THE BANK OF MONTREAL (PLAINTIFF) ..... } APPELLANT; 1899

AND *March 7.

GEORGE DEMERS (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE SUPERIOR COURT FOR LOWER CANADA, SITTING IN REVIEW, AT QUEBEC.

Appeal—Jurisdiction—Special leave—R. S. C. c. 135, *ss.* 40, 42—*Form of application and order—Cross-appeal to Privy Council—Inscription pending such appeal—Stay of proceedings—Costs.*

In an order granting special leave to appeal to the Supreme Court of Canada under the provisions of the forty-second section of the Supreme and Exchequer Courts Act after the expiration of the time limited by the fortieth section of that Act, it is not necessary to set out the special circumstances under which such leave to appeal has been granted nor to state that such leave was granted under special circumstances.

Where the appellant had inscribed an appeal for hearing in the Supreme Court of Canada after he had received notice of an appeal taken in the same matter by the respondent to the Privy Council, upon motion on behalf of the respondent the proceedings on the Supreme Court appeal were stayed with costs against the appellant pending the decision of the Privy Council upon the respondent's appeal. (*Eddy v. Eddy* [Coutlée's Dig. 23] followed.)

*PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

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APPEAL from a judgment of the Superior Court for Lower Canada, sitting in review, at Quebec, affirming the judgment of Sir Louis Casault, Chief Justice of the Superior Court, (which condemned the defendant to pay the plaintiff $5,689.24,) and dismissing an appeal therefrom by the plaintiff seeking to have the amount of the said judgment increased.

This appeal was brought under an order of a judge of the court appealed from granting leave to appeal under the provisions of the forty-second section of the Supreme and Exchequer Courts Act, after the expiration of the time limited for bringing appeals to the Supreme Court of Canada, under the fortieth section of that Act. No special circumstances were mentioned in the order granting leave to appeal nor did the order state that leave had been granted under special circumstances, but it was admitted that due notice of the application had been given to the defendant, that the whole record was before the judge at the time he made the order and that the application had not been opposed in the court below. It also appeared that the inscription of the appeal for hearing in the Supreme Court had been made after the plaintiff had received notice of the taking of an appeal by the defendant to Her Majesty's Privy Council from a judgment of the Court of Queen's Bench on appeal by him from the Superior Court and before the hearing of such appeal in the Privy Council.

MOTIONS were made on behalf of the respondent when the appeal was called for hearing in the Supreme Court. First: that the appeal to the Supreme Court should be quashed on the grounds that it had not been taken within sixty days from the pronouncing of the judgment appealed from, and that the application and order for special leave did not shew special circumstances necessary to give jurisdiction to the judge of

the court appealed from to grant such special leave for the appeal; and secondly: that all proceedings upon said appeal should be stayed and suspended until the respondent's appeal pending before the Privy Council should have been disposed of.

Belleau Q.C. for the motions, cited sections 40 and 42 of the "Supreme and Exchequer Courts Act," and the cases of *McGreevy* v. *McDougall* and *Eddy* v. *Eddy*, mentioned in Coutlée's Supreme Court Digest, at pages 9 and 23.

Fitzpatrick Q.C. (Solicitor General for Canada) contra. The defendant had notice of the application for leave and did not oppose it in the court below. The question should not be as to the form of the application or order or what allegations they may contain, but whether there actually did exist special circumstances which, in the judge's discretion, should entitle the party making the application to have leave to appeal. The record which was before the judge on the application shewed that such special circumstances did exist and consequently the judge had full jurisdiction to act and, as a judge of a superior tribunal, he was not obliged to shew his jurisdiction upon the face of his order. The judge's discretion once exercised cannot be reviewed by this court.

After hearing counsel, the court was of opinion that the judge of the court below had jurisdiction and that the order granting leave to appeal had been properly made and accordingly dismissed the motion to quash with costs.

The motion to stay proceedings pending the decision of the appeal to the Privy Council was granted and, as the inscription for hearing had been made subsequent to the decision in *Eddy* v. *Eddy* (1), which settled the jurisprudence of the Supreme Court of

(1) Coutlée's Dig. 23.

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Canada in such cases, it was held that the appellant should not have inscribed the case and the respondent was allowed costs on the latter motion.

Motion to quash dismissed with costs.

Motion to stay proceedings allowed with costs.

Solicitors for the appellant: *Fitzpatrick & Taschereau.*

Solicitor for the respondent: *Louis G. Demers.*