[HIGH COURT OF AUSTRALIA.]

CABASSI . . . . . APPELLANT;
PLAINTIFF,

AND

VILA . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

H. C. OF A. 1940.

Nov. 25, 26; *Dec.* 12.

Rich A.C.J., Starke, McTiernan and Williams JJ.

Tort—Conspiracy to commit perjury—Judgment alleged to have been obtained by perjured evidence—Right of action against witness.

The principle that no civil action lies in respect of evidence (although false and malicious) given by witnesses in the course of judicial proceedings extends to prevent the maintenance of an action for conspiracy by an unsuccessful litigant against witnesses whom he alleges to have conspired together to give false evidence.

Decision of the Supreme Court of Queensland (Full Court): *Cabassi* v. *Ferrando*, (1940) Q.S.R. 70, affirmed.

APPEAL from the Supreme Court of Queensland.

On 1st March 1934 Marie Cabassi, a spinster, of Brisbane, formerly of Ayr, Queensland, issued a plaint and summons out of the Magistrates Court, Ayr, whereby she claimed from Rafael Ferrando, the defendant named therein, the sum of £200 damages for assault.

Ferrando pleaded that he was not indebted and not guilty.

Evidence was adduced on the plaintiff's behalf that Ferrando unlawfully assaulted her on or about 8th January 1933, by striking her on the jaw, thereby causing a fracture of the jaw.

Evidence was given on oath orally by Ferrando and by Elies Aracil, Bruno Tapiolas Vila and Joe Clement that Ferrando did not assault the plaintiff and that the fracture of her jaw was occasioned by the fact that she jumped from a window and thereby fell to the ground.

The magistrate found as facts that, on 8th January 1933, the plaintiff, Ferrando, Clement, Aracil and one Tony Guerra were at the home of Ferrando; that Ferrando referred to the plaintiff as a charlatan; that the plaintiff used abusive language towards Ferrando; that Ferrando and Aracil took hold of the plaintiff and removed her to an upstairs room where she was locked in by Ferrando; that the plaintiff jumped from a window on to the ground, a distance of about eleven feet, and fell to the ground; that her jaw was broken on that night between the time when Ferrando referred to her as a charlatan and when she was taken away for dental and medical treatment; that Ferrando did not strike the plaintiff as deposed by her; that Ferrando committed a trivial assault on the plaintiff by seizing her and taking her upstairs; that such assault was justified in the circumstances and was not complained of or relied upon by the plaintiff; that the assault she relied upon was an alleged blow causing the fracture of her jaw; that the plaintiff had stated to Vila that Ferrando was not guilty of the charge she had made against him; and that in making certain payments of money to the plaintiff Vila had not acted as agent for Ferrando. The magistrate gave judgment for the defendant.

An appeal by the plaintiff against the magistrate's decision was dismissed by the Supreme Court of Queensland in July 1934, and the plaintiff was ordered to pay costs. The only evidence before the court on the hearing of the appeal was the depositions of the witnesses in the Magistrates Court.

In April 1938, the plaintiff brought an action by way of writ of summons in the Supreme Court of Queensland against Ferrando, Aracil and Vila.

In her statement of claim the plaintiff craved leave to refer to and incorporate the depositions and set forth the facts shown above. She alleged that to the extent that the evidence given by and on behalf of Ferrando was in conflict with the evidence given by and on behalf of herself it was false, and false to the knowledge of the defendants and Clement, and that such evidence was material to the issue and issues before the court. She further alleged that the defendants unlawfully conspired together to cheat and defraud her and to deceive and fraudulently mislead the Magistrates Court and the Supreme Court, and agreed together to give, adduce and procure the evidence given by them and Clement as mentioned above, and that in pursuance of such agreement the evidence mentioned was given, adduced and procured by the defendants and

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the said evidence did in fact deceive and fraudulently mislead each of the said courts and was adduced to, and did, cheat and defraud her.

The plaintiff stated that in consequence of being so deceived and misled and in consequence of the defendants' conspiracy and fraud the magistrate made the findings of fact set forth above contrary to the true facts of the case, and, therefore, that the judgment of the magistrate and the judgment or order of the Supreme Court were and each of them was obtained by fraud.

The plaintiff alleged that on 8th January 1933 Ferrando assaulted her by striking her on the jaw whereby her jaw was fractured, and that in consequence of such assault she suffered damages in the sum of £455, of which the sum of £55 had been paid by Ferrando, and in addition she had paid or had become liable for legal costs and expenses in the sum of £120.

The plaintiff claimed against the defendant Ferrando: (*a*) a declaration that the judgment of the Magistrates Court and the judgment or order of the Supreme Court were obtained by fraud; (*b*) that the said judgments or order and the order for costs should be set aside; (*c*) £1,000 damages for fraud; and (*d*) £400 damages for assault or in the alternative a new trial of the original action. She claimed against the defendants Ferrando, Aracil and Vila the sum of £1,000 damages for conspiracy.

The defendant Vila demurred to the statement of claim on the grounds (*a*) that the facts alleged did not show any cause of action or claim for damages to which effect could be given by the court against him, (*b*) that the facts alleged so far as they concerned him did not constitute any cause of action against him, and (*c*) that the conspiracy alleged was not one for which an action was maintainable against him.

The Full Court of the Supreme Court allowed the demurrer with costs and ordered that judgment in the action be entered for the defendant Vila with costs: *Cabassi* v. *Ferrando* (1).

From that decision the plaintiff appealed, *in forma pauperis*, to the High Court.

Hart (with him *Jeffriess*), for the appellant. If an act wilfully done by an individual to the damage and hurt of another is in itself an actionable tort, e.g., an assault, then two or more individuals who combine to do such an act are joint tortfeasors, and an action will lie against them or any or either of them as such; an allegation of conspiracy in such a case is unnecessary and mere surplusage. It is only in an action brought against two or more individuals for

(1) (1940) Q.S.R. 70.

the doing of a non-tortious act that conspiracy is a necessary ingredient. There is an essential distinction between an action and a criminal prosecution. The character of a criminal conspiracy is described in *Mulcahy* v. *The Queen* (1). Parties to an unlawful combination commit a misdemeanour. A person who, as the result of such unlawful combination and misdemeanour, receives a private injury has a right of action (*Mogul Steamship Co. Ltd.* v. *McGregor, Gow & Co.* (2)). A litigant is entitled to have his case tried on proper evidence. It is the combination or conspiracy that is the cause of action. The appellant's private injury is the loss of the proceeds of her claim (*Quinn* v. *Leathem* (3)). The statement in *Kearney* v. *Lloyd* (4), and to the same effect in *Salaman* v. *Warner* (5), that the cause of action must exist although the allegation of conspiracy be struck out is not now sound law. Observations which appear in *Sorrell* v. *Smith* (6) and in *Mogul Steamship Co. Ltd.* v. *McGregor, Gow & Co.* (7) are not dicta and are very germane to the matters now before the court. The appellant's cause of action is the combination to commit the specific illegal acts ; a combination entered into outside the court altogether (*Verplanck* v. *Van Buren* (8)). An act which may properly be done by one person may become actionable if done in concert or combination with another or other persons (*Gregory* v. *Duke of Brunswick* (9) ; *Sorrell* v. *Smith* (10)). It is competent for the court, under sec. 4 (8) of the *Judicature Act* 1876 (Q.), in the same action, to set aside the judgment and grant further relief (*United States* v. *Motor Trucks Ltd.* (11)). The action to set aside the judgment was properly brought in the Supreme Court because the judgment of the magistrate had merged into a judgment of the Supreme Court (*Shedden* v. *Patrick* (12)).

