ATTORNEY-GENERAL *v.* SMITH.

D. C., Colombo, 20,723.

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Contract—Patient in hospital—Action by Crown for recovery of charges for subsistence in its General Hospital—Claim in reconvention for damages upon an implied contract to use due care and reasonable skill in treatment of patients in such hospital—Liability of Crown on implied contract for negligence of its officers—Rejection of issue not distinctly raised in the pleadings—Scope of Civil Procedure Code, s. 146—Framing of issues irrespective of pleadings—Costs of new trial.

The admission of a person into the General Hospital of the Crown for treatment involves an implied undertaking on the part of the Crown that due and reasonable skill will be exercised by the staff of the hospital in the treatment and nursing of the person so admitted.

A claim for damages for the non-fulfilment of such an implied undertaking is maintainable in reconvention against the Crown's action for the recovery of charges for subsistence in the General Hospital.

This claim in reconvention must be treated as one founded on an implied contract and not upon a delict.

The Civil Procedure Code of Ceylon is mainly founded on the Indian Code.

The Indian and English system of pleadings proceed on entirely different principles.

In England the parties frame their own pleadings, and the case is tried on the issues raised on the pleadings. If a pleading is objected to, the Judge has to decide on its sufficiency or insufficiency. If insufficient, leave is given to amend. The amendments are never made by the Judge. The Court does not dictate to the parties how they should set out their case.

Under the Indian system no answer is required, though permission is given to the defendant, if he desires, to file a written statement of his case. The Court does not try the case on the pleadings. It can use the plaintiff's and defendant's statements (if any) to ascertain what issues are to be adjudicated on.

The Ceylon Code follows the Indian on this matter, except that it requires the defendant to file an answer. Like the Indian Code, however, it does not allow the Court to try the case on the parties' pleadings, but requires specific issues to be framed. Section 146 of the Ceylon Code does not restrict the issues to the pleadings. It is the duty of the Judge to ascertain what the parties intended by the pleadings, and frame issues accordingly.

Where the defendant proposed for trial an issue not distinctly raised in the pleadings and the Court refused to accept it—

Held, that the costs of the new trial ordered by the Appellate Court in regard to such issue should be borne by the plaintiff, as he ought to have consented to the issues suggested by the defendant.

THE Attorney-General on behalf of the Crown sued the defendant, Mr. William Smith, in the Court of Requests of Colombo for the recovery of Rs. 131.70 as costs of subsistence and entrance fee and ambulance hire, which it was alleged he

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undertook to pay when his wife, Mrs. Smith, was admitted into the General Hospital of Colombo as a patient, but which the defendant had failed and neglected to pay, though thereunto often requested.

The General Hospital of Colombo was described as the property of the Government of Ceylon, and the bill of particulars annexed to the plaint showed that the entrance fee was Rs. 10.50; costs of subsistence of Mrs. Smith from 17th May to 9th June, 1903, being twenty-three days at Rs. 5 per diem, Rs. 115; extras 70 cents; and ambulance hire Rs. 5.50.

The defendant denied his indebtedness to the plaintiff in the amount claimed, and pleaded that his undertaking to pay the charges in respect of his wife's entrance to the hospital and maintenance therein was conditional on an undertaking on the part of the Government that all due care and reasonable skill would be exercised by the agents and servants of the Government who comprised the staff of the hospital in the treatment, nursing, and care of his wife; that while his wife was a patient in the hospital and in the course of an operation on her for lumbar abscess performed on the 23rd May, 1903, the agents and servants of the Government, who were performing or assisting in the said operation, acted in so unskilful and negligent a manner that she was severely scalded in three places and sustained such grave injuries that she died from the effects thereof on the 9th June, 1903. The defendant alleged that by reason of the death of his said wife, who was helping him in carrying on an educational establishment in Colombo known as the Queen's College, the said business had to be abandoned, and he suffered substantial damage in consequence. He claimed Rs. 100,000 in reconvention, and prayed for a dismissal of plaintiff's action.

The plaintiff filed replication on the 22nd November, 1904, and the case having been transferred to the District Court of Colombo for trial, both parties agreed to the following issues of law and fact:—

(1) Do the allegations in the answer disclose a valid defence to the plaintiff's claim?

(2) Did the agents and servants of the Government, in the course of the operation performed on the 23rd May, 1903, on the defendant's wife, act so unskilfully and negligently that she was scalded in three places?

(3) Was her death on the 9th June due to such scalding?

(4) What damages did defendant suffer by the death of his wife?

(5) Is he entitled to recover such damages from the plaintiff?

An additional issue was suggested for the defendant, viz., whether the scalding was the cause or a contributory cause of the death of the defendant's wife. But the Acting District Judge (Mr. J. R. Weinman) refused to accept this issue and ordered the defendant to begin.

The defendant, being called and sworn, stated that he and his wife were trained and certificated English teachers, and had carried on an educational establishment called the Queen's College at Colombo; that the nett income from the College averaged about Rs. 4,000 a year; that his wife attended to the duties of the College up to the day of her removal to the hospital; that an operation was performed on her by Dr. Garvin for an abscess in the left lumbar region on the 23rd May; that his wife told him on the morning of the 24th that she had been scalded during the operation by a hot water bottle on her right side; that nevertheless she was progressing favourably till the 5th June, when a change for the worse occurred; that Dr. Garvin told him she had an acute attack of dysentery; that on the 7th June his wife was in great pain. "She would not allow the bed clothes to remain and was continually moaning; she was reluctant to speak throughout the day; she was articulating nothing; she took no notice of any one unless roused. I went to the hospital on Monday, the 8th, and as usual took some coffee with me for her. I asked her if she wanted some coffee. She said she would, and I held a cup of coffee to her lips. She motioned it away. I said 'Lottie, don't you know me?' She looked at me rather vacantly, and said 'Don't I know you, my own dear William.' We then kissed each other. She was not conscious after that. I went home and came back about 9 A.M. All afternoon up to about 6 P.M. that day she kept uttering the word 'considerate' almost every minute. From 6 P.M. for about three hours she kept on saying 'Ah well, ah well, ah well.' About 9 P.M. she started crying out 'Irene, Irene,' sometimes with a piercing cry. After that she kept crying out 'I, I, I.'"

