

The appeal was heard by GARROW, MEREDITH, and MAGEE, JJ.A., and LATCHFORD and LENNOX, JJ.

H. W. Mickle, for the defendants.

R. C. H. Cassels, for the plaintiff.

GARROW, J.A.:—The action was brought upon a judgment recovered by one Frederick Charles Johnston against the defendants, an English joint stock company, in the Territorial Court of the Yukon Territory, which was assigned to the present plaintiff after the action commenced; and by an order of revivor dated the 12th December, 1911, the action was directed to be continued in the name of the present plaintiff.

The judgment in the Yukon Court was recovered in the month of February, 1907. The defendants appeared to the writ of summons, and were represented by counsel before the Court on the motion for judgment. Mr. Archibald Baird Craig, the defendants' managing director, then in Canada, made an affidavit of the facts from the defendants' standpoint, which was read and used upon the motion. The defence suggested in that affidavit is not that the then plaintiff's claim was entirely unfounded, but that, if he had a claim at all, it was not against these defendants, but against another company called "The Klondike Eldorado Company Limited." And upon this affidavit, as well as upon the other materials before him, the learned Judge of that Court found in favour of the plaintiff.

Fraud is not explicitly pleaded upon this record. An application to amend so as to set up a defence of that nature was made at the trial, and was reserved by the learned Chief Justice. The application is now renewed; and, as it must depend for its success upon the evidence already given, I see no objections to formally granting it.

The state of the pleadings, however, is not the defendants' main difficulty, which goes much deeper. And their difficulty is this: they are not by the evidence seeking to set up such a fraud as would avoid the judgment under the principles discussed and approved in *Jacobs v. Beaver*, 17 O.L.R. 496, recently before this Court, to which the learned Chief Justice refers in his judgment, but practically to have the question which was before the Yukon Court, and upon which that Court necessarily passed in awarding judgment in favour of the plaintiff, tried over again. What is presented is really not, properly speaking, a case of fraud at all.

The Klondike Eldorado Company, by which Johnston was apparently originally employed, was connected with and