Sugerman, for the respondent. There is not any general principle, either in *Sorrell* v. *Smith* (13) or elsewhere, that, whenever conspiracy has occurred, then the effect of that conspiracy is necessarily to convert what would otherwise not be actionable into an actionable tort. Perjury is not actionable as a tort. No action lies against an individual who commits perjury whereby the plaintiff in the second action lost the verdict in the first action. A party against

(1) (1868) L.R. 3 H.L. 306, at p. 317.
(2) (1888) 21 Q.B.D. 544, at p. 549.
(3) (1901) A.C. 495, at pp. 498, 501, 515, 531.
(4) (1890) 26 L.R. Ir. 268, at p. 280.
(5) (1891) 7 T.L.R. 484, at p. 485.
(6) (1925) A.C. 700, at pp. 725, 726.
(7) (1889) 23 Q.B.D. 598, at p. 624.
(8) (1879) 76 N.Y. 247, at p. 260.
(9) (1843) 6 Man. & G. 205, 953 [134 E.R. 866, 1178].
(10) (1925) A.C., at p. 725.
(11) (1924) A.C. 196, at p. 201.
(12) (1854) 1 Macq. H.L. 535, at p. 590.
(13) (1925) A.C. 700.

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whom an adverse decision of a court has been obtained cannot, at any rate while that decision remains unreversed, maintain an action upon the procuring of that adverse decision. This principle applies (*a*) whether the prior decision was in civil or criminal proceedings (*Bynoe* v. *Bank of England* (1); *Turley* v. *Daw* (2); *Basebé* v. *Matthews* (3); *Huffer* v. *Allen* (4); *Taylor* v. *Ford* (5); *Barber* v. *Lesiter* (6); *Metropolitan Bank Ltd.* v. *Pooley* (7); *Castrique* v. *Behrens* (8); *Vanderbergh* v. *Blake* (9); *Gilding* v. *Eyre* (10); *Woolley* v. *Morgan* (11)), (*b*) to the maintaining of an action whether against the other party to the prior proceedings or one who was not a party thereto, that is, it is not merely a matter of estoppel (*Bynoe* v. *Bank of England* (1); *Turley* v. *Daw* (2); *Commonwealth Life Assurance Society Ltd.* v. *Smith* (12)), and (*c*) whether or not conspiracy is alleged in relation to the institution of the prior proceedings (*Metropolitan Bank Ltd.* v. *Pooley* (7); *Barber* v. *Lesiter* (13)). The present action is governed by the same principles as an action for maliciously and without reasonable or probable cause instituting civil proceedings against the plaintiff, such proceedings resulting in a judgment adverse to the plaintiff. An unsuccessful litigant has no cause of action against a party or a witness who has committed or suborned perjury (*Jerom and Knight's Case* (14); *Damport* v. *Sympson* (15); *Eyres* v. *Sedgewicke* (16); *Harding* v. *Bodman* (17); *Revis* v. *Smith* (18); *Collins* v. *Cave* (19); *Ashby* v. *White* (20); *Smith* v. *Lewis* (21); *Cunningham* v. *Brown* (22); *Phelps* v. *Stearns* (23); *Parker* v. *Huntingdon* (24); *Gusman* v. *Hearsey* (25); *Godette* v. *Gaskill* (26); *Corpus Juris*, vol. 48, p. 918; 26 *Ruling Case Law* 770, 771). Courts of the United States of America have proceeded further than British courts in this matter, and have held that no action lies for a conspiracy

(1) (1902) 1 K.B. 467.
(2) (1906) 94 L.T. 216.
(3) (1867) L.R. 2 C.P. 684.
(4) (1866) L.R. 2 Ex. 15.
(5) (1873) 29 L.T. 392, at p. 394.
(6) (1859) 7 C.B. N.S. 175 [141 E.R. 782].
(7) (1885) 10 App. Cas. 210.
(8) (1861) 3 E. & E. 709 [121 E.R. 608].
(9) (1661) Hard. 194 [145 E.R. 447].
(10) (1861) 10 C.B. N.S. 592 [142 E.R. 584].
(11) (1887) 4 T.L.R. 211.
(12) (1938) 59 C.L.R. 527, at pp. 538-540.
(13) (1859) 7 C.B.N.S. 175 [141 E.R. 782].
(14) (1588) 1 Leo. 107 [74 E.R. 99].
(15) (1596) Cro. Eliz. 520 [78 E.R. 769].
(16) (1620) Cro. Jac. 601 [79 E.R. 513].
(17) (1617) Hut. 11 [123 E.R. 1064].
(18) (1856) 18 C.B. 126, at pp. 140, 141, 144 [139 E.R. 1314, at pp. 1319-1321].
(19) (1859) 4 H. & N. 225, at pp. 229, 230, 235 [157 E.R. 824, at pp. 826-828].
(20) (1703) 2 Ld. Raym. 938; 3 Ld. Raym. 320 [92 E.R. 126, 710]; 25 Ruling Cases 52, at pp. 75, 81.
(21) (1808) 3 Am. Dec. 469.
(22) (1846) 46 Am. Dec. 140.
(23) (1855) 64 Am. Dec. 61.
(24) (1856) 66 Am. Dec. 455.
(25) (1876) 26 Am. Rep. 104.
(26) (1909) 134 Am. St. Rep. 964.

to secure a false decision by perjury (*Stevens* v. *Rowe* (1); *Dunlap* v. *Glidden* (2); *Ross* v. *Wood* (3); *Corpus Juris*, vol. 12, p. 610; 5 *Ruling Case Law* 1101). The decision in the last-mentioned case was partly based on *Patch* v. *Ward* (4). The case of *Verplanck* v. *Van Buren* (5) is distinguishable, as one where there was a conspiracy to defraud by means of false contracts and records, the prior proceedings being merely the successful result of an earlier conspiracy: See the report (6), and *Corpus Juris*, vol. 12, p. 588. The principles now put to the court are supported in the judgments cited for various reasons, such as the high nature of the crime of perjury, the embarrassment to witnesses, the absence in a civil action of the requirement of two witnesses to establish the perjury. Predominantly they rest upon the necessity of securing finality in litigation and avoiding the multiplicity of litigation which would result from permitting the same issue to be re-investigated in collateral proceedings. They may also be supported upon the grounds, applicable to cases where it is sought not merely to retry the issues already determined but to treat the judgment in the prior proceedings as the harm complained of and the gist of the action, that a judgment of a court cannot be relied upon as a head of damage in law—*actus legis nemini facit injuriam*. Further, a litigant has not a right enforceable by action for damages to have litigation terminate in his favour or to have the evidence against him confined to what is true; his only rights and remedies in this regard are those which he has as a litigant in the proceeding in question and on appeal therefrom; the proper remedy for perjury is prosecution and punishment. Even if, as is not conceded, an action would lie if the prior judgment were set aside, such setting aside would require to have taken place before action brought and to be alleged in the statement of claim in order that it should not be demurrable: See particularly *Metropolitan Bank Ltd.* v. *Pooley* (7), and also *Bynoe* v. *Bank of England* (8); *Turley* v. *Daw* (9); *Basebé* v. *Matthews* (10); *Huffer* v. *Allen* (11); *Taylor* v. *Ford* (12); *Barber* v. *Lesiter* (13); *Castrique* v. *Behrens* (14); *Vanderbergh* v. *Blake* (15); *Gilding* v. *Eyre* (16); *Woolley* v. *Morgan* (17). Those cases are

