J. W. MACDONALD (PLAINTIFF).....APPELLANT;

AND

E. PIER (DEFENDANT).....RESPONDENT.

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*Oct. 12, 13.
Nov. 27.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Practice and procedure—Action to set aside judgment—Statement of claim—Allegation of perjury—New evidence.

In an action to set aside a judgment obtained in the same court, the statement of claim merely alleged that the judgment "was obtained by the false and untrue statements made by the defendant" on material matters of fact at the former trial. In dismissing the action, the trial judge said "that to hear evidence would only leave me in the position that the judge was in when he tried the first action." Counsel for the appellant in this court declined to give any assurance, or even to state, that any evidence materially different from that given at the original trial would or could be adduced. The trial judge dismissed the action and the Appellate Division affirmed his judgment.

Held, Duff J. dissenting, that a new trial should be refused.

Per Davies C.J. and Anglin J.—The dismissal of the action may be regarded as equivalent in effect to an order perpetually staying it as frivolous and vexatious and an abuse of the process of the court, which under the circumstances, should not be interfered with.

Per Idington and Brodeur JJ.—The statement of claim does not sufficiently disclose a cause of action. Duff J. *contra.*

Per Idington J.—The trial judge rightly refused to rehear substantially the same evidence and to review the judgment rendered upon it at the former trial.

Per Idington and Brodeur JJ.—The sufficiency of the allegations in a statement of claim is a matter of practice and procedure and the jurisprudence of this court is not to interfere in such matters.

Per Duff J. (dissenting).—Where the plaintiff's statement of claim sufficiently alleges a cause of action and the plaintiff appears at the trial ready to proceed with his evidence in support of his claim, the trial judge could not properly dismiss the action except upon some admission on behalf of the plaintiff shewing his claim to be unfounded or unforceable. To dismiss the action as an abuse of the process without hearing the evidence in such circumstances would be un-

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

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precedented and contrary to the course of the court. The trial judge did not so proceed but dismissed the action on the ground that the statement of claim shewed no cause of action, and as he erred in this, there should be a new trial.

Per Mignault J.—When it became evident to the trial judge at the second trial that no other evidence than that offered at the former trial would be tendered he was justified in dismissing the action.

Judgment of the Appellate Division ([1922] 1 W.W.R. 1208) affirmed, Duff J. dissenting.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1) affirming the judgment of Ives J. at the trial and dismissing appellant's action.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

Lafleur K.C. for the appellant. The statement of claim discloses a good cause of action. All the material and necessary allegations to constitute an action for fraud were made and particulars of the fraud were given. The plaintiff should have been allowed to proceed and to have his case tried, and evidence heard to show that the statements complained of were in fact untrue. Then the trial judge would have been in a position to decide whether the court at the former trial could in fact have been misled by such statements. *Flower* v. *Lloyd* (2); *Abouloff* v. *Oppenheimer* (3); *Birch* v. *Birch* (4).

Geo. H. Ross K.C. for the respondent. The Supreme Court of Canada should not interfere with matters of practice and procedure.

The statement of claim does not disclose a good cause of action.

THE CHIEF JUSTICE.—For the reasons stated by my brother Anglin, in which I concur and to which I have nothing useful to add, I would dismiss this appeal with costs.

(1) [1922] 1 W.W.R. 1208.

(2) [1878] 10 Ch. D. 327; 46 L.J. Ch. 838.

(3) [1882] 10 Q.B.D. 295.

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IDINGTON J.—The appellant by his amended statement of claim sets forth that respondent recovered judgment, on the 22nd December, 1920, against him for the sum of $4,500.58 and the costs of the action.

In the third, fourth and fifth paragraphs of said statement of claim he alleges as follows:—

3. The said judgment was obtained by the false and untrue statements made by the defendant in giving his evidence before this honourable court.

4. The defendant made such statements knowing them to be false and untrue, and with the intent that they should be acted upon by this honourable court, and this honourable court being misled and deceived by acting on such false and untrue statements caused judgment to be given in favour of the defendant in the said action to the loss and detriment of the plaintiff in the action.

