1887
Mar. 21.

JOHN KYLE (DEFENDANT).....APPELLANT;

AND

THE CANADA COMPANY (PLAINTIFFS) RESPONDENTS.

ROBERT HISLOP (PLAINTIFF).....APPELLANT;

AND

THE CORPORATION OF THE TOWN OF McGILLEVRAY (DEFENDANTS). } RESPONDENTS

Appeal—Direct from Divisional Court of Ontario—Special circumstances—Decision of Court of Appeal on abstract question of law.

It is not a sufficient ground for allowing an appeal direct from the decision of the trial judge on further consideration or of a Divisional Court of the High Court of Justice of Ontario, that the Court of Appeal of that province had already, in a similar case before it, given a decision on the abstract question of law involved in the case in which the appeal was sought, though it might be sufficient if such decision had been given on the same state of facts and the same evidence.

KYLE *v.* THE CANADA COMPANY.

APPLICATION to STRONG J. in chambers for leave to appeal to the Supreme Court of Canada from the deci-

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sion on further consideration of the judge who tried the cause, without any appeal to the Divisional Court or the Court of Appeal for Ontario.

The grounds urged in support of the application are fully set out in the judgment of His Lordship.

Godfrey supported the application.

McCracken contra.

STRONG J.—This is an application for leave to appeal directly to this court from the judgment pronounced on further consideration by the judge who tried the action, there having been no intermediate appeal either to the Divisional Court, or to the Provincial Court of Appeal. The application is of course made under section 6 of the "Supreme Court Amendment Act of 1879," the only enactment which authorises the making of such an order as is sought to be obtained. I am of opinion that the section referred to authorises an order being made in any proper case, as well when the proceeding in the court below is an action at law as where it is a suit in equity; and, indeed, as regards the province from which this case comes it would be almost impossible, in the altered state of the practice under the Judicature Act, to give effect to any such distinction. But I am clear that no such distinction ever existed. Then, it is objected that this section 6 does not apply to a case like the present, where it is sought to appeal directly from the judgment of the judge who tried the case (without a jury), no recourse having been had to the jurisdiction of the Divisional Court. I am against this objection also. Under the practice now prevailing in Ontario the judgment of the judge at the trial is in effect the judgment of the Divisional Court, and appeals directly from a judgment such as this to the Court of Appeal are according to the general course of practice. Every appeal from this province

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to the Supreme Court heard during the present session has been a proceeding of this kind, that is, one in which the appeal to the Court of Appeal was directly from the judgment of the judge at the trial on further consideration.

It remains, however, to be considered whether this is a case in which section 6, being, as already said, applicable, it is proper to exercise the power thereby conferred, and I am clearly of opinion that it is not. It is suggested as a reason for allowing an appeal directly to this court that an appeal to the Court of Appeal would be useless, as that court has already decided the point in dispute viz., that the period of limitation to an action on a covenant for the payment of rent is 20 years and not 10 years as the defendant contends. It is, therefore, said that this abstract point of law having been thus decided, and subsequent cases in England (1) having, as it is urged, since decided otherwise, it would be useless now to appeal to the Court of Appeal, inasmuch as that court, without regard to the English cases referred to, would adhere to its previous decisions. I could not admit this as a sufficient reason for making the order asked for even if I thought that the English cases referred to at all affected the question decided by the learned judge whose decision is sought to be brought under review. In the case of *Moffatt* v. *Merchant's Bank* (2), which is relied on for the appellant, leave to appeal direct to the Supreme Court of Canada was given because the Court of Appeal had not only decided the same legal question which the proposed appellant sought to raise, but had decided it upon the same actual state of facts and virtually upon the same evidence, oral and documentary, as that upon which the decision which it was proposed to appeal

(1) *Sutton* v. *Sutton* 22 ch. D 511; *Fearnside* v. *Flint* 22 ch. D 579.
(2) 11 Can. S. C. R. 47.

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from had proceeded. Under these circumstances it was manifestly a proper case for giving leave for a direct appeal, since the Court of Appeal could not be expected to take a different view of the legal consequences flowing from the identical state of facts upon which they had lately pronounced. Here, however, it is, at the most, said that the Court of Appeal has decided the same abstract proposition of law which it is proposed to raise in this court if the appeal is admitted. I should regard this as an insufficient ground even if the assertion was found to be warranted upon a consideration of the decided cases. But it is clear the Court of Appeal has never pronounced any decision which would debar them from acting on the English authorities referred to if they applied.

These English cases, however, have no application whatever. The question which arises here was in England set at rest by *Foley* v. *Paget* (1), a decision which is wholly untouched by the recent English authorities. To my mind an appeal to this court on any such grounds as those suggested would be frivolous and unfounded, and as the foundation of an application under section 6 of the Act of 1879 for leave to appeal direct must be some reasonable ground of appeal, I hold that for want of any such ground this motion must be refused with costs.

Motion refused with cost.