(1) (1880) 47 Am. Rep. 231.
(2) (1850) 52 Am. Dec. 625.
(3) (1877) 70 N.Y. 8.
(4) (1867) 3 Ch. App. 203.
(5) (1879) 76 N.Y. 247.
(6) (1879) 76 N.Y., at pp. 260, 261.
(7) (1885) 10 App. Cas. 210.
(8) (1902) 1 K.B. 467.
(9) (1906) 94 L.T. 216.
(10) (1867) L.R. 2 C.P. 684.
(11) (1866) L.R. 2 Ex. 15.
(12) (1873) 29 L.T. 392.
(13) (1859) 7 C.B.N.S. 175 [141 E.R. 782].
(14) (1861) 3 E. & E. 709 [121 E.R. 608].
(15) (1661) Hard. 194 [145 E.R. 447].
(16) (1861) 10 C.B.N.S. 592 [142 E.R. 584].
(17) (1887) 4 T.L.R. 211.

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directed to undetermined proceedings as well as to those which have determined against the plaintiff. The difficulty is not overcome by sec. 4 (8) of the *Judicature Act* 1876 (Q.). That section does not dispense with the necessity of a cause of action being complete before action brought, or enable the missing element to be supplied by the subsequent result of a separate claim against another party in the same action. The cases on joining a claim for rectification with a claim for specific performance of the ratified contract depend upon considerations special to themselves: See the cases reviewed in *Montgomery* v. *Beeby* (1). This is not a demurrer to the claim for relief against the respondent Ferrando by way of setting aside the judgment: all that is in question in this case is whether the statement of claim alleges a complete cause of action against the respondent Vila. In any event, the statement of claim does not make out a case against Ferrando for the setting aside of the judgment (*Jonesco* v. *Beard* (2); *Flower* v. *Lloyd* (3); *Birch* v. *Birch* (4); *Halsbury's Laws of England*, 2nd ed., vol. 19, p. 266; *Spencer Bower* on *Actionable Misrepresentation*, 2nd ed. (1927), pp. 363-364).

[WILLIAMS J. referred to *Hip Foong Hong* v. *H. Neotia & Co.* (5).]

The procedure prevailing in Queensland is based upon the old Chancery procedure whereby judgments might be set aside; thus this action is really a twofold action partly in the nature of an action to set aside the judgment and partly in the nature of an action for damages at common law. In any event, merely setting aside the present judgment is not sufficient; it is necessary that the prior proceedings should have gone on to a fresh judgment in the appellant's favour: See *Varawa* v. *Howard Smith Co. Ltd.* (6). Having obtained such a judgment, the appellant would be left without any damage to found an action, for an ordinary civil action differs in this respect from a prosecution or bankruptcy or the issue of a writ of *ca. sa.* or *ca. re.* The argument for the appellant, that, even in the absence of a cause of action against the individual, there is a cause of action where a number of persons act in combination and the intent is to injure the plaintiff, is based mainly upon the speech of Lord *Dunedin* in *Sorrell* v. *Smith* (7). The real question in that case was whether conspiracy is necessary to the cause of action for injury to a plaintiff's trade by intimidation of third

(1) (1930) 30 S.R. (N.S.W.) 394; 47 W.N. (N.S.W.) 163.
(2) (1930) A.C. 298.
(3) (1879) 10 Ch. D. 327, especially at pp. 330, 333, 334.
(4) (1902) P. 130.
(5) (1918) A.C. 888.
(6) (1911) 13 C.L.R. 35.
(7) (1925) A.C., at pp. 716-731.

parties not to deal with the plaintiff, or whether such a cause of action exists in the absence of such a conspiracy.

[WILLIAMS J. referred to *Thorne* v. *Motor Trade Association* (1).]

Even on this limited question, what was said by Lord *Dunedin* was *obiter*, as there was in fact a combination in that case, and three of the learned law lords preferred to leave the matter open (2). On the broader question whether conspiracy with intent to injure always converts non-tortious conduct into an actionable tort, what was said in *Sorrell* v. *Smith* (3) was entirely *obiter*. While in some cases the element of combination and intent to injure may supply the element of illegality and render actionable conduct which in an individual would not be unlawful, the position is different where the conduct is already unlawful, i.e. criminal, although not actionable in the individual. If there is not any civil remedy for criminal conduct on the part of an individual, the introduction of conspiracy does not supply a civil remedy. The reasons against permitting a civil remedy are of as much force whether the wrongdoer is one person or several persons acting in combination. As criminal conduct is usually tortious as well, the question cannot arise in relation to most crimes; in such cases the element of conspiracy, however important in criminal law, is, except perhaps to aggravate damages, superfluous as regards civil liability. But there are some crimes, e.g., murder, perjury, which do not afford a cause of action in tort; there is no principle upon which it can be said that the presence of conspiracy makes any difference in these cases. Lord *Dunedin* could not have intended his remarks to extend to such cases as these: See *Holdsworth's History of English Law*, 2nd ed. (1937), vol. VIII., pp. 392, 394 et seq., and *Salmond* on *Torts*, 9th ed. (1936), pp. 640-644. If the measure of damage to the appellant is the quantum of damages she would have recovered in her original action plus costs, then, as her claim was limited to the sum of £200, she would not have an appealable amount and thus this appeal would not be competent. It, however, would be otherwise if damages were at large.

Hart, in reply. The appellant has a cause of action against the respondent (*Quinn* v. *Leathem* (4)). The Supreme Court of Queensland exercises all the jurisdiction that was possessed by courts of common law and courts of chancery. It is not necessary that separate proceedings should be instituted to set aside the judgment

(1) (1937) A.C. 797, at pp. 815, 816.
(2) (1925) A.C., at pp. 711-716, 739-747.
(3) (1925) A.C. 700.
(4) (1901) A.C., at pp. 505, 506, 510, 511, 528, 530, 534, 536, 538.

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and to grant relief (*Verplanck* v. *Van Buren* (1)). The reason that in an action for malicious prosecution the termination of the proceedings in favour of the plaintiff in the action must be proved does not exist in this case: See *Commonwealth Life Assurance Society Ltd.* v. *Smith* (2). In an action based on conspiracy it is not necessary to show that the prior proceedings terminated in favour of the plaintiff (*R.* v. *Saddlers' Co.* (3)). The setting aside of proceedings was dealt with in *Flower* v. *Lloyd* (4); *Patch* v. *Ward* (5); *Cole* v. *Langford* (6); *Wyatt* v. *Palmer* (7); *Hip Foong Hong* v. *H. Neotia & Co.* (8); *Shedden* v. *Patrick* (9); and *Ronald* v. *Harper* (10). The measure of damages in a case of this nature was dealt with in *Pratt* v. *British Medical Association* (11).

