

[Reference to *Boyse v. Rossborough*, supra; *Baudains v. Richardson*, [1906] A. C. 169; *Perera v. Perera*, [1901] A. C. 354; *Barker v. Fellgate*, 8 P. D. 171.]

I find that the will proved of the 9th January, 1909, is the last will and testament of Mary Jane Daniels, deceased.

The facts and circumstances detailed in this case as to the preparation of this will are of such a nature as to lead me to the conclusion that no costs should be given to the defendant Ferguson. I wish to express my disapproval of the manner in which the will was prepared. At some stage entirely independent persons might, and I think should, have been called in, either in the preparation of the will or in the reading and explanation of it to the testatrix, and for this reason I withhold costs. The action is dismissed without costs. The costs of the executors to be paid out of the estate.

DIVISIONAL COURT..

OCTOBER 23RD, 1909.

BEAL v. MICHIGAN CENTRAL R. R. CO.

Railway—Fire from Engine—Destruction of Property—Evidence—Conjecture as to Cause of Fire—Findings of Trial Judge—Reversed on Appeal—Misappropriation of Evidence—Inference.

Appeal by the defendants from the judgment of MACMAHON, J., who tried the action without a jury, in favour of the plaintiffs for the recovery of \$500 and costs.

The plaintiff Paul Beal was the owner of a barn, etc., in the township of Wyndham near the line of the defendants' railway. On the 22nd September, 1908, these were destroyed by fire, and damage to the amount of \$500 was done, as found by the trial Judge. The plaintiff Beal was insured in the Perth Mutual Fire Insurance Co. to the amount of \$300; that company paid \$300 to the plaintiff Beal and took an assignment from him of all claims against the defendants for damages in respect to the fire. Beal and the company united in bringing this action to recover the value of the property destroyed, alleging that the defendants negligently allowed fire to escape from an engine and so caused the destruction.

The appeal was heard by FALCONBRIDGE, C.J.K.B., TEETZEL and RIDDELL, JJ.

D. W. Saunders, K.C., and W. B. Kingsmill, for the defendants

G. G. McPherson, K.C., for the plaintiff.