5. The following are the false and untrue statements made by the defendant in giving his evidence before this honourable court on the 28th day of October, 1919.

Then follow over six pages of the printed appeal case herein what appears to be a copy of the respondent's evidence in that case; mostly trivial questions and answers and a few which may or may not have been the material matters upon which the decision of the learned trial judge or the referee to whom some questions had been referred, turned.

And following such copy of evidence is the plaintiff's (now appellant's) prayer for relief as follows:—

(*a*) That the said judgment of this honourable court be set aside and vacated.

(*b*) Judgment against the defendant for the said sum of $5,673.82.

(*c*) His costs of this action.

The statement of defence by present respondent thereto denied the allegations in the said fourth and fifth paragraphs of the said statement of claim and further alleged that he would have been entitled to the judgment given in said action even if none of the evidence complained of in the statement of claim herein had been given at the trial; and again that all the statements complained of were litigated in said action and decided against appellant who then unsuccessfully appealed to the Appellate Division. That the plaintiff instituted original proceedings against the defendant for false swearing at the said trial, which

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proceedings resulted in the acquittal of the defendant; and that there is no evidence available to the plaintiff which was not available to him at the time of the said trial, and at the time the appeal was taken therefrom; and that if plaintiff now knows of any evidence which he did not produce at the trial, it was wholly due to his failure to exercise reasonable diligence in his preparation for the trial and the appeal taken therefrom.

The final paragraph of the statement of defence was as follows:—

(8) The statement of claim does not disclose a cause of action and is bad in law.

No reply to all this or even formal joinder of issue is to be found in the case presented to us.

The appellant's counsel opened the trial hereof by calling appellant and after his examination had proceeded so far as to show what a wide range of irrelevant matter was possible under such pleadings, objection was taken after the record of the former trial had been produced, including the opinion judgments of the learned trial judge thereof and of the referee, that the action could not be maintained, and that the statement of claim herein did not show a good cause of action for different reasons and that evidence along that line could not be properly tendered.

To this the learned trial judge remarked as follows:—

The court: Well, I don't know, it occurs to me that if false statements, false evidence is given at a trial and it can be shewn that the evidence so given induced the judgment, and upon shewing that evidence was false, that it did induce the judgment, that that judgment can be set aside. Now have you any authority against that proposition?

Thereupon there ensued an argument of some length of which there is no record, but merely marks indicating that the reporter made no note of what passed between counsel and the court.

At the conclusion thereof the learned trial judge said he had made up his mind on the issue of law so raised, but if it would save expense and trouble he was willing to proceed, but if counsel insisted he was entitled to judgment now.

Counsel for defence insisting, he delivered his judgment as follows:

The court: Well this action as at present constituted will be dismissed on the ground that the pleadings disclose no cause of action. I think that to hear evidence would only leave me in the position that the judge was in when he tried the action of Pier v. MacDonald and upon which he has decided.

This being the result it is quite clear to me that the learned trial judge having the correct conception of the law as expressed before the said argument had concluded from all that appellant's counsel had presented to him, that he was not in a position to do more than ask him to re-hear substantially the same evidence as adduced at the trial of the other case, with nothing materially new and hence he had no right to review the case and reverse the learned judge in the former trial.

In all of this I think the learned trial judge in this case was right and the Appellate Division was therefore right in dismissing the appeal therefrom.

It is elementary law that a judgment obtained by fraud can be vacated and surely perjury, which produces that fraud, falls within such a proposition. And as I read the elaborate opinions of the learned judges of the Appellate Division, none deny the law to be so but four out of five agree that such a case is not properly stated herein. Mr. Justice Beck would allow an amendment by plaintiff if he saw fit. I submit, as I suggested on the argument herein, that therefore there is nothing involved in this appeal but questions of practice and procedure and hence it should not have been entertained if we followed, as we should, the settled jurisprudence of this court in that regard.

The statement of claim herein by no means makes any such case in such a proper manner that any court could or should listen to as a means of enforcing the law which does not permit of such a mode of re-trial and acting upon simply a different view of the facts from that taken respectively by the learned trial judge and referee in the first action.

