1925
*June 12.
*June 18.

A. J. ASHBRIDGE AND OTHERS (DEFENDANTS) ..... } APPELLANTS;

AND

N. C. SHAVER (PLAINTIFF) ..... }
AND
THOMAS HARRISON AND OTHERS (DEFENDANTS) ..... } RESPONDENTS

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Appeal—Judgment—Co-defendants—Concurrent appeals to the Supreme Court of Canada and Privy Council—Stay of proceedings.

Where, A. and B. being co-defendants, A. had first inscribed an appeal for hearing in the Supreme Court of Canada and B. later on had inscribed an appeal to the Judicial Committee of the Privy Council, upon motion on behalf of B. the proceedings on the first appeal were stayed pending the decision of the Privy Council upon B's. appeal.

MOTION on behalf of the respondent Thomas Harrison that all proceedings upon appellants' appeal to this court should be stayed and suspended until his appeal pending before the Privy Council will have been disposed of.

The material facts of the case are sufficiently stated in the above head-note and in the judgment now reported.

Louch for motion.

Hellmuth K.C. contra.

Bullen for executors of estate.

The judgment of the court was delivered by

RINFRET J.—The respondent Thomas Harrison moves for an order that the appellants' appeal to this court be stayed until the adjudication on his appeal to His Majesty's Privy Council, or for such other order as may seem just and proper.

By the material filed in support of the motion, it appears that the appellants claim to be cousins and the heirs at law and first of kin of the late William Henry Hill, of Toronto, who died on the 30th January, 1923.

They had lodged a caveat; and, upon their motion, an order was made, removing the case from the Surrogate Court into the Supreme Court of Ontario and nominating the respondent Shaver, the sole executor named in the last will and testament of the late William Henry Hill, as plaintiff, and all others interested as defendants.

The action involved proof in solemn form of the said last will and testament bearing date the 16th day of January, 1923.

At the trial, the executor adduced as evidence three earlier wills of the deceased respectively dated 30th October, 1897, 16th July, 1901, and 25th February, 1911. Under this latter will, Thomas Harrison was named a residuary beneficiary and claimed approximately one-ninth of the estate of the deceased which is estimated to amount to about $350,000.

All of the appellants to this court are excluded and left without benefit from the terms of any known will of the deceased.

The trial judge found *inter alia* the purported will, dated 16th January, 1923, to be a forgery. He refused the petition for probate and dismissed the action.

Upon appeal by the executor Shaver and also certain beneficiaries under the said will, the Appellate Division of the Supreme Court of Ontario reversed the trial judgment, allowed the petition for probate and declared the said document of the 16th January, 1923, to be the last will and testament of the deceased. The appellants to this court took the first step towards an appeal from the appellate court's judgment by obtaining, on 28th May, 1925, an order approving of a bond as security for the appeal to this court.

However, on the 2nd June, 1925, the respondent Thomas Harrison paid two thousand dollars ($2,000) into court as security for an appeal from the said appellate court to His Majesty's Privy Council, and this security was, on the 5th June, approved and the appeal allowed

upon the undertaking of counsel for the applicant that a motion would be made forthwith to the Supreme Court of Canada for an order staying the pending appeal to that court in this action.

Such is the motion which is now being made to this court.

Harrison has always had his own solicitor and counsel, other than those employed or retained by the appellants here.

It is not disputed, in fact it was conceded at bar, that if the respondent Thomas Harrison be successful on his appeal to His Majesty's Privy Council, this result will be conclusive of the contentions of the appellants before this court; while the judgment of this court will not necessarily

1925

ASHBRIDGE v. SHAVER

Rinfret J.

be final, as leave to appeal from it may still be granted by the Judicial Committee.

The precise question involved in this motion does not appear to have yet come before this court in exactly the same form.

In the case of *McGreevy* v. *McDougall* (1) (3rd March, 1888), at the hearing, it appeared that the respondent had taken an appeal from the same judgment to Her Majesty's Privy Council, which said appeal was then pending before the Judicial Committee. The court stopped the arguments of counsel and ordered that the hearing of the appeal to this court should stand over until after the adjudication of the said appeal to the Privy Council.

In the case of *Eddy* v. *Eddy* (2) (4th October, 1898), the situation was the same. The respondent before this court had taken an appeal from the same judgment to the Judicial Committee of the Privy Council. Again the hearing of the appeal to this court was stayed until the appeal to the Privy Council had been decided,

upon the respondent undertaking to proceed with diligence in the appeal so taken by him.

In neither of these decisions does the priority of the proceedings in appeal of one or the other party appear to have been the ratio decidendi.

In the case of *The Bank of Montreal* v. *Demers* (3), where the appellant had inscribed an appeal for hearing in the Supreme Court of Canada after he had received notice of an appeal 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 pending the decision of the Privy Council. The motion was granted with costs against the appellant, on the ground, not that he had inscribed his appeal subsequent to that of the respondent to the Privy Council, but that it was posterior to the decision in *Eddy* v. *Eddy*, which, in the judgment of the court as reported, was stated to have

settled the jurisprudence of the Supreme Court of Canada in such cases.

In each of the preceding cases, the parties were opponents in the courts below. The difference between them and the present case therefore is that Ashbridge and his

(1) Coutlée's Dig. 74. (2) Coutlée's Dig. 130.
(3) [1899] 29 Can. S.C.R. 435.

1925

ASHBRIDGE v. SHAVER & HARRISON.

Rinfret J.

co-appellants here, as well as Thomas Harrison, the appellant to the Privy Council, were co-defendants in the action before the Supreme Court of Ontario. This difference, however, does not appear to us to be sufficient for distinguishing this case from the others above mentioned.

We know of no rule, and none has been pointed to us, which could prevent one of the co-defendants, under the circumstances appearing in this case, from severing and appealing to the Judicial Committee; and Thomas Harrison, having been properly allowed to appeal to the Privy Council, we think the principle laid down in the former decisions should also govern this appeal.

The motion to stay proceedings pending the decision of the appeal to the Privy Council shall therefore be granted; but upon the undertaking by the applicant Thomas Harrison to expedite his appeal so taken by him and to proceed with diligence. If he should not do so, leave should be reserved to the appellants herein to apply to this court for the removal of the stay under the present order.

Motion granted.