1946
*Nov. 12, 13
*Dec. 20

CANADIAN NATIONAL RAILWAYS COMPANY (DEFENDANT) ..... APPELLANT;

AND

ANNIE L. MACEACHERN AND OTHERS (PLAINTIFFS) ..... RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA IN BANCO

Railway—Negligence—Motor vehicle—Collision at double track level crossing—One train just passed on one track—Second train travelling in opposite direction—Engine bell ringing, and wig-wag light and bell operating—Failure by engineer to sound whistle—Municipal by-law prohibiting train whistle at crossings unless necessary to prevent accident—Railway Act, R.S.C. 1927, c. 170, s. 308.

The driver of a motor vehicle, following another motor vehicle across the tracks at a double track level railway crossing, after a train had just passed on one of the tracks, was struck by an oncoming train travelling on the far track in the opposite direction. There was an automatic flagman or wig-wag which was in operation at all relevant times, with its bell ringing and its light burning. The whistle of the engine was not sounded but its bell was being rung continuously.—A municipal by-law, approved by the Board of Transport Commissioners under the provisions of section 308 of the *Railway Act*, prohibited the sounding of train whistles within the city limits unless there was reasonable cause for belief that it was necessary in order to prevent an accident.—The driver of the motor vehicle and two of the passengers sued the railway company for damages. The finding of the jury was that, "in view of the conditions prevailing at the crossing," the engineer was negligent in failing to sound the engine whistle, presumably on the ground that the first train might have caused noise sufficient to drown out the signal bell, that it might have obscured the wig-wag and that there was likelihood that motor vehicles would be waiting to cross. The trial judge maintained the action. The appellate court affirmed that judgment as to the two passengers now respondents, but held that the driver of the motor vehicle could not recover.

Held, Hudson J. dissenting, that the appeal should be allowed and the respondent's action dismissed. There was no evidence upon which the jury could base their finding that the engineer had reasonable cause for belief, at the eighty rods mark before reaching the level crossing (s. 308 *Railway Act*), that it was necessary for him to sound the engine whistle in order to avoid an accident. The engineer, and the trial judge so found, could not reasonably have foreseen the accident, the train was proceeding in the normal cause of its operation, the engine bell was ringing, the wig-wag was operating and its bell was ringing. Under these circumstances, a jury properly instructed could not have found the appellant railway guilty of any negligence.

*PRESENT:—Kerwin, Hudson, Taschereau, Kellock and Estey JJ.

1946

CANADIAN NATIONAL RAILWAYS COMPANY v. MACEACHERN

Per Kerwin and Estey JJ.:—The municipal by-law would fail of its evident purpose, if it were to be held that when two trains are approaching each other at or near a level crossing the engineer of each must always sound the whistle eighty rods from the crossing. Circumstances, however, might arise where it would be incumbent at common law upon the engineer to sound the whistle, but no such case has been made out in the present instance.

Per Taschereau and Kellock JJ.:—The obligation to sound the whistle imposed by section 308 of the *Railway Act,* by itself, is an absolute obligation independent of the particular circumstances which may in fact exist. The municipal by-law substitutes for that an obligation not to sound the whistle at all unless from the particular circumstances observable at the time when the statutory warning should otherwise be given a prudent man would consider that in order to prevent an accident the prohibition should be disregarded and the warning given. Neither the statute nor the by-law have anything to do with any duty at common law which may rest upon the appellant at all points upon its railway.

Judgment of the Supreme Court of Nova Scotia *in banco* (19 M.P.R. 65) reversed.

APPEAL from the judgment of the Supreme Court of Nova Scotia *in banco* (1), affirming in part the judgment of the trial judge, Doull J. after trial with jury, which had maintained an action for damages for injuries sustained by the driver of a motor vehicle and two of the passengers in a collision at a railway level crossing.

D. L. McCarthy K.C. and *W. H. Jost* for the appellant.

R. S. MacLelland K.C. for the respondent.

The judgment of Kerwin and Estey JJ. was delivered by

KERWIN J.:—This is an appeal by Canadian National Railways Company from a judgment of the Supreme Court of Nova Scotia *in banco,* affirming the judgment entered at the trial upon the findings of the jury. The respondents, Annie I. MacEachern and Catherine Christine MacEachern, together with four other people, were passengers in an automobile owned and driven by Archibald A. MacAulay who, at about 8.30 p.m. on September 18, 1943, had been proceeding westerly on Townsend street, in the city of Sydney, in the province of Nova Scotia. Two pairs of tracks of the appellant company cross Townsend street

(1) (1946) 19 M.P.R. 65;
59 Can. Ry. Cas. 180.

