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KONRAD HESSLER (PLAINTIFF).....APPELLANT; * May 15, 16
* Nov. 7.

AND

CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANT)..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Railways—Negligence—Railway employee, while walking on track in course of duty, struck by train between whistling post and highway crossing—Bad weather conditions—Failure to sound whistle and bell in accordance with s. 308 of Railway Act (R.S.C. 1927, c. 170)—Whether employee entitled in law to benefit of s. 308—Railway company's rules—Failure to have headlight burning under stormy conditions in day-time—Evidence—Directions to jury—Findings of jury.

Plaintiff, a section foreman for defendant railway company, while walking westerly on the track in the course of his duty of inspection, about 11 o'clock a.m. on a very cold and stormy winter's day, was struck by a special freight train of defendant coming behind him. He sued for damages. The accident occurred about 250 yards east of a highway level crossing, and west of the whistle post for that crossing. S. 308 of the *Railway Act*, R.S.C. 1927, c. 170, and also defendant's rule 31, required the whistle to be sounded at least 80 rods before reaching the crossing and the bell to be rung continuously from the sounding of the whistle until the engine had crossed the highway. These requirements were apparently (and as the jury found) not observed on the occasion of the accident, the train engineer, though frequently during his journey sounding the whistle and bell, not being able under the stormy conditions to locate exactly the whistling posts. The trial judge charged the jury that the failure to comply with s. 308 was "absolute negligence in law," and that the jury was "not free to find anything else with respect to it." Defendant's rule 17 required that a headlight be displayed to the front of every train by night,

* PRESENT:—Duff C.J. and Lamont, Cannon, Crocket and Davis JJ.

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and its rule 9 required that "when weather or other conditions obscure day signals, night signals must be used in addition." The engine's headlight had been burning but was extinguished prior to the accident, the train men regarding it as useless owing to ice and snow on the glass and the storm's severity. The trial judge put the question of the headlight to the jury as a matter for them to deal with on the meaning of the words in defendant's rule book. The jury found that the accident was caused by defendant's negligence in "no sounding of whistle, no bell ringing, no light in headlight of engine." Judgment was entered for plaintiff, which was reversed by the Court of Appeal for Saskatchewan, which dismissed the action ([1934] 2 W.W.R. 24).

Held: There should be a new trial (Cannon and Crocket JJ., dissenting, would restore the judgment at trial).

Per Duff C.J., Lamont and Davis JJ.: The said charge to the jury as to s. 308 was a misdirection.

Per Duff C.J. and Davis J.: S. 308 was designed for the protection of persons on, or about to proceed on, a highway crossing at rail level, and was not intended for the protection of persons walking along the tracks mile after mile without any reference to highway crossings, and plaintiff, upon the facts of this case, was not entitled as a matter of law to the benefit of it (*Chesapeake & Ohio Ry. Co.* v. *Mihas,* 280 U.S. 102, and *O'Donnell* v. *Providence & Worcester Rd. Co.,* 6 R.I. 211, cited. *Grand Trunk Ry. Co.* v. *Anderson,* 28 Can. S.C.R. 541, and *McMullin* v. *Nova Scotia Steel & Coal Co.,* 39 Can. S.C.R., 593, explained and distinguished). The jury's finding of negligence in respect of the failure to sound the whistle and bell was obviously based on the breach of s. 308 and said misdirection of the trial judge, and therefore could not be upheld. Their finding of negligence in respect of the headlight might fairly be attributed to the disobedience of defendant's rules; the evidence was merely guesswork as to whether or not the accident would have been avoided had the headlight been burning; and upon the evidence as it stands their finding of negligence in respect of the headlight could not be maintained. But, on the question of whether or not, quite apart from the statute, there was any negligence on defendant's part that caused the accident, the trial was very unsatisfactory, and there should be a new trial.

Per Lamont J.: Plaintiff, as an employee on the track in performance of his duty, was one for whose benefit defendant's rules were made (reference made to a "General Notice" in defendant's rule book, that "obedience to the rules is essential to the safety of passengers and employees, and to the protection of property"). As between plaintiff and defendant, the rules were as effective as the statute and were evidence of what defendant considered to be the exercise of due care. Plaintiff was injured through failure of defendant's servants to comply with the rules, and in the absence of a finding of justification or excuse for such failure, he had a right of action. Whether or not what defendant did was a reasonable precaution against accident, whether or not under all the circumstances plaintiff would have heard the whistle and bell if sounded, whether or not he would have seen the headlight if burning, were all for the jury to say. But, as it was impossible to tell whether the jury's finding as to whistle and bell was a finding of fact on the evidence or was induced by the trial judge's misdirection, there should be a new trial.

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Per Cannon J. (dissenting): S. 308 would seem to protect railway employees as well as other persons (s. 419 (2) referred to in this connection). Besides, the action was based, not only on statutory duty, but also on common law negligence, and default in obeying defendant's rules; which rules were sufficient evidence of the care that should be taken. The jury's findings that the rules were not complied with, and that such non-compliance caused the accident, were based on sufficient evidence and should not be disturbed. Also the fact that plaintiff was not told, contrary to custom, before starting that day's inspection, that this extra train was coming, would aggravate defendant's imprudence in running it under such difficult weather conditions.