In cross-examination Mr. Smith admitted that in 1895 menstruation ceased in his wife and her health became a source of anxiety to him and to her; that she then said that her head seemed to slit open and then shut; that it was opening and shutting; that she was suffering from insomnia; that in 1896 she was mentally affected in England; that they called on a specialist in mental disorders, Dr. Gordon Leslie; that after he had seen her she was taken to Stone Asylum, where she remained three or four months; that Dr. Humphry, in charge of that Asylum, told him he had done the worst thing possible in bringing her there; that she was

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kept under restraint when coming back from England in July, 1896; that for six months after her return she took no part in school work, being perfectly indifferent to everything about her; that she read nothing, spoke to nobody, not even to her husband; that another lady from England took charge of the College work; that afterwards she recovered sufficiently to take charge of the College and work it very successfully; that on the 17th May, 1903, she awoke from bed and was shivering all over; that her temperature then was 104°, and Dr. Thomasz was called in on the same day, and he advised her to be taken to the hospital, as a serious operation was necessary in the lumbar region; that he saw nothing of the burn in the hospital till her death; that he agreed to have the funeral from the hospital at first; that he afterwards changed his mind, removed the body to his house, and had the bandages undone, and then for the first time saw the burn on the right side about the lower ribs; that he was then satisfied that the cause of death was the burn itself and not lumbar abscess complicated with acute mania, as certified by Dr. Garvin; that on the evening of the day of the funeral he went over to Dr. Garvin's residence and persistently said to him that the cause of the death was not as stated by Dr. Garvin. "I said I was so confident of it that I would have my wife's body exhumed. I cannot say that I seriously intended to have the body exhumed. I did not have her body exhumed."

Mr. E. V. Rutnam, a licentiate of the Ceylon Medical College and Senior Resident House Surgeon of the Colombo General Hospital, was the next witness called on behalf of the defendant. Mr. Rutnam said: "Mrs. Smith's case came under my notice from first to last; she was a patient from her admission up to her death. Whatever I wrote on the bed tickets was either at the dictation of Dr. Garvin or subject to his revision. I was present in the operating room on the 23rd May, when the operation was performed on Mrs. Smith. The operation lasted an hour, and Dr. Garvin performed it. I assisted during the whole time. Dr. Thomasz was also present, and Dr. Van Langenberg, I believe, administered chloroform. About twenty ounces of pus were evacuated from the abscess. I saw the burns on the morning after the operation, in all three, within the area of a hot water bottle. The largest burn was about 3 inches by 4. The death certificate of Mrs. Smith was signed by me. The entries are in the handwriting of Dr. Garvin's clerk. I did not dictate the entries in that certificate. It was brought to me filled up and I signed it. If I had to put down the cause of death I would have said 'lumbar abscess complicated by mania, dysentery, and burn. The lumbar abscess at the date of

death was not quite healed. The abscess was dressed all throughout. I never told Miss Thiedeman that Mrs. Smith died of burn. I do not know what she died of. The words ' acute mania ' in the death certificate or ' mania ' do not appear in the bed-head ticket. There are words imputing acute mania. I should have entered either ' acute mania ' or ' insanity.' The bed tickets do not contain complete records of everything that happens. Minute description of everything that happens is never gone into. The word ' chloroform ' is not put on that ticket. There was no entry that drainage tubes were put in. I thought when I saw Mrs. Smith once or twice she was insane. I thought she had dysentery, judging from the character of the motions as they appeared in certain bed-head tickets. I would have put in the death certificate ' Cause of death: lumbar abscess, complicated by insanity, dysentery, and burn,' because I knew or inferred that she suffered from these disorders after she was admitted into hospital, but I did not know the cause of death."

The third witness called was Mr. F. M. Alvis, a licentiate of the Medical College, who was present at the latter part of the operation on Mrs. Smith. He said about 1 P.M. that day he was sent for by the nurse of the ward, and on going up she complained to him of pain on the right side. He untied the bandages and found some burns and he applied boric ointment thereto. He made no entry in the bed-head ticket, nor saw the burns afterwards.

Three lady teachers who visited Mrs. Smith at the hospital were also called. One of them, Miss Thiedeman, said: " I was present when she died. I got a stretcher from Dr. Rutnam. I walked with the men who were carrying the body. Mr. Smith wanted the body unbandaged. I said ' What's the use? leave her alone.' Mr. Smith insisted. I cut the bandages; then I saw the wound on the right side. I was so horrified at what I saw on the right side that I did not think I would look at the other wound on the left. From the day of the death we all believed that Mrs. Smith died of the burn."

Two more witnesses were called—Dr. Thomasz (Second Surgeon of the General Hospital) and Dr. Rodrigo (a licentiate of the Ceylon Medical College, who held also the Diploma of Membership of the Royal College of Surgeons, England, &c.).

Dr. Thomasz was present at the operation as Mrs. Smith was getting under chloroform and remained for about fifteen minutes. He never saw the case after that day professionally, nor had he seen the bed-head tickets. He saw nothing in the bed-head tickets whereby he could ascribe death to the original abscess. He did not see the burns on Mrs. Smith at any time. The symptoms shown

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in the bed-head ticket were not in his opinion the result of the ulceration of the duodenum, but of the lower bowels. A duodenal ulcer could be recognized only after a post-mortem examination. The bed-head notes showed that there was dysentery passing on to diarrhœa. Judging from the bed-head tickets, he thought dysentery began on the 5th. The dysentery seemed to have passed away on the 7th, when looseness of the bowels followed. He should call these motions of the 5th and 6th dysenteric, not dysentery. They were not due to ulceration of the duodenum or of any parts of the bowels. There must have been only congestion or catarrh of these organs. He would not say it was probable, though it was possible, that the symptoms as described in the bed-head ticket were the result of burns. It is very difficult to say. He did not think that the abscess had anything to do with the condition of the bowels. He could not say what was the cause of death. It might be exhaustion due to lumbar abscess. Dr. Garvin was in a better position to decide whether the patient was suffering from mania or not. At the time she was removed to hospital she was in possession of her mental faculties, but sudden shock caused by grief and pain might bring on a recurrence of the malady as on prior occasions. Given the cause, the recurrence would be very similar to the original malady. Such a cause might be the abscess or the exhaustion which followed the operation or the operation itself. He had himself not stated in his bed-head tickets the full entries required to be made. He saw the hot water bottle put under the patient; flannel was not necessary to be used to cover the bottle; a towel might be used to cover the bottle. He usually left the wrapping up of the towel to the nurses. A professional nurse knew exactly what to do. The doctor's attention would be concentrated on the operation.