It is to be observed that the learned trial judge of such action was a member of the Appellate Division who heard the appeal now in question herein, and agreed with Mr. Justice Stuart.

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I submit that a statement of claim in such a case as this should, when relying alone upon alleged perjury of the respondent, as the basis of the fraud alleged to have been practised, at least be quite as concise and definite in pointing out each of the essential statements claimed to have been perjury, as would be required in an indictment for perjury.

Can any one imagine any court trying, or even listening, to an indictment for perjury framed in the way this statement of claim presents the appellant's case?

Again the claim to vacate a judgment on the grounds of perjury cannot succeed unless by new evidence and shewing that the aggrieved party could not by reasonable diligence have been able to discover and bring forward at the trial such new evidence as desired to be presented in the action, and the statement of claim should so allege and give some good reason for such failure.

The statement of claim in question herein entirely fails in this regard and thereby, as well as on other grounds entitled the learned trial judge to rule as he did.

Again one may surmise that one of the substantial features intended to have been relied upon by appellant was what the respondent had stated before the referee relative to the rate of compensation to have been due the appellant by the respondent.

The referee states these parties were in conflict in the evidence given; and that by reason of appellant never having claimed, in the course of the business more than five per cent, contended for by the respondent, and having rendered accounts for several years on that basis without making any reservation that he should go beyond, and then he (the referee) was influenced thereby to accept that as correct.

If I am correct in my surmise as to this item, surely there was not so much basis connected therewith for reaching any such charge as possibly intended to have been made herein relative thereto.

This statement of claim is such a curiosity that I am not surprised that neither party has been able to cite any precedent exactly fitting it; but the many cases cited here

and below do show that when the plaintiff fails to present a clear and definite case, he must fail.

And I submit that our courts should always, when any pretensions set up as herein, rigidly adhere to the clear and definite requirements of the law in that regard and thus discourage any suitor from hoping to re-litigate any case unless he has used the utmost care and diligence in the preparation of his case or defence and done everything possible to help the trial court to determine aright. I think this appeal should be dismissed with costs.

DUFF J. (dissenting).—The learned trial judge and the majority of the judges of the Appellate Division came to the conclusion that the statement of claim did not in substance disclose a cause of action. Had I come to the same conclusion I should have been prepared to dismiss the appeal on the ground, if on no other, that no adequate reason had been presented for setting aside the judgment of the Alberta courts. The Supreme Court of Alberta has authority to strike out any pleading disclosing no reasonable cause of action in addition to its inherent authority to stay or dismiss actions which on good grounds the court is satisfied are frivolous and vexatious.

An application made invoking the jurisdiction of the court to strike out a pleading as disclosing no reasonable cause of action or defence, as the case may be, is an application which must be determined upon an examination of the pleadings alone, while on the other hand, an application addressed to the inherent jurisdiction of the court to exercise its control over proceedings initiated in abuse of the process of the court is one with which the court deals after being fully informed of the facts and in which evidence may and commonly is offered and received *pro* and *con* from both sides. After a case has come on for trial, it would, I think, be without precedent, the plaintiff being there with his witnesses and ready to present his evidence in support of his case, in support, that is to say, of a claim resting upon allegations disclosing a good cause of action on the face of it—it would, I think, be an unheard of thing for a trial judge in such circumstances to dismiss

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the action as frivolous and vexatious except at all events upon the strength of some admission deliberately made by counsel and establishing that the case made upon the pleadings could not be supported; even in such a case it would be an unusual thing to dismiss the action without the consent of the plaintiff's counsel. Thirty years ago it was held by the Court of Appeal in *Fletcher* v. *London and North Western Railway Company* (1), that a trial judge had no power to non-suit a plaintiff without his consent upon the ground that on the opening statement of his counsel, it must be held that the plaintiff had no cause of action.

But the trial judge in the present case took no such course. He took a course which, having regard to the view of the law expressed by him was, I think, not open to criticism. Taking, as I have said, the view that the statement of claim did not allege the facts constitutive of a right of action to set aside the previous judgment as obtained by fraud he held that the pleading ought to be struck out and the action dismissed accordingly.

