

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

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

J. A. Macintosh, for the plaintiff.

MAGEE, J.A. :—The plaintiff alleges that the defendants negligently placed planks between their rails on a highway crossing so that an unnecessarily wide space was left between the rail and the planking, and his left boot-heel was caught therein as he was walking along the highway, and he was unable to extricate himself before an approaching engine and train came upon him and severed his leg above the ankle.

The highway is a main road, much travelled, near Vankleek Hill. The defendants' railway crosses it at nearly right angles; and in the middle of the highway, at the travelled part of it, the defendants had laid planking between and outside their rails and parallel therewith so as to keep the surface nearly flush with the top of the rails. Outside of the tracks, the planks are said to be tight up to the rails; but on the inside it was necessary to leave a space between the rail and the nearest plank for the flange of the train wheels. The flange is  $1\frac{3}{4}$  inches in width and projects downward in the case of the engine drive-wheels  $1\frac{3}{4}$  inches to 2 inches and on others  $\frac{3}{4}$  of an inch to  $1\frac{1}{4}$  inches. What the defendants' witnesses call the "standard" width of space to be left for the flange is 2 inches. The rail then used was  $4\frac{3}{4}$  inches high, but may have sunk somewhat into the tie; whatever its height above the tie, the 2-inch space below the flange would be left vacant, and would be increased in width by the hollow in the side of the rail below its head.

The accident occurred after half-past five, on a snowy, sleety evening, the 29th November. The plaintiff was walking home, going north, and had followed the foot-track along the east side of the travelled portion of the highway. When he came to the south side of the plank crossing, instead of continuing straight on the line of the foot-path, which would have taken him along the east end of the planking, he says that he turned diagonally north-west, to avoid a puddle on the side of the road north of the track, and was almost across when his left foot slipped on the north rail, and his boot-heel went into the flange space and became fastened there. He saw a train approaching from the west a considerable distance away, but says he could not extricate his foot; and, after trying by waving his hands to attract the attention of those on the engine, had to throw himself down to the side to save his life, and "the foot was cut clean off and above the