Dr. Rodrigo swore that he could correctly state and describe the cause of death of Mrs. Smith. He would describe the death as due to the burns. The defendant, Mr. Smith, consulted him about ten days before the trial about his wife's case, and he had read and studied the bed-head tickets and Dr. Garvin's report, and had been in Court while the previous witnesses were giving their evidence. He had do doubt whatever that the abscess was quite healed on the day of death. The inflammation from the burns in Mrs. Smith's case would affect the colon, small intestines, and the kidney. To get to them the heat would have to pass the peritoneum and through it to the smaller intestine, and so produce peritonitis. Possibly she died of peritonitis; more likely she died of intestinal inflammation. The cardinal symptoms of dysentery were frequent

stools accompanied with griping tenesmus (a desire to strain), colicky pain, possibly fever, stools containing blood and mucus, generally scanty. There were no symptoms of dysentery mentioned in the bed-head ticket, excepting the words "motions contain mucus and blood." It was true mucus and blood are always present in dysentery, and the treatment might have been for dysentery, but "I do not think that Mrs. Smith suffered from dysentery; not a bit of it. I ascribe the intestinal inflammation as recorded in the bed-head tickets to the burns and to nothing else. In the presence of the burn I would not look for any other cause for the intestinal symptoms. I do not consider that she was suffering from acute mania at any time she was in hospital. I should say she was suffering from delirium. I would have put the cause of death on the death certificate as burns, and nothing else."

In cross-examination Dr. Rodrigo said the inflammation of the bowels was caused by absorption of septic matter formed in the burnt parts. If fever was present it would be due to septic absorption and septic intoxication. The normal temperature of Mrs. Smith, however, indicated the absence of sepsis or collapse and cerebral inflammation. The first evidence that Mrs. Smith had collapsed of cerebral inflammation in the bed-head ticket was on the 5th of June. Nothing else but collapse or cerebral inflammation could reduce the temperature. If there were meningitis or encephalitis the temperature would be subnormal.

The learned District Judge considered that the evidence of Dr. Rodrigo was not worthy of credit, and dismissed the defendant's claim in reconvention and gave judgment for the plaintiff as prayed.

The defendant appealed.

Browne, for appellant.—Dr. Garvin's operation was thoroughly successful, but the burn was severe and dangerous. It was caused by negligence of some one who took part in the operation. Dr. Rodrigo's evidence shows that he is an expert, and that in his opinion Mrs. Smith died of inflammation of the bowels caused by the burns. The visceral effects of burns would, according to medical books, apppear at the second week, and in this case such effects did appear at the second week. It is not contended that Mrs. Smith died of duodenal ulcer, because only a post-mortem examination could reveal whether she died of it or not, and there has been no post-mortem examination in her case. Nor can it be alleged by the Crown that she died of lumbar abscess complicated by acute mania. The Resident

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Surgeon of the Hospital, who signed the death certificate, said he did not know the cause of death. Dr. Thomasz's evidence amounts to the conclusion that she died of exhaustion due to burns. The bed-head ticket shows she had delirious symptoms but not acute mania, and according to medical authorities even acute mania does not kill a person. The abscess was practically healed, and the patient was out of danger and had a thanksgiving ceremony at the hospital. What endangered her life was the burn, which was in the trunk of the body, and so capable of affecting the internal organs easily. In the second week the visceral effect of the burns manifested themselves and caused her death.

If the burn was the cause of death, the Court would remit the case to the Court below for assessment of damages.

The defendant is entitled to sue the Crown for the wrongful acts of its agents or servants. According to Roman-Dutch Law an action is maintainable for the recovery of what is called reconciliation money (*soen-geld*) on the ground of homicide (*Opinions of Grotius, No. 83, p. 602*, Bruyn's Translation). It has been conceded in our Courts that an action in tort may be brought against the Crown (*Lipton v. Fraser, 8 N. L. R. 54; Attorney-General v. Kudatchy, 7 N. L. R. 236*).

Rámanáthan, S.-G. (with him *Prins*, C.C.), for the plaintiff, respondent.—The plaintiff's action rests upon a contract and a breach of it. The contract was that Mrs. Smith, the wife of defendant, should be admitted into the General Hospital of Colombo as a patient on the defendant undertaking to pay certain charges, viz., entrance fee Rs. 10.50, her costs of subsistence at Rs. 5 per diem amounting to Rs. 115, and ambulance hire Rs. 5.50. The total amount of the plaintiff's claim was Rs. 131. The defendant resists this claim on the ground that the Government, who are owners of the General Hospital, undertook that all due care and reasonable skill should be exercised by the medical officers and their staff in the treatment, nursing, and care of his wife, and that it was owing to such an undertaking that he agreed to pay the charges claimed. This allegation has not been proved. It is only a vain contention. The Government was not claiming anything for treatment or medicine or nursing, but only for subsistence, that is, for food and board. [LAYARD, C.J.—Is not there an implied contract in that patients admitted to the hospital should be carefully and skilfully treated?] Not in such a case as the present one, where no charge is claimed for treatment. The General Hospital is a charitable institution where patients, if poor, are fed, treated, and nursed free of any cost. If a better class of patients

