

JUNE 16TH, 1913.

DICARLLO v. McLEAN.

Master and Servant—Injury to Servant—Negligence of Fellow-servant—Engineer in Charge of Engine Operating Steam-shovel—Person in Charge or Control of Engine or Machine upon Railway—Workmen's Compensation for Injuries Act, sec. 3, sub-sec. 5—Findings of Jury.

Appeal by the defendant from the judgment of MIDDLETON, J., upon the findings of a jury, in favour of Carmine Dicarllo, the plaintiff, for the recovery of \$1,500 in an action against his employer for damages by reason of injuries sustained in the course of his employment as a labourer in railway construction work, by reason of the negligence of the defendant or some person in his employment.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, and LEITCH, JJ.

J. M. Ferguson, for the defendant.

B. H. Ardagh, for the plaintiff.

The judgment of the Court was delivered by CLUTE, J.:—The defendant is a sub-contractor for the Canadian Pacific Railway. The plaintiff was in the defendant's employ, and at the time of the accident was operating the jack which supported a steam-shovel when hoisting the load. The steam-shovel rested on wheels on a side track, and changed its position from time to time on the rails, in order to carry on its work of excavation in connection with the railway.

It became necessary, when operating, to give support by means of the jack, in order to meet and counterbalance the extra weight thus imposed upon one side of the steam-shovel.

For this purpose, it was the plaintiff's duty to operate the jack; and, while he was in the act of so doing, it is alleged, the engineer, in charge of the engine operating the shovel, started the machinery and steam-shovel without giving warning to the plaintiff, whereby a part of the hoist swung round and knocked the plaintiff on the jack and threw him against the cogs of the steam-shovel, which caught his coat and drew his left arm