1946

CANADIAN NATIONAL RAILWAYS COMPANY v. MACEACHERN

Kerwin J.

in what is generally a north and south direction and the distance between the inner rails of each pair is 9·5 feet. At the southwest corner of the crossing is an automatic flagman or wig-wag which was in operation at all relevant times, with the bell ringing and light burning. As MacAulay's automobile approached the crossing, a train of the Sydney and Louisburg Railway, consisting of twenty-three coal cars, was moving in a northerly direction over the crossing on the east tracks and MacAulay brought his car to a stop thirty or forty feet from the tracks and immediately behind another automobile. Upon the last car of the Sydney and Louisburg train clearing the crossing, the driver of this other automobile and MacAulay put their cars in motion and proceeded over the crossing. MacAulay failed to notice a train of the appellant travelling south on the west track, consisting of an engine and caboose. The whistle on that engine was not sounded but its bell was being rung continuously. This train struck MacAulay's car, the two respondents were severely injured, and the automobile damaged, while MacAulay and the four other passengers were not injured. An action was brought by MacAulay and the two respondents against the appellant at the trial of which the main question was as to the speed of the appellant's train.

Before turning to the questions submitted to the jury and their answers thereto, a reference should be made to section 308 of the *Railway Act*, R.S.C. 1927, chapter 170:—

308. When any train is approaching a highway crossing at rail level the engine whistle shall be sounded at least eighty rods before reaching such crossing, and the bell shall be rung continuously from the time of the sounding of the whistle until the engine has crossed such highway.

2. Where a municipal by-law of a city or town prohibits such sounding of the whistle or such ringing of the bell in respect of any such crossing or crossings within the limits of such city or town, such by-law shall, if approved by an order of the Board, to the extent of such prohibition relieve the company and its employees from the duty imposed by this section.

Pursuant to subsection 2, by-law 35 was enacted by the Council of the city of Sydney, reading as follows:—

1. It is prohibited to sound any engine whistle in respect to the following highway crossings within the limits of the city of Sydney, namely —Kings Road, Bentinck St., George St., Brookland St., Townsend St., Prince St., and the Canadian National Railways and Prince St., and the Sydney & Louisburg Railway.

2. The said prohibition shall not apply when there is reasonable cause for belief that it is necessary to sound an engine whistle in order to prevent an accident.

3. This by-law shall come into effect if and when approved by an order of the Board of Transport Commissioners for Canada.

This by-law was duly approved by the Board of Transport Commissioners for Canada, which is the Board referred to in subsection 2 of section 308 of the Act and was in force at the time of the accident.

It will be observed that subsection 1 of section 308 of the Act provides for the sounding of the engine whistle at least 80 rods before reaching a highway crossing at rail level, and that the authority under subsection 2 is for a by-law to prohibit *such* sounding, and it is therefore to that sounding that the prohibition in clause 1 of the by-law applies,—although it does not apply

when there is reasonable cause for belief that it is necessary to sound an engine whistle in order to prevent an accident.

A complaint was made that this by-law was not referred to by the appellant in its pleading but it was put in as an exhibit and the trial proceeded without objection. On the other hand, I assume that the pleadings of the plaintiffs in the action are sufficient to raise the issue as to whether there was reasonable cause for belief that it was necessary to sound the engine whistle.

The questions submitted to the jury and their answers are as follows:—

1. Was there any negligence on the part of the defendant, or its servants, which caused or contributed to the property damage sustained by the plaintiff, Archibald A. MacAulay; or the bodily injuries suffered by Annie I. MacEachren and Catherine Christine MacEachren?

Answer yes or no.

"Yes."

2. If so, in what did such negligence consist? Answer as fully as you can.

"Part 2 city of Sydney ordinance relating to the sounding of engine whistle at a crossing states as follows, quote—the said prohibition shall not apply if there is reasonable cause for belief that it is necessary to sound an engine whistle in order to prevent an accident. In view of the conditions prevailing at the crossing on the night of the accident the jury are agreed that the whistle should have been sounded. This was not done."

3. Was there any negligence on the part of the plaintiff, Archibald A. MacAulay, which caused or contributed to the accident? Answer yes or no.

"No."