seek admission there and call for better food and higher comforts than are given to the usual run of patients and wish to occupy a separate room, the Government charges, as costs of subsistence, Rs. 5 a day. It is no doubt the moral duty of the Government to do all it can for the successful treatment of the patients admitted to the hospital, but there is no legal duty on its part that the best skill should be made available, or that negligence of every kind should be guarded against in the case of those who do not pay anything for medical skill or for nursing. Therefore the theory of implied contract falls to the ground. The Crown is not responsible for the torts of its servants. On the merits, the defendant has not proved that the accidental burns were the sole cause of death. There was no post-mortem examination, and therefore all opinions regarding the cause of death would be mere speculation. Two or three young ladies who attended on Mrs. Smith saw the burns on her body and rushed to the conclusion that those burns were the cause of death. Mr. Smith took up this idle cry, and without any evidence whatever was as " satisfied " as his school girls as to the cause of death. He even had the hardihood to say to the Surgeon of the Hospital that his wife did not die of the cause stated in the death certificate. He had no reasons whatever for making this assertion. He took no measures to hold a post-mortem examination after the removal of the body to his house. Nor after the burial, when the discussion as to the cause of death became heated, did he exhume her body and submit it to the examination of qualified medical men. The results of a post-mortem, if held, would be the best evidence in the case, but as the defendant carried away his wife's body from the hospital and buried it after challenging Dr. Garvin's opinion as to the cause of her death, the defendant should not be allowed to bolster up his case by speculative evidence. The death certificate signed by the House Physician of the Hospital at the instance of Dr. Garvin gives the cause of death as lumbar abscess complicated by acute mania. The only witnesses called for Mr. Smith as regards the cause of death were Drs. Rutnam, Thomasz, and Rodrigo. Dr. Rutnam swears that he does not know what Mrs. Smith died of, that he could not say that her burn caused her death, and that if he had to put down the cause of death he would have said " lumbar abscess complicated by mania, dysentery, and burn." Dr. Thomasz is also unable to state definitely what the cause of death was, and does not know how he would have written up the death certificate. He swears, " I might have said exhaustion due to lumbar abscess." These two physicians were in actual attendance on Mrs. Smith. Dr. Thomasz it was that recommended Mrs. Smith to go to the hospital, and at the hospital Dr. Garvin and Dr. Rutnam

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were in constant attendance as Chief Surgeon and House Physician respectively of the hospital. According to Dr. Garvin the death was due to lumbar abscess complicated by acute mania. According to Dr. Rutnam death may have been due to lumbar abscess complicated by mania, dysentery, and burn. But Dr. Rodrigo, an outsider who knew nothing personally of Mrs. Smith's case, boldly undertakes on oath to " correctly state and describe the cause of death." He is called as an expert, but having been proved to have a grievance against the Government, and especially against the Head of the Medical Department, his evidence is open to great suspicion. Besides, his evidence depends entirely on premises which were not proved to exist in the cause of Mrs. Smith. He is unhesitatingly of opinion that death was due to the burn and burn only; but the assumptions he makes in order to maintain this conclusion do not exist here. He says the heat of the hot water bottle would pass directly from the skin to the peritoneum and through the peritoneum into the smaller intestine, and so produce inflammation of the bowels. But there is no evidence whatever that there was inflammation of the bowels in the present case. All that is proved is that the bowels were irritated, that the motions contained mucus and blood, and that one motion contained much undigested matter. As her temperature was normal it cannot be assumed as Dr. Rodrigo assumes, that there was inflammation of the bowels or peritonitis. Indigestion is capable of producing blood and mucus in the motions. About ten symptoms are necessary to constitute peritonitis according to the medical authority quoted by Dr. Rodrigo, but really and truly there are only two of the symptoms in the present case, and yet he jumps to the conclusion that she may have died of peritonitis or more likely died of intestinal inflammation. This is absurd. Ousted from this conclusion by the force of cross-examination, he swears that duodenal ulcers may have resulted from this burn, but when reminded that such ulcers cannot be discovered except by a post-mortem examination, he flits to the conclusion that the cause of Mrs. Smith's death was exhaustion resulting from the burn. As, however, it was pointed out that he had not shown any real connection between the burn and death, he jumped to the third conclusion that she died of collapse or exhaustion, due to meningitis and ensephalitis. But as the authority he quoted mentioned symptoms like paralysis, &c., which were not present in the present case, it became quite clear that he was a wild speculator and quite unfit to advise the Court as to the cause of death, much less on the question whether such cause was due to the burn and burn only. The opinions of the young ladies who were allowed to enter the sick chamber of Mrs. Smith are attempted in this case to be forced

through the Law Courts as indisputable facts with the help of Mr. Rodrigo, who has a grievance against the Head of the Medical Department. Mr. Rodrigo has shown himself most incautious and inexpert in trying to prop up a fanciful idea by inapplicable texts from medical books.

Browne heard in reply.

Cur. adv. vult.

25th May, 1905. LAYARD, C.J.—

The plaintiff in this action is the Attorney-General of Ceylon, and seeks to recover from the defendant the sum of Rs. 131 under the circumstances alleged in the plaint, viz., that at the request of the defendant and on his undertaking to pay the charges his wife (now deceased) was admitted into the General Hospital of Colombo as a " patient ". The above is admitted by the defendant, but I understand his answer to allege that the contract on which the plaintiff sues contains an implied undertaking on the part of the Government, the proprietors of the hospital, to use due care and reasonable skill in the treatment and nursing of the defendant's wife.

The plaintiff's action is undoubtedly and admittedly founded on contract, and I think that the admission of a person into the General Hospital for treatment involves an implied undertaking on the part of the Government that due and reasonable skill will be exercised by the staff of the hospital, *i.e.*, by the servants of the Government, in the treatment, nursing, and care of the person so admitted into the hospital. The items sought to be recovered by the plaintiff mostly consist of charges for subsistence of the deceased whilst living in the hospital.

There remain two other charges, one for ambulance hire and the other for " entrance fees," the first for service rendered prior to admission to the hospital and the second payable before admission, being " entrance fees. "

The defendant's defence to the claim in convention is that after admission the deceased was not properly treated in the hospital and her death was caused thereby, and consequently the defendant is not liable to pay the amount claimed in convention. I agree with the District Judge that it is no answer to the claim in convention. The defendant is bound to pay the actual cost of subsistence and the other charges. If there was any negligence on the part of the servants of the Government in treating his deceased wife, the defendant has a claim in reconvention for damages on the implied contract set out by him in his answer.

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Turning to defendant's claim in reconvention, I understand it to be one resting on the contract above-mentioned and to be a claim for damages for the non-fulfilment of the implied undertaking to use due care and reasonable skill in the treatment and nursing of the defendant's wife. The Attorney-General has argued that paragraph 2 of the answer ought not to be read with paragraph 3, and that the latter refers to the claim in reconvention, whilst the former must be treated only as an answer to the claim in convention. We do not now apply very strict rules with regard to pleadings, but try to ascertain what the parties intended by the statements made in their answer. The defendant distinctly alleged the implied contract in the 2nd paragraph of his answer, and there is no doubt that the pleader intended paragraphs 2 and 3 to be read together. The implied contract is not specifically denied in the plaintiff's replication, and no issue was raised at the trial as to whether the plaintiff's contract included the implied undertaking alleged by defendant. I think we ought to treat the defendant's claim in reconvention as one founded on contract, and not, as suggested by the Attorney-General, as an action founded on a delict. It is admitted that if the action is based on contract the defendant can maintain such an action against the plaintiff.