That is quite evident from the report of the proceedings at the trial. The learned judge explicitly says:

> This action as at present constituted should be dismissed on the ground that the pleadings disclose no cause of action.

It is true he goes on to say:

> I think, that to hear evidence would only leave me in the position that the judge was in when he tried the action of Pier v. Macdonald and upon which he has decided.

But the learned judge was evidently under the impression that the plaintiff must not only produce evidence which had not been produced at the former trial but that such evidence must be set out in his pleadings or that, at all events, he must in his pleadings allege the discovery of fresh evidence; and that in the absence of such an allegation the plaintiff would not be permitted to offer any evidence other than that which had been produced before the judge who pronounced the judgment impeached. I cannot help saying, with great respect, that this position

(1) [1892] 1 Q.B. 122.

of the trial judge appears to be logically unassailable. If it was necessary that the plaintiff should allege that fresh evidence had been discovered as a condition of the production of such evidence then it is quite obvious that under the pleadings as they stood such evidence could not be produced and the learned judge was quite right in thinking that in the absence of such additional evidence the trial would be a waste of time. The majority of the judges of the Appellate Division dealt with the case, I think, in a similar way and on similar grounds. The principal *ratio* of the judgment of Mr. Justice Stuart and quite clearly the conclusion at which he arrived was that the allegations in the statement of claim were not in substance sufficient to entitle the plaintiff to the relief demanded. His remarks as to the proceedings being vexatious do not convey to my mind the idea that in the absence of any explicit admission by counsel and in the absence of any application to the court to dismiss the action as frivolous and vexatious on the ground that the statement off claim, assuming it to disclose a cause of action, could not be supported by evidence (a proceeding which would have required the plaintiff to make answer and to disclose to the court the nature of the case he was prepared to make)— I do not get the impression, I say, that in the absence of any such admission or any such proceeding calling for an answer from the plaintiff by way of affidavit or otherwise Mr. Justice Stuart would have considered it the proper way to deal with an action based upon a good statement of claim to dismiss it in the middle of the trial as an abuse of the process. The observations of the learned judge are, of course, quite *ad rem* in relation to the point to which he is addressing himself, namely, whether in the circumstances the dismissal of the action should stand or the plaintiff should be given an opportunity to amend and proceed to a further trial; and again, let me say that having taken the view he did as to the allegations necessary to support such an action I think the ultimate conclusion to which he came to is one with which I am not at all disposed to disagree.

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The action was an action to set aside a judgment on the ground that the judgment had been obtained by fraud, the fraud being the fraud of the plaintiff in producing before the court his own perjured evidence. It will help to elucidate what I have to say if I quote at the outset the first paragraph of Lord Cairns' judgment in *Patch* v. *Ward* (1).

> The bill in this case is filed to set aside a decree absolute for foreclosure made as long ago as the month of March, 1849, and enrolled a few years subsequently. Being a decree signed and enrolled, the matter covered by it has become solemnly *res judicata* between the parties to the suit, and the decree must remain unless it can be set aside either upon the ground of error apparent upon the face of it, upon the ground of new matter subsequently discovered or upon the ground of fraud. If it is to be impugned upon the ground of error apparent upon the face of it, or for new matter relevant to the issues in the cause, that must be done by bill of review, the bill of the former case being filed without any leave of the court, in the latter not without leave, and in order to obtain that leave the applicant must satisfy the court that the new matter is relevant to the issues and could not with reasonable diligence have been earlier discovered. There is here no error apparent upon the face of the decree, neither has any leave been applied for or obtained to file a bill of review upon the ground of new matter discovered. The third ground alone remains, and it is that on which the bill is filed, that the decree was obtained by fraud.