1946

CANADIAN NATIONAL RAILWAYS COMPANY v. MACEACHERN

Kerwin J.

Question 4, asking in what the negligence of MacAulay consisted, was, of course, not answered, and question 5, dealing with the damages need not be considered.

The trial judge, after quoting the answer to question 2, proceeded as follows:—

> This creates a rather peculiar situation as there had been no argument before the jury in regard to the sounding of an engine whistle and there had been no instruction as to negligence of that kind. The pleadings, however, set out the failure to sound a whistle as one of the items of negligence and clearly if there is any evidence to support the finding it may very well be a proper ground. As there will no doubt be an appeal, I am dealing with the subject in only a general way. It is quite clear that the engineer of the engine which collided with the car in which the plaintiffs were driving could not reasonably have foreseen the accident which happened but it is not an unreasonable argument that the fact that there were two trains going in opposite directions on separate tracks and that there were clearly cars waiting to pass on both sides of the railway, might very well have raised reasonable apprehension of an accident and might have made it necessary in the exercise of prudence to sound a whistle. At any rate I am signing the order for judgment and no doubt the matter can be dealt with more fully by a higher court

The appeal by the present appellant against the judgment in favour of MacAulay was allowed as the court *in banco* decided that the finding that MacAulay had not been negligent was perverse and not supported by the evidence. As to the present respondents, the court *in banco* considered it clear that the jury believed that there was ground for the belief that the sounding of the whistle was necessary to prevent an accident and that they thought the sounding of the whistle would have been an effective warning. The reasons for judgment of the Chief Justice of Nova Scotia on behalf of the court continues:—

> The sharp sound of a whistle would no doubt have been heard amid the din caused by the cars. Defendant's engineer must have known that he was approaching a busy crossing; that vehicles were standing at the time on the western side of the track waiting for the opportunity to pass; and he might reasonably expect vehicles to be waiting on the eastern side of the track as well. I think there is evidence to support the answer of the jury finding the defendant guilty of negligence, and I am not prepared to set aside their verdict in their answers to questions numbers 1 and 2.

I am unable to agree with this conclusion. The appellant's train was proceeding in the normal course of its operation and the wig-wag was operating, and if it were to be held that when two trains are approaching each other at or near the crossing the engineer of each must always

sound the whistle 80 rods from the crossing, the by-law would fail of its evident purpose. The trial judge was satisfied that the engineer of the appellant's train could not reasonably have foreseen this particular accident and, despite the fact that the engineer might have anticipated that traffic was waiting to cross from both directions, I can find no evidence upon which the jury could base their finding that he had reasonable cause for belief that it was necessary to sound the whistle at least 80 rods before reaching the crossing in order to prevent any accident. On the proper construction of the by-law, that is what the finding amounts to. This is not to say that circumstances might not arise where it would be incumbent at common law upon the engineer to sound the whistle but no such case is made out.

As was also pointed out by the trial judge, the jury's answer to question 2 is all the more remarkable as no such point as is there mentioned had been argued by counsel and no instruction upon the point had been given them. The dispute at the trial was as to the speed of the appellant's train but in the absence of a finding by the jury that the speed of the appellant's train was illegal or excessive, that question must be disregarded.

The appeal should be allowed and the respondents' action dismissed with costs throughout. There was an appeal by MacAulay from the judgment of the court *in banco* dismissing his claim for damages to his automobile but at the argument this appeal was abandoned and it should, therefore, be dismissed without costs.

HUDSON J. (dissenting): This action was brought for damages in respect of injuries sustained as a consequence of the motor car in which the plaintiffs were driving being struck by an engine of the defendant company.

The accident took place in Sydney, N.S. where a busy city street crosses two parallel tracks of the defendant's railway. The plaintiffs alleged that the defendant's engine and following cars were travelling at an execessive rate of speed, and also that there was no sufficient or effective bell and whistle warning given to the plaintiffs by the "said outgoing freight train".

1946

CANADIAN NATIONAL RAILWAYS COMPANY v. MACEACHERN

Hudson J.

The jury found first, that the damage and injury sustained by the plaintiffs was due to the negligence of the defendant or its servants, and secondly, that such negligence consisted in:

City of Sydney ordinance relating to the sounding of engine whistle at a crossing states as follows, quote—the said prohibition shall not apply if there is reasonable cause for belief that it is necessary to sound an engine whistle in order to prevent an accident. In view of the conditions prevailing at the crossing on the night of the accident the jury are agreed that the whistle should have been sounded. This was not done.