Cur. adv. vult.

Dec. 12.

The following written judgments were delivered:—

RICH A.C.J. I have had the opportunity of reading the judgment of my brother *Williams* and concur in it. Without repeating the facts stated in that judgment I would shortly state my opinion.

Assuming that the action is not premature and therefore liable on that ground to be dismissed, I pass to the demurrer, which, it should be noted, is a demurrer by a witness defendant not originally a party to the earlier proceedings. Although the question has not been directly raised in England, the researches of Mr. *Sugerman* have revealed a number of American authorities which cover the question. And I adopt two passages from two of the decisions which in my opinion correctly state the law and are conclusive. In each case the cause of action was laid in conspiracy either to give false evidence or to defraud by means of false evidence. The latter part of the second passage is exactly in point. The first is from the judgment of *Wells* J., speaking for the court in *Dunlap* v. *Glidden* (12):—

"The plaintiff cannot recover upon the ground alleged of false testimony given by some of the defendants. For an action will not lie against a witness for giving false testimony in another case (*Damport* v. *Sympson* (13); *Eyres* v. *Sedgewicke* (14)). If the judgment was obtained, as is contended, by fraud and perjury, the

(1) (1879) 76 N.Y. 247.
(2) (1938) 59 C.L.R., at pp. 538-540.
(3) (1863) 10 H.L.C. 404, at p. 431 [11 E.R. 1083, at pp. 1093, 1094].
(4) (1877) 6 Ch. D. 297.
(5) (1867) 3 Ch. App. 203.
(6) (1898) 2 Q.B. 36.
(7) (1899) 2 Q.B. 106.
(8) (1918) A.C. 888.
(9) (1854) 1 Macq. H.L. 535.
(10) (1913) V.L.R. 311. 35 ALT 70
(11) (1919) 1 K.B. 244, at pp. 281, 282.
(12) (1850) 52 Am. Dec., at pp. 627, 628.
(13) (1596) Cro. Eliz. 520 [78 E.R. 769].
(14) (1620) Cro. Jac. 601 [79 E.R. 513].

plaintiff has ample remedy by law. The court which rendered the judgment, upon proof of these allegations, would be bound to grant a new trial, so that, upon a further investigation, justice might be done. The witnesses, if guilty, might be indicted for perjury, and so might all those be indicted who had unlawfully conspired together to deprive the plaintiff of his rights, and their conviction would afford most convincing evidence that a review of the action should take place." The second I have chosen from the judgment of *Allen* J., speaking for the court in *Stevens* v. *Rowe* (1) :—" A party cast in a judgment in a suit at law cannot maintain an action against the adverse party for suborning a witness, whose false testimony tended to produce the judgment (*Bostwick* v. *Lewis* (2) ; *Smith* v. *Lewis* (3)) ; nor for the adverse party's fraud and false swearing, so long as the judgment remains in force (*Curtis* v. *Fairbanks* (4) ; *Lyford* v. *Demerritt* (5) ; *Damport* v. *Sympson* (6) ; *Eyres* v. *Sedgewicke* (7) ; *Revis* v. *Smith* (8)). A proceeding of this kind is an attempt to re-examine the merits of a judgment in a collateral suit between the same parties. Reasons of public policy and uniform authority forbid the attacking and impeachment of a judgment in this way. The plaintiff's only remedy is an equitable proceeding to set aside the judgment, or a petition for a new trial under the statute. An action by the defeated party cannot, for equally good reasons, be maintained against a witness or witnesses for giving false testimony in favour of his opponent. Public policy and the safe administration of justice require that witnesses, who are a necessary part of the judicial machinery, be privileged against any restraint, excepting that imposed by the penalty for perjury. Though not a party to the former suit and judgment, the merits of that judgment cannot be re-examined by a trial of the witness' testimony in a suit against him. The procedure, if permitted, would encourage and multiply vexatious suits, and lead to interminable litigation (*Cunningham* v. *Brown* (9) ; *Dunlap* v. *Glidden* (10) ; *Grove* v. *Brandenburgh* (11))." Another case to the same effect is *Gusman* v. *Hearsey* (12).

In my opinion the appeal should be dismissed.

(1) (1880) 47 Am. Rep., at p. 232.
(2) (1804) 2 Day. 447 : 2 Am. Dec. 73.
(3) (1808) 3 Johns. 157 ; 3 Am. Dec. 469.
(4) (1844) 16 N.H. 542.
(5) (1855) 32 N.H. 234.
(6) (1596) Cro. Eliz. 520 [78 E.R. 769].
(7) (1620) Cro. Jac. 601 [79 E.R. 513].
(8) (1856) 18 C.B. 126 [139 E.R. 1314].
(9) (1846) 18 Vt. 123 ; 46 Am. Dec. 140.
(10) (1850) 31 Me. 435 ; 52 Am. Dec. 625.
(11) (1844) 7 Blackf. (Ind.) 234.
(12) (1876) 26 Am. Rep. 104.

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STARKE J. Appeal from a judgment of the Supreme Court of Queensland, which allowed a demurrer on the part of the respondent Vila to the appellant's statement of claim and entered judgment for him.

The appellant brought an action in the Supreme Court of Queensland in which she sought to set aside on the ground of fraud a judgment pronounced in favour of the respondent Ferrando in proceedings brought by the appellant against Ferrando in the Magistrates Court at Ayr for £200 damages for assault, and affirmed in the Supreme Court, and also to recover against Ferrando damages for fraud and assault. Another cause of action alleged in the statement of claim is, in substance, that the respondents unlawfully conspired together to cheat and defraud the appellant and to deceive and fraudulently mislead the magistrate's court and agreed together to give, adduce and procure evidence false to their knowledge, namely, that Ferrando had not assaulted her and that she was injured by jumping from a window, whereby the magistrate was deceived and pronounced judgment in favour of Ferrando, which judgment was affirmed in the Supreme Court, whereby the appellant lost her action and claim for damages for assault and incurred and was made liable for costs of the proceedings before the magistrate and the Supreme Court. The respondent Vila demurred to the statement of claim so far as it alleged a cause of action against him on the ground that the facts alleged constituted no cause of action against him. The Supreme Court, as already mentioned, allowed the demurrer and entered judgment for Vila: hence this appeal.

No action lies in respect of evidence given by witnesses in the course of judicial proceedings, however false and malicious it may be, any more than it lies against judges, advocates or parties in respect of words used by them in the course of such proceedings or against juries in respect of their verdicts. Witnesses:—*Damport* v. *Sympson* (1); *Eyres* v. *Sedgewicke* (2); *Revis* v. *Smith* (3); *Dawkins* v. *Lord Rokeby* (4); *Seaman* v. *Netherclift* (5); *Watson* v. *McEwan* (6). Judges:—*Scott* v. *Stansfield* (7); *Anderson* v. *Gorrie* (8). Advocates:—*Munster* v. *Lamb* (9). Parties:—*Astley* v. *Younge* (10); *Henderson* v. *Broomhead* (11). Juries:—*Bushell's Case* (12).