The question then remains to be decided whether the defendant has substantiated the negligence alleged by him. This was the first isue of fact settled by the District Judge, and the burden of proving it was on the defendant. The Judge has held that he has. There has been no attempt by respondent's counsel to upset that finding, and I am not surprised, because the Principal Civil Medical Officer, after inquiry, came to the conclusion that it was due to carelessness. See his letter D 3 dated February 15, 1903, in which he states that a hot water bag without having a flannel cover to fit it should never be so used in a hospital. Whatever may be the final result of this case, one cannot help feeling that the unfortunate deceased, who was in hospital for the purpose of undergoing (to use Dr. Garvin's own words) "a severe and serious operation," was, through the carelessness and negligence of one or more of the agents and servants of the Government, caused to suffer considerably from such carelessness and negligence.

I now turn to the second issue settled at the trial, "Was the death on the 9th of June due to such scalding?"

I see that the appellant's counsel was anxious that a further issue should be settled by the Judge, viz., whether the scalding contributed to the death of the deceased. The Judge appears to

have declined to accept that as one of the issues because it was not distinctly raised on the pleadings. I am inclined, for the following reasons, to think he was wrong.

Our Civil Procedure Code is mainly founded on the Indian. The English and the Indian systems of pleadings are on entirely different principles. In England the parties frame their own pleadings, and the case is tried on the issues raised on the pleadings. If a pleading is objected to by the other party, the Judge has to decide on the sufficiency or insufficiency of the pleading, and if the Judge should find it insufficient leave is given to amend. The amendments are never made by the Judge. The Court never dictates to parties how they should set out their case. Under the Indian system no answer is required, though permission is given to the defendant, if he desires, to file a written statement of his case. In India the Court does not, as in England, try the case on the pleadings; it can use the plaint and the defendant's statement (if any) to ascertain what issues are to be adjudicated on. They are supplemented by examination of the parties, the documents produced by them, and also by the statements of their respective pleaders. It is the duty of the Court in India from such materials to frame the issues to be tried and disposed of in the case. Our Code follows the Indian in this matter, except that it requires the defendant to file an answer, like the Indian Code. However, it does not allow the Court to try the case on the parties' pleadings, but requires specific issues to be framed. By section 146 of our Code, if the parties are agreed, the issues may be stated by them; if not agreed, then the Court must frame them (see *Fernando v. Soysa, 2 N. L. R. 41*). In this case the defendant's counsel—*i.e.*, pleader—expressed a wish to have a further issue settled. There is no necessity under our law to restrict the issues to the pleadings, as was done in this case; in fact, it appears to me to be contrary to our law, and I think the Judge should have allowed an issue to be framed as to whether the burns contributed to the death of the deceased.

I must now deal with the issue tried, "Was the defendant's wife's death, on the 9th June, due to scalding?" The construction that has been placed on that issue by both the appellant's and defendant's counsel is whether the cause of the deceased's death was due to the burns mentioned in the evidence. I am a little doubtful myself as to the exact meaning to be attached to the issue as worded, but every one seems to be agreed that the matter in dispute between the parties was as to the cause of death, the defendant alleging on the one hand it was the burn, and the plaintiff forcibly contesting that it was the lumbar abscess

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complicated with acute mania. The District Judge has found that the cause of death was correctly described in the death certificate, and was not due to the burns.

The question to be decided is a difficult one, and the Solicitor-General argues that without a post-mortem examination no one could conclusively state what the actual cause of death was, and consequently we must more or less speculate from the circumstances of the case and the facts proved as to what actually did cause the death. The case is not made easier by the gentleman who actually certified the cause of death, and who made a declaration to the effect that the cause of death to which he certified was true and correct, now turning round and saying he does not know what the deceased died of, and further saying if he himself had inserted the cause of death on the certificate he would not have used the words appearing in the certificate, which he had previously declared to be true and correct. We must do our best to arrive at some conclusion.

The deceased lady, early in May, 1903, was attended by Dr. Thomasz, who found her suffering from pain on the left side and fever. On the 17th May he satisfied himself that she had an abscess in the loin, and advised her going to the General Hospital. At the hospital, I understand, she passed to the charge of the Surgeon in charge, Dr. Garvin, and on the 20th May was operated on and the abscess cavity evacuated. The operation was very successfully performed. Most unfortunately a hot water bag or bottle was placed under the right loin of the patient to prop her up. The oral evidence in the case seems, so far as it goes, to show that a hot water bag or bottle ought not to have been so used (see Dr. Thomasz's evidence, page 88A, and Dr. Rodrigo's evidence). In any case, whether it was right to use one or not, every one connected with the case, including counsel for the Crown, admits that a hot water bag or bottle, if used, should be so securely covered and protected that under no circumstances should the bare bag or bottle come in direct contact with any part of the patient's body. During the course of the operation the bag or bottle appears to have come into direct contact with the deceased's body at three different spots. It is impossible from the evidence adduced in the District Court to find who is responsible for what occurred. Neither is it necessary for the purpose of this judgment to find who was responsible in the matter. The evidence shows that it must have been due to one or more of the several officers or servants of the Government whose names have been mentioned as taking part in the operation. There is no doubt that

