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MR. JUSTICE STREET.

"Justum et tenacem propositi virum."

The Horatian line above quoted seems fitly to indicate the general impression made by the late Mr. Justice Street on those who knew him best and recognized in him one who was in all the relations of his personal and professional life "a just man and firm of purpose." Such was not always the opinion of those who were not so well acquainted with him and who were sometimes led to imagine that the low-pitched voice, the slender, almost attenuated frame, and the gentle manner were the index of a mind that might be easily bent and influenced by those of a more masterful temperament. How utterly baseless any such view of his character would be, none can know so well as his brethren of the Bench and of the Bar, who while fully appreciating the charm of his suaviter in modo, were no less forced to recognize, not always to their complete contentment, his fortiter in re. It may be said, however, that his long judicial career of nearly twenty years had impressed the public no less than the profession with the salient features of his personality to which we have referred.

It is not necessary here to give more than the briefest outline of the career of the deceased judge, the main facts of which moreover lie within a comparatively narrow compass. William Purvis Rochfort Street was born in November, 1841, in the good town of London the Less, which has sent so many of its sons to grace the Bench, and was educated at the Grammar School there under the supervision of that fine old scholar and gentleman, the Rev. Benjamin Bayly, one of whose sons, the well-known K.C., was a pall-bearer at his funeral. He studied law in his native city, was called to the Bar in 1864, and forthwith was taken into partnership by the late H. C. R. Becher, Q.C., a well-known

leader of the Bar in London and Western Ontario generally in those days. He speedily attained a high position more especially as a pleader and consultant, though his friends would scarcely claim for him the possession of those special gifts which qualify their owner to shine as a leading counsel in the strenuous arena of nisi prius. His reputation however as a consummate lawyer steadily increased, and in 1883 he was created a Q.C. by the Marquis of Lorne. It is said also on good authority that in the same year he was offered a Superior Court judgeship, but refused for the reason that he was not satisfied that his knowledge of criminal law was adequate to the requirements of the position. This fact illustrates alike the modesty and the conscientiousness which were such strongly marked elements in his character, but fortunately these scruples were overcome a few years later, and on November 30, 1887, he was raised to the Bench as a puisne judge of the then Queen's Bench Division, a few days after a similar dignity was conferred upon the present Chief Justice of the Division. About the same time the late Hon. J. D. Armour became the Chief Justice of that division, and members of the Bar who are also graduates of our National University will long be glad to remember that for many years that notable Court was made up of three men who were gold medallists of the University in classics, modern languages and law, respectively.

Our limits will not permit us to refer in any detailed way to Mr. Justice Street's judicial career. It was soon felt by all who came before him that in him were united many of the characteristics that go to make up the ideal judge. Rapid and keen comprehension of facts, wide and accurate grasp of legal principles, unfailing courtesy to all with whom he came in contact (including even the "younger" or "youngest members of the Bar") tempered by a dignity on which none could presume, and a firmness which all were forced to respect—all these good judicial gifts were his by common consent. It has been said that he was too "technical" in his application of legal principles and there may be some force in the criticism. Every one has

"the defects of his qualities," and there is no doubt that the deceased judge had a strongly marked reverence for the law as it appeared to him to have been settled by previous decisions, no matter how hardly it might bear on the individual case before him.

The efforts made to restore his health, which had been failing for some time past, were unhappily of no avail and on the 31st of July he passed away regretted by all who value the best traditions of the profession.

DEATH OF MR. JUSTICE SEDGEWICK.

On the fourth of August inst., Mr. Justice Sedgewick of the Supreme Court of Canada died at Chester where he had been spending the summer with his family.

The late Hon. Robert Sedgewick was the third son of the late Rev. Robert Sedgewick, D.D. He was born in Aberdeen, Scotland, on May the 10th, 1848, and when quite a child accompanied his parents to Canada. He received his education at Dalhousie College, Halifax, taking his B.A. degree in 1867 and his LL.D. degree in 1873. He commenced his legal studies under the late Hon. John Sanfield MacDonald, formerly Attorney-General of Ontario, and was called to the Bar of Ontario in 1872 and to that of Nova Scotia in the following year. He commenced practice in Halifax and became head of the firm of Sedgewick, Ross & Sedgewick, which had an extensive practice. In 1880 he was created a Q.C. by the Marquis of Lorne. He was Governor of the University of Dalhousie College and president of the Alumni Association, and for some years held the lectureship on equity jurisprudence there. He became Deputy Minister of Justice of Canada under the late Sir John Thompson in 1885, and held that office until February, 1893, when he was appointed a puisne judge of the Supreme Court of Canada.

As Deputy Minister of Justice he argued before the Imperial Privy Council the case between the Dominion and British Columbia as to the ownership of precious metals in the railway belt.

In 1891 he went on a special mission to Washington in connection with the Behring Sea question. He was looked upon by his colleagues and the Bar of the Dominion as a strong man well versed in the principles of law. He codified the laws on the subject of bill of exchange and promissory notes and had a great deal to do with the drafting of the Criminal Code of Canada.

He was considered an eminent jurist and his experience at the Bar and his long experience as Deputy Minister of Justice gave his judgments great weight. He was easy of approach, more so than most of the judiciary are credited with being. A modest and genial man willing and ready to assist and greatly beloved by all the members of the Bar especially the younger members. He was well versed in legal matters and with his long experience as Deputy Minister of Justice he was enabled to apply the principles in cases which came before him and his conclusions were clear and well expressed. His special knowledge of legislation and the practice of the Maritime Provinces rendered him a valuable judge of the Supreme Court of Canada. His death will cause a vacancy on the Supreme Court Bench which will be hard to fill.

MANITOBA BENCH.

The Manitoba Legislature has created a Court of Appeal by an Act which came into force on the twenty-first day of July last. The Court consists of four judges, Chief Justice H. M. Howell, K.C., appointed from the Bar; puisne judges; A. E. Richards and W. E. Perdue taken from the King's Bench, and J. H. Phippen, K.C., from the Bar. The Court of the King's Bench is to have only three judges instead of four, Chief Justice Dubuc remains, and the puisne judges are Mr. Justice Mathers and Mr. Justice D. A. MacDonald, the latter being taken from the Bar. The Chief Justice of the King's Bench still retains the title of Chief Justice of Manitoba, but upon his death or retirement the Chief Justice of the Court of Appeal will be Chief Justice of Manitoba.

REVIEW OF CURRENT ENGLISH CASES.

SHIP—CHARTER PARTY—IMPLIED CONDITION THAT SHIPOWNER WILL NOT USE SHIP IN MANNER PREJUDICIAL TO THE CHARTER.

In *Darling v. Raeburn* (1906) 1 K.B. 572 the plaintiffs had chartered a vessel from the defendants to load "a full and complete cargo . . not exceeding what she can reasonably stow and carry over her tackle, apparel, provision and furniture," and proceed therewith to two or three ports of discharge. On arrival at the first port of discharge the defendants took on board a large quantity of bunker coal intended to be used upon some prospective voyage after the ship's final discharge. The consequence of thus loading the ship with an excessive quantity of coal was, that in order to enter one of the ports of discharge, she had to be lightened to enable her to get over the bar, which would not have been necessary had the supply of coal been limited to what was necessary for the voyage for which the ship was chartered. The plaintiffs claimed to recover the expense thus incurred from the defendants, and Kennedy, J., held that they were entitled to succeed on the ground that there is an implied condition in such a charter party that the shipowners will not use the ship in a manner prejudicial to the charterer, and that, notwithstanding there was a provision in the charter-party that the expense of lightening the ship to enable her to enter a port was to be borne by the charterers, the expense so occasioned could not be thrown on him.