(1) (1596) Cro. Eliz. 520 [78 E.R. 769].
(2) (1620) Cro. Jac. 601 [79 E.R. 513].
(3) (1856) 18 C.B. 126 [139 E.R. 1314].
(4) (1873) L.R. 8 Q.B. 255; (1875) L.R. 7 H.L. 744.
(5) (1876) 1 C.P.D. 540; 2 C.P.D. 53.
(6) (1905) A.C. 480.
(7) (1868) L.R. 3 Ex. 220.
(8) (1895) 1 Q.B. 668.
(9) (1883) 11 Q.B.D. 588.
(10) (1759) 2 Burr. 507 [97 E.R. 572].
(11) (1859) 4 H. & N. 569 [157 E.R. 964].
(12) (1670) 1 Freem. K.B. 1 [89 E.R. 2]; 6 St. Tr. 599.

Actions against witnesses for defamation have failed and so have actions analagous to actions for malicious prosecution, which *Brett* M.R. thought were brought "in despair" (*Munster* v. *Lamb* (1)), and now we have an action against witnesses for conspiracy to give, adduce and procure false evidence justified by the proposition taken from *Sorrell* v. *Smith* (2) that a combination of a set of persons or a conspiracy for the purpose of injuring another followed by actual injury is actionable.

But it does not matter whether the action is framed as an action for defamation or as an action analagous to an action for malicious prosecution or for deceit or, as in this instance, for combining or conspiring together for the purpose of injuring another; the rule of law is that no action lies against witnesses in respect of evidence prepared (*Watson* v. *McEwan* (3)), given, adduced or procured by them in the course of legal proceedings. The law protects witnesses and others, not for their benefit, but for a higher interest, namely, the advancement of public justice (*Seaman* v. *Netherclift* (4); *Goffin* v. *Donnelly* (5)). The remedy against a witness who has given or procured false evidence is by means of the criminal law or by the punitive process of contempt of court: See *Watson* v. *McEwan* (3).

Another submission on the part of Vila was that the action could not be maintained against him unless and until the judgment pronounced in Ferrando's favour was set aside. I agree that the action cannot succeed unless the judgment be set aside. No doubt great difficulties confront the appellant on the case made in the statement of claim for setting aside the judgment on the ground of fraud (*Flower* v. *Lloyd* (6); *Birch* v. *Birch* (7)). But I am not clear that the *Judicature Act* and the *Rules of Court* in Queensland are not flexible enough to justify a proceeding to set aside the judgment and for damages for the conspiracy charged in this action (if maintainable) being joined in one and the same action: See *Judicature Act* 1876 (Q.), 40 Vict. No. 6, sec. 4 (8); *Rules*, Order 3, rules 1 and 5; Order 4, rules 1, 7 and 10. However, this submission on the part of Vila does not, in the view I take of the case, call for decision and I refrain from expressing any concluded opinion upon it.

The appeal should be dismissed.

McTiernan J. The present action grows out of proceedings which the plaintiff took in a Magistrates Court against the defendant Ferrando to recover damages for assault. The other defendants

(1) (1883) 11 Q.B.D., at p. 602.
(2) (1925) A.C. 700.
(3) (1905) A.C., at p. 486.
(4) (1876) 2 C.P.D. 53, at p. 62.
(5) (1881) 6 Q.B.D. 307, at p. 308.
(6) (1877) 6 Ch. D. 297; (1879) 10 Ch. D. 327.
(7) (1902) 86 L.T. 364.

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were witnesses in those proceedings. Her claim is twofold. She seeks to recover damages from the defendants for conspiring to give false evidence; and as against the defendant Ferrando she claims that both the judgment of the Magistrates Court and the judgment of the Supreme Court dismissing the appeal which she brought against that judgment be set aside on the ground of fraud. One of the defendants in the action demurred to so much of the statement of claim as relates to the claim for damages on the ground that it does not sufficiently state a cause of action. The Supreme Court allowed the demurrer. This appeal is brought against that judgment.

The question was raised in argument whether the appeal lies as of right. The objection to the appeal is that, even if the plaintiff had a good cause of action for conspiracy, she could not recover general damages, but particular damages only, and these would be less than £300.

This question was deferred in the order of argument to the main question, which is whether upon the allegations in the statement of claim the plaintiff can maintain an action on the case in the nature of conspiracy. The allegations are in effect that the defendants and another person, who is not joined as a defendant, gave evidence which was false, and false to their knowledge, in the proceedings before the magistrate with the intention of deceiving the court and the plaintiff and that they did this in pursuance of a conspiracy and that in consequence of this conduct the court made findings opposed to the true facts which the plaintiff proved by her own evidence. The statement of claim sufficiently alleged that the defendants entered into a criminal conspiracy. But the crime of conspiracy and the action for conspiracy have not the same basis. In contrasting the crime with the tort Sir *William Holdsworth* said:— "The crime consists in the conspiracy; but the damage is the gist of the action by the party injured by the conspiracy—the damage, that is, flowing from the unlawful acts done by each and all of the conspirators in pursuance of their joint design. What we must look at, therefore, in order to establish a cause of action, is not so much the conspiracy, as the quality of the acts and the damage flowing therefrom. It follows that the conspiracy is important, not as establishing directly a cause of action in tort, but, firstly, sometimes as showing that the acts done were unlawful, because they amounted to a criminal conspiracy; and, secondly, always as an element in estimating the damage suffered" (*Holdsworth, History of English Law*, 2nd ed. (1937), vol. VIII., at p. 394)—See also *Savile* v. *Roberts* (1). An averment that the defendants criminally con-

(1) (1698) 1 Ld. Raym. 374, at p. 378 [91 E.R. 1147, at pp. 1149, 1150].

spired together would not necessarily in itself be sufficient to state a good cause of action. It would be surplusage if the acts charged to have been done in pursuance of the conspiracy alleged would, if not so done, be torts. In *Sorrell* v. *Smith* (1) Lord *Dunedin* said: "Passing therefore, to the case of concerted action, the first and obvious observation is that if a combination of persons do what if done by one would be a tort, an averment of conspiracy so far as founding a civil action is mere surplusage." Where the acts alleged to have caused damage to the plaintiff would not be unlawful if not done in execution of a conspiracy, the averment is an essential part of the statement of the cause of action, because the conspiracy imparts the unlawful character to the acts. In *Ware and De Freville Ltd.* v. *Motor Trade Association* (2), *Atkin* L.J. said: "It appears to me to be beyond dispute that the effect of the two decisions in *Allen* v. *Flood* (3) and *Quinn* v. *Leathem* (4) is this: that on the one hand a lawful act done by one does not become unlawful if done with an intent to injure another, whereas an otherwise lawful act done by two or more in combination does become unlawful if done by the two or more in combination with intent to injure another." In *Sorrell* v. *Smith* (5) Lord *Dunedin* approved of this statement, and in explaining the same principle used these words:—"But when there is nothing done which *per se* would be a tort, then one is at once faced by the consideration that a particular thing done, not in itself a tort, may, if done by an individual, be supportable though unpleasant, but may, if done by many in concert, become insupportable and create a real injury. This truism has been recognized by many learned judges. As example may be given the words of Lord *Halsbury* in *Allen* v. *Flood* (3), and many other passages might be quoted" (6). These statements are not expressed to refer to a conspiracy to do acts which would be unlawful apart from the conspiracy; it is pointed out that if these acts are torts the averment of conspiracy is surplusage. In the present case the acts alleged to have been done in execution of the conspiracy are in themselves unlawful and criminal. The ground upon which these acts could give rise, if at all, to a cause of action would be that they caused damage to the plaintiff. The conspiracy may aggravate the damage but it would not play any part in producing the unlawful quality of the acts, for they are unlawful in themselves apart from the conspiracy. If an action lay the damage, not the conspiracy, would be the gist of the action.