the operation was thoroughly and successfully performed, and the medical men in attendance considered that if nothing untoward happened in forty-eight hours the deceased would have recovered (see Rutnam's evidence, page 80, and Smith's evidence, page 15). That Mrs. Smith was burned during the course of the operation was not discovered until she complained to Alvis, a licentiate of the Medical College, who was at the time of the operation a student of the hospital. Mrs. Smith complained to him of pain, and he untied the bandages and found some burns on the right side. He applied boric ointment to the burns and reported what he saw to Dr. Rutnam. No entry, however, was made of the burns in the bed-head ticket. I must here explain that a bed-head ticket is by the general regulations of the Ceylon Civil Medical Department kept for the purpose of having entered therein the history of the patient's case and its treatment, &c., and by the rules of the paying wards (one of which Mrs. Smith occupied) the medical attendant is required to record the histories in detail on the bed-head ticket, so that it may be available for the information of relations or friends when death takes place. It was after repeated inquiries, to which I received no satisfactory answer from the counsel for the Government, as to why no mention of the burns was made in these tickets and of the treatment of the burns when discovered, the Attorney-General came into the Court and informed me that there was reason to think that all mention of the burns was excluded from the bed-head tickets, so that the Principal Civil Medical Officer and the superior authorities in the hospital should not hear of them. I had myself previously arrived at the same conclusion, and think that that was very probably the reason. It is not very clear how Dr. Garvin became first aware of the burns, but it is admitted that his statement in his report that he discovered the burns on the evening of the 23rd is incorrect, and that they were not treated by him antiseptically, as stated in his report that evening. The antiseptic treatment began on the morning of the 24th, the day after the operation. Dr. Rutnam and Dr. Garvin are not at one as to the discovery of the burns being made by the latter. I see no reason to disbelieve the sworn evidence of Alvis that he discovered the burns and told Dr. Rutnam, and I think it is probable that Dr. Rutnam is right when he states that Dr. Garvin was informed of it on the day of the operation. I must prefer the sworn testimony of the witnesses to the report of Dr. Garvin, which has not been verified on oath or tested by cross-examination, and which admittedly on this point is not accurate. I gather from the evidence that there were three burns, one of the fourth degree,

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deep and involving the skin in its entire depth, and two others of the second and third degree, comparatively slight. The first was as large as a turkey egg, and the other two the size of duck eggs; they were all three situated within the area covered by the hot water bag or bottle. The most serious, of course, was the burn of the fourth degree, which would result, I understand, in the integument being destroyed and part of the subcutaneous cellular tissue. The evidence shows that there is greater danger attending burns on the trunk of the body than on the extremities of the feet by reason of the proximity of the viscera. There is a certain amount of danger from all burns dependent on the area burnt. A burn of the fourth degree on the trunk, I gather, is always more or less dangerous, and Dr. Thomasz says " the burns in Mrs. Smith's case would possibly have resulted in serious consequences, and would possibly have been fraught with danger to her life." According to Mr. Smith's evidence, which is uncontradicted, Mrs. Smith first told him of the burn on the morning of the 24th, the day after the operation. She mentioned having complained of pain on the right side to Dr. Garvin—that is, the side on which the burns were, and not on the side on which the operation had taken place, from which she suffered apparently no pain. Dr. Garvin appears to have exclaimed on first seeing the burn, " Good God Almighty." I am told that this is language commonly adopted by Dr. Garvin; however, it certainly is an exclamation expressing surprise. And as I gather from the evidence Dr. Garvin knew of the burn the evening before, it seems to me that it is an expression of horror. Mr. Smith then appears to have seen Dr. Garvin, who told him that unfortunately Mrs. Smith got a " slight burn " during the operation. He could not account for how it happened, and added: " It is most unfortunate; it may delay her convalescence for some weeks. " That is the only evidence we have of the interview between Mr. Smith and Dr. Garvin. If Mrs. Smith had lived and her recovery had been delayed by the burns, there can be no doubt that she would have been entitled to recover damages consequent on such delay. In view of Dr. Thomasz's statement quoted above, it is unaccountable why Dr. Garvin told Mr. Smith it was " a slight burn," when the burns " might possibly have resulted in serious consequences and would possibly have been fraught with danger " to his wife's life. Mr. Smith appears to have been satisfied, from what Dr. Garvin told him, that it was a slight burn. From the day of the operation, as far as one can judge from the oral evidence, the bed-head ticket, and the temperature chart, the patient progressed very favourably. She had no fever after the 24th May, save on the evening of the 29th May, when the

temperature appears to have risen. The abscess was healing so satisfactorily that the drainage tubes were removed on the 28th or 29th May, and from the bed-head ticket it appears there was only a slight discharge on the 29th and 31st May, and not thereafter; and Dr. Rutnam says that if the abscess wound was in a serious condition it would have attracted his attention, and he would remember it and would have entered it on the bed-head ticket. He cannot say when he saw the abscess wound last, though he remembers the washing and dressing of the burns on the 8th June. I find Dr. Garvin's report is silent as to when the discharge from the abscess ceased. He does not state there was any discharge from the abscess after the 31st May, but says: "From the date of operation, the 20th May, until the 5th June, the patient's progress was steady and encouraging; nothing untoward occurred. The abscess was healing satisfactorily." And he does not anywhere state the condition of the abscess at the time of death.

Dr. Rutnam, as I pointed out above, does not throw any light on the matter. Dr. Thomasz says: "If there was a discharge after the 31st May, I think such discharge should have been recorded on the bed-head ticket. I think probably the abscess had healed. I am not able to judge of the case. The stoppage of discharge is no indication that the abscess had healed. There might have been pent-up pus. I see nothing in the bed-head ticket whereby I could ascribe death to the original abscess." With reference to the pent-up pus, there appears to me to be wanting any material to support this theory; the patient did not suffer from fever, and there is no suggestion in Dr. Garvin's report that he had reason to think there was pent-up pus. On the contrary, I understand him to be of opinion that the operation was most successful, and he nowhere hints that the treatment of the abscess failed, or that the drainage tubes were removed too early. Dr. Rutnam, who with Dr. Garvin was attending the patient and dressing the wound, nowhere suggests that there was pent-up pus, and I cannot find any evidence to support the theory of pent-up pus advanced by Dr. Thomasz. Dr. Garvin does not suggest it in his report. If there had been pent-up pus, one would have expected to see the temperature of the patient rise, which did not occur. The evidence points to the operation being most successful; in fact, so successful that the medical men anticipated, if nothing untoward happened, in forty-eight hours the deceased would have recovered. I cannot find from the evidence that anything untoward happened after the operation, and nothing to account why the patient did not recover within the forty-eight hours. The only untoward event was the burning during the operation, and that admittedly would, on

