

THE HALIFAX STREET RAILWAY } APPELLANTS ;
COMPANY (DEFENDANTS)..... }

1890
*Oct. 30.

AND

THOMAS JOYCE (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

*Appeal—Judgment on motion for new trial—R.S.C. c. 135 s. 24 (d)—
Construction of—Non-jury case.*

Section 24 (d) of the Supreme Court Act (R.S.C. c. 135) allowing an appeal “ from the judgment on a motion for a new trial upon the ground that the judge has not ruled according to law,” is applicable to jury cases only. Gwynne J. *dubitante*.

APPEAL from a decision of the Supreme Court of Nova Scotia setting aside a judgment for the defendant and ordering a new trial.

The action is for damages alleged to be caused by plaintiff’s horse having caught his foot in the groove of a rail laid on defendant’s road in Halifax, N.S.

The negligence of defendants alleged in the declaration was :

1. In not keeping the rails level with the street.
2. In using grooved rails and allowing them to project above the level of the street.
3. In using rails of a pattern not approved by the city engineer as required by the act incorporating defendants company.

The amount of damages claimed was \$30 and the action was tried by the Chief Justice without a jury, and judgment was given for the defendants on the ground that no negligence had been proved. This judgment was set aside by the full court and a new trial ordered, one judge being of opinion that the certi-

PRESENT :—Sir W. J. Ritchie C.J. and Strong, Fournier, Taschereau, Gwynne and Patterson JJ.

1890
 THE
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 STREET
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 COMPANY
 v.
 JOYCE.

ificate of the city engineer approving of the pattern of the rails used was necessary and had not been proved, and two other judges dissenting from that but holding that it had not been shown that the charter had been complied with as to keeping the rails level with the street. The defendants appealed.

Newcombe for the respondent took a preliminary objection that the court had no jurisdiction to hear the appeal.

Russell Q. C. contra.

The majority of the court were of opinion that sec. 24 (d), the section of the Supreme Court Act which provides for an appeal from a judgment ordering a new trial, only applies to cases which have been tried by a jury, and that no appeal would lie under that section from an order granting a new trial in a non-jury case, the expression "that a judge has not ruled according to law" having reference to the directions given by a judge to the jury.

Mr. Justice Gwynne said that he was not satisfied that an appeal would not lie, but as the majority of the court were of that opinion he would not delay the judgment.

Appeal quashed with costs.

Solicitor for appellants: *F. G. Forbes.*

Solicitor for respondent: *E. L. Newcombe.*