(1) (1925) A.C., at p. 716.
(2) (1921) 3 K.B. 40, at pp. 90, 91.
(3) (1898) A.C. 1.
(4) (1901) A.C. 495.
(5) (1925) A.C., at p. 719.
(6) (1925) A.C., at p. 717.

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But, even if a conspiracy to commit a criminal act could add to or change the tortious quality of the act and in that way provide ground for an action other than that which may lie for the act itself, such an action would not lie if the execution of the conspiracy consisted in the giving of evidence by a witness in the course of a judicial proceeding. It is a rule of law that no civil action lies at the suit of any person for any statement made by a witness in the course of giving evidence in a judicial proceeding. The rule, which is founded on public policy, is not confined to actions for defamation but applies to any form of action. Some of the cases in which the rule is laid down are:—*Revis* v. *Smith* (1); *Henderson* v. *Broomhead* (2); *Dawkins* v. *Lord Rokeby* (3); *Seaman* v. *Netherclift* (4). In *Munster* v. *Lamb* (5) *Brett* M.R. and *Fry* L.J. reaffirmed the rule and discussed the reasons for its introduction. *Brett* M.R. said: "With regard to witnesses, the chief cases are, *Revis* v. *Smith* (1) and *Henderson* v. *Broomhead* (2), and with regard to witnesses, the general conclusion is that all witnesses speaking with reference to the matter which is before the court—whether what they say is relevant or irrelevant, whether what they say is malicious or not—are exempt from liability to *any* action in respect of what they state" (6) (The italics are mine). The Master of the Rolls continued:—"It was at one time suggested that although witnesses could not be held liable to actions upon the case for defamation, that is, for actions for libel and slander, nevertheless they might be held liable in another and different form of action on the case, namely, an action analogous to an action for malicious prosecution, in which it would be alleged that the statement complained of was false to the knowledge of the witness, and was made maliciously and without reasonable or probable cause. This view has been supported by high authority; but it seems to me wholly untenable" (7). The following statements by *Crompton* J. in *Henderson* v. *Broomhead* (8) are quoted and approved of by the Master of the Rolls:—"The attempts to obtain redress for defamation having failed, an effort was made in *Revis* v. *Smith* (1) to sustain an action analogous to an action for malicious prosecution. That seems to have been done in despair" (9). "No action will lie for words spoken or written in the course of any judicial proceeding. In spite of all that can be said against it, we find the rule acted

(1) (1856) 18 C.B. 126 [139 E.R. 1314].
(2) (1859) 4 H. & N. 569 [157 E.R. 964].
(3) (1873) L.R. 8 Q.B. 255.
(4) (1876) 1 C.P.D. 540; 2 C.P.D. 53.
(5) (1883) 11 Q.B.D. 588.
(6) (1883) 11 Q.B.D., at p. 601.
(7) (1883) 11 Q.B.D., at pp. 601, 602.
(8) (1859) 4 H. & N., at p. 579 [157 E.R., at p. 968].
(9) (1883) 11 Q.B.D., at p. 602.

upon from the earliest times. The mischief would be immense if the person aggrieved, instead of preferring an indictment for perjury, could turn his complaint into a civil action. By universal assent it appears that in this country no such action lies. *Cresswell* J. pointed out in *Revis* v. *Smith* (1) that the inconvenience is much less than it would be if the rule were otherwise. The origin of the rule was the great mischief that would result, if witnesses in courts of justice were not at liberty to speak freely, subject only to the animadversion of the court" (2). The Master of the Rolls added: "It is there laid down that the reason for the rule with regard to witnesses is public policy" (3)—See also *Harding* v. *Bodman* (4); *Henderson* v. *Broomhead* (5), per *Erle* J.; *Kennedy* v. *Hilliard* (6). It is clear then, that this rule under which witnesses are exempt from the liability to be sued is of general application to all actions. The reasons for the rule require that it should extend to an action on the case, if there could in principle be such an action, brought to recover compensation for damage alleged to have been caused by any evidence given in the course of a trial in pursuance of a criminal conspiracy to give such evidence. The existence of this rule is sufficient to dispose of the plaintiff's claim for damages.

It was argued that the claim was bad in law for other reasons as well, but the necessity of deciding the questions raised by these arguments does not now arise. It becomes unnecessary also to deal with the objection that the question raised by the appeal does not involve a sum of at least £300.

In my opinion the appeal should be dismissed.

WILLIAMS J. This is an appeal from a judgment of the Supreme Court of Queensland pronounced on 14th December 1939, upholding a demurrer by the respondent B. T. Vila to the statement of claim in an action brought by the appellant Marie Cabassi as plaintiff against R. Ferrando, E. Aracil and the respondent B. T. Vila as defendants.

The material facts are as follows:—On 8th January 1933, the appellant's jaw was fractured. The injury was the result either of the appellant having jumped out of a window, or of Ferrando having assaulted her. She sued Ferrando for damages for assault in the Magistrates Court. On 10th May 1934, the magistrate found that her injury was due to the first of these two causes and gave

(1) (1856) 18 C.B. 126 [139 E.R. 1314].
(2) (1883) 11 Q.B.D., at pp. 602, 603.
(3) (1883) 11 Q.B.D., at p. 603.
(4) (1617) Hut. 11 [123 E.R. 1064].
(5) (1859) 4 H. & N., at p. 577 [157 E.R., at p. 967].
(6) (1859) 10 Ir. C.L. Rep. (N.S.) 195.

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judgment in favour of the defendant. She appealed to the Supreme Court of Queensland at Townsville, which, on 23rd July 1934, dismissed the appeal.

At the hearing before the magistrate oral evidence was given for the defendant by the defendant himself and by Aracil, Vila and one Clement. The depositions of these witnesses were used on the appeal to the Supreme Court.

In June 1938, the appellant commenced an action in the Supreme Court of Queensland in respect of which the present appeal has been brought, the defendants being Ferrando, Aracil and Vila. The defendant Vila demurred to the statement of claim on the ground that the facts alleged therein did not constitute any cause of action against him.

The statement of claim alleges (*a*) that the defendants unlawfully conspired together to cheat and defraud the plaintiff and to deceive and fraudulently mislead the court and agreed together to give, adduce and procure the evidence that the defendant did not assault the plaintiff on 8th January 1933, and that the fracture of her jaw was occasioned by the plaintiff jumping from a window and falling to the ground; that, in pursuance of the agreement, this evidence was given, adduced and procured by the defendants before the Magistrates Court; that it did in fact deceive and fraudulently mislead the said court; and that it was adduced to cheat and defraud the plaintiff and did cheat and defraud her; (*b*) that on the hearing of the appeal in the Supreme Court the only evidence was the depositions of the witnesses in the Magistrates Court; and that it was intended by the defendants that these depositions should deceive the Supreme Court and that they did in fact do so; and (*c*) that, on or about 8th January 1933, the defendant Ferrando assaulted and beat the plaintiff by striking her on the jaw whereby her jaw was fractured and that in consequence of the said assault the plaintiff became sick and wounded and was for a long time unable to transact her business, and incurred expenses for medical, nursing and dental attendance, amounting to £455 less certain payments made by Ferrando.

