JANUARY 27TH, 1913.

STEVENS v. CANADIAN PACIFIC R.W. CO.

Railway—Injury to Person Crossing Track at Highway Crossing—Foot Caught between Rail and Plank—Negligence—Findings of Jury at Second Trial—Appeal—Refusal to Direct Third Trial.

Appeal by the defendants from the judgment of CLUTE, J., at the second trial of the action, upon the findings of a jury, in favour of the plaintiff.

The action was brought to recover damages for injury sustained by the plaintiff, viz., having his foot cut off by the locomotive of a train of the defendants, at a highway crossing, by reason, as the plaintiff alleged, of the negligence of the defendants or their servants, in leaving an unnecessarily wide space between the planking and the inside of the north rail of their track, whereby the plaintiff had his foot caught in the space, and was unable to extricate it. See the judgment of the Court of Appeal, after the first trial, directing a new trial: 3 O.W.N. 221.

The appeal was heard by GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

I. F. Hellmuth, K.C., and W. L. Scott, for the defendants.

J. A. Macintosh, for the plaintiff.

GARROW, J.A.:—This case has been twice tried, and I am unable to agree that there are circumstances which would justify another trial. The issues are essentially upon questions of fact, vitally involving the question of the credit to be given to the depositions at the trial of the plaintiff himself. For, as carefully pointed out to the jury by Clute, J., in his charge, unless the plaintiff is believed, the case utterly fails. We may doubt the plaintiff's story, or even go farther and say we do not believe him, but we have no right to substitute ourselves for the jury or our opinion for theirs upon such a question.

There is some confusion in the findings of the jury; but, upon the whole, I take it to be reasonably clear that it is found as a fact that the opening between the rail and the plank exceeded two inches, and was, therefore, wider than necessary. On this there was, I think, some evidence to support the finding.

I would dismiss the appeal with costs.