MAGEE, J.A.:—Two trials have now been had in this action, in which the plaintiff charged that the defendants negligently left an unnecessarily wide space between the planking and the inside of the north rail of their track, at a highway crossing, whereby, while he was walking along the highway at night, he got his foot caught in the space, and, he being unable to extricate it in time, it was cut off by the locomotive of a train. The jury at each trial have accepted the plaintiff's version of his misfortune, and have rejected the theory of the defendants that he was injured while intoxicated, not at the plank crossing, but some distance east of it.

Apart from the probable uselessness of a third trial, I see no ground for disturbing the result of the second one. When the case was before this Court after the first trial the facts were more fully referred to. Some details then in evidence have been left out at the second trial and some additional ones proved. It was strongly urged before this Court that the plaintiff's story was incredible, and that his foot could not have been cut off as he stated without some injury being caused to the boot; but the jury had before them what the defendants put forward as a fair reproduction of the track and planks and engine, and would be able to judge of the credibility or the reverse of the plaintiff's evidence; and the cross-examination of the plaintiff does not read as if the defendants had much hope of convincing the jury that it would be impossible for the boot to get down so far that the top would not be pressed between the wheel and the rail.

The plaintiff swears that, in his struggles before the train reached him, he threw himself so hard that his ankle went out of joint, and that, when he did so, he screamed with the pain. This was brought out on cross-examination, and is a circumstance not mentioned at the former trial, and would more readily account for the occurrence happening as the plaintiff says it did; and the jury may well have considered that the plaintiff's account given to the doctor immediately after the accident was not likely to have been manufactured.

The two physicians who attended to the plaintiff that same evening were called by the defendants, but not a question was asked them or any other witness as to even the improbability of the injuries being received as he states or the insufficiency of the space to receive the boot if crushed down. His statement is undisputed that the wheel cut off the foot an inch or two above the ankle joint.

The evidence for the defendants shews that 1¾ or 2 inches is all the width of space necessary to be left between the plank