

IDINGTON, J., gave reasons in writing for the same conclusion, referring to *Huffman v. Walterhouse*, 19 O. R. 186, 191; *McRae v. Brown*, 5 U. C. L. J. 91; *Flannigan v. McMahan*, 7 U. C. L. J. 155; *Crozier v. Taylor*, 6 U. C. L. J. 60; *Walsh v. Walper*, 3 O. L. R. 58; *In re Blumenthal*, 125 Pa. St. 412; *Conn v. Bagan*, 9 Dana 310; *R. v. Jones*, 59 J. P. 87; *Pearson v. Broadbent*, 36 J. P. 485; *Vine v. Leeds*, L. R. 10 Q. B. 195; *Ritchie v. Smith*, 6 C. B. 462; *Cowles v. Gale*, L. R. 7 Ch. 12; *Tadcaster v. Wilson*, [1897] 1 Ch. 705; *Thompson v. Harvey*, 4 H. & N. 254; *Mayhew v. Suttle*, 4 E. & B. 347; 1 Sm. L. C. 385; *Thwaites v. Coulthwaite*, [1896] 1 Ch. 496.

MAGEE, J., concurred.

ANGLIN, J.

JANUARY 13TH, 1905.

TRIAL.

VAN CLEAF v. HAMILTON STREET R. W. CO.

*Way—Non-repair—Injury to Person—Portion of Roadway Occupied by Street Railway Tracks—Liability of Railway Company—By-law of Municipality Imposing Duty on Company—Construction.*

Action by the father and mother of Thomas C. Van Cleaf, under the Fatal Injuries Act, for damages for the death of the latter by alleged negligence of defendants.

The deceased, a teamster, on 5th July, 1904, was driving a team of horses with a waggon westerly along the north side of Barton street, in the city of Hamilton, and when near the east side of Sandford avenue, on turning to the left to pass vehicles in front, the front left wheel of the waggon came in contact with the southerly rail of the northerly track of defendants' rails on Barton street, causing the waggon to "slew" and throwing the deceased out on his head, inflicting injuries from which he died a few days afterwards. Plaintiffs alleged that the "slewing" was caused by defendants' track being out of repair by reason of the rails not being flush with the street, and not being from 3 to 5 inches above the level of the street inside the tracks, such inequality having existed for a long time prior to the accident.

A. M. Lewis, Hamilton, for plaintiffs.

E. E. A. DuVernet and W. W. Osborne, Hamilton, for defendants.