate matter) could state, if they spoke the truth. In these circumstances, it is not surprising to find that the Appellant not only selected his own witnesses, but examined them himself, and furnished to the Respondent written notes, or proofs as they are called, of what they were expected to say in the witness-box. The Appellant was present, and sat beside the Respondent during the whole of the trial, without making any complaint of the Respondent's conduct as his counsel. He stated before the jury who tried this case:—"In cross-examination, he" (the Respondent) "constantly referred to the "notes I had given him, and also referred to me "—sometimes asking me what else can I ask?" It is not pretended that the Respondent was charged with the duty of finding out and citing the witnesses who ought to be called in order to substantiate the Appellant's defence. That duty was undertaken, and was admittedly performed by the Appellant himself. He brought the witnesses daily to an office in Kingston, an hour or so before the case was called in Court, not in order that the Respondent might take down their depositions, which had already been furnished to him, but in order that he might have an opportunity of obtaining from them any additional information which he might desire. It appears to their Lordships to be impossible to affirm that, in these circumstances, it was the duty of the Respondent, upon whom, through the absence of his senior counsel, the task of conducting the case had devolved, to examine at length, and to take down the statements of witnesses who had already been examined, and their proofs recorded, by one having much better knowledge than himself.

Their Lordships have come to the conclusion that the verdict of the jury, which must be taken to have negatived the existence of any such duty on the part of the Respondent as the Appellant has alleged, is fully warranted by the evidence which was led before them; and they are also satisfied, that the evidence which was rejected by the presiding Judge could, if admitted, have had no legitimate effect upon their verdict.

Upon the second point urged for the Appellant, their Lordships are unable to concur in the view taken by the learned Judges of the Appeal Court. On the 27th June 1891, the Appellant wrote a letter to the Respondent, who was at that time his agent and counsel, in which he charges the Respondent with various gross breaches of professional duty, "the result of which has wrecked "my whole future prospects, and to-day I am "deprived of my good name and truthfulness, "on which my business was hitherto carried on." The letter concludes with an intimation that, as the writer felt that he required "reliable counsel "on some points," he would be obliged by the Respondent returning the papers in Mrs. Nias' case, and sending in his bill of costs. Their Lordships cannot conceive that any respectable lawyer would continue to act for the writer of such a letter; nor can they suppose that the writer of such a letter could reasonably expect him to do so.

In their Lordships' opinion, the Appellant has failed to show reasonable cause for disturbing the verdict of the jury upon the third point, viz., the Respondent's counterclaim.

They will accordingly humbly advise Her Majesty to affirm the Order appealed from. The Appellant must pay to the Respondent his costs of this appeal.