I quote this passage because it shows that a supplemental bill claiming a rehearing on the ground of the discovery of fresh evidence is a very different thing from a bill to set aside a judgment on the ground of fraud. I can find no authority anywhere in the books to show that in an action to set aside a judgment on the ground of fraud it is necessary for the plaintiff to set out in his statement of claim the evidence or the nature of the evidence upon which he relies in support of the claim. It is one of the elementary rules of pleading that the pleading is not to allege evidence but that it is to allege the facts which are constitutive of the cause of action. In Sir James Stephen's language, it must allege *facta probanda*, not the evidence by which the facts are to be proved. In view of the very able argument presented by Mr. Ross, I think it is right to point out what this does not mean. It does not mean that in an action to set aside a judgment on the ground of fraud consisting of perjury by one of the parties that

(1) [1867] 3 Ch. App. 203 at p. 206.

a judgment could be given for the plaintiff solely upon the strength of the evidence which was before the judge who tried the case in which the judgment impeached was pronounced. Upon that point the law is quite clear but it does not follow that notice of the additional evidence must be given in the pleadings or that it is necessary that the pleadings should mention the evidence or refer to the evidence which the plaintiff intends to offer. It is not necessary just as it is not necessary in a case in which corroboration is required by law of the plaintiff's testimony. It would be bad pleading to set out in the statement of claim the manner in which the plaintiff proposed to corroborate his own testimony.

The authorities which influenced the minds of the judges in the court below are the judgment of Lord Selborne in *Boswell* v. *Coaks* (1), and a judgment of the Court of Appeal in *Birch* v. *Birch* (2) as well as the judgment of James L.J. in *Flower* v. *Lloyd* (3).

Lord Selborne's judgment deals with an application to dismiss an action as frivolous and vexatious. He points out that assuming evidence to have been withheld from the court at the former trial from improper motives that conduct was not in itself a sufficient ground for setting aside the judgment unless the evidence withheld was something "material" to "disturb" the judgment impeached, and he comes to the conclusion that the evidence upon which the plaintiff proposed to rely could not be said, on the facts presented, to be material. There are certain observations in Lord Selborne's judgment relied upon by Mr. Ross which, it ought to be noticed, relate only to proceedings in the nature of a bill of review in respect of which under the old practice it was necessary to obtain leave of the court before filing the bill. It is quite clear that no such leave was necessary where the bill was an original bill impeaching a decree as obtained by fraud. That is clear from the passage already quoted from Lord Cairns' judgment as well as from the discussion of the subject in Milford on Pleadings pp. 101-114 (where such bills are

(1) [1894] 6 R. 167.
(2) [1902] P. 62, 130; 71 L.J.P. 58; 86 L.T. 364; 18 Times L.R. 485.
(3) 10 Ch. D. 327.

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clearly distinguished from a bill impeaching a judgment on the ground of fraud), as well as from Maddock's Chancery Practice (vol. 2, p. 709). Lord Selborne's whole judgment proceeds upon the view that in passing upon the evidence offered in proof of the allegation that a judgment has been obtained by fraud the court is bound to act in the spirit of the observations of Lord Justice James in *Flower* v. *Lloyd* (1), and that the plaintiff could only succeed by producing evidence discovered since the former trial in proof of fraud and that on a summary application to dismiss the action as being without foundation the court would examine the facts with care and in order to see whether there had been

> a new discovery of something material in this sense that *prima facie* it would be a reason for setting the judgment aside if it were established by proof.

Lord Selborne's observations indeed have very little direct bearing upon any question in controversy on this appeal. The fraud charged there was the concealment of evidence with the object of misleading the court; and the gist of the decision consists in this, that such an allegation in itself even if fully established, would not be a ground for setting aside the judgment but that the plaintiff must go further and show that the facts withheld were material to the issues in controversy in the proceeding resulting in the judgment. If the plaintiff's action was based on these grounds it was, of course, necessary for him to allege first the concealment of the facts, and secondly, such other facts as might be necessary to make them appear material and of facts of this kind his Lordship says there was neither allegation nor proof. *Birch* v. *Birch* (2) is also a case of an application by the defendant to deal with an action on the ground that it was frivolous and vexatious. The Court of Appeal according to the practice heard evidence *pro* and *con* for the purpose of ascertaining whether or not there was such probability of success as to entitle the plaintiff to proceed with his case. It was held that in the circumstances the plaintiff was really seeking a re-trial of issues already passed upon.

