JUNE 18TH, 1912.

CUNNINGHAM v. MICHIGAN CENTRAL R.R. CO.

Railway—Injury to Person on Track—Negligence—Trespasser —Leave — Acquiescence — Findings of Jury—Warning of Approach of Engine—Speed—Cause of Injury.

Appeal by the defendants from the judgment of TEETZEL, J., upon the findings of a jury, in favour of the plaintiff, a brakesman employed by the Toronto Hamilton and Buffalo Railway Company, who, while engaged in checking cars for his employers, was struck by an engine in charge of the defendants' servants, and injured, in an action for damages for his injuries. The jury found negligence, and assessed the plaintiff's damages at $1,500, for which sum he was awarded judgment with costs.

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

D. W. Saunders, K.C., and A. A. Ingram, for the defendants.

D. L. McCarthy, K.C., and J. G. Gauld, K.C., for the plaintiff.

The judgment of the Court was delivered by MEREDITH, J.A.: —It seems to me to be impossible to support the judgment in this case, directed to be entered in the plaintiff's favour at the trial.

In the first place, there is no evidence of any duty to the plaintiff, on the part of the defendants, the breach of which had anything to do with his injury. He was in the place where the accident happened without the leave or knowledge of the defendants, as far as the evidence shews. The work he was engaged in was premature; he had no right to interfere with the cars in any way until they were delivered by the defendants to his masters, the other railway company. That which he was doing was being done for his own convenience, and was at best but only a cursory glance at cars which might, and probably would, be so delivered in due course—a glance which might, and no doubt would generally, aid in the convenient disposition of some of the cars after such delivery in due course. There is no evidence of any duty, or right, on the part of the other railway company to interfere, in any manner, with any cars, such as those in question, until they were duly delivered; the delivery being made by the transfer of way-bills, through the station-master, or the night