Privy Council Appeal No. 152 *of* 1923.

Mary Brodie Laing and another - - - - - *Appellants*

v.

The Toronto General Trusts Corporation and others - - - *Respondents*

FROM

THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 21ST OCTOBER, 1924.

Present at the Hearing:

VISCOUNT CAVE.
LORD DUNEDIN.
LORD CARSON.
LORD BLANESBURGH.

[*Delivered by* LORD BLANESBURGH.]

This is an appeal from an order of the Second Appellate Division of the Supreme Court of Ontario, approving the judgment of Rose J., by which, on the 27th March, 1923, that learned Judge, after the trial, ordered, subject to a declaration to which reference will subsequently be made, that the appellants' action against the respondents should be dismissed with costs.

The final purpose of the action was to have set aside two voluntary settlements, one ante-nuptial, of the 11th December, 1915, and the other post-nuptial, of the 14th March, 1916, whereby the appellant, Mrs. Laing, settled, by the one settlement, certain personal property, and by the other certain real estate inherited by her under the will of an aunt who had died in 1912.

The action was the second instituted by Mrs. Laing for the like purpose, and the prospect of any success in it was from the first made remote by the judgment which, on the recommendation of her own most experienced Counsel, she had accepted in the first action.

By that judgment, dated the 12th November, 1919, and made on the consent of all adult parties, and with the approval

of the Court, so far as the interests of any unborn issue of Mrs. Laing were concerned, it was ordered that the real estate settlement of 1916 should be set aside altogether, and incidentally it may here be observed that in obedience to that direction, and prior to the institution of the present action, the property comprised in the settlement had been duly reconveyed to Mrs. Laing. By the same judgment the trusts of the personalty settlement were modified to the advantage and at the complaint of Mrs. Laing, and as so modified that settlement and the transfer of the property comprised in it to the defendants—the Toronto General Trusts Corporation—as trustees were confirmed and declared valid and binding. Incidentally it may again be observed that in pursuance of that declaration a supplemental trust deed carrying it into effect had been on the 26th February, 1920, duly executed by Mrs. Laing, her signature being attested by her husband and co-appellant.

Manifestly in the face of these events no claim to have both settlements set aside *de novo* could make any progress until some good cause had been shown for discharging the consent order and for setting aside the instruments which had followed thereon.

And this difficulty in the appellants' way was, in the course of the present proceedings, made the more manifest when it was admitted as it was, at the trial, by both of them, that if under the consent judgment just referred to, the appellant Mrs. Laing had really obtained a good title to the real estate formerly comprised in the settlement of 1916, they would be satisfied.

But they asserted that the consent order gave her no such title. On investigation, however, it became clear that the only objection that could even be formulated to that order was based upon the contention that, as in the action in which it was made, Mrs. Laing had not thought fit to join as defendants any representative of her own potential next of kin—a class entitled on her decease, but subject to a double contingency, to the settled properties—no order made in that action could bind them, and accordingly no title to the real estate could be conferred upon her by a conveyance deriving its effect only from such an order. To the learned Judge at the trial this contention did not appear to be tenable. Nor does it so appear to their Lordships, for reasons which will emerge later. But the learned Judge nevertheless very properly determined to confirm Mrs. Laing's title—whether or not any confirmation was required—by an order made in this action in which, *ex facie* at all events, these next of kin are by representation parties. Accordingly, while dismissing the action in other respects, he, by his formal judgment of the 27th March, 1923, ordered and declared :—

> " For greater certainty and to remove all doubts that the judgment of this Court dated the 12th November, 1919, in an action then pending therein in which Mary Brodie Laing was plaintiff and the Toronto General Trusts Corporation and F. W. Harcourt, Official Guardian, representing

the unborn issue of the said plaintiff, were defendants, was intended to bind, and did from its issue bind, all persons ascertained or unascertained who are or can be or shall hereafter be interested under the trust deed dated the 24th August, 1915, or/and the trust deed dated the 14th day of March, 1916, therein and in the pleadings in this action referred to."

In view of their admissions above referred to, it might have been expected that the appellants would thereafter remain satisfied with this declaration. But that expectation has not been realised. They appealed to the Appellate Division, and on that appeal being dismissed they appeal now to His Majesty in Council. Their Lordships can think of no reason for these appeals except a desire to obtain the relief which is already the appellants' at the cost of the respondents and not at their own. It must be for that limited purpose that charges of fraud, misrepresentation, undue influence and coercion against persons of unblemished character, high professional position, and close relationship—some of whom are now dead—charges withdrawn once, and in most cases twice, and by two Courts judicially found to be groundless, have been persisted in up to the last. To such a course of conduct their Lordships can lend no countenance, and finding, as they do, that the judgments of both Courts below are based, and are properly based, on concurrent findings of fact, their Lordships might well mark their sense of the appellants' action in presenting this appeal by merely accepting, in accordance with their usual practice, these findings as binding, and by founding upon them, without further investigation, their own advice to His Majesty.

Their Lordships have been moved, however, in the special circumstances of this case to do more. They fully accept the view of the learned trial Judge, that Mrs. Laing, whatever may be thought of her charges and suspicions, did not by her evidence in support of them intend to mislead the Court. It is her misfortune to believe that her charges are true. Further, the case of both appellants was presented to the Board with apparent conviction by her husband Mr. Laing in person, himself a member of the Ontario Bar. Their Lordships accordingly, at the conclusion of Mr. Laing's argument, intimated to him that they would examine the record for themselves, and if, in the result, they found that they required further assistance from Counsel they would notify the parties to that effect. Their Lordships have now examined the whole record and they find that they need no further assistance. But, while the result has been to lead them unhesitatingly to the conclusion reached by both Courts below, they will, in deference to the appellants, advert succinctly to the facts and circumstances by which they have been mainly influenced, dealing with these, for the purposes of convenience, in chronological rather than in logical sequence.