There was no finding as to speed.

Following these answers, on motion for judgment the learned trial judge after quoting the second answer says:

This creates a rather peculiar situation as there had been no argument before the jury in regard to the sounding of an engine whistle and there had been no instruction as to negligence of that kind. The pleadings, however, set out the failure to sound a whistle as one of the items of negligence and clearly if there is any evidence to support the finding it may very well be a proper ground. As there will no doubt be an appeal, I am dealing with the subject in only a general way. It is quite clear that the engineer of the engine which collided with the car in which the plaintiffs were driving could not reasonably have foreseen the accident which happened but it is not an unreasonable argument that the fact that there were two trains going in opposite directions on separate tracks and that there were clearly cars waiting to pass on both sides of the railway, might very well have raised reasonable apprehension of an accident and might have made it necessary in the exercise of prudence to sound a whistle.

Judgment was entered for the plaintiffs accordingly.

On appeal, Chief Justice Chisholm, in giving the unanimous opinion of the court, said:

I shall first deal with the contention that the defendant was negligent. The by-law of the city of Sydney was approved by the proper authority, namely the Board of Transport Commissioners, and must be taken as an effective direction as to the use of a train whistle at crossings within the city of Sydney. The question then narrows down to this—did the defendant observe its requirements? If the city ordinance absolutely forbade the use of the whistle at the crossing, then the defendant was not guilty of negligence in its failure to make use of its whistle. In express words, however, the prohibition is not to apply if there is reasonable cause for belief that the sounding of the whistle is necessary to prevent an accident. Then arises the question whether there was reasonable cause for such belief. It is clear that the jury believed that there was ground for such belief, and that they thought the sounding of the whistle would have been an effective warning. The sharp sound of a whistle would no doubt have been heard amid the din caused by the cars. Defendant's engineer must have known that he was approaching a busy crossing; that vehicles were standing at the time on the western side of the track waiting for the opportunity to pass; and he might reasonably expect

vehicles to be waiting on the eastern side of the track as well. I think there is evidence to support the answer of the jury finding the defendant guilty of negligence, and I am not prepared to set aside their verdict in their answers to questions number 1 and 2.

The learned judges of appeal, however, were of the opinion that the male plaintiff, MacAulay, was not entitled to succeed and allowed the appeal in so far as his claim was concerned.

After perusal of the evidence, I am not prepared to say that the two courts below were clearly wrong in their conclusion. Two parallel tracks crossing a busy street thoroughfare obviously create great dangers for those using the highway. Provision was made by order of the Board of Transport Commissioners which, no doubt, was deemed adequate protection in the case of normal operations.

The jury's answers indicated that, in their opinion, at the time of the accident, the conditions prevailing demanded something more. This was a fact which they had a right to decide. See Salmond on Torts, 10th Ed. at p. 438:

> What amounts to reasonable care depends entirely on the circumstances of the particular case as known to the defendant whose conduct is the subject of inquiry. Whether in those circumstances, as so known to him, he used due care—whether he acted as a reasonably prudent man—is a mere question of fact as to which no legal rules can be laid down.

(See *Commissioners of Taxation* v. *English, Scottish and Australian Bank Limited* (1).

As Chief Justice Chisholm pointed out:

> The sharp sound of a whistle would no doubt have been heard amid the din caused by the cars.

This might very easily have saved these people from this very unfortunate accident.

I think there was concurrence in the courts below in respect of the essential facts.

I would dismiss the appeal with costs and also dismiss the cross-appeal of MacAulay without costs.

The judgment of Taschereau and Kellock JJ. was delivered by

KELLOCK J.:—This is an appeal from the judgment of the Supreme Court of Nova Scotia, *in banco,* dated the 19th January, 1946, affirming the judgment at trial in favour

(1) [1920] A.C. 683, at 689.

1946

CANADIAN NATIONAL RAILWAYS COMPANY v. MACEACHERN

Kellock J.

of the respondents other than the respondent MacAulay, upon the verdict of a jury and allowing the appeal with respect to the last named respondent as to whom the action was dismissed.

