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HIGH COURT DIVISION.

LENNOX, J. NOVEMBER 22ND, 1920.

FARYNA v. OLSEN.

Negligence—Death of Plaintiff's Son—Action under Fatal Accidents Act—Failure to Prove Negligence of Defendant—Withdrawal of Case from Jury—Dismissal of Action—"Nonsuit"—Meaning of—Costs.

Action to recover $5,000 damages for the death of the plaintiff's son, who was killed by a boat, which he was assisting to hoist, falling upon him, owing, as the plaintiff alleged, to the negligence of the defendant, the owner of the boat.

The action was tried with a jury at a Toronto sittings.

T. J. Agar, for the plaintiff.

W. H. Kirkpatrick, for the defendant.

LENNOX, J., in a written judgment, after referring to the evidence, said that he refused to allow the case to go to the jury and intimated that he would direct judgment to be entered dismissing the action, because there was no evidence whatever of negligence, no evidence in fact that any one was blameworthy or negligent.

Counsel for the plaintiff asked the learned Judge to direct a nonsuit, saying that the plaintiff would then be in a position, without more, again to set the action down for trial, and at a new trial to adduce more satisfactory evidence. The learned Judge did not understand that to be the law or practice. Since the Judicature Act, a judgment of nonsuit is a judgment for the defendant. Even if an easy method of prolonging the litigation could be found, the learned Judge would not be inclined to apply it in this case. On the contrary, he thought it his duty to prevent it by making a conditional order as to costs. The action should not have been brought, and reasonable investigation would have shewn this to be so.