

Practice.

C.P. Div'l Court.]

[March 3.

McDERMOTT v. GROUT.

Jury—Findings—No verdict—Ruling of trial judge—New trial—Right to—Motion for.

This action was tried with *Stevens v. Grout*, *post infra*, and came before this court upon the same state of facts as that upon which that action came before the Queen's Bench Division.

Held, that the judgment of the trial judge at the first trial was a judgment of the High Court, and, as neither party moved against it, it was a binding adjudication that no verdict could be entered on the findings of the jury, and the judge at the second trial should have proceeded to try the action, and a motion to the Divisional Court was not necessary.

Wills v. Carman, 14 A.R. 656, followed.

Aylesworth, Q.C., for the plaintiff.

Shepley, Q.C., for the defendant.

Q.B. Div'l Court.]

[March 3.

STEVENS v. GROUT.

Jury—Findings—No verdict—Ruling of trial judge—New trial—Right to—Motion for—Divisional Court—Time—R.S.O., c. 44, s. 84—Rules 789, 792.

At the trial of an action for malicious prosecution, the jury, in answer to questions, made two findings in favour of the plaintiff, but found that he was entitled to no damages. The trial judge expressed the opinion that no verdict could be entered for either party, and refused motions for judgment made by both. The plaintiff, treating the trial as void, gave a new notice of trial for a later sittings. A motion by the defendant to set aside this notice was refused by a local judge and by a judge of the High Court on appeal. The plaintiff then entered the action for trial, but the presiding judge refused to try it, holding that it was not properly before him.

Upon appeal by the defendant from the order in Chambers refusing to set aside the notice of trial, and upon motion by the plaintiff by way of appeal from the ruling of the judge at the second trial, or for leave to move against the finding of no damages at the first trial, notwithstanding that two sittings of the Divisional Court had passed since that finding;

Held, that, although no judgment could be entered for either party, the findings of fact remained, and neither party could ignore them and proceed to trial again as if they did not exist; the trial judge could do nothing but order or refuse judgment upon them; it was for the Divisional Court to deal with the action and the findings, either by sending it down for a new trial or by ordering judgment for either party under Rule 755; and, under all the circum-