The action was brought to recover damages arising out of a collision which took place about 8.30 p.m., on September 18, 1943, between an automobile, owned and operated by the respondent MacAulay, in which the other respondents and others were passengers, and a freight train of the appellant on Townsend street where it crosses at grade level a double line of tracks of the Canadian Government Railways in the city of Sydney. Townsend street, which also carries a street railway, runs east and west. As the respondent's car, travelling west, approached the easterly tracks, another train, consisting of some twenty-three empty coal cars, was moving northerly over the crossing. The automobile accordingly stopped, it is said, some thirty feet from the easterly tracks immediately behind another automobile. There was other traffic similarly stopped on the west side of the crossing. MacAulay says that when the last car of the coal train had left the crossing by some fifty feet, having looked up and down the track without seeing anything, the automobile in front of him moved ahead and he started up and proceeded to cross. He had just succeeded in placing his car in the centre of the westerly tracks when he was struck by the freight train which was proceeding southerly. Although the train crew endeavoured to stop the train as soon as they observed him their efforts were without avail. It is for the damages resulting from this occurrence that the action was brought.

The crossing was protected by a wig-wag, having a light and an automatic bell, placed on the westerly side of the two sets of tracks on the southerly side of Townsend street. Although the wig-wag was operating neither MacAulay nor any of the other occupants of the automobile saw its light nor heard its bell, nor did any of them hear the bell of the train which struck their car, although it had been in continuous operation for eighty rods as required by statute. All said they did not either hear or see this train until it was upon them, the reasons given being the noise made by the coal train in passing over the crossing and that the approaching train was obscured by the coal cars.

It was also said that the headlight on the approaching engine was not noticed as the crossing was brightly lit up by the lights of the automobiles and a light on a post.

The evidence of the appellant's train crew established that the bell on the freight engine had been sounded continuously as required by the statute and that this was the only signal given by that train. No evidence was given by any of the respondents' witnesses as to any lack of warning by either bell or whistle of the approaching engine beyond the statements made by all the occupants of the MacAulay car that they heard nothing. A by-law of the city of Sydney, hereinafter referred to, was put in by counsel for the appellant no doubt in view of the above evidence and allegations in the statement of claim that effective bell and whistle warnings had not been given. No reference was made in the address of either counsel to failure to blow the whistle nor did the learned trial judge refer to the subject in his charge.

The verdict of the jury was in the following terms:

1. Was there any negligence on the part of the defendant, or its servants, which caused or contributed to the property damage sustained by the plaintiff, Archibald A. MacAulay; or the bodily injuries suffered by Annie L. MacEachren and Catherine Christine MacEachren? Answer yes or no.

"Yes".

2. If so, in what did such negligence consist? Answer as fully as you can.

"Part 2 city of Sydney ordinance relating to the sounding of engine whistle at a crossing states as follows, quote—the said prohibition shall not apply if there is reasonable cause for belief that it is necessary to sound an engine whistle in order to prevent an accident. In view of the conditions prevailing at the crossing on the night of the accident the jury are agreed that the whistle should have been sounded. This was not done."

3. Was there any negligence on the part of the plaintiff, Archibald A. MacAulay, which caused or contributed to the accident? Answer yes or no.

"No".

4. If you answer the 3rd question "yes" then in what did such negligence consist? Answer as fully as you can.

Effect was given to this verdict by the learned trial judge who said in the course of his reasons:

It is quite clear that the engineer of the engine which collided with the car in which the plaintiffs were driving could not reasonably have foreseen the accident which happened but it is not an unreasonable argument that the fact that there were two trains going in opposite

1946

CANADIAN NATIONAL RAILWAYS COMPANY v. MACEACHERN

Kellock J.

directions on separate tracks and that there were clearly cars waiting to pass on both sides of the railway, might very well have raised reasonable apprehension of an accident and might have made it necessary in the exercise of prudence to sound a whistle.

In giving judgment on the appeal on behalf of the full Court the Chief Justice said:

> The by-law of the city of Sydney was approved by the proper authority, namely, the Board of Transport Commissioners, and must be taken as an effective direction as to the use of a train whistle at crossings within the city of Sydney. The question then narrows down to this—did the defendant observe its requirements? If the city ordinance absolutely forbade the use of the whistle at the crossing, then the defendant was not guilty of negligence in its failure to make use of its whistle. In express words, however, the prohibition is not to apply if there is reasonable cause for belief that the sounding of the whistle is necessary to prevent an accident. Then arises the question whether there was reasonable cause for such belief. It is clear that the jury believed that there was ground for such belief, and that they thought the sounding of the whistle would have been an effective warning. The sharp sound of a whistle would no doubt have been heard amid the din caused by the cars. Defendant's engineer must have known that he was approaching a busy crossing; that vehicles were standing at the time on the western side of the track waiting for the opportunity to pass; and he might reasonably expect vehicles to be waiting on the eastern side of the track as well. I think that is evidence to support the answer of the jury finding the defendant guilty of negligence and I am not prepared to set aside their verdict in their answers to questions number 1 and 2.