ACT OF STATE—ANNEXATION OF TERRITORY TO THE CROWN OF ENGLAND—CONFISCATION OF PRIVATE PROPERTY OF FORMER RULER — FRIVOLOUS ACTION — JURISDICTION OF MUNICIPAL COURTS.

Solaman v. *Secretary of State* (1906) 1 K.B. 613 was an action by the trustee in bankruptcy of Prince Duleep Sing, who was the son and residuary legatee of a former Indian potentate whose territories had been annexed by the East India Company as representing the Crown, and whose public and private revenues had been confiscated. The plaintiff claimed that the British government had in effect assumed the guardianship of the dethroned potentate and that they were liable to account as

trustees for the property taken possession of by the company. Bucknill, J., dismissed the action as frivolous and vexatious, and the Court of Appeal (Williams, Stirling and Moulton, L.JJ.,) affirmed the decision on the ground that the acts complained of were clearly acts of state which could not be called in question or inquired into in municipal Courts. Moulton, L.J., dissented, and, though agreeing with the rest of the Court as to the general principle, thought that an act of state might in its intention and effect sometimes be to modify and create rights as between the government and individuals who are, or are about to become subjects of the Crown, and in such cases the rights thus arising may be adjudicated upon by a municipal Court, and that in the present case the claim as to private property might be inquired into. Ultimately leave was given to the plaintiff to amend his statement of claim.

BILL OF SALE—REGISTRATION—APPARENT POSSESSION—BONA FIDE PURCHASE—EXECUTION CREDITOR—BILLS OF SALE ACT, 1878 (41 & 42 VICT. c. 31) s. 8—(R.S.O. c. 148, s. 2).

Hopkin v. *Gudgeon* (1906) 1 K.B. 690 was an interpleader issue. T. W. Gudgeon, the execution debtor, was in 1903 the owner of certain chattels the subject of the issue, and in that year sold them bonâ fide to a company by an agreement which was not registered. In 1904 the company bonâ fide sold them to the claimant also by an agreement which was not registered. T. W. Gudgeon always continued in possession of the chattels, and there was never any actual or continued change of possession, and while thus in his possession they were seized under an execution against T. W. Gudgeon under a judgment recovered in 1905 and they were claimed by the second vendee. The county court judge who tried the issue disallowed the claim of the claimant on the ground of the non-registration of the transfer to her, and the want of any change of possession; and the Divisional Court (Lord Alverstone, C.J., and Ridley and Darling, JJ.) affirmed his decision.

CRIMINAL LAW — CRUELTY TO ANIMALS—ONE ACT—SEVERAL ANIMALS CRUELLY TREATED AT SAME TIME—CRUELTY TO ANIMALS ACT, 1849 (12 & 13 VICT. c. 92) s. 2—(CR. CODE, s. 512(*a*)).

In *The King* v. *Cable* (1906) 1 K.B. 719 the defendant was convicted under the Cruelty to Animals Act 1849, s. 2 (see Cr.

Code, s. 512(*a*)) for that he did cruelly ill-treat, abuse and torture five cows by causing them to be over-stocked with milk. The defendant contended that the conviction was bad in that it was a conviction for five separate and distinct offences; but the Divisional Court (Lord Alverstone, C.J., and Darling and Bray, JJ.) affirmed the conviction on the ground that an act or omission affecting several animals may constitute an offence under the Act.

STATUTE—CONSTRUCTION—"AND" CONSTRUED "OR."

Walker v. *York* (1906) 1 K.B. 724 may be briefly noted as a case in which the Court (Ridley, Darling and Bray, JJ.) in construing a statute relating to highways, finding that the word "and" if literally construed made the section contradictory, held that it must be read as "or."

DIVORCE—JUDGMENT IN REM—FOREIGN COURT—DOMICIL—JURISDICTION—AMERICAN LAW—DECREE OF DIVORCE BY NEW YORK COURT.

Bater v. *Bater* (1906) P. 209 is a divorce case and deserves careful attention from the fact that it confirms the important distinction which exists between foreign judgments in rem and affecting status, and foreign judgments in personam, for while fraud in obtaining the latter may be successfully pleaded, yet it is held that it cannot be as regards the former class of judgments; and that so long as they are unimpeached in the foreign Court they must be recognized as binding, by international law, on the Courts of England. The parties concerned appear to have been an adulterous generation, and their notions of the sanctity of marriage were quite "up to date." Mr. and Mrs. Lowe were married in England; Mr. Lowe ill-treated Mrs. Lowe and Mrs. Lowe committed adultery with Mr. Bater, and then Mr. Lowe sued for a divorce in England, which was refused on the ground of his cruelty. Mr. Lowe then went off to New York where he acquired a domicil and lived in adultery; Mrs. Lowe continuing to live in England with Mr. Bater in adultery. After a little time Mrs. Lowe seems to have thought it would be nicer to marry Mr. Bater, so she set off for New York and instituted proceedings for divorce against Mr. Lowe, neither she nor Mr. Lowe thinking it worth while to mention to the Court her own transgressions with Mr. Bater. The suit was unopposed and the decree pronounced. Mrs. Lowe then went through the form of

marriage with Mr. Bater, who having apparently grown tired of the lady, instituted the present proceedings to have his marriage with her declared null and void on the ground of the alleged illegality of the New York divorce, but Barnes, P.P.D., held that the New York Court had jurisdiction by reason of the domicil of Mr. Lowe in that state, and that its decree was binding by the law of nations on the Courts of England so long as it remained unreversed, because it affected the status of the parties, and was similar in its nature to a judgment in rem, and this, notwithstanding that the fact of the plaintiff's own adultery had been suppressed; and with this decision the Court of Appeal (Collins, M.R., and Romer and Cozens-Hardy, L.JJ.) agreed. It may be noted that according to the expert evidence the decree of divorce was not liable to be reversed in New York on the ground of the suppression of facts by the plaintiff.

VENDOR AND PURCHASER—TRUST FOR SALE—CONDITIONS OF SALE —SALE BY WAY OF UNDER LEASE—LEASEHOLD.

In re Judd and Poland (1906) 1 Ch. 684 was an application under the Vendors and Purchasers' Act. The vendors were trustees for sale of certain leaseholds, which consisted of five separate houses. They offered the property for sale in five separate lots, subject to a condition that if the whole five were sold the purchaser of the largest in value should accept an assignment of the leasehold property as a whole, and undertake to grant underleases to the other purchasers of the lots respectively purchased by them for the residue of the term less one day at an apportioned rent. One of the purchasers objected that a sale in this manner was not authorized by the trust, inasmuch as a trust for sale did not authorize a lease—and Warrington, J., so held, but the Court of Appeal (Collins, M.R., and Romer and Cozens-Hardy, L.JJ.) reversed his decision on the ground that the trustees were carrying out the sale in the way customary where several properties were included in one lease, and though the underlease was technically a lease it was in substance and effect a sale and a decision of Kekewich, J. *In re Walker and Oakshott* (1901) 2 Ch. 383 was overruled.