Per Crocket J. (dissenting): All persons rightfully upon the railway track were entitled to the benefit of s. 308 (*Grand Trunk Ry. Co.* v. *Anderson*, 28 Can. S.C.R. 541, and *McMullin* v. *Nova Scotia Steel & Coal Co.*, 39 Can. S.C.R. 593, cited); and plaintiff was entitled to rely on failure to sound whistle or bell in accordance with s. 308 as negligence, if that negligence was the direct cause of his injury. Plaintiff had a right to, and on the evidence he did, rely on compliance with defendant's rules as to whistle and bell. It was idle to suggest that, had they been sounded, he might not have heard them. The objection that the trial judge misdirected (as aforesaid) as to the effect of s. 308, was met by *Grand Trunk Ry. Co.* v. *Anderson* (*supra*) and his clear directions to the jury that, before defendant could be held liable through negligence by non-observance of the statutory requirements, they must be satisfied that the injury was the direct consequence of such negligence; and defendant was not prejudiced, nor was any substantial wrong or miscarriage occasioned, by the alleged misdirection. Defendant owed plaintiff a duty to exercise reasonable care to avoid injury to him. The plaintiff relied, throughout the case, on common law negligence as well as breach of statutory duty. The jury's finding of negligence in not using the headlight meant that, had it been on, as it should have been, it also would have warned plaintiff in time to enable him to avoid his injury; this was a finding upon a straight question of fact, depending in very large measure upon the credibility of the trainmen's testimony; which credibility the jurors had a right to test by the light of their own experience and knowledge, or as inconsistent with indisputable facts or other testimony. Whether or not engine headlights are such signals as fall within the intendment of defendant's said rule 9, the evidence shewed that, when weather conditions were such as to obscure day signals, headlights were in fact used as additional warning signals, and the question was whether in the existing circumstances it was negligence (causing the injury) to turn it off.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Saskatchewan (1) which (reversing the judgment of Embury J. in favour of the plaintiff, on the findings of the jury) dismissed the plaintiff's action. The action was to recover from the defendant railway company damages for injuries received by the plaintiff when, while walking on the defendant's railway track in the

(1) [1934] 2 W.W.R. 24.

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course of his duties as section foreman in the defendant's employ, he was struck by a train of defendant. The material facts and circumstances of the case are sufficiently stated in the judgments now reported, and are indicated in the above headnote. This Court ordered a new trial (Cannon and Crocket JJ. dissenting, who would restore the judgment at trial in plaintiff's favour).

P. M. Anderson K.C. for the appellant.

W. N. Tilley K.C. and *H. A. V. Green* for the respondent.

The judgment of Duff C.J. and Davis J. was delivered by

DAVIS J.—This is an appeal by the plaintiff from the judgment of the Court of Appeal for Saskatchewan which set aside the judgment at the trial, on the verdict of a jury, in favour of the plaintiff for $8,850, in an action against a railway company for damages for the loss of a foot. The plaintiff had been in the employment of the defendant company from September, 1919, first as a section man and since 1920 as a section foreman. At the time of the accident his section was from Weyburn, Sask., easterly a distance of 6·8 miles. On February 10, 1933, at about eleven o'clock in the morning, while walking westerly between the rails of the single track in his section in the course of his duty of inspection, the plaintiff was struck by the engine of a special freight train of the defandant travelling in the same direction which overtook him. As he jumped from the track the engine hit his right foot and it was so badly injured that it had to be amputated. The railway company admits that the plaintiff was at the time lawfully and properly where he was in the course of his employment and that he is excluded from the benefits of the *Workmen's Compensation (Accident Fund) Act,* being chapter 253 of the Revised Statutes of Saskatchewan.

It was a cold, stormy day about forty degrees below zero, with a gusty wind blowing from the north-west to the south-east. It was a blizzard, the plaintiff says, and it was blowing in his face as he travelled westward. He was wearing a leather cap with ear-laps, and, though his face and nose were frozen, he says the ear-laps were hanging down loose. The plaintiff further says that he could not see very far and he knew that he might expect a train along

at any time. The place of the accident was approximately 750 feet east from a level highway crossing, and the whistle post was approximately a quarter of a mile east from the crossing. There was a statutory duty upon the railway (sec. 308 of the Dominion *Railway Act*) to sound the whistle at least eighty rods before reaching a highway crossing at rail level and to ring the bell continuously from the time of the sounding of the whistle until the engine has crossed the highway, and penalties are imposed (sec. 419) for disobedience. There were also rules of the railway company (Nos. 9 and 17) that the headlight on the engine (being a night signal) must be used when weather or other conditions obscure day signals. It may be convenient here to mention that the doctrine of common employment is negatived by statute in the Province of Saskatchewan. R.S.C. (1930) ch. 49, sec. 27 (14).