The Court held, however, that the finding of the jury with respect to the alleged negligence of the respondent MacAulay was perverse and his action was dismissed. This respondent cross-appealed with respect to the dismissal but the cross-appeal was abandoned before us.

The by-law mentioned above was approved by an order of the Board of Transport Commissioners, dated 1st November, 1941, pursuant to the provisions of section 308 of the *Railway Act* and reads as follows:

> 1. It is prohibited to sound any engine whistle in respect to the following highway crossing within the limits of the city of Sydney, namely: Kings Road, Bentick Street, George Street, Brookland Street, Townsend Street, Prince Street and the Canadian National Railways and Prince Street and the Sydney & Louisburg Railway.
>
> 2. The said prohibition shall not apply when there is reasonable cause for belief that it is necessary to sound an engine whistle in order to prevent an accident.
>
> 3. This by-law shall come into effect if and when approved by an order of the Board of Transport Commissioners for Canada.

By section 308 of the statute, R.S.C. 1927, ch. 170, provision is made for the sounding of the whistle when a

1946

CANADIAN NATIONAL RAILWAYS COMPANY v. MACEACHERN

Kellock J.

train is approaching a highway crossing at rail level, the whistle to be sounded "at least eighty rods before reaching such crossing". Subsection 2 provides that:

> Where a municipal by-law * * * prohibits *such* sounding of the whistle * * * in respect of any such crossing or crossings * * * such by-law shall, if approved by an order of the board, to the extent of such prohibition relieve the company and its employees *from the duty imposed by this section.*

The duty imposed by the section is to sound the whistle "at least eighty rods before reaching such crossing" and it is only "*such* sounding" which may be affected by any by-law passed under the authority of the section. The point therefore at which the engineer had to determine whether or not the statutory signal should be given was at the eighty rod mark. The question which arises is as to whether or not on the evening in question and under the circumstances then existing there was reasonable cause presented to the engineer of the freight engine at that point which should have actuated him to sound his whistle in the belief that it was "necessary" in order to prevent an accident. In my opinion there is no evidence upon which an affirmative finding could be made upon that question.

There is no evidence even to show in the first place that when the freight engine was at the whistling post one-quarter mile from the crossing, it could be there observed that the two trains, one proceeding at the rate of ten miles per hour, and the other at the rate of approximately three miles per hour, were in such positions relative to each other that it should have been realized that the last car of the coal train would pass over the crossing before the freight reached it and thus open up the crossing so as to permit an incautious person to attempt to cross; or in the second place, that the coal train would not pass over the crossing sufficiently prior to the other train reaching it that the approach of the latter would be easily observed from both sides of the crossing. I see nothing in the evidence which, at the whistling post, should have created in the minds of any of the train crew a reasonable belief that it was "necessary" to sound the whistle in order to prevent an accident. The engine was moving slowly, its bell was ringing and there were no conditions in existence which would obscure its approach from anyone who cared to

1946

CANADIAN NATIONAL RAILWAYS COMPANY v. MACEACHERN

Kellock J.

look before stepping into its path. All of this was known to the train crew, who also knew that the crossing was protected by the wig-wag. In my opinion something more had to be observable than was in fact observable at the whistling post in order to raise the duty with which the by-law deals.

The obligation to sound the whistle imposed by section 308, by itself, is an absolute obligation independent of the particular circumstances which may in fact exist. The by-law substitutes for that an obligation not to sound the whistle at all unless from the particular circumstances observable at the time when the statutory warning should otherwise be given a prudent man would consider that in order to prevent an accident the prohibition should be disregarded and the warning given. Neither the statute nor the by-law have anything to do with any duty at common law which may rest upon the appellant at all points upon its railway. Counsel for the respondents opened his argument with the statement that

> Our whole case is based upon the omission of the statutory duty to sound the whistle.

For the reasons given, the evidence, in my opinion does not enable any such finding to be made.

