

favour, and upon motion to set aside the verdict and judgment and to enter judgment for plaintiff or for a new trial, the County Court Judge in term made an order setting aside the verdict and judgment, and ordering judgment to be entered for plaintiff. It was held that an appeal by defendant from the order of the County Court Judge in term lay to a Divisional Court. Street, J., points out that the right under sub-sec. (1) of appeal to a Divisional Court in that case was not taken away by sub-sec. (4), because it was not an application for a new trial.

In *Irvine v. Sparks*, 31 O. R. 603, it was held that an appeal did not lie from a judgment of the County Court setting aside a verdict and ordering a new trial, the appeal having been taken under sub-sec. (4).

In *Leishman v. Garland*, 3 O. L. R. 241, 1 O. W. R. 22, there was an appeal by plaintiff to a Divisional Court from the judgment of the senior Judge of the County Court, in term, setting aside the judgment of the junior Judge of the same Court in favour of the appellant at a trial without a jury. It was there held that the motion was properly made under sub-sec. (2) and not under sub-sec. (4), and none the less so because, in the alternative, a new trial was moved for; sub-sec. (5) providing that if the party moves before a County Court under sub-sec. (2) in a case in which he might have appealed to the High Court, he shall not be entitled to appeal from the judgment of the County Court to the High Court, but the opposite party shall be entitled to appeal therefrom to the High Court.

It was strongly urged by Mr. Scott that the judgment in the previous appeal in this case from the County Court was decisive of the present motion, and that the appeal should be heard.

At the first trial of this action before Judge MacTavish and a jury, judgment was given for plaintiff on the answers of the jury. An application was then made in term for a new trial or for judgment for defendant, and judgment was thereupon given in favour of defendant, from which plaintiff appealed to a Divisional Court, and objection was taken to the motion being heard, on the ground that the Court had no jurisdiction to entertain the appeal, and *Leishman v. Garland* was cited in support of the objection. The Court, however, held that such an appeal lay. It will be seen that the facts on that application were the reverse