PRACTICE—ATTACHMENT FOR DISOBEDIENCE OF ORDER—PERSONAL SERVICE OF ORDER—PRESENCE OF PARTY WHEN ORDER MADE.

In re Tuck, Murch v. *Losemore* (1906) 1 Chy. 692. An applica-

tion was made for an attachment of a defendant for disobedience of an order of Court. The defendant was in Court when the order was made, which required him to pay money into Court within a specified time, and initialled one of the briefs of counsel. He had not been personally served with the order. In these circumstances Warrington, J., held that personal service of the order was unnecessary and granted the attachment; but the Court of Appeal (Collins, M.R., and Cozens-Hardy, L.J.) held that the order should have been personally served unless it could have been shewn that the defendant was evading service and for that reason reversed the order of Warrington, J., but it must be noted that Cozens-Hardy, L.J., who delivered the judgment of the Court of Appeal expressly says: "It must not for a moment be understood that any doubt is cast by us upon the result of disobeying an order not to do a thing of which notice can be proved to have reached a defendant. But there is a wide distinction between such an injunction and an order commanding the defendant to do something within a definite time."

ATTACHMENT — CONTEMPT — DISOBEDIENCE OF ORDER TO PAY MONEY—FIDUCIARY CAPACITY—DEBTOR EXECUTOR—DEBTORS' ACT 1869 (32 & 33 VICT. C. 62) S. 4.

In re Bourne, Davey v. *Bourne* (1906) 1 Ch. 697. The defendant was the executor of an estate of which he was also a debtor, he had been ordered to pay the amount of his debt into Court, and, having failed to comply with the order, an application was made under the Debtors' Act 1859, s. 4, for an attachment. The defendant had, since his appointment of executor, means available for payment, but had denuded himself of his property, and filed a petition in bankruptcy, for the purpose of evading payment. Kekewich, J., granted the attachment, and the Court of Appeal (Collins, M.R., and Romer and Cozens-Hardy, L.JJ.) affirmed the order. How far the Courts of Ontario have any similar jurisdiction seems questionable; sed vide *Pritchard* v. *Pritchard*, 18 Ont. 173.

COMPANY—POWER TO SELL UNDERTAKING FOR SHARES IN ANOTHER COMPANY AND DISTRIBUTE SAME IN SPECIE—SCHEME FOR SALE FOR PARTLY PAID SHARES—ULTRA VIRES.

Bisgood v. *Nile Valley Co.* (1906) 1 Ch. 747 was an action by the shareholders of a company for an injunction to restrain

the defendant company from selling its undertaking for partly paid shares of another company. The articles of association empowered the company to sell its undertaking for shares in any other company and to distribute such shares in specie among its shareholders. Part of the capital had been issued and fully paid, and the company being in need of more capital, and being unable to get it by the sale of its unissued shares, entered into an arrangement whereby the undertaking was to be sold to another company for partly paid shares of that company of the same number and amount as the fully paid shares of the old company, and it was provided if the old company should go into liquidation before the allotment of the shares of the new company every member of the old company was to be entitled to claim an allotment to himself of one of the partly paid shares of the new company for each share of the old company held by him, and a time limit was fixed for their exercising the option to take such new shares and provision was made for selling and dividing the proceeds of the unaccepted shares. This, Kekewich, J., held to be a mere scheme for compelling the shareholders of the old company to subscribe further capital, or else accept a share of the proceeds of the unclaimed shares of the new company to be ascertained under a scheme which was likely to be unfair to the dissentient members of the old company, and therefore ultra vires, and he granted an injunction. See *Fuller* v. *White*, infra.

ADMINISTRATION—PROBATE ACTION—COSTS "OUT OF THE ESTATE" —LIABILITY OF THE REAL ESTATE FOR COSTS OF PROBATE ACTION—(DEVOLUTION OF ESTATES ACT, ONT.).

In re Vickerstoff, Vickerstoff v. *Chadwick* (1906) 1 Ch. 762 may be briefly noted for the fact that it shews the liability of real as well as personal estate for the costs of a probate action since the Land Transfer Act of 1897 (see Ontario Devolution of Estates Act). The English Act, it is held by Kekewich, J., makes the real estate as well as the personalty liable for the costs of a probate action; and the same rule will no doubt apply in Ontario in cases of probate, and wherever the grant of administration extends to the realty, so that in the event of a deficiency of the personalty where costs of such proceedings are ordered to be "paid out of the estate" resort may be had to the realty for payment thereof.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

N.S.] [May 14.

LEAHY *v.* THE TOWN OF NORTH SYDNEY.

Watercourses—Riparian rights—Expropriation—Trespass torts —Diversion of natural flow—Injurious affection—Damages —Execution of statutory powers—Arbitration—Injunction —Mandamus—Construction of statute.

A riparian proprietor whose property has been injuriously affected by the unlawful diversion of the natural flow of a watercourse may recover damages therefor, and may also obtain relief by injunction restraining the continuation of the tortious acts so committed. The powers conferred upon the town council of the town of North Sydney, N.S., by the Nova Scotia statute, 59 Vict. c. 44, for the purpose of obtaining a water supply give them no rights in respect to the diversion of watercourses except subject to the provisions of the fourth section of the Act, and after arbitration proceedings taken to settle compensation for injuries affection to property resulting from the construction or operation of the waterworks. *Saunby* v. *The Water Commissioners of London* (1906), A.C. 110, followed.

Appeal dismissed with costs.

Drysdale, K.C., for appellant. *Newcombe*, K.C., and *O'Connor*, for respondents.

Que.] [June 12.

WILSON *v.* SHAWINIGAN CARBIDE COMPANY.

Appeal—Jurisdiction — Declinatory exception — Interlocutory judgment—Review of judgment on exception—Practice.

The action was dismissed in the Superior Court upon declinatory exception. The Court of King's Bench reversed this decision and remitted the cause for trial on the merits. On motion to quash a further appeal to the Supreme Court of Canada,

Held, that such motion should be granted on the ground that

the objection as to the jurisdiction of the Superior Court might be raised on a subsequent appeal from a judgment on the merits.

Per GIROUARD, J.: The judgment of the Court of King's Bench was not a final judgment and consequently no appeal could lie to the Supreme Court of Canada.

Appeal quashed with costs.

Errol Languedoc, for motion. *Aylen*, K.C., contra.

EXCHEQUER COURT.

Burbidge, J.] [March 5.

COPELAND-CHATTERSON *v.* HATTON.

Patent for invention—"Reasonable price"—Infringement resulting from breach of agreement—Infringement by inducing others to infringe.

Section 37 of the Patent Act (R.S.C. c. 61) provides, among other things, that the patentee must, within a certain time after the date of his patent commence and continuously carry on the manufacture of the invention patented in such a manner that any person desiring to use it may obtain it, or cause it to be made for him, at a reasonable price. For the plaintiffs it was contended that such price need not be a money price, but that conditions may be imposed, the value of which may constitute part or the whole of the price for which the thing covered by the invention is sold.

