

ORDE, J.

JANUARY 29TH, 1921.

**McIVER v. TAMMI.*

Negligence—Injury to Workman in Building by Carelessness of another Workman—Dropping Heavy Article from Height—Duty Owed by Workman to Others—Action for Damages for Injury—Absence of Contributory Negligence—Absence of Knowledge of Risk—Election of Injured Workman to Claim Compensation from Workmen's Compensation Board—Workmen's Compensation Act, sec. 9—Right of Board to Benefit of Judgment in Action—Assessment of Damages—Notice to Board—Application of Amount Payable under Judgment.

Action by a carpenter for damages for personal injuries sustained by reason of the alleged negligence of the defendant, a labourer.

The action was tried without a jury at Sault Ste. Marie.

U. McFadden, for the plaintiff.

J. L. O'Flynn, for the defendant.

ORDE, J., in a written judgment, said that the defendant denied that he was negligent, alleged contributory negligence on the part of the defendant, and also set up that the plaintiff was barred from bringing this action because he had filed a claim with the Workmen's Compensation Board and had received full compensation from the Board.

The plaintiff was employed by a construction company in building work. On the 19th July, 1918, the day on which the plaintiff was injured, the building in which he was working was in skeleton form and almost wholly open at the sides and ends and to the sky. The defendant, a Finlander, was engaged that day, with some other men, upon the upper portion of the structure, in bolting certain parts of the iron work together. The defendant, following a practice in vogue in the building, when any portion of the work was finished, threw a heavy wrench to the ground from above, first calling out "Watch out below!" At that moment the plaintiff, being on the ground within the walls of the building, stepped out from behind a beam and was struck on the head by the wrench and badly injured. He said that he heard no warning shout, and there was no reason to doubt his word in this respect.

Whatever the practice or the orders of a superior might be, it must be negligence to throw a heavy tool from a height of 40 feet when there is the slightest risk of hitting some one. Merely shouting "Watch out below" in a perfunctory way, and then