The statement of claim includes three separate causes of action, the first two being causes of action against the defendant Ferrando alone, and the third against all the defendants. They are as follows: (*a*) a claim to set aside the judgments of the Magistrates Court and of the Supreme Court on the ground that they were obtained by fraud and for consequential relief; (*b*) damages for the assault or alternatively a new trial of the action in the Magistrates Court;

and (*c*) damages for the alleged conspiracy to give false evidence before the magistrate.

In actions based on fraud the particulars of the fraud must be exactly given and the allegation established by the strict proof such a charge requires. The only fraud alleged in the statement of claim is the conspiracy to cheat and defraud the appellant by committing perjury before the magistrate. A judgment which is procured by fraud is tainted and vitiated throughout. If the fraud is clearly proved the party defrauded is entitled to have the judgment set aside in an action (*Hip Foong Hong* v. *Neotia & Co.* (1); *Jonesco* v. *Beard* (2)). In some of the older cases in the House of Lords it has been stated that where a judgment has been so obtained it may be treated as a nullity (*Shedden* v. *Patrick* (3); *R.* v. *Saddlers' Co.* (4)). In the last-mentioned case (5), *Willes* J. said: "A judgment or decree obtained by fraud upon a court binds not such court, nor any other; and its nullity upon this ground, though it has not been set aside or reversed, may be alleged in a collateral proceeding (*Phillipson* v. *Lord Egremont* (6); *Bandon* v. *Becher* (7); *Shedden* v. *Patrick* (3): see also *Tommey* v. *White* (8))."

In all these cases the judgment had been procured by collusion, and in *Boswell* v. *Coaks* [*No.* 2] (9) the Earl of *Selborne* said that the whole proceeding in such a case may be described as "*fabula non judicium.*" He then pointed out that there is a second class of case where "it is not sought to treat as a nullity what has passed, but to undo it judicially upon judicial grounds, treating it as in itself, and until judicially rescinded, valid and final." The judgments impeached in the present action are included in the second class. In *Charles Bright & Co. Ltd.* v. *Sellar* (10) the Court of Appeal pointed out that actions to set aside a judgment on the ground of fraud do not invite the court to re-hear upon the old materials, but "fresh facts are brought forward, and the litigation may be well regarded as new and not appellate in its nature, because not involving any decision contrary to the previous decision of the High Court." I have been unable to find any case in which a judgment has been set aside where the only fraud alleged was that the defendant or a witness or witnesses alone or in concert had

(1) (1918) A.C. 888.
(2) (1930) A.C. 298.
(3) (1854) 1 Macq. H.L. 535.
(4) (1863) 10 H.L.C. 404 [11 E.R. 1083].
(5) (1863) 10 H.L.C., at p. 431 [11 E.R., at pp. 1093, 1094].
(6) (1844) 6 Q.B. 587 [115 E.R. 220].
(7) (1835) 3 Cl. & Fin. 479 [6 E.R. 1517].
(8) (1853) 4 H.L.C. 313 [10 E.R. 483].
(9) (1894) 86 L.T. 365, note *a* at p. 366.
(10) (1904) 1 K.B. 6, at p. 12.

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committed perjury. In fact the court has said that except in very exceptional cases perjury is not a sufficient ground for setting aside a judgment (See *Flower* v. *Lloyd* (1); *Baker* v. *Wadsworth* (2)), but in view of the allegation in the statement of claim that the evidence did deceive and fraudulently mislead the court I shall assume the plaintiff could establish such special circumstances.

When the statement of claim was filed there was in existence a binding judgment against the appellant in favour of Ferrando. Until rescinded the appellant could not have taken any civil proceedings against Ferrando which impugned the judgment except to challenge its validity. The appellant claims to have suffered damage because the judgment was procured by the false evidence of the defendant and his witnesses, but it is a maxim that *actus legis nemini facit injuriam*. While the judgment stood no averment could be permitted against it, otherwise the judgment would be "blowed off by a side wind" (*Vandenbergh* v. *Blake* (3); *Barber* v. *Lesiter* (4); *Huffer* v. *Allen* (5); *Wildes* v. *Russell* (6)).

The decision of the Court of Appeal in *Bynoe* v. *Bank of England* (7) shows that third parties such as the other two defendants could not be in a worse position than Ferrando. *Turley* v. *Daw* (8) is to the same effect. The principle laid down in *Bynoe's Case* (7) is, in my opinion, of general application and not confined to judgments *in rem*. The position is really analogous to that which obtains in the case of actions for malicious prosecution or for maliciously causing certain processes of a court to issue against a person or his property such as bankruptcy proceedings or the arrest of a ship. In all such cases it is essential that the plaintiff shall be able to allege in his statement of claim that the proceedings terminated in his favour (*Metropolitan Bank Ltd.* v. *Pooley* (9); *Commonwealth Life Assurance Society Ltd.* v. *Smith* (10)). A cause of action must be complete in all respects at the date of the issue of the writ (*Evans* v. *Bagshaw* (11); *Eshelby* v. *Federated European Bank Ltd.* (12); *Horton* v. *Jones* [*No.* 2] (13); *The Great Western Milling Co. Ltd.* v. *Commissioner for Railways* (14)).

(1) (1879) 10 Ch. D. 327.
(2) (1898) 67 L.J. Q.B. 301.
(3) (1661) Hard. at p. 195 [145 E.R., at p. 448].
(4) (1859) 7 C.B.N.S. 175 [141 E.R. 782].
(5) (1866) L.R. 2 Ex. 15.
(6) (1866) L.R. 1 C.P. 722, at p. 746.
(7) (1902) 1 K.B. 467.
(8) (1906) 94 L.T. 216.
(9) (1885) 10 App. Cas. 210.
(10) (1938) 59 C.L.R. 527.
(11) (1870) 5 Ch. App. 340.
(12) (1932) 1 K.B. 254, 423.
(13) (1939) 39 S.R. (N.S.W.) 305; 56 W.N. (N.S.W.) 161.
(14) (1940) 40 S.R. (N.S.W.) 182, at p. 207; 57 W.N. (N.S.W.) 74, at p. 80.

Mr. *Hart* referred the court to sec. 4, sub-sec. 8, of the *Judicature Act* 1876 (Q.), but this sub-section could not apply to the joinder of causes of action which were incomplete at the date of the issue of the writ.

At the date of the statement of claim, therefore, the alleged third cause of action, which is the only one with which the court is concerned on this appeal, was not complete, because the judgment of the Supreme Court of 23rd July 1934 had not been set aside, and the appeal can be dismissed on this ground.