Held, 1. That while there is nothing in the Act to prevent parties from entering into a binding agreement embodying such conditions, the patentee cannot prescribe his own conditions as part of such price and impose them upon all person who may desire to use the invention. The "reasonable price" mentioned in the statute means a reasonable price in money; and for such a price the purchaser is entitled in Canada to acquire the complete ownership of the thing that the patentee is bound to manufacture or permit to be manufactured in Canada.

2. The defendant H., having purchased a binder from the plaintiffs on the condition that it was to be used only with sheets sold or under the plaintiffs' authority, contrary to such condition used in the binder sheets supplied by the defendants

G. H. had not only broken his contract but had also infringed the patent.

3. One who knowingly and for his own ends and benefit and to the damage of the patentee induces, or procures, another to infringe a patent is himself guilty of an infringement.

4. The defendants G., being aware of the terms upon which the defendant H. had purchased a binder from the plaintiffs, viz., that only sheets that were supplied by or under the authority of the plaintiffs were to be used in it, furnished H. with sheets prepared and adapted by them for use in such binder, and to induce him to buy sheets from them they undertook to indemnify him against any action the plaintiffs might bring against him in that behalf. The defendants G. had thereby infringed the patent.

W. Cassels, K.C., and *Raney*, for plaintiffs. *Mignault*, K.C., and *Perron*, for defendants.

Province of Ontario.

COURT OF APPEAL.

Full Court.] CRAIG *v.* MCKAY. [March 28.

Bankruptcy and insolvency—Preference—Statutory presumption—Rebuttal—Transaction before 1897*—Circumstances rebutting intent to prefer—Registry laws—Assignment for creditors—Mortgage—Priorities.*

At the revision of the Ontario Statutes in 1897, the words "prima facie" were inserted after the word "presumed," where it occurs in sub-ss. 3 and 4 of s. 2 of 147, and the doubt whether the presumption was rebuttable was thereby set at rest; but even under the language of sub-s. 2 (*b*) of s. 2 of the Act of 1887, i.e., without the words "prima facie," the presumption was rebuttable; and in the case of a mortgage of land to secure a debt, made on 15th Oct., 1896, to the defendants, followed on the 21st October, 1896, by an assignment by the mortgagor to the plaintiff for the benefit of creditors, the defendants were entitled to shew that there was no intent to prefer. *Lawson* v. *McLoch*, 20 A.R. 464, followed.

Held, also, upon the evidence, that the presumption of intent to prefer was rebutted.

Held, also, that the plaintiff, as assignee for the benefit of creditors, occupied no higher position than his assignor, and could not be regarded as a subsequent purchaser for valuable consideration within the meaning of the Registry Act, so as to avail himself of its provisions with regard to the registration of the assignment before the mortgage.

Arnoldi, K.C., and *P. McDonald*, for plaintiff, appellant. *W. M. Douglas*, K.C., for defendant, respondents.

Full Court.] LANCASTER *v.* SHAW. [March 28.

Penalty—Ontario Election Act—Disqualified person voting—"Postmasters in cities"—Sub-postmaster.

A sub-postmaster appointed by the Postmaster-General to the charge of a sub-post office in a city is not a "postmaster," within the meaning of s. 4 of the Ontario Election Act, and is not liable to the penalty imposed by that section if he votes at an election for the Legislative Assembly.

Judgment of Meredith, J., 10 O.L.R. 604, reversed.

Gibbons, K.C., for defendant, appellant. *Hellmuth*, K.C., for plaintiff, respondent.

[March 28.

LONDON AND WESTERN TRUSTS CO. *v.* LAKE ERIE AND DETROIT RIVER R.W. CO.

Negligence—Railway—Injury to yardsman—Shunting cars—Absence of warning—Contributory negligence—Failure to look—Jury.

A railway yardsman in the ordinary course of his duty was passing behind the most westerly of four cars standing by themselves on a side line. As he was crossing the track, two cars of the defendants, propelled by a flying shunt, came from the east and ran into the standing cars, with the result that he was knocked down, run over, and killed by the car behind which he was passing. He did not see or hear the cars, and no warning was given to him.

Held, that there was evidence of negligence on the part of the defendants, to go to the jury, and that the fact that the yard-master did not look for approaching cars before going behind the standing car was not sufficient to shew that he was guilty of such negligence as ipso facto to deprive him of the right to recover.

Judgment of MEREDITH, J., reversed.

Gibbons, K.C., and *C. A. Moss*, for plaintiffs, appellants. *W. Nesbitt*, K.C., and *D. L. McCarthy*, for defendants.

Full Court.] [April 23.

HAMILTON DISTILLERY CO. *v.* CITY OF HAMILTON.

HAMILTON BREWING ASSOCIATION *v.* CITY OF HAMILTON.

Municipal corporations—Water rates—Power to discriminate.

A water rate imposed by a municipal authority must be an equal rate to all consumers, unless express legislative authority has been given to discriminate.

Attorney-General of Canada v. *City of Toronto* (1892), 23 S.C.R. 514, followed.

Judgment of Street, J., 10 O.L.R. 280, affirmed.

Shepley, K.C., *Crerar*, K.C., *Gausby*, for plaintiffs, respondents. *Riddell*, K.C., and *H. E. Rose*, for defendants, appellants.

Full Court.] [April 23.

WRIGHT *v.* GRAND TRUNK R.W. Co.

Railway—Negligence—Injury to person crossing track—Failure to look for train—Contributory negligence—Case for jury.

The plaintiff was injured by being run over at a highway crossing by a train moving reversely, and brought this action to recover damages for his injuries. The jury found that the plaintiff's injury was caused by the defendants' negligence in not using sufficient signals to attract his attention, that the conductor was not on the rear end of the car and that the plaintiff could not by the exercise of ordinary care have avoided the injury. The train was coming from the east, and the plaintiff on approaching the track looked to the east and did not see it, his view being obstructed, and did not again look to the east

when, just before attempting to cross, he might have seen the train.

Held, that it was not so clearly manifest that the plaintiff was the cause of his own injury that there was nothing to leave to the jury; although the plaintiff might be guilty of some neglect in approaching the track, it was for the jury to say whether the defendants might not still have avoided the accident if they had discharged their statutory duty; the case was properly left to the jury; and their findings were sufficient to support a verdict for the plaintiff.

Decision of a Divisional Court reversed.

Proudfoot, K.C., for plaintiff, appellant. *Riddell*, K.C., for defendants.

Full Court.] [April 23.

SIMS *v.* GRAND TRUNK R.W. CO.

Railway—Negligence—Injury to person crossing track—Failure to look for train—Contributory negligence—Case for jury—Unsatisfactory verdict—Damages—New trial.

The infant plaintiff was injured by being struck by the engine of a train of the defendants, while crossing their track at a level highway crossing. Had he looked, he could have seen the approach of the train, but he did not look. There was some evidence that the usual statutory signals of the approach of the train were not given. The infant plaintiff sought to recover damages for his injuries, and the adult plaintiff, the infant's father, claimed damages for loss and expense incurred by him in consequence of the injuries.

Held, affirming the decision of Street, J., 10 O.L.R. 330, that the case could not have been withdrawn from the jury; but that the findings were opposed to the great weight of the evidence, and the damages recovered by the father excessive; and therefore there should be a new trial.

