[HIGH COURT OF AUSTRALIA.]

BAYNE AND ANOTHER . . . . APPELLANTS;
PLAINTIFFS,

AND

BLAKE AND OTHERS . . . . . RESPONDENTS.
DEFENDANTS,

(No. 3.)

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1909.

MELBOURNE, *Sept.* 30.

Griffith C.J., Barton and O'Connor JJ.

Practice—Summary judgment—Action frivolous or vexatious—Action arising out of matters already litigated—Hopelessness of re-opening the matters—Rules of the Supreme Court of Victoria 1906, *Order* XIV. (A), *r.* 1.

The plaintiffs having brought an action against the defendants in respect of matters which had been already litigated between the plaintiffs and some of the defendants when the plaintiffs were defeated, and the Court being of opinion, in view of all the probabilities and of the judicial history of the case, that any attempt to re-open the matters would be hopeless :

Held, that summary judgment for the defendants had been properly given.

Decision of the Supreme Court of Victoria (*Hood* J.) affirmed.

APPEAL from the Supreme Court of Victoria.

An action was brought in the Supreme Court of Victoria by Mary Bayne and Lila Elizabeth Bayne against Arthur Palmer Blake, William Riggall, Robert Murray Smith and Grace Bayne in respect of a transaction arising out of the matters litigated in *Bayne* v. *Blake* (1); *Blake* v. *Bayne* (2). The plaintiffs in this action alleged that Grace Bayne had in breach of trust purchased

(1) 4 C.L.R., 1. (2) (1908) A.C., 371; 6 C.L.R., 179.

certain real estate, the purchase money being borrowed from the defendant Murray Smith and another person, to whom a mortgage for £10,000 over that property and other of the trust estate already mortgaged was given; that the defendant Murray Smith was subsequently registered as sole proprietor of the mortgage, and, default having been made in payment, became registered as sole proprietor of the land, which was thereby wholly lost to the estate; and that the land was on 5th December 1902 transferred to the defendants Murray Smith and Riggall, who were still the proprietors of it.

It was further alleged that Blake and Riggall were the solicitors of the mortgagees, and that they and the mortgagees knew that the transaction was a breach of trust on the part of Grace Bayne. A further claim was made in respect of a mortgage given by Grace Bayne over certain other of the trust properties which afterwards were wholly lost to the estate, it being alleged that Blake and Riggall, as solicitors for Grace Bayne, knowing that the transaction was in breach of trust, received payment for services rendered in respect of the transaction out of the trust estate. The plaintiffs claimed consequential relief.

An application was made by the defendants by summons for summary judgment, and, on 19th April 1909, *Hood* J. made an order for judgment for the defendants with costs, on the ground that the action was frivolous or vexatious and that the defendants had a good defence on the merits, holding that substantially the action had already been decided in the previous litigation.

From this decision the plaintiffs now appealed to the High Court.

The appellant *Lila Elizabeth Bayne* in person.

Mann, for the respondents. The whole basis of this action is the breach of trust. The only breach of trust that can be suggested is that which has already been litigated and determined against the appellants in *Blake* v. *Bayne* (1). In view of that decision there is no *bonâ fide* claim which can be litigated by the appellants with any possibility of success.

[GRIFFITH C.J. referred to *Lawrance* v. *Norreys* (*Ld.*) (2).]

The cases as to *res judicata* do not apply, for it is not con-

(1) (1908) A.C., 371; 6 C.L.R., 179. (2) 15 App. Cas., 210.

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tended that this is a case of *res judicata*. [He also referred to *Worman* v. *Worman* (1); *Concha* v. *Concha* (2); *Guest* v. *Warren* (3); *Bake* v. *French* (4).]

GRIFFITH C.J. We are very much indebted to Mr. *Mann* for the assistance he has given us in this case, and the appellants may be assured that the case has been as fully presented to the Court as if they had been represented by counsel. The order from which the appeal is brought is an order giving judgment for the defendants, the respondents, on the ground that the action was frivolous and vexatious and that the defendants had a good defence on the merits. The principles upon which the Courts will deal with applications of that sort were laid down by this Court in a similar case between the same parties, *Bayne* v. *Riggall* (5), but there is nothing in the judgment of that case which will assist the appellants in the present appeal, because here the actual facts are substantially before the Court. The action was brought by the appellants against the respondents setting up that the respondent, Grace Bayne, some years ago, when she was administratrix of the estate of her mother, of which she and the appellants were the sole beneficiaries, committed certain breaches of trust, one of which was that she executed certain mortgages of property. It is alleged that the other two respondents are the mortgagees of the land and acquired the mortgage with notice of the breaches of trust. Another claim made is that the respondents, Blake and Riggall, received certain costs out of the estate for services rendered by them as solicitors in connection with what they knew to be another breach of trust. The application to dismiss the action was made on the ground that these matters have really been investigated in a suit between practically the same parties, that all the facts had been inquired into, and that the opinion of the highest tribunal in the Empire had been given in respect of them, so that it would be idle to try them all over again without any possibility of success for the appellants in the action. That being so it was said that the case was one for dismissal of the action.

(1) 43 Ch. D., 296.
(2) 11 App. Cas., 541.
(3) 23 L.J. Ex., 121.
(4) (1907) 1 Ch., 428.
(5) 6 C.L.R., 382.

In the argument put before us by the appellants it is suggested that the doctrine of *res judicata* cannot be set up because the questions for determination in this suit are not the same in form as the questions in the previous suit. That is possibly so. But the application assumes that this is not a case in which the defence of *res judicata* can be pleaded. It is made on other grounds, and the Court must have regard to all the circumstances, or, as Lord *Watson* said in *Lawrance* v. *Norreys* (*Ld.*) (1), "the whole probabilities of the case, and the judicial history of the claim." We know the judicial history of the very same dispute between the very same parties, we know how it was decided, and we think it would be absurd to allow it to be litigated again. This Court never expressed any opinion upon the facts. The matter was argued before this Court upon the question of the validity of a release, and we were not invited to express any opinion except as to the release, and we held it was bad. The Judicial Committee, however, went into the whole matter. They held that the release was good, and also went into the other facts and expressed an opinion upon them. But, whether that could or could not be set up as *res judicata*, I think that any attempt to re-open the matter between the same parties would be hopeless. For these reasons I think the learned Judge was bound to make the order which he made, and that the appeal should be dismissed.

BARTON J. I am of the same opinion.

O'CONNOR J. I also concur.

Appeal dismissed with costs.

Solicitors, for respondents, *Blake & Riggall.*

B. L.

(1) 15 App. Cas., 210, at p. 222.