(1) 10 Ch. D. 327.

(2) [1902] P. 62, 130.

In both these cases an application was made invoking the jurisdiction of the court to deal with vexatious proceedings. The plaintiff was required and permitted to place before the court the evidence upon which his claim was founded and the court scrutinizing the evidence held it in both cases to be too slight to afford any foundation of the plaintiff's claim. In the present case no such application was made, the action had proceeded to trial, the plaintiff was proceeding with his evidence in support of his claim and offered to lay before the court the whole of the evidence which he proposed to adduce. The action was dismissed, not on the ground that the evidence which he was neither called upon to produce nor allowed to produce was insufficient, but on the ground that no cause of action was disclosed by the pleadings, that there was no issue on the record which if found in his favour would entitle him to judgment.

The discussion of *Flower* v. *Lloyd* (1) I postpone for the moment.

We come at once to the question whether or not an action lies to set aside a judgment on the ground that the judgment was obtained by perjury of one of the parties. I quote in full the language of Lord Justice James which shows how grave is the issue presented when the jurisdiction of the court is invoked to set aside a judgment on the ground that it has been obtained through perjured evidence. I quote from pp. 333 and 334 in the report of *Flower* v. *Lloyd* (1):

> But we must not forget that there is a very grave general question of far more importance than the question between the parties to these suits. Assuming all the alleged falsehood and fraud to have been substantiated, is such a suit as the present sustainable? That question would require very grave consideration indeed before it is answered in the affirmative. Where is litigation to end if a judgment obtained in an action fought out adversely between two litigants *sui juris* and at arm's length could be set aside by a fresh action on the ground that perjury had been committed in the first action, or that false answers had been given to interrogatories, or a misleading production of documents, or of a machine, or of a process had been given? There are hundreds of actions tried every year in which the evidence is irreconciliably conflicting, and must be on one side or other wilfully and corruptly perjured. In this case if the plaintiffs had sustained on this appeal

(1) 10 Ch. D. 327.

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the judgment in their favour, the present defendants in their turn might bring a fresh action to set aside that judgment on the ground of perjury of the principal witness and subornation of perjury, and so the parties might go on alternately *ad infinitum*. There is no distinction in principle between the old common law action and the old chancery suit, and the court ought to pause long before it establishes a precedent which would or might make in numberless cases judgments supposed to be final only the commencement of a new series of actions. Perjuries, falsehoods, frauds when detected, must be punished and punished severely; but, in their desire to prevent parties litigant from obtaining any benefit from such foul means the court must not forget the evils which may arise from opening such new sources of litigation, amongst such evils not the least being that it would be certain to multiply indefinitely the mass of those very perjuries, falsehoods and frauds.

As I have already mentioned Lord Selborne refers to these observations in *Boswell* v. *Coaks* (1) and the passage in which he does it is worth quoting:

> I say that, not by any means dissenting from the spirit of the observations made in *Flower* v. *Lloyd* (2) by that great judge, Lord Justice James, and concurred in by Lord Justice Thesiger, that the court ought to be even more than usually cautious how it attends to all sorts of reasons which may be brought forward plausible upon the face of them, for disturbing such a solemn judgment, having regard to the enormous mischief of unsettling the principle on which the doctrine of *res judicata* is established.

Now Lord Selborne explicitly says that he has no doubt that a judgment may be set aside on the ground of fraud and it is to be noted that the observations of Lord Justice James are not confined in their application to cases where the fraud charged consists of perjury; false answers to interrogatories, misleading production of documents, subornation of perjury are all pointed out in the passage quoted above, and I think that notwithstanding Lord Selborne's expressed approval of the spirit of those observations and notwithstanding the weight and force of the observations themselves one is constrained to the conclusion upon an examination of the authorities that there is jurisdiction in the court to entertain an action to set aside a judgment on the ground that it has been obtained through perjury. The principle I conceive to be this; such jurisdiction exists but in the exercise of it the court will not permit its process to be made use of and will exert the utmost care and caution to prevent its process being used

(1) 6 R. 167. (2) 10 Ch. D. 327.