Riddell, K.C., for defendants, appellants. *John MacGregor*, for plaintiffs.

Full Court.] [April 23.

MISENER *v.* WABASH R.W. CO.

Railway—Negligence—Injury to person crossing track—Failure to look for train—Contributory negligence—Case for jury.

In an action under the Fatal Accidents Act to recover damages for the death of a man who was struck by a light engine of the defendants when attempting to cross their track in a wag-

gon with horses, it appeared that the deceased on approaching the track looked both ways, but did not look again just before crossing when he could have seen the engine. The jury found that the whistle was not sounded nor the bell rung, that such neglect was the proximate cause of the injury, and that the deceased could not by the exercise of ordinary care have avoided the injury.

Held, that the omission to look again was not such a circumstance as would have justified withdrawing the case from the jury; and a judgment for the plaintiffs upon the findings should not be disturbed.

Decision of MEREDITH, J., affirmed.

Riddell, K.C., for defendants, appellants. *G. H. Pettitt*, for plaintiffs.

Full Court.] [April 23.

RENWICK *v.* GALT, PRESTON AND HESPELER STREET R.W. Co.

Damages—Fatal Accidents Act—Loss of child—Right of mother while father living—Excessive damages—Reasonable expectation of pecuniary benefit—New trial.

The mother of the deceased is a person for whose benefit an action can be brought under the Fatal Accidents Act, although the father is living.

Damages assessed by a jury at $3,000 for the loss of a daughter seventeen years old by reason of the negligence of the defendants, were held to be excessive, and a new trial was directed unless both parties would agree to have the damages fixed at $1,500.

Order of a Divisional Court, 11 O.L.R. 158, reversed.

DuVernet and *R. H. Greer*, for defendants, appellants. *Lynch-Staunton*, K.C., and *Secord*, for plaintiff.

HIGH COURT OF JUSTICE.

Boyd, C., Street, J., Britton, J.] [March 14.

SMITH *v.* CANADIAN EXPRESS Co.

Carriers—Non-delivery and conversion of goods—Termination of transitus—Conditional refusal of consignee to accept—Place of refusal—Setting aside findings of jury—Dispensing with new trial—Judgment.

Trees consigned by the plaintiffs to one C., at Aylmer, Que-

bec, were delivered by a railway company, by mistake, at Aylmer, Ontario. The defendants, pursuant to a message received from the railway company, "Ship by express C.'s trees to Aylmer, Quebec," carried the trees as far as Ottawa, and were about to send them on by wagon to Aylmer, Quebec, when C., who was the only person known in the transaction by the defendants, appeared at Ottawa and said to the defendants' agent that he would not accept the trees until he saw one F. There were no further communications between the defendants and C. The defendants held the goods and sought out the consignors and notified them of C.'s refusal.

Held, in an action by the consignors for damages for non-delivery and conversion of the trees, that the defendants' contract was not one to deliver the goods to C., at Aylmer and not elsewhere, and his refusal to accept, even if not absolute, was such as dispensed with any further action on the part of the defendants till they had a message from C. that he was ready and willing to receive; and this never having come, the defendants acted reasonably in holding the goods and notifying the consignors, and were not liable for the loss.

The findings of the jury not having supplied material for a final disposition of the case, the Court, acting under Con. Rule 615, instead of directing a new trial, set aside the findings and gave judgment on the whole case for the defendants, deeming that if the proper questions had been put to the jury they could have been answered in only one way.

Judgment of the County Court of Wentworth reversed.

J. W. Nesbitt, K.C., for defendants. *Logie,* for plaintiffs.

Boyd, C., Street, J., Britton, J.] [March 19.

ROBINSON *v.* MCGILLIVRAY.

Bankruptcy and insolvency—Preferential transfer of cheque—Deposit with private banker—Application by banker upon overdue note—Absence of pre-arrangement and of intent to prefer.

On the 5th September, 1904, a merchant, being then insolvent, sold his stock-in-trade to G. at 50 cents on the dollar, and received in payment G.'s cheque on the defendants' private bank

for $1,172.27, payable to his own order, which he took to that bank, where he had an account, and deposited it to his own credit. The defendants knew that the sale was about to be made, and had lent G. the money to make the purchase, and knew that the money was to be deposited in their bank by the insolvent, and, in anticipation of this, had charged up against the insolvent's account (without the latter's knowledge) an overdue note for $1,000 and $40 interest thereon. The deposit of G.'s cheque with the defendants was attacked by this action (brought within 60 days thereafter) as a preferential transfer of a bill or security to a creditor, within R.S.O. 1897, c. 147, s. 2.

Held, STREET, J., dissenting, that, there being no evidence of any pre-arrangement nor of any intent to prefer, the transaction was not within the scope of the Act.

Judgment of FALCONBRIDGE, C.J.K.B., affirmed.

Gibbons, K.C., and *Blewett*, for plaintiffs. *T. G. Meredith*, K.C., for defendants.

Teetzel, J.] RE MCNEIL. [April 4.

Distribution of estate—Legatee not heard of for seven years—Presumption of death—Burden of proof.

A testator, dying in 1895, gave his estate (subject to his wife's life interest) to his brothers and sisters, share and share alike. One brother was living in 1885, but had not been heard of for more than seven years before the death of the testator. There was no evidence that he was in fact dead, nor that he he survived the testator. Letters of administration to his estate were granted in 1903, upon the presumption that he was dead.

Held, that the onus of proof that he survived the testator lay upon those who claimed under him; and, there being no evidence that he survived, the administrator of his estate failed to establish any right to share in the testator's estate; and distribution among the other legatees or their representatives was ordered, subject to their undertaking to refund should it be established hereafter that the absentee or his representative was entitled.

G. E. Taylor, for applicants. *Hume Cronyn*, for official guardian.

Clute, J.] MURPHY *v.* CURRY. [April 7.

Practice—Reference for trial—Motion for judgment—Costs.

Where there is a reference to a master or referee to try the action and dispose of the costs, a motion to the Court for judgment on his report is necessary.

Bethune, for plaintiffs. *W. J. Code*, for defendants.

Britton, J.] SHURIE *v.* WHITE. [May 12.

Contract for sale of land—Verbal—Execution of deed and mortgage—Misdescription—Defective title—Innocent misrepresentation—Rescission—Compensation.

Plaintiff at an interview with the defendant agreed to purchase "the F property" belonging to her for $2,300—$500 cash and the balance in six years with interest secured by mortgage and advised her to get the papers made out, and she instructed her solicitors to prepare the deed and mortgage. When they were ready she advised the plaintiff who had, however, changed his mind and refused to go on, but offered to pay the expense of the papers. Under pressure from two solicitors and the issue of a writ he accepted the deed, executed the mortgage to secure purchase money and paid the $500 without searching the title, relying on the representation of one of the solicitors that the defendant had a good title. Subsequently he discovered that the description in the deed to him covered more property that the vendor owned, and that what he did get was subject to an outstanding lease for life. In an action for a rescission of the contract the trial judge found that the defendant was not guilty of any fraudulent misrepresentation or concealment; that there was no mutual mistake and no express agreement as to title, and that the misrepresentation as to title was innocently made.

