SECOND DIVISIONAL COURT. MARCH 26TH, 1920.

*ROSS v. SCOTTISH UNION AND NATIONAL INSURANCE CO.

Stay of Proceedings—Second Action Brought Vexatiously—Jurisdiction of Court to Stay—Effect of Judgment—Res Judicata—Action for Reformation of Contract upon which Former Action Brought—Fraud—Time-limit for Bringing Action—Ontario Insurance Act, sec. 194, condition 24—Estoppel—Rules 124, 222—Appeal—Costs.

Appeal by the plaintiffs from the order of MIDDLETON, J., 17 O.W.N. 166, 46 O.L.R. 291.

The appeal was heard by MAGEE, J.A., CLUTE, RIDDELL, SUTHERLAND, and MASTEN, JJ.

H. J. Macdonald, for the appellants.

Shirley Denison, K.C., for the defendants, respondents.

MAGEE, J.A., in a written judgment, said (after stating the facts and referring to authorities) that the plaintiffs here were in the position of the plaintiffs in Carroll v. Erie County Natural Gas and Fuel Co. (1899), 29 S.C.R. 591, affirmed in Erie County Natural Gas and Fuel Co. v. Carroll, [1911] A.C. 105, 111, where rectification was granted. It was said in the Supreme Court of Canada (29 S.C.R. at pp. 593, 594): "No case for rectification having been made by the first action . . . it is impossible upon any recognised principle applicable to the defence of res judicata to hold that such an answer to the" (second) "action can be maintained. . . . It is not material to say that the appellants might, if they had so elected, have made an alternative case for relief on the ground of mistake in their first action; it is sufficient to say that they did not in fact do so and that no such question was there in issue."

If it was not open there, it would not be open here; and, if not res judicata, there was no other respect in which the action could be said to be either vexatious or frivolous. It did not present itself to the learned Justice of Appeal as a case in which what has been called the "might and ought" principle should be applied on the ground that the plaintiffs had fair opportunity and might and ought to have brought up their present claim in the former action.

The Court has inherent jurisdiction to prevent abuse of its process and merely vexatious actions. This was made use of in Lawrance v. Lord Norreys (1890), 15 App. Cas. 210, but it was