for the purpose of obtaining a re-trial of an issue already determined, of an issue which *transivit in rem judicatam* under the guise of impugning a judgment as procured by fraud. Therefore the perjury must be in a material matter and therefore it must be established by evidence not known to the parties at the time of the former trial, Mr. Ross in his very able argument on behalf of the respondent relied upon *Baker* v. *Wadsworth* (1), a decision of a divisional court in which some countenance is no doubt given to the proposition I am now discussing but I am not perfectly clear that in *Baker* v. *Wadsworth* (1) Mr. Justice Wright and Mr. Justice Darling intended really to decide anything more than the point that the case was not clear enough to justify an order for judgment in default of defence. At all events in *Cole* v. *Langford* (2), decided in the same year, another divisional court declined to follow *Baker* v. *Wadsworth* (1). *Cole* v. *Langford* (2) was followed by McCardie J. in *Gordon-Smith* v. *Peizer* (3). The subject is discussed in two cases before the Court of Appeal. *Abouloff* v. *Oppenheimer* (4) and *Vadala* v. *Lawes* (5). The principle upon which both these cases proceeded is that, to quote the judgment in the *Duchess of Kingston's case* (6):

> Although it is not permitted to show that the court was mistaken it may be shown that it was misled.

Where the court is misled by the fraud of the parties that is something which vitiates the most solemn proceedings of courts of justice and as Lord Coke says, it avoids all judicial acts ecclesiastical or temporal. In the very nature of things as Lord Coleridge C.J. said in *Abouloff* v. *Oppenheimer* (4) at p. 302, the question whether the court was misled in pronouncing judgment never could have been submitted to them, never could have been in issue before them and therefore never could have been decided by them. Brett L.J. at p. 307 discusses the judgment of James L.J. in

(1) 67 L.J.Q.B. 301.
(2) [1898] 2 Q.B. 36.
(3) 65 Sol. J. 607.
(4) 10 Q.B.D. 295.
(5) 25 Q.B.D. 310.
(6) 2 Smith Leading Cases, 8th ed. 754 at p. 794.

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Flower v. *Lloyd* (1) and he expressly dissents from the proposition that there can be any doubt that the fraud of the party to the action committed before the court for the purpose of deceiving the court is a ground for setting aside the judgment. In the second of the above quoted cases the subject is discussed in a very instructive way by Lindley L.J. The action was an action on a foreign judgment and the defence was that the court pronouncing judgment had been imposed upon by the shuffling of some documents and the substitution of genuine documents for forged documents in such a manner as to deceive it. Lindley L.J. points out that there are two propositions which are to be reconciled. It is the law that a party to an action can impeach the judgment given in that action for fraud. There is another general proposition that when you sue on a foreign judgment it is not open to the defendant to go into the merits which have been decided in a foreign court and after examining the judgments in *Abouloff* v. *Oppenheimer* (2) he comes to the conclusion that, where the fraud alleged consists in misleading the court by evidence produced by a party knowing the evidence to be false, it may be that for the purpose of establishing the fraud it is necessary to try over again issues already passed upon and that if so, then it is competent to the court before which the judgment is impeached to re-try the merits.

Now it is quite true that in both of these cases the court was dealing with an action on a foreign judgment but it is equally true that no distinction appears to be drawn for this purpose between the status of a foreign judgment and that of a domestic judgment. There is, it is true, a technical difference. A domestic judgment is a contract of record, a foreign judgment gives rise only to a simple contract obligation, but given the jurisdiction of the court a judgment in a foreign court is conclusive against the parties to the litigation to the same extent as a domestic judgment and for my own part I find it difficult to comprehend any ground of distinction for our present purpose between the two classes of judgment.

The appeal should be allowed.

(1) 10 Ch. D. 327.

(2) 10 Q.B.D. 295.

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Anglin J.

ANGLIN J.—After hearing some evidence given by the plaintiff and arguments of counsel, the learned trial judge dismissed this action, saying:

> This action as at present constituted will be dismissed on the ground that the pleadings disclose no cause of action. I think that to hear evidence would only leave me in the position that the judge was in when he tried the action of Pier v. MacDonald, and upon which he decided.

