1940
* Oct. 7, 29.

MARY BRODIE LAING ..... APPELLANT;

AND

THE TORONTO GENERAL TRUSTS CORPORATION ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Appeal—Motion to quash—Nature of judgment appealed from—In essence and in substance a matter of procedure only—Practice or course of Supreme Court of Canada in such cases.

The dismissal of an originating motion in the Supreme Court of Ontario was affirmed by the Court of Appeal for Ontario on the ground that the relief asked for and the matters raised were not matters which could be conveniently and properly considered in such a proceeding and that to enable these matters to be properly considered and dealt with there should be an action commenced by writ; and leave was given to appellant to bring such an action. An appeal was brought to this Court, and respondent moved to quash the appeal for want of jurisdiction.

Held: It is the settled practice, the settled course of this Court, not to interfere with a judgment of that type by the Court of last resort in a province. It is in essence and in substance a matter of procedure only. And it is also the settled course of this Court that when on a motion to quash it plainly appears to the Court that the appeal is one which, if it came on in the regular and ordinary way, must be dismissed, the Court will on that ground quash the appeal. The appeal was accordingly quashed. (No opinion was expressed as to respondent's contention that the judgment appealed from was not a "final judgment" within s. 36 of the *Supreme Court Act*, R.S.C., 1927, c. 35).

MOTION to quash an appeal for want of jurisdiction.

The appellant had applied by way of originating notice of motion in the Supreme Court of Ontario for an order terminating the trust declared in a certain trust deed and for other relief. McFarland J. dismissed the motion with costs. His reasons were:

This application does not come within the provisions of Rule 600. The proper procedure is by action.

The appellant appealed to the Court of Appeal for Ontario. That Court, by its order, dismissed her appeal,

with leave to the appellant to bring an action if so advised, without any expression of opinion by this Court as to the merits.

As to costs, the order of the Court of Appeal provided:

that upon the trial of the action, if one is had, the costs of this appeal and of the appellant's motion in the High Court Division be in the

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discretion of the Trial Judge but so nevertheless that the respondent shall be entitled to its costs of this appeal and of the said motion as between solicitor and client to be paid out of the trust fund, after the taxation thereof.

The reasons of the Court of Appeal (Riddell, Masten and McTague, JJ.A.) were given by Riddell J.A. at the conclusion of the argument as follows:

> We consider this case of some importance; and we think the facts should not be disposed of simply on affidavit—the deponents not being cross-examined and not being seen by the Court.
>
> We think that the facts should be determined by a Judge who sees the witnesses and hears their evidence on examination and cross-examination.
>
> We accordingly dismiss the appeal, with leave to the applicant to bring an action, if so advised, without any expression of opinion on our part. [Costs dealt with in terms as above].
>
> Nothing we have said is to be taken as an adjudication on any point in question, except that we do not deal with it.

The appellant appealed to the Supreme Court of Canada. The present motion was made on behalf of the respondent to quash the appeal for want of jurisdiction. It was contended in support of the motion that the judgment appealed from was not a "final judgment" (within s. 36 of the *Supreme Court Act*, R.S.C., 1927, c. 35); that the question was purely one of practice and procedure; and that no injustice would be done to either of the parties by the quashing of the appeal. These contentions were opposed by appellant's counsel, who also complained of delay in making the motion, much work having been done in the meantime in preparing the Appeal Case.

J. J. Connolly for the motion.

J. M. Laing, contra.

The motion was heard on October 7, 1940, and at the conclusion of the argument, the judgment of the Court was delivered orally, to the effect that the appeal be quashed without costs. (A further direction with respect to costs was made on October 29, 1940, as appears at the end of the reasons *infra*).

THE CHIEF JUSTICE (orally, for the Court)—We have considered the very able argument of Mr. Laing and we have come to the conclusion that this is one of those cases in which it is plain that if the appeal came on for hearing

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in the ordinary way it could not be entertained by the Court, conformably to the course of the Court with regard to such matters.

The Court of Appeal for Ontario has held that the relief asked for, and the matters raised by the originating motion, are not matters which could be conveniently and properly considered by the Supreme Court of Ontario in a proceeding of this kind, and that to enable these matters to be properly considered and dealt with the proceedings ought to be commenced by writ; that is to say, they should be dealt with in a proceeding which is an action for all purposes.

Now, it is the settled practice, the settled course of this Court not to interfere with a judgment of that type by the Court of last resort in a province. It is in essence and in substance a matter of procedure and only a matter of procedure. And it is also the settled course of this Court that when on a motion to quash it plainly appears to the Court that the appeal is one which, if it came on in the regular and ordinary way, must be dismissed, the Court will on that ground quash the appeal.

In the result then, this motion must succeed, but in the circumstances of this case we think there should be no costs either of the motion or in the appeal.

We do not decide any question as to whether in the strict sense the Court would have jurisdiction to entertain this appeal; that is to say, whether there is a final judgment. We express no opinion on that point.

(29th October, 1940)

The order as to costs will be without prejudice to the right, if any, of the Trusts Corporation to apply to the proper tribunal for its costs (taxed as between solicitor and client) to be paid out of the trust fund.

Appeal quashed.

Solicitor for the appellant: *J. M. Laing.*

Solicitors for the respondent: *Malone, Malone & Montgomery.*