

highway crossing, by a yard engine moving reversely without any person stationed on the part of the tender which was foremost. There was a path between the two tracks on which the deceased might have walked safely.

*Held* (without a finding on the evidence as to whether or not the bell of the yard engine had been rung), that the defendants were not liable, as they had not been guilty of any negligence and the deceased was guilty of contributory negligence in going upon the other track.

*Semble*, the deceased had no right to be where he was at the time of the accident and was therefore a trespasser: *Dean v. Clayton*, 7 Taunt. 489, and *Jordin v. Crump*, 8 M. & W. 782; and no action was maintainable without evidence of intention to injure.

*Howell and H. V. Hudson*, for plaintiff. *Clark, K.C.*, for defendants.

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Robson, J.]

NOBLE v. CAMPBELL.

[Dec. 14, 1910.]

*Mortgage—Purchaser of land subject to mortgage on implied covenant to indemnify vendor—Foreclosure, effect on liability of mortgagor under covenant—Parties to action.*

The plaintiff sold certain land to the defendant subject to two mortgages under the Real Property Act, so that defendant was under an implied covenant to indemnify the plaintiff against the mortgages. The mortgagees subsequently recovered judgment against the plaintiff for the amount due on the mortgages, and afterwards foreclosed them and obtained certificate of title to the property. In this action by plaintiff to enforce the defendant's implied covenant of indemnity defendant raised the contention that the plaintiff was released from his covenant by this action of the mortgagees in obtaining the foreclosure.

*Held*, that this question could not be decided in the absence of the mortgagees, and that unless plaintiff would amend, pursuant to leave, adding the mortgagees as parties defendant, the action should be dismissed with costs.

*Haggart, K.C.*, and *Sullivan*, for plaintiff. *Hoskin, K.C.*, and *Huggard*, for defendant.