Held, that fraud having been negatived and the deed having been executed, the plaintiff was not entitled to a rescission of the contract.

Held, also, that as an adverse claim to title by possession could not be decided in this action owing to the claimant not being a party, it could not be said there was an entire failure of consideration and the plaintiff was, therefore, not entitled

to relief on that ground, and the action was dismissed, but under the circumstances without costs.

Arnoldi, K.C., and *Alcorn,* K.C., for plaintiff. *Marsh,* K.C., and *E. Gus. Porter,* for defendant.

Meredith, C.J.C.P., Teetzel and Anglin, JJ.] [June 14.

BUSH *v.* PARK.

Malicious prosecution—Confined as lunatic—Proof—Act respecting public lunatic asylums.

Proceedings were taken under the Act Respecting Public Lunatic Asylums—R.S.O. 1897, c. 317, for arrest and confinement, as insane and dangerous, of the person of the plaintiff, before the justice, who committed him to jail, from which he was afterwards taken to an asylum and was discharged on the ground that he was not insane and never had been insane. The plaintiff now brought his action for malicious prosecution against the parties by whom the above proceedings had been taken.

Held, that the action should have been dismissed on the ground that the inquiry before the justice was a judicial proceeding and that it was essential to the plaintiff's success that he should be able to allege and prove that the proceedings had terminated in his favour (which they had not done so long as the order of the justice stood), and this although the statute contained no provision for setting aside the adjudication of the justice by way of appeal or otherwise. The plaintiff was not in a position to allege that the proceeding before the justice was an ex-parte one because he based his action on the hypothesis that he was sane, and if so, he was competent to make his defence before the justice.

J. A. Robinson, for plaintiff. *Essery,* for defendants.

Mulock, C.J., Anglin, J., Clute, J.] [June 18.

GOODWIN *v.* CITY OF OTTAWA.

Assessment and taxes—Income assessment—Dividends on shares in Ottawa Electric Railway Company—Agreements between company and city corporation—Exemptions—Assessment Act, 1904*—Business assessment.*

By an agreement dated the 28th June, 1893, between the

corporation of the City of Ottawa and the two companies which were amalgamated under the name of the Ottawa Electric Railway Company, by statutes which confirmed the agreement, it was provided, inter alia, that "the corporation shall grant to the said companies exemption from taxation and all other municipal rates . . . on the income of the companies earned from the working of the said railway.

Held, that the plaintiff's income from dividends upon shares of the capital stock of the Ottawa Electric Railway Company was not, by reason of the agreement in part above recited, nor by reason of an earlier agreement, exempt from municipal taxation.

Held, also, that the Ottawa Electric Railway Company is not a company which would, but for the agreements mentioned, be liable to be assessed for income under the provisions of the Assessment Act, 1904; and therefore sec. 5, sub-sec. 17, does not apply to exempt dividends or income from the stock.

The Assessment Act does not confer upon the shareholders of a company which is not liable to income assessment, but is liable to business assessment, an exemption from assessment upon their dividends from stock in the company, except as contained in s. 10, sub-s. 7.

Judgment of Teetzel, J., affirmed.

Chrysler, K.C., and *Osler*, K.C., for plaintiff. *McVeity*, for defendants.

Mulock, C.J. Ex. D., Britton and Mabee, JJ.] [June 20.

THOMAS *v.* CANADIAN PACIFIC RY. CO.

BUSH *v.* CANADIAN PACIFIC RY. CO.

Master and servant—Railway watchman—Scope of authority—Malicious arrest—Railway constable—Railway Act, 1903, *s.* 241.

Jardine, a watchman of the defendants' company, who was also a constable appointed on the application of the defendants' under the provisions of s. 241 of the Railway Act, 1903, arrested the plaintiffs near the corner of King and Jordan Streets in Toronto, and swore out an information against them for breaking into a freight car of the defendants with intent to steal. The evidence failed to connect with plaintiffs with the matter,

and they were discharged and now brought this action for false arrest and malicious prosecution.

Held, that the defendants were not liable, because, so far as his capacity as watchman went, Jardine had no authority, either expressed or implied, from the defendants either to arrest or prosecute the plaintiffs under the circumstances; and so far as his capacity of constable went, he was to be regarded as an officer of the law, and not as a servant of the company, and there was no evidence that the defendants exercised any control over his action as constable. If Jardine had found the plaintiffs on the defendants' premises endeavouring to steal their property it would have been within the scope of his authority as watchman to arrest them in order to prove injury to the defendants' property, but that was not this case.

W. T. J. Lee, for plaintiffs. *Shirley Denison*, for defendants.

Province of Manitoba.

KING'S BENCH.

Full Court.] [May 7.

WALLMAN *v.* CANADIAN PACIFIC RY. CO.

Negligence—Contributory negligence—Death of person run over on railway track through negligence of crew of engine.

The plaintiff's husband, while in the actual discharge of his duty as section foreman on the defendants' railway examining e track was struck by a yard engine running backwards. No lookout was on the tail board or rear of the engine and no signal of any kind was given to warn the deceased of the approach of the engine.

Held, that there was ample evidence to support the findings of the jury that the deceased came to his death in consequence of the negligence of the engine crew in neither blowing the whistle, ringing the bell nor keeping a proper lookout, and that the deceased could not, by the exercise of reasonable care under the circumstances, have avoided the accident, and that the appeal from the verdict in favour of the plaintiff should be dismissed. Although the deceased, if he had looked round, would

have seen the approaching engine and stepped out of the way, yet he was engaged at the time in the discharge of a duty of an absorbing character which would naturally take his whole attention and, under the circumstances, a jury might properly infer that there was no absence of reasonable care on the part of the deceased. Moreover, even if the deceased had been guilty of negligence, the defendants would still be liable if the engine crew could, by the exercise of reasonable care, have avoided the accident. *Coyle* v. *G.N. Ry.*, L.R. 20 Ir. 409; *The Bernina*, 12 P.D. 89, *Kelly* v. *Union Ry. & T. Co.*, 8 S.W.R. 20, *Canada Southern Ry. Co.* v. *Jackson*, 17 S.C.R. 316; and *London, etc., Co.* v. *Lake Erie, etc., Ry. Co.*, 7 O.W.R. 571, followed.

The omission of a common law duty is actionable negligence equally with the omission of a statutory duty, and the common law requires the defendants' servants, when running through the yard, to take the obvious precaution of watching for workmen lawfully on the track and giving them timely warning: *Canada Atlantic Ry. Co.* v. *Henderson*, 29 S.C.R. 632.

Held, also, that the jury would have been justified if they had drawn inferences unfavourable to the defence from the fact that neither the engineer nor the fireman who were in charge of the engine were called to give evidence for the defence: *Green* v. *Toronto Ry. Co.*, 26 O.R. 326.

The accident occurred within twenty feet of a public highway crossing, but,

Quære, whether s. 224 of the Railway Act, 1903 (*d*), requiring that the whistle should be sounded when approaching a highway crossing and that the bell should be continuously rung until the highway is crossed, and be invoked on behalf of any persons except those using the highway crossing.

Hudson, and *Johnston*, for plaintiff. *Aikins*, K.C., for defendants.

Full Court.] [May 10.

DAY *v.* CROWN GRAIN CO.