I am also of opinion that the alleged third cause of action is bad in law, and the statement of claim would be demurrable even if the judgment had been set aside. It is clear law that a witness cannot be sued in a civil action in respect of anything which he has said in the course of his examination in the witness box. In *Seaman* v. *Netherclift* (1) *Cockburn* C.J. said : " If there is anything as to which the authority is overwhelming it is that a witness is privileged to the extent of what he says in the course of his examination." In the same case (2) *Amphlett* J.A. said : This rule " was established not for the benefit of witnesses, but for that of the public and the advancement of the administration of justice, to prevent witnesses from being deterred by the fear of having actions brought against them from coming forward and testifying to the truth."

In *Munster* v. *Lamb* (3) *Brett* M.R. quoted with approval a passage from the judgment of *Crompton* J. in *Henderson* v. *Broomhead* (4) : —" No action will lie for words spoken or written in the course of any judicial proceeding. In spite of all that can be said against it, we find the rule acted upon from the earliest times. The mischief would be immense if the person aggrieved, instead of preferring an indictment for perjury, could turn his complaint into a civil action."

In *Ashby* v. *White* (5) *Holt* L.C.J. said :—" If one perjures himself in a cause, to the damage of another person who is either plaintiff or defendant, no action upon the case lies. Nor is it reason it should, for perjury is a crime of so high a nature that it concerns all mankind to have it punished, which cannot be in an action upon the case, where nothing but damages shall be recovered by the party injured, which is not sufficient to secure the public against so dangerous a creature, who hath offended against the common justice of the kingdom. Therefore, for example sake, and public security, the prosecution of such an offence is vested in the Crown."

(1) (1876) 2 C.P.D., at p. 56.
(2) (1876) 2 C.P.D., at p. 62.
(3) (1883) 11 Q.B.D., at p. 602.
(4) (1859) 4 H. & N., at p. 579 [157 E.R., at p. 968].
(5) (1703) 25 Ruling Cases 52, at p. 75.

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In numerous other cases it has been held that such an action is not maintainable (*Damport* v. *Sympson* (1); *Eyres* v. *Sedgewicke* (2); *Jerom and Knight's Case* (3); *Harding* v. *Bodman* (4); *Collins* v. *Cave* (5); *Revis* v. *Smith* (6)). In face of these authorities Mr. *Hart* could not and did not contend that the appellant could have sued any of the defendants individually for any damage she had suffered by their having committed perjury. He did, however, refer the court to the Queensland *Criminal Code*, sec. 132, which provides that any person who conspires with another to obstruct, prevent pervert or defeat, the course of justice is guilty of a crime, and to the speech of Lord *Dunedin* in *Sorrell* v. *Smith* (7), where his Lordship said :—" My Lords, it may seem self confident to be positive when so many learned persons have expressed other views, but candidly I never held a clearer opinion than the one I now express, that the effect of *Allen* v. *Flood* (8) and *Quinn* v. *Leathem* (9) is to settle beyond dispute that in an action against an individual for injury he has caused to the plaintiff by his action, the whole question is whether the act complained of was legal, and motive or intent is immaterial ; but that in an action against a set of persons in combination, a conspiracy to injure, followed by actual injury, will give a good cause for action, and motive or intent when the act itself is not illegal is of the essence of the conspiracy. If that be so, the form of question which at first I indicated as what I should put to a jury is justified by the authorities. Before finally leaving the subject, it may be well to point out that all through the *Mogul Case* (10) it was clearly indicated that if the facts had raised conspiracy to injure, the result would have been different. Thus Lord *Watson* says : ' If the respondents' combination had been formed, not with a single view to the extension of their business and the increase of its profits, but with the main or ulterior design of effecting an unlawful object, a very different question would have arisen for the consideration of your Lordships ' (11). But no such thing is pointed out by the acts disclosed in that case, and Lord *Bramwell*, speaking of what might have been urged if the acts had been different, speaks of it then as an indictable conspiracy." He submitted that the statement of claim alleged the defendants had agreed to give false evidence in concert, that this was a crime within

(1) (1596) Cro. Eliz. 520 [78 E.R. 769].
(2) (1620) Cro. Jac. 601 [79 E.R. 513].
(3) (1588) 1 Leo. 107 [74 E.R. 99].
(4) (1617) Hut. 11 [123 E.R. 1064].
(5) (1859) 4 H. & N. 225. [157 E.R. 824].
(6) (1856) 18 C.B. 126 [139 E.R. 1314].
(7) (1925) A.C. 700, especially at pp. 723, 724.
(8) (1898) A.C. 1.
(9) (1901) A.C. 495.
(10) (1892) A.C. 25.
(11) (1892) A.C., at p. 42.

the meaning of the section; and that, upon proof that they had carried their illegal purpose into effect and the appellant had thereby suffered damage, she would have a complete civil cause of action against the defendants.

Apart from considerations of public policy there does not seem to be any reason why the unsuccessful party in legal proceedings should not be able to sue the other party or a witness who had committed perjury in an action on the case for the damage which he had thereby suffered. If such a right of action existed against one person who had committed perjury, it would also exist against a number of persons who had done so in concert, and they could be sued at the plaintiff's option as joint tortfeasors or severally for the same conduct. "If a combination of persons do what if done by one would be a tort, an averment of conspiracy so far as founding a civil action is mere surplusage" (*Sorrell* v. *Smith* (1), per Lord *Dunedin*).

Every consideration of public policy which prevents the crime of perjury followed by damage from constituting a tort is equally applicable to prevent the crime of conspiracy to commit perjury followed by its commission and consequential damage from doing so.

A joint action can be brought against two or more persons for conspiracy to slander as well as against them severally (*Thomas* v. *Moore* (2)). If the appellant is right the immunity of a witness who made a slanderous statement in the course of his evidence would be destroyed by alleging that he had conspired to do so with another person. A witness usually discusses his evidence with the solicitor for the party on whose behalf he is going to give evidence, and often with that party himself, so it would be simple to allege the conspiracy to give false evidence or to utter a slander in order to found the action. The value of the immunity of witnesses would be substantially diminished and in fact almost destroyed if such an action could be brought because, even if it failed, as pointed out by Lord *Penzance* in *Dawkins* v. *Lord Rokeby* (3), "the witness may be cleared by the jury of the imputation, and may yet have to encounter the expenses and distress of a harassing litigation. With such possibilities hanging over his head, a witness cannot be expected to speak with that free and open mind which the administration of justice demands."

Such cases as *Sorrell* v. *Smith* (4) and the earlier cases therein discussed, *Re Jetly Marks* v. *Greenwood* (5), *Thorne* v. *Motor Trade*

(1) (1925) A.C., at p. 716.
(2) (1918) 1 K.B. 555.
(3) (1875) L.R. 7 H.L., at p. 756.
(4) (1925) A.C. 700.
(5) (1936) 1 All E.R. 863.

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Association (1), *McKernan* v. *Fraser* (2), and *Independent Oil Industries Ltd.* v. *The Shell Co. of Australia Ltd.* (3), are all cases where the alleged conspiracy was to injure the plaintiff in his trade or business or occupation. They are all distinguishable because none of the considerations of public policy to which I have referred apply to them.

The appeal should be dismissed.

Appeal dismissed. No order as to costs, the appeal having been made in forma pauperis.

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J. B.

(1) (1937) A.C. 797.
(2) (1931) 46 C.L.R. 343.
(3) (1937) 37 S.R. (N.S.W.) 394; 54 W.N. (N.S.W.) 152.