SEPTEMBER 27TH, 1912.

*MARTIN v. GRAND TRUNK R.W. CO.

Master and Servant—Injury to Servant—Negligence of Fellow-servant—Liability of Master—Workmen's Compensation for Injuries Act, sec. 3, sub-sec. 5—Railway—"Person in Charge or Control of Engine"—Evidence—Findings of Jury.

Appeal by the defendants from the judgment of MULOCK, C.J.Ex.D., in favour of the plaintiff, upon the findings of a jury, in an action for damages for injuries sustained by the plaintiff while in the service of the defendants, owing, as the plaintiff alleged, to the negligence of one McNaughton, a fellow-servant.

The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, and MAGEE, JJ.A., and LENNOX, J.

I. F. Hellmuth, K.C., and W. E. Foster, for the defendants.

W. S. Brewster, K.C., for the plaintiff.

GARROW, J.A.:—The plaintiff and McNaughton were both in the employment of the defendants, the former as yard foreman at the city of Brantford, and the latter as his helper. Early on the morning of the 16th October, 1910, the plaintiff, while engaged upon his duties in the yard, was struck and severely injured by an engine which was being used for shunting purposes. The collision was, it is said, brought about by the negligence of McNaughton in carrying out a shunting order given by the plaintiff, by taking the engine along the west-bound track instead of the east-bound track. The plaintiff, after the order, assumed that the engine which was following behind him would proceed on the east-bound track; and, in consequence, was walking forward so near the west-bound track that he was struck by the buffer of the engine.

The evidence shewed that the portion of the yard which it was desired to reach could be reached by both tracks, but that the east track was much the more direct, and in fact the only natural and proper one to use on the occasion in question.

The order given to McNaughton by the plaintiff was verbal and was called to him from a distance. It must now, however, be assumed that the order was heard, and was understood by McNaughton, who, although apparently available, was not called as a witness. No question, apparently, was raised at the trial

*To be reported in the Ontario Law Reports.