Mechanics' and Wage Earners' Lien—Time for filing lien—Completion of contract.

Judgment of Richards, J., noted vol. 41, p. 801, reversed on appeal to the full Court on the following grounds.

1. The plaintiff himself treated the contract as having been completed more than thirty days before the filing of the lien, and his foreman did not appear to have intended to return to the building, except for the purpose of testing the machinery.

2. A test would not be a performance of a part of the work to be performed under the contract. It would only be for the purpose of finding defects, and defendants said there were none.

3. Even if defects had been found, the making good of them would not, under the authority of *Neill* v. *Carroll*, 28 Gr. 30, and *Somers* v. *Beard*, 24 O.R. 641, be a performance of a part of the work such as would revive the right to file a lien.

Hoskin, for plaintiff. *Potts*, for other lienholders. *Phippen* and *Minty*, for defendants.

Richards, J.] [May 23.

RE SWAN RIVER LOCAL OPTION BY-LAW.

Local option by-law—Liquor license—Majority necessary to carry by-law.

Held, that, when an elector has deposited a ballot at the voting on a local option by-law submitted under "The Liquor License Act," R.S.M. 1902, c. 101, which ballot has been rejected, he has not voted within the meaning of s. 63 of the Act, and he should not be counted among those who vote in ascertaining whether the necessary three-fifths of those who vote have voted in favour of the by-law.

The essence of voting is the expression of the choice of the elector. The ballot paper is only the medium by which he expresses that choice. When he deposits a ballot so marked that it is properly rejected under the provisions of the law, he has in law failed to express his choice. His position is the same as that of an elector who, under the system of open voting, enters the polling booth, goes through all the preliminaries to the declaration of his choice and then makes a statement from which it can not be gathered how he means to vote, and leaves the booth without saying any further.

Application to quash by-law dismissed with costs.

Potts, for applicant. *Robson*, for the municipality.

Richards, J.] [June 4.

IMPERIAL ELEVATOR CO. *v.* WELSH.

Pleading—Mechanics' and Wage Earners' Lien.

In his statement of defence to a mechanics' lien action, defendant set up and pleaded that the said lien was not filed within the time required by law, that proceedings had not been instituted within the time required by law, and that the plaintiff was not entitled to said lien.

Held, that such pleading, except the last clause, was authorized by the form No. 7 in the schedule of forms appended to the "Mechanics' and Wage Earners' Lien Act," R.S.M. 1902, c. 110, and referred to in s. 45 of the Act, since that section says that the forms in the schedule, or forms similar thereto or to the like effect, may be adopted, and the expressions used were to the like effect as that in the form, viz., "that the lien has not been prosecuted in due time as required by statute." As to the statement that the plaintiff is not entitled to said lien, it is only an allegation of a conclusion of law, and should be struck out.

Phillipps, for plaintiff. *Locke*, for defendant.

Mathers, J.] [June 13.

NORTH-WEST CONSTRUCTION CO. *v.* VALLE.

Priority of equitable claims—Negligence of holder of prior equity—Constructive notice—Knowledge of solicitor, when imputed to client.

The defendant Valle was the nominal purchaser of the land in question from the city of Winnipeg under an agreement of sale, but he only held it as trustee for the plaintiffs. The defendant Wolfe bought the land from Valle, took an assignment of the agreement and paid the purchase money without any notice or knowledge of the plaintiff's claim. In carrying out his purchase Wolfe employed a clerk in the office of a solicitor who was said by the plaintiffs to have had a knowledge of their claim, although he denied it. The plaintiffs had neglected to register any notice of their claim in the Land Titles Office, and had given no notice of it to the city of Winnipeg. The solicitor knew nothing of Wolfe's purchase till after it was completed and his clerk had no notice or knowledge of the plaintiffs' claim.

Held, following *Brown* v. *Sweet*, 7 A.R. 725, that Wolfe was not affected by notice of the plaintiffs' claim even if the solicitor had been aware of it.

Held, also, that, although the plaintiffs' equity was prior to that of Wolfe, it should not prevail because the plaintiffs had been guilty of gross negligence in not giving notice of their claim, and thus enabling Valle to sell the property to an innocent purchaser.

Elliott and *Macneil*, for plaintiffs. *Ross*, for defendant, Wolfe. *Hunt*, for city of Winnipeg.

Mathers, J.] ROGER *v.* BRAUN. [June 14.

Contract—Construction—Agent "producing" a purchaser to vendor of land—What may amount to a refusal of an offer.

In settlement of litigation between the plaintiff and defendant over some lands which stood in defendant's name, but in which the plaintiff had claimed an interest, they entered into a written agreement whereby it was provided that a price list of the lands was to be settled; that if the lands should be sold at the prices fixed, within a year, the plaintiff should receive twenty-five per cent. of the amount realized; and that if the plaintiff should, within such year, produce to the defendant a bona fide purchaser for the lands ready and willing to pay, at least, one quarter of the purchase money in cash, and who had signed an offer in writing therefor, then he should receive "twenty-five per cent. commission on such purchase price," even if the defendant should refuse to make the sale. The price list was duly settled, and within the year an agent employed by the plaintiff procured from a bona fide purchaser a written and signed offer to purchase the lands at the list prices, and to pay one fourth in cash, but conditioned on its acceptance by the defendant before 10 a.m. of 16th March. This offer, but not the name of the purchaser, was communicated to the plaintiff by letter which reached him in the forenoon of the 14th. Plaintiff then telegraphed to defendant at Gretna informing him of the offer and its condition, and asking for an answer. The telegram reached defendant at 1.58 p.m. of the

14th, but, although he instructed his solicitor by telephone between 6 and 7 p.m. of the 15th to accept the offer, his proceedings and those of his solicitor were so dilatory that the plaintiff was not informed of the acceptance until about 10 a.m. of the 16th, and was unable to communicate it to the proposed purchaser within the time limited, and the offer was withdrawn. Up to this time neither the defendant nor his solicitor had asked plaintiff to give the name of the purchaser.

Held, that under the circumstances, the defendant had waived the condition requiring the plaintiff to "produce" the purchaser to the defendant, and that the latter had refused to make the sale, within the meaning of the agreement, and that plaintiff was entitled to recover from the defendant one fourth of the whole purchase money. This was not the ordinary case of an agent employed to find a purchaser. The amount to be paid plaintiff was five times the ordinary commission. The agreement was made to settle a suit in which the plaintiff claimed an interest in the lands, and he had a real and substantial interest in them which, under certain circumstances, was to become forfeited to the defendant. Forfeitures are not favoured by the Court, and if, by any reasonable contruction of the agreement a forfeiture can be avoided, the Court is bound to adopt such construction. It was admitted that if the plaintiff had given the purchaser's name to the defendant's solicitor that would have been a sufficient "producing" of the purchaser, but the plaintiff was not even asked for his name. It may fairly be inferred that the plaintiff had the right to employ agents to sell the land, who would thereby become the agents both of the plaintiff and defendant, and, therefore, the agent through whom the offer was made was the defendant's agent as well, and the purchaser was known to him, which would satisfy the requirements of the agreement. If the name had been asked for, no doubt the plaintiff could have ascertained and communicated it to the defendant or his solicitor in plenty of time, but the omission to give the name was treated as entirely unimportant, and it would be unjust to now permit the defendant to raise the objection, and by so doing deprive the plaintiff of an interest in lands valued at over $6,000.

