JANUARY 8TH, 1902.

DIVISIONAL COURT.

LEISHMAN v. GARLAND.

Appeal—From County Court—To Divisional Court—R. S. O. ch. 55, sec. 51, sub-secs. 1, 2, 3, 5.

After judgment for plaintiff in an action in a County Court, tried without a jury, a motion was made in term to set aside the judgment and enter judgment for defendants upon the claim and counterclaim, or in the alternative for a new trial, or for such further order as might be just: Held, plaintiff was entitled to appeal to a Divisional Court from an order made on the motion setting aside the judgment and directing a new trial.

Appeal by plaintiff from order of the Judge of the County Court of York setting aside the judgment of the junior Judge in favour of plaintiff, and directing a new trial of action for damages for wrongful dismissal, and to recover a balance of amount due for commission on sales of goods and salary under the agreement between the parties, and of the counterclaim. The motion to the senior Judge was to enter judgment for defendants upon the claim and counterclaim, or in the alternative for a new trial, or for such other order as might be just.

B. N. Davis, for plaintiff.

W. R. Riddell, K.C., for defendants, objected that an appeal did not lie.

After argument on the objection, the case was heard on the merits, and the judgment of the Court, MEREDITH, C.J., and BRITTON, J., which was reserved, was subsequently delivered by

MEREDITH, C.J.—The motion falls within R. S. O. ch. 55, sec. 51, sub-sec. 2. It was to set aside the judgment and enter judgment for defendants, and none the less was it so because a new trial was asked in the alternative, and by sub-sec. 5 an appeal lies to the High Court. If the Legislature had intended otherwise, sub-sec. 4 would have been made applicable to all cases instead of to jury cases alone. It is not clear that sub-sec. 3 applies to a motion for a new trial, where the ground on which the party moves is that, upon the whole case, it is one in which in its discretion the Court should direct a new trial, and that it is not to be taken to be confined to cases where the ground is something ejusdem generis with that mentioned in the sub-section—the discovery of new evidence. The scheme of the section appears to be this:—There is to be an appeal at the option of the unsuccessful party, both in jury and non-jury cases, either