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Dr. Garvin's authority, retard the recovery of the patient. The patient appears to have had fever until the evening of the day after she was operated on, but none thereafter except on the evening of the 29th, after the removal of the drainage tubes. Her progress towards recovery and accession of strength seemed to be everything to be desired, and she actually had a thanksgiving service on the 3rd June on account of her recovery. At that time apparently from the bed-head tickets the discharge from the abscess, which had been slight, had ceased for three days. On the 4th June we find from the bed-head ticket a prescription used which was applied to the burn and not to the abscess wound. It contained cocaine. Why was that applied if the burn was causing no trouble or discomfort, and how is this reconcilable with Dr. Garvin's statement that from the date, the 23rd May, till the 5th June the patient's progress was steady and encouraging, and nothing untoward occurred? "The abscess was healing satisfactorily, and the scalded area caused no trouble or discomfort;" what, then, was the necessity or the use of prescribing anything to be applied to the burns? With reference to the burns, I must here point out that owing to their never being mentioned in the bed-head ticket it is impossible to say what the actual state of them was from day to day or at the time the ointment was prescribed. Dr. Rutnam says: "I cannot say whether the cuticle was sloughed off or not. I have no means of refreshing my memory by means of any memorandum made by me nor to my knowledge by any one else." He could give no information as to why the prescription of the 4th June was ordered, but he says it could not have been applied to the abscess wound. All he does appear to remember is, that when the chloroform was administered on the 8th June there was some sloughing removed from one of the burns, and he does not recollect the abscess wound being attended to. Dr. Garvin in his report does not give a detailed history of the treatment of the burns. He does mention "the wounds" (in the plural) were washed and dressed on the 8th June, but does not mention the sloughing being removed from the burns. I am forced to think there was trouble and discomfort on the 4th June from the burns, and perhaps this is what Dr. Garvin refers to when he says that the patient once complained of pain over the burnt area, when an ointment containing 2 per cent. cocaine quickly removed it. It was from the 4th of June that the patient became worse. On the 5th of June her bowels were irritated, and the motions contained mucus and blood. She had two motions during the night of the 4th and two on the morning of the 5th. One motion contained much undigested matter, but she did not complain of much pain. In

the evening I find recorded in the bed-head ticket, "Had two motions since 11 A.M. Contained blood serum and shreds of mucus and shreds of mucus bile tinged. Has no pain to speak of. Tongue coated white in the middle. Is somewhat drowsy and incoherent in her speech. Pulse normal. Pulse 100—of good volume. Consultation with Dr. Sinnetamby."

The Solicitor-General tells me that as there was undigested matter there can be no doubt that the irritation of the bowels was caused by indigestion. I cannot find that Dr. Garvin in his report alludes to this as the cause. I am inclined to think that I cannot accept this simple solution as the cause, in view of what Dr. Garvin himself said to Mr. Smith: "Your wife has got an acute attack of dysentery; I don't know how." This apparently was said after examination of the motions. There has been a great deal of learned discussion as to whether these symptoms showed dysentery or merely dysenteric diarrhœa. Where doctors disagree I refrain from expressing any opinion.

I must try, however, from the medical evidence, oral and documentary, to trace the cause. The bed-head tickets do not help me. Dr. Garvin's report gives me no information. It is not suggested that it was caused by the original abscess; why not, I cannot say. I can only assume it would have been suggested if it was thought the abscess caused it. Dr. Rutnam's evidence does not help me. Dr. Thomasz, who appears to think the symptoms dysenteric but not dysentery, says that the motions of the 5th and 6th were not due to ulceration of the duodenum or of any part of the bowels. There must have been only congestion or catarrh of these organs. He has known cases of mild attacks of dysentery following burns. He could not say it was probable, though it is possible, that the symptoms as described in the bed-head tickets were the result of burns. The condition of the bowels might be disease *per se*, or it may result as a consequence of the burns.

As a consequence of the burns the patient would be more susceptible to disease. Assuming that the abscess itself had healed and the surface wound was healing (which I may here say appears to be supported by the evidence in the case), and assuming the burns were of the second, third, and fourth degree, as described by Dr. Garvin, the doctor says he would not ascribe the intestinal inflammation rather to the burn than to the abscess. It is very difficult, he says, to say. It may or may not be, and he does not think that the abscess had anything whatever to do with the condition of the bowels. He adds catarrh may have supervened from some independent consideration or from the burn. The burns would have the effect of lowering the system, and as a

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result render the patient more susceptible to chills and consequently to catarrhal affections. I gather from this that the doctor cannot positively ascribe the symptoms as arising from the burn. The abscess, though apparently healed, might also have the effect of lowering the system. The burn, together with the abscess, not only would retard, as admitted, convalescence, but would contribute to the lowering of the system, and naturally render the patient more susceptible to chills and consequently to catarrhal affections. On Dr. Thomasz's evidence, uncontradicted by any evidence on behalf of the Crown, I cannot help thinking that the burn, if I may use that expression, on the top of the abscess contributed to the lowering of the system, and rendered the patient more susceptible to chills and to catarrhal affections, and the combination of the two led to the dysenteric symptoms mentioned in the bed-head ticket. It is then suggested by respondent that on the 5th June, in the evening, the deceased was suffering from an onset of an attack of acute mania, and was absolutely insane on the 7th June. I have carefully read through Dr. Ratnam's evidence, as he was in attendance on the deceased when in hospital. He nowhere deposes to the onset of an attack of acute mania, nor that Mrs. Smith appeared to him to be at any time before her death insane. All he deposes to is that he would have put down the cause of the death to be lumbar abscess complicated by mania amongst other things. The value of that statement must be judged by the context, and also by the subsequent statement of this witness that he did not form any opinion as to the cause of death. I go further: the value of his opinion as to the patient suffering from insanity must be gauged not only by the context, to which I shall presently allude, but to his not deposing to having at any time himself observed any symptoms in the patient which would enable him or any one else to say whether Mrs. Smith ever was insane. After saying he would have put down the cause of death to be lumbar abscess, complicated by mania and certain other things, he adds: "The words 'acute mania' or 'mania' do not appear in the bed-head tickets, but there are words imputing acute mania."