The same view prevailed with at least two of the learned judges who constituted the majority in the Appellate Division, the third member of the majority of that court basing his judgment on the view that the materiality of the impeached evidence did not sufficiently appear. Under these circumstances the plaintiff comes before this court without offering any assurance, or even alleging, that, if the case be sent back for a new trial, any evidence different from or in addition to that adduced at the original trial before Mr. Justice Scott will be forthcoming.

On this aspect of the matter being drawn to his attention, counsel for the appellant, no doubt because without instructions enabling him to do so, did not offer any such assurance to the court. He did not even state that he was instructed that the evidence at the new trial would in any respect differ from that passed upon by Mr. Justice Scott.

A legitimate, and I think the proper, inference is that the plaintiff has no additional evidence to offer and is unable to put before the court anything which would make it in the least probable that his allegation of perjury on the part of the defendant can be maintained.

Having regard to all that has transpired, including the important fact that a criminal prosecution for the same alleged perjury has already failed, without expressing an opinion as to the cause of the action disclosed by the statement of claim, I think it would be quite improper for this court to interfere with the judgment dismissing this action, which, though differing in form, is in substance and effect the same as an order perpetually staying the action as frivolous and vexatious and an abuse of the process of the court. *Birch* v. *Birch* (1); *Lawrence* v. *Norreys* (2); *Reichel* v. *Magrath* (3).

(1) [1902] P. 62. (2) 15 App. Cas. 210-219. (3) 14 App. Cas. 665-668.

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BRODEUR J.—The question in this case is whether the allegations of the statement of claim are sufficient.

A judgment which has been obtained by fraud can be impeached by means of an action. But in such action the particulars of the fraud should be given and should relate to matter which *prima facie* would be a reason for setting the judgment aside.

The sufficiency of the allegations is in this case a matter of practice and procedure and the constant jurisprudence of this court is that we do not interfere in such matters with the disposition of the case by the courts below. *Ferrier* v. *Trépannier* (1); *Higgins* v. *Stephens* (2); *Russia* v. *Proskouriahoff* (3).

The plaintiff has had several opportunities to amend his statement of claim in order to show that the evidence which he would adduce would not be the same as the one on which the first action was decided but he has failed to do so.

The appeal fails and should be dismissed with costs.

MIGNAULT J.—This is an action to have vacated and set aside a judgment whereby, in an action by the present respondent against the present appellant, the latter was declared accountable to the respondent on certain transactions between them. The appellant alleged, in his statement of claim, that the judgment was obtained by reason of false and untrue statements made by the respondent in giving his evidence, which statements were untrue to the knowledge of the respondent and were made with the intention that they should be acted upon by the court. Issue was joined on this statement of claim and the trial began, the appellant's counsel having called his client as his first witness. After some questions had been put to the appellant and answered, the respondent's counsel objected that his adversary had no right to offer the evidence of the appellant to make out a case of perjury against the respondent. A discussion took place between counsel on this objection and finally the learned trial judge

(1) 24 Can. S.C.R. 86. (2) 32 Can. S.C.R. 132.
(3) 42 Can. S.C.R. 226.

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reached the conclusion that the pleadings disclosed no cause of action and that, should he hear evidence, he would find himself in the same position as the judge was when he tried the former case. The action was therefore dismissed.

I am not at all ready to say that the plaintiff's statement of claim disclosed no cause of action, but it must have been evident to the learned trial judge that the evidence being tendered would be the same as in the previous case. Counsel for the appellant never suggested that he had any other evidence of the fraud and perjury which he had alleged as the basis of his action. And before this court counsel for the appellant could give no assurance that any evidence was available to the appellant other than that adduced in the first trial.

Under these circumstances, no useful purpose would be served in sending back the case for trial and I concur in the judgment dismissing the appeal.

Appeal dismissed with costs.

Solicitors for the appellant: *Lougheed, McLaws, Sinclair & Redman.*

Solicitors for the respondent: *Short, Ross, Selwood, Shaw & Mayhood.*