And first of all their Lordships are in agreement with Rose J. that in relation to the personalty settlement of 1915 the charges of misrepresentation made by the appellants against Mr. Clark,

Mr. Jarvis and Mr. Campbell are entirely disproved. It is true that settlement, although voluntary, contains no clause of revocation. The evidence of Mr. Campbell, however, makes it clear, in their Lordships' judgment, that such a clause was omitted by express direction of Mrs. Laing.

And, having perused her correspondence and her evidence at both trials, their Lordships have no doubt as to Mrs. Laing's capacity to decide such a matter for herself. It appears to them that Mr. Jarvis's description of that lady in evidence was very just. "She was a woman of very good intelligence. She understood everything: she was always a nervous woman." As to the realty settlement of 1916 Rose J. accepted Mr. Malone's evidence. Their Lordships agree with the learned Judge in the view that that settlement was executed on instructions from Mrs. Laing on advice which Mr. Malone believed to be best for her interest and without any compulsion, either on his part or on the part of her father, now deceased.

That the latter was acting, as Mrs. Laing asserts, in the interests of his second family, as possible next of kin of Mrs. Laing, is a charge that can hardly survive an examination of the position of the lady's next of kin under each settlement as orginally framed. That subject, and also the powers reserved to Mrs. Laing under each settlement, were much canvassed at the trial. Some reference to both of them will not at this point be out of place.

As to the personalty settlement, it ceased altogether to be operative if Mrs. Laing did not marry within a year. During coverture her life interest is restrained from anticipation, but, in default of issue attaining 21, she has a general power of dispositon by deed or will over the whole fund. It is only in default of such disposition that her kindred come in; it is only then that the fund devolves according to the rules of the Devolution of Estates Act of Ontario.

The liberties reserved to Mrs. Laing under the real estate settlement are even greater. Apart from her right to receive $20,000, and the power in the trustees to allow her a further $30,000 out of the proceeds of sale of the property, she has a general power of appointment by will over the entire settled estate, by the exercise of which she may defeat any interest under the settlement, even of her own children. In each case, in short, the trusts are framed so as to give Mrs. Laing a bare sufficiency of protection with a maximum of freedom. The ultimate trust under the personalty settlement gives to the statutory successors no interest which they would not take if there were no settlement at all; under the realty settlement any interest of the next of kin was liable at any time to be defeated by the exercise of Mrs. Laing's testamentary power of appointment. On the face of them therefore the settlements are open to little criticism. It is extravagant to suggest that they were the result either of misrepresentation or coercion on the part of anyone whatever, least of all on the part of those who, with no personal interest to serve, were, it seems, never disposed to be unfriendly to Mrs. Laing. The relief, in

respect of both settlements, extended to her by the consent order approved by Lennox J. appears to their Lordships to be the maximum to which, upon the evidence, she could ever have claimed to be entitled. The realty settlement is gone. She may now by appointment defeat even the interest of her own children under the personalty settlement. If, therefore, the appellants were to get rid of that order, they would be no further advanced. They could not hope to obtain any further measure of relief than that order gives them.

But have they shown any ground for discharging that order? In their Lordships' opinion they have shown none. The objection taken to the order as we have seen is that no representative of Mrs. Laing's potential next of kin was a party to the action in which it was made. The objection comes with little grace from a party who objected to the addition as a defendant to that action even of Mr. Harcourt, the Official Guardian, as representing Mrs. Laing's unborn issue. But apart from that, there is, in the opinion of their Lordships, nothing in the objection. They have already indicated the remote character of the interest of these next of kin; as a class they are unascertainable so long as Mrs. Laing lives; there was no one amongst them either a necessary or a proper party to the suit; there was no one of them with either a present interest or anything beyond a bare expectation of a future interest; "*Ex necessitate rei*," says Chitty J., in *Fursell* v. *Dowding*, 27 Ch.D., at p. 240:—

> "they being an unascertained class, and a class that could not be represented by an individual member of it at the time, were according to the law of the Court, not depending upon any statutes, represented by the trustees."

The objection that the first action was improperly constituted is therefore untenable. The further contention of the appellants that, if everyone was bound by the consent order except the next of kin, the result would be that the latter would take the settled property on the death of Mrs. Laing, whether leaving children or not, whether with a will or without one, is merely fantastic. The objections of the appellants to the consent order are, in their Lordships' judgment, entirely without foundation.

They need say nothing of the objections taken to the order of Mr. Justice Middleton appointing the respondents, the Toronto General Trusts Corporation, to be trustees of the personalty settlement. The observations of the learned trial Judge upon that point are sufficient to dispose of it.

Their Lordships have already adverted to the unjustifiable action of the appellants in prosecuting this appeal after the declaration made at the trial by Rose J. If such extravagance is persisted in, Mrs. Laing may before long have reason to be grateful for the measure of protection afforded to her by the amended settlement to which she still so violently objects.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellants must pay the costs, the order as regards the costs payable by the appellant, Mrs. Laing, being in the form set forth in the judgment under appeal

In the Privy Council.

MARY BRODIE LAING AND ANOTHER

v.

THE TORONTO GENERAL
TRUSTS CORPORATION AND OTHERS.

DELIVERED BY LORD BLANESBURGH.

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