

HISLOP *v.* THE TOWN OF MCGILLEVRAY.

1887

APPLICATION to HENRY J. in Chambers for leave to appeal to the Supreme Court of Canada from the judgment of the Queen's Bench Division of the High Court of Justice for Ontario without an intermediate appeal to the Court of Appeal.

April 16.

The grounds of the application are sufficiently set out in the judgment.

(1) 2 Bing. (N. C.) 679.

1887

HISLOP
v.
THE TOWN
OF MC-
GILLEVEAY.

Henry J.

HENRY J.—This is an action brought by the appellant who, by means of an injunction in the nature of a mandamus, seeks to compel the respondent, through its municipal officers, to open up a highway reserved for the purpose adjoining the land of the appellant. A verdict on the trial was given in favor of the appellant, but it was ordered to be set aside and judgment entered for the respondent by the Queen's Bench Divisional Court. Proceedings were then taken by the appellant for an appeal to the Court of Appeal for Ontario, but the same have remained in abeyance, pending an application to a judge of this court to order an appeal directly to this court under sec. 6 of the Supreme Court Amendment Act of 1879.

The application was opposed and I have now to dispose of it.

The section in question provides, amongst other things, that by leave of this court or a judge thereof an appeal shall lie to it "from the final judgment of any superior court of any province, other than the province of Quebec, in any action, suit, cause, matter or other judicial proceeding originally commenced in such superior court, without any intermediate appeal being had to any intermediate court of appeal in the province."

Under the provisions of that section ample discretionary power is, in my opinion, given to this court or one of its judges to make an order such as that applied for in this case, but I cannot assume that it was intended to be acted on unless some good reason could be found for doing so.

The reason advanced in this case is that the Court of Appeal in Ontario, in a case before it, decided the main point in this case; and that inasmuch as that court has in their judgment virtually settled that point against the appellant, it would be an useless ex-

pense to have an intermediate appeal to that court.

The case referred to is *re Moulton and Haldimand* (1.)

I have carefully considered it and am of the opinion that the decision of this case ought not to be affected by the decision in that. It was heard by four of the learned judges of that court. It was an application to the court by a writ of mandamus to compel the county of Haldimand to repair an existing bridge or the erection of a new one—the bridge being part of a highway then opened up and used. The court decided that the duty to repair the bridge or erect a new one was on the county of Haldimand, but were equally divided as to the remedy sought, and the court below having decided to refuse the mandamus, the appeal was dismissed—two of the learned judges arriving at the conclusion that the remedy by indictment was alone available.

The case now under consideration differs from that just referred to. The latter was virtually to compel the repairing of a bridge forming part of a highway then in use by the public. In this the proceeding is to compel the opening up of a new highway on land appropriated for it. The Appeal Court in Ontario, by an equal division of its members, dismissed an appeal from a decision that the remedy by indictment was alone available as applicable to the matter of the repair of the existing highway, but I could hardly conclude that any member of that court would be heard to say that the respondent township could be indicted for not opening up a new highway.

The decision of the one case does not therefore, in my opinion, in that respect affect the other, and the same learned judges who were of opinion that an indictment was the only means of remedy may be of the opinion that although mandamus is not the proper remedy in the one case, it may be in the other. I

1887

HISLOP

v.

THE TOWN
OF MC-
GILVERAY.

Henry J.

1887
HISLOP
v.
THE TOWN
OF MC-
GILVERAY.

think, therefore, it would be a wrong exercise of the power bestowed on this court and its judges to allow an appeal directly to this court.

The application of the appellant is therefore refused with costs.

Motion refused with costs.