One has only to read the bed-head tickets carefully to see there are no words used "imputing" or ascribing acute mania or any form of mania. I go even further and say, judging from the bed-head tickets, there is nothing to show Mrs. Smith was suffering from acute mania, and we have before us the testimony of Dr. Thomasz, with which I entirely agree, that "judging from the evidence given already (see evidence in case of all except Dr. Rodrigo), and from the bed-head tickets, I should not say

Mrs. Smith suffered from acute mania." He further adds: "There was delirium in her case—a symptom of the exhaustion she was in." It is true he admits that Dr. Garvin was in a better position to judge. We have not, however, had the advantage of Dr. Garvin's evidence on this subject, and after all he appears, judging from his report, to have relied a great deal on the opinion of one Dr. Sinnetamby, and that gentleman has not been called as a witness. The District Judge seems to think that if Dr. Thomasz had been shown the temperature chart he would have come to the conclusion it was mania but not delirium. The temperature chart, however, appears to be only made up from the bed-head tickets, and the doctor had seen these tickets and gave his evidence accepting those bed-head tickets as his data, and they clearly described the patient's temperature from time to time, and showed as clearly as the chart, to use the words of the District Judge, that "between the day of the operation and the death the temperature of the body was normal or subnormal, except on the 27th, when the drainage tubes were removed." Dr. Thomasz underwent a severe cross-examination, but was never asked whether, in view of the patient's temperature, he still adheres to the opinion that the bed-head tickets showed the patient was suffering from delirium and not mania. The District Judge appears to think "that the patient was treated with trional and subcutaneous injections of morphia because she was supposed to be suffering from acute mania." The bed-head tickets, however, describe that the morphia was last injected on the 4th June, and not once during the period of alleged mania, and that the only treatment for it was a powder of fifteen grains of trional on the night of the 6th June. The evidence certainly does not disclose that at any time during her illness Mrs. Smith was suffering from mania or insanity. There is no evidence to support the statement in Dr. Garvin's report that Mrs. Smith was before her death suffering from acute mania. Whatever may be my final decision in this case, and whatever may be ultimately decided, I am unable to support the District Judge's finding that the evidence establishes that the cause of death was correctly described in the death certificate for the following reasons:—

(1) Dr. Rutnam, who is responsible for the death certificate, deposes that he did not form any opinion as to the cause of death, and had he filled up the certificate himself says he would have put down the cause of death differently.

(2) Dr. Thomasz was unable to say what the cause of death was, and does not know how he would have written the certificate.

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He says he "might have said exhaustion due to lumbar abscess,' not that he is prepared to depose to that being the cause of death or only cause of death.

(3) Even admitting that Dr. Garvin's report has the same probative value as sworn evidence, which it clearly has not, he nowhere in that report states "in my opinion the only cause of death was lumbar abscess complicated with acute mania." He merely relates what were the contents of the certificate of death issued by him. It may be that the certificate did properly set out the cause of death; there is, however, no evidence of any probative value to support it.

The argument for the plaintiff was that only a post-mortem examination of the deceased's body could possibly elicit what the cause of death was. Accepting that to be the plaintiff's case, it is evident that the burying of the body without a post-mortem examination was entirely due to the fault of one of the servants of Government in signing as true a certificate which he now, by his own evidence, admits he cannot support, as he formed no opinion himself as to the cause of death. If it had not been for the granting of that certificate there must have been a post-mortem examination of the deceased's body before burial. The Solicitor-General argues that the defendant was responsible for the burial without a post-mortem examination, but the defendant could not have buried the body without the medical certifiate granted by one of the Government's own medical officers.

It will be noticed that up to this I have made hardly any mention of Dr. Rodrigo's evidence. My reason for so doing is that the District Judge has commented very severely on this witness, and I thought it better in the first place to consider the evidence of the expert witnesses against whom the plaintiff's counsel could not allege anything, and both of whom had had an opportunity of seeing the patient and knowing something of her case. Judging from the diplomas and degrees held by Dr. Rodrigo, he appears to be well qualified to give an expert opinion on a medical subject, and he appears to me to have given his evidence with considerable ability, and to have quoted authorities in support of the propositions adduced by him. The Solicitor-General referred to the witness more than once with great contempt. I am unable to find any justification for this. His cross-examination has not, in my opinion, shown him to be a sham expert or a medical witness who has sold his knowledge for the purpose of advancing the defendant's case. He is undoubtedly a young man, and consequently his experience is limited.

He is alleged to have made some unfounded charges against his superior officers in the Medical Department. It is impossible for me to adjudicate without material whether the charges brought by him were unfounded or not. Assuming, however, that he was wrong in attributing the loss of an appointment for which he had been selected by the Secretary of State to the action of the Head of his Department, or in suggesting that Dr. Perry opposed his appointment on account of certain letters written by him to the local papers—and there is no reason to think that he was right—I do not consider I should be justified in dismissing his evidence altogether, for it is supported to a very great extent by Dr. Thomasz, and what Dr. Rodrigo concludes to have followed from the data sumbitted to him is confirmed by Dr. Thomasz admitting in almost every case the possibility of such following. Expert evidence is essentially necessary in this case, and the general dictum of Lord Campbell, to which the District Judge refers, has not abolished expert evidence, and certainly never will do away with medical scientific evidence.

The question, however, remains for me to decide as to whether I can rightly adjudicate that the burns were the sole cause of death. There is a great deal to be said in favour of Dr. Rodrigo's opinion, but I must say, on the material before me, I am not prepared to definitely hold that the burns were the sole cause of death.

The statement made by Dr. Garvin that they would retard recovery, the evidence of Dr. Thomasz that they would possibly have resulted in serious consequences and would possibly have been fraught with danger to Mrs. Smith's life, the evidence of Dr. Rutnam that they complicated her case, and the evidence with regard to the healing of the abscess and the sudden and unaccountable change for the worse on the 5th June, all point to the burns as contributing to the death, though possibly not being the sole cause of it; and had the District Judge so held, I would have accepted his verdict.

If the Attorney-General is prepared to accept this finding, I will remit the case to the District Judge for the amount of damages to be ascertained and determined.

On the other hand, if the Attorney-General insists upon his technical right to have the issues, which ought to have been accepted by the District Judge, as I pointed out earlier in this judgment, placed on record and determined by the District Court, I see no other course open but to remit the case to the District Judge for a new trial. As the respondents ought to have consented to the issue suggested by appellant's counsel being settled by the District Judge and determined by him, the respondent

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must pay the costs of the abortive trial in the District Court and of this appeal.

The appellant to be at liberty, in the new trial, to read as evidence the deposition of any witness taken at the first trial, provided such witness's presence at the new trial cannot be readily obtained.

The Solicitor-General preferred a new trial.

The Chief Justice: It will be noted that the Solicitor-General wishes a new trial on behalf of the Crown, and order will be made as in the second alternative.

MONCREIFF, J. (whose written judgment was read by the Chief Justice) considered the case on the merits at length and concluded as follows: "I need not say more on the materials before us than that the burns contributed to the death of the patient. I agree to the order suggested by the Chief Justice."