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

Richards, J.] [June 23.

IVESON *v.* CITY OF WINNIPEG.

Municipality—Negligence—Notice of action—Liability for non-repair of highway.

The plaintiff's claim was for damages for injuries received in consequence of a fall caused by stepping on a decayed plank in a sidewalk on one of the streets of the city. The plank broke under plaintiff's weight. Its weakness was not visible either to the plaintiff or to the defendants' inspector who used to walk over it about three times in every two weeks. The sidewalk in question had been built about twenty-two years before, and was old and in constant need of repairs. It was proved that very frequently the stringers and the under side of the planks became rotten, while the upper side appeared still sound enough to walk on.

Held, that the method of inspection of the sidewalk was not sufficient to protect the city from liability for negligence to a person injured as the plaintiff was. The practice was to look for breaks and to replace planks found broken, but little or nothing was done to obviate the danger of breaks occurring, which danger should, in the case of such a sidewalk, have been anticipated.

The defendants also objected to the sufficiency of the notice of the action given by the plaintiff as required by sub-s. (*b*) of s. 667 of "The Municipal Act," R.S.M. 1902, c. 116, which says that "notice of any such claim or action must be served upon the clerk of the municipality within one month after the happening of the alleged negligence." Plaintiff's notice stated that she claimed from defendants $1,000 damages with respect to the matters therein set out and that she would commence an action against defendants in the Court of King's Bench to recover that sum for injuries sustained by her through the omission and default of defendants to keep in repair the sidewalk in question. It was given within a month from the date of the injury, but did not state such date or the nature of the injury or how it had occurred.

Held, (1) following *Curle* v. *Brandon*, 15 M. R. 122, that the notice was sufficient. The statute should receive a liberal construction, and requirements, not specifically stated in it, and not necessarily implied, should not be read into it.

McInnes v. *Egremont*, 5 O.L.R. 715; *Keen* v. *Millwall Dock Co.*, L.R. 8 Q.B.D. 482, and *Christie* v. *St. John*, 21 S.C.R. 7, distinguished on the ground that the statutes under which they were decided differed from the above statute.

(2) Plaintiff's injuries having resulted much more seriously after the notice was given than she anticipated, she was not precluded by the terms of the notice from claiming and recovering in the action a larger amount than that mentioned in the notice.

Verdict in plaintiff's favour for $3,000 damages.

Robson and *Coyne*, for plaintiff. *I. Campbell*, K.C., and *Hunt*, for defendants.

Full Court.] BENNETT *v.* GILMOUR. [June 25.

Practice—Amendment—Transfer of land under Real Property Act does not work an estoppel—Parties to action.

Appeal from order of Perdue, J., refusing to allow certain amendments to the statement of claim asked for by the plaintiffs.

By that statement the plaintiffs claimed the land in question under a transfer from one James Gardiner, not a party to the action, who was the registered owner by a certificate of title issued under the Real Property Act, and alleged that, after the delivery of the transfer to them and before its registration, the defendant Gilmour registered a caveat against the land, claiming that the said Gardiner was a trustee for him for an undivided one-third interest therein, that after the filing of such caveat the defendant Gilmour sold his said interest to Gardiner, and that the plaintiffs, as transferees from Gardiner, were entitled to the fee simple in said land free from any claim of Gilmour, and they asked that this said caveat and claim of Gilmour might be declared to be a cloud on their title.

The plaintiffs sought to amend by setting up that, pursuant to the sale to Gardiner by Gilmour of his one-third interest, Gardiner paid money and gave securities to Gilmour for the purchase price and that Gilmour had realized money on such securities, and had parted or otherwise dealt with them, and by asking, as alternative relief, that they might be declared entitled to stand in the position of Gardiner towards Gilmour and that an account might be taken as between Gardiner and Gilmour,

and that plaintiffs might be declared entitled to specific performance by Gilmour of his said agreement with Gardiner.

Held, that leave to make such amendments had been properly refused on the following grounds:

(1) A transfer of land, in the form provided in the Real Property Act, made by the registered owner, and without any special comments or recitals, does not operate as an estoppel and does not rest in the transferee an equitable interest subsequently acquired by the transferor, there being no fraud or misrepresentation by the latter. No covenant is expressed in the transfer, and the law does not imply any. The only recital in the transfer is that the transferor is the registered owner, which Gardiner admittedly was in this case.

In a transfer under the Real Property Act, all that the transferor purports to convey is "all his estate and interest in the said piece of land" without specifying what that estate and interest consists of. The facts stated do not, therefore, shew that the plaintiffs are entitled to Gardiner's subsequently acquired interest, and the proposed amendments would be useless.

Noel v. *Bewley*, 3 Sim. 103, and *Re Hoffe*, 82 L.T.N.S. 556, distinguished.

(2) Gardiner was not a party to the action, nor was it proposed by the amendments to make him a party.

Appeal dismissed with costs.

Potts and *Minty*, for plaintiffs. *Howell*, K.C., and *Hoskin*, for defendants.

Province of British Columbia.

SUPREME COURT.

Duff, J.] [June 6.

McGREGOR *v.* THE CANADIAN CONSOLIDATED MINES, LTD.

Statute, construction of—Penal statute—Inspection of Metalliferous Mines Act Amendment Act, 1901, s. 12 Rule 21a—"Machinery hereinafter mentioned," meaning of.

On a case stated by the police magistrate of Rossland, the following questions were submitted:—

(*a*) Whether employment for wages to perform duties which are in violation of the provisions of Rule 21*a* of s. 25 of the Inspection of Metalliferous Mines Act, 1901, constitutes an inducing or persuading within the meaning of Rule 21*b* of said amended Act?

(*b*) Whether the words "preceding section" in the third line of said Rule 21*b* apply to the matters referred to in Rule 21*a*?

(*c*) Whether the provisions of said Rule 21*a* apply at all unless both a direct-acting, geared, or indirect-acting hoisting engine, exceeding fifty horse power and a stationary engine or electric motor (exceeding fifty horse power) are operated in the same mine?

Held, answering the first two questions in the affirmative, that in construing a penal statute, the rule to be followed is that by which that sense of the words is to be adopted which best harmonizes with the context and promotes in the fullest manner the policy and object of the Legislature.

The paramount object, in construing penal as well as other statutes, is to ascertain the legislative intent; and the rule of strict construction is not violated by permitting the words to have their full meaning, or the more extensive of two meanings, when best effectuating the intention.

Semble, the phrase "machinery hereinafter mentioned" in Rule 21*a* of s. 25 of the Inspection of Metalliferous Mines Act, as enacted by c. 37 of 1901, means "any of the machinery hereinafter mentioned."

R. M. Macdonald, for plaintiff. *MacNeill*, K.C., for defendants.

Flotsam and Jetsam.

NOT COMMITTING HIMSELF.—In a Scottish Court recently an important witness failed to put in an appearance, and the judge indignantly demanded to know why he was not present. "It's his duty to be here. Where is he?" demanded his honour. The officer, with true Scotch canniness, replied: "Weel, I'll no say for that—but he's dead."