

1908  
 \*May 14.

AINSLIE MINING AND RAILWAY } APPELLANTS;  
 COMPANY (DEFENDANTS) . . . . . }

AND

MURDOCK McDOUGALL (PLAIN- } RESPONDENT.  
 TIFF) . . . . . }

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

*Appeal—Alternative relief—Judgment granting one—Final judgment.*

Where the party failing at the trial moves the court of last resort for the province for judgment or, in the alternative, a new trial he cannot appeal to the Supreme Court of Canada from the judgment granting the latter relief. *Mutual Ins. Co. v. Dillon* (34 Can. S.C.R. 141) followed.

**APPEAL** from a decision of the Supreme Court of Nova Scotia setting aside a verdict for the plaintiff and ordering a new trial.

The action was for damages resulting from the death of plaintiff's son while working in defendants' mine. At the trial plaintiff had a verdict and defendants moved the full court for an order dismissing the action, or, in the alternative, for a new trial on the grounds that the verdict was against the evidence and weight of evidence and for other reasons. A new trial was granted on the ground that there was no evidence of the negligence found by the jury though defendants might have been negligent in other respects not passed upon. The defendants appealed from this judgment seeking to have the action dismissed. The plain-

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\*PRESENT:—Girouard, Davies, Idington, Maclellan and Duff JJ.

tiff gave notice of cross-appeal to have the verdict at the trial restored.

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*Mellish K.C.* for the appellants, admitted that the case could not be distinguished from *Mutual Reserve Ins. Co. v. Dillon*(1), and the court quashed the appeal, but without costs, as no notice of motion to quash had been given by respondent.

*Daniel McNeil* appeared for the respondent.

The judgment of the court was delivered by

GIROUARD J.—We are all of opinion that this appeal must be quashed on the simple ground that where a party appeals to the full court from a judgment at the trial, and asks for a new trial either as the sole or as an alternative relief, and such new trial is granted, in such case, having obtained the relief asked for, there can be no appeal to this court from such a judgment. In this respect we follow the judgments of this court in *Mutual Reserve v. Dillon*(1), and the *Corporation of Delta v. Wilson*, reported in *Cameron's Practice*, at p. 99.

*Appeal quashed without costs.*

Solicitor for the appellants: *W. H. Fulton.*

Solicitor for the respondent: *Daniel McNeil.*

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(1) 34 Can. S.C.R. 141.