Notwithstanding the argument with which respondents' counsel opened, he found himself in reality arguing that there had been a breach of duty at common law resting upon the appellant in failing to whistle when, as the freight engine was a short distance from the crossing it became, or should have become, apparent that the coal train would leave the crossing clear before the freight engine entered upon it and that the engine crew should have anticipated that some person might attempt to cross in disregard of the wig-wag, having failed to see or hear the freight by reason of the coal train and its attendant noise.

The first difficulty with such an argument in my opinion is that if the jury intended to find in favour of the respondents with respect to such a breach of duty they have not so framed their verdict. They have, on the contrary, founded themselves on the by-law which is limited in its

application to quite a different place. If the jury intended to decide that a breach of a common law duty occurred in the vicinity of the crossing itself, as the respondent now disregard the reference in the verdict to the by-law. For myself, I think that brings us into the realm of conjecture as to whether or not the jury would have so found if they had not had present to their minds the terms of the by-law at all. Even if such a construction could properly be put upon the verdict the evidence in my opinion does not support it.

What was the situation as it presented itself to the train crew of the freight train as it neared the crossing? What is the evidence? The train was travelling not faster than ten miles an hour. The coal train was moving over the crossing at about three miles per hour. The crossing was well lighted. The complaint in fact is that there was too much light. The engine-bell was ringing. The wig-wag light was operating and its bell was ringing. The approaching engine was itself clearly visible to anyone approaching the tracks before he entered upon those tracks unless such a person rushed from behind the coal train immediately it passed without waiting for it to clear the crossing by any appreciable distance so as to permit a view. The respondent driver said that the last car of the coal train had cleared the crossing by some fifty feet before he started to move his car and it must have proceeded some distance beyond that while he traversed the forty odd feet intervening between the point where he had stopped and the westerly set of tracks. There is no question that the freight engine was in plain view for anyone who cared to look before entering its path. It is quite true that the wig-wag continues to operate for some time after a receding train has left the crossing as well as for an approaching train, but in my view that is insufficient to cast upon the appellant in the circumstances here present a duty to anticipate that some person will be reckless enough to cross in reliance upon a belief that the wig-wag was connected only with a train which had passed and not with one which was approaching. The sufficiency of the protecting installations at the crossing was a matter for the

1946

CANADIAN NATIONAL RAILWAYS COMPANY v. MACEACHERN

Kellock J.

Board of Transport Commissioners: *Grand Trunk Railway Co. of Canada* v. *MacKay* (1). Something more than the possibility that the crossing signal would be disregarded by persons at the crossing was required to impose upon the crew of the approaching train the obligation to blow the whistle. I think, therefore, that there was nothing to require the appellant's servants to do other than they did.

In my opinion the duty resting upon the appellant in the circumstances of the case at bar cannot be put higher against the railway than as expressed by Riddell, J. in *City of London* v. *Grand Trunk Railway Company,* (2). there must be knowledge that the danger is imminent; not simply knowledge that the danger is possible.

The circumstances present in *Grand Trunk Railway Company of Canada* v. *Hainer,* (3), were very different. There was evidence in that case of wind, flurries of snow and smoke and dust from the passing freight which enabled the jury to find that the approaching express train, admittedly moving at an excessive speed, would have its headlight obscured during the approximately two seconds between the time when the one train passed and the deceased entered upon the tracks of the approaching freight. While in the case at bar there was evidence that the noise of the coal train may very well have drowned out the approach of the freight, the night was clear and there is no suggestion of smoke or dust from the coal train having any tendency to obscure the freight.

In my opinion there was no evidence upon which the jury, properly instructed, could have found the appellant guilty of any negligence in the circumstances. In truth the jury were not instructed at all with regard to the alleged negligence upon which the respondents now rely as no such question was even suggested at the trial.

While it is no doubt always possible that some person will, like these respondents, rush across in the face of a waving wig-wag on the assumption that there is no other train than the one which has passed, I think it would be to impose too heavy a burden upon the operators of a railway

(1) (1903) 34 Can. S.C.R. 81.
(2) (1914) 32 O.L.R. 642, at 664.
(3) (1905) 36 Can. S.C.R. 180.

1946

CANADIAN NATIONAL RAILWAYS COMPANY v. MACEACHERN

Kellock J.

to say that it is negligence to have abstained from blowing the whistle (in the absence of something more than existed in the case at bar.)

I would allow the appeal and dismiss the action both with costs if demanded. I would dismiss the cross-appeal without costs.

Appeal allowed with costs.

Solicitor for the appellant: *John MacNeil.*

Solicitor for the respondents: *R. S. MacLelland.*