

in the proviso to sec. 6. I do not think the facts bring the case within that exception. Fogle, who made the sale, was a resident agent, in my opinion, within the meaning of the proviso; he says in his evidence that he never went out to solicit orders, but took only those which came to him at his place of business. He was clearly authorized in writing by plaintiffs to sell their goods at fixed prices upon commission. There was, therefore, a contract made orally in Ontario and completed by delivery of goods and part payment, contrary to the provisions of the 6th section of the Act, and plaintiffs, having admittedly no license, cannot maintain an action.

Appeal allowed with costs, and judgment to be entered in the Court below for defendant upon the issue upon which he has succeeded, with such costs as he would have been entitled to had that been his only defence. Plaintiffs are entitled to have the other issues found in their favour with the costs of them, and to set off such costs against defendant's costs of defence. The action will be dismissed, but without prejudice to plaintiff's right to bring another action, as permitted by sec. 14 of the Act, in case they shall take out a license under the Act.

BRITTON, J., gave reasons in writing for the same conclusion.

FALCONBRIDGE, C.J., concurred.

MEREDITH, J.

OCTOBER 25TH, 1904.

TRIAL.

ARMSTRONG v. BRUCE.

*Surgeon—Malpractice—Aseptic Surgery—Injury to Patient by Mistake of Nurse in Preparing for Operation—Responsibility of Surgeon for Nurse.*

This was an action for alleged malpractice, the plaintiff alleging that defendant, a surgeon, had negligently directed the nurse to fill with boiling water a "Kelly pad," upon which plaintiff was placed while an operation was performed upon him under the influence of anæsthetics by defendant. His back and shoulders were burned by the pad.

At the opening of the case MEREDITH, J., decided to dispense with the jury, following *Town v. Archer*, 4 O. L. R. 383, 1 O. W. R. 391.

The nurse swore that she had been directed by defendant to fill the Kelly pad with boiling water. This, however, was