Counsel for the railway admitted that it was not proved that the whistle was blown or the bell rung at the particular whistle post. The engineer swore that the day was so stormy that he could not tell exactly where the different whistle posts along the line were but that the whistle was blown and the bell rung frequently that morning, though without reference to any particular whistle post. As to the headlight of the engine, the evidence is that it was turned off an hour or two before the accident because the glass was all covered with ice and snow and the storm was raging to such an extent that the train men regarded the headlight as useless. We have, however, the frank admission on behalf of the railway company that the company failed to prove that the whistle was blown or that the bell rang at the whistle post as required by the statute and it was admitted that the headlight on the engine was not burning as required by the company's rules. What the effect in law is of such admissions of fact is the real question with which we are concerned in this appeal.

The plaintiff charged the railway company with several acts of negligence or breach of duty. One of these was " excessive, reckless and dangerous speed (i.e., of the train) under the circumstances." The jury made no mention of this ground of complaint and the plaintiff's counsel before us did not contend that there was in fact any excessive speed but took the very opposite view of the evidence, to

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serve a particular purpose in his argument, that the speed of the train was moderate. Further, the plaintiff alleged as a ground of negligence that "the engineer and fireman failed to keep a sharp lookout and see the plaintiff and stop the train in time." The jury made no mention of any such alleged negligence and the evidence does not support any such allegation. The other grounds of complaint were the failure to sound the whistle and to ring the bell and to have the headlight burning.

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

1. Was there negligence of the defendant company which caused the accident?—A. Yes.

2. If so, in what did such negligence consist?—A. No sounding of whistle, no bell ringing, no light in headlight of engine.

3. Was there negligence of the plaintiff which contributed to the accident?—A. No.

4. If so, in what did such contributory negligence consist?—A. No.

5. Did the plaintiff with a full knowledge and appreciation of the risk arising from the circumstances nevertheless voluntarily elect to assume the same?—A. No.

6. In what amount do you assess the damages, if any?

A. (*a*) General damages	$8,500 00	
(*b*) Special damages	350 00	$8,850 00

The failure to sound the whistle and to ring the bell was put to the jury by the learned trial judge in his charge as a matter of absolute statutory duty. Dealing with sec. 308 of the *Railway Act*, which reads as follows:

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,

the trail judge said,

It is my duty to say that this provision, sec. 308 of the *Railway Act*, is an absolute provision which has to be carried out, no matter what the weather conditions might be.

I conceive it is my duty to charge you that the failure to comply with that provision in this case is absolute negligence in law, and that you are not free to find anything else with respect to it.

While no objection was taken by counsel for the railway company to this part of the charge, the plaintiff has had and taken the full benefit of it. In my view it was a plain misdirection to the jury on a question of law. The statutory provision was designed for the protection of persons on, or about to proceed on, a highway crossing at rail level.

The provision was not intended for the protection of persons walking along the tracks mile after mile without any reference to highway crossings, and the plaintiff upon the facts of this case was not entitled as a matter of law to the benefit of the statutory provision. The same question was considered by the Supreme Court of the United States in 1929 in the case of *Chesapeake & Ohio Railway Co.* v. *Mihas* (1). The Court there quoted with approval a judgment in 1859 of the Supreme Court of Rhode Island, *O'Donnell* v. *The Providence and Worcester Railroad Co.* (2), where it was held that a statute giving a right of action to one injured by the neglect of the railroad company to ring the locomotive bell before making a highway crossing was designed exclusively for the benefit of persons crossing the highway, and one injured while walking along the track not at a crossing could not recover under the statute. The court had there said (p. 214 of 6 R.I.),

> If the defendants have violated any duty owing from them to the plaintiff, and by means or in consequence of that violation the plaintiff has suffered injury, he has a right to compensation and damages at the hands of the defendants for such injury. In the language of the books, an action lies against him who neglects to do that which by law he ought to do, (1 Vent. 265; 1 Salk. 335) and that, whether the duty be one existing at common law, or be one imposed by statute. In order, however, to a recovery, it is not sufficient that some duty or obligation should have been neglected by the defendants, but it must have been a neglect of some duty or obligation to him who claims damages for the neglect. In 1 Comyns's Digest, Action upon Statute, F, it is said, "In every case where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of the wrong done to him contrary to said law," confining the remedy to such things as are enacted for the benefit of the person suing.

These American cases, while not differing in principle, are closer to the facts of this case than the English decisions in *Gorris* v. *Scott* (3), and *Atkinson* v. *Newcastle & Gateshead Waterworks Co.* (4).

Counsel for the appellant relied upon the judgment of this Court in *Grand Trunk Railway Co.* v. *Anderson* (5). In that case the real question was whether or not the deceased passenger had been a trespasser or an invitee or licensee upon the railway tracks. The Court held upon the

(1) 280 U.S. 102; 50 Sup. Ct. Rep. 42.
(2) 6 R.I., 211.
(3) (1874) L.R. 9 Ex. 125.
(4) (1877) 2 Ex. Div. 441.
(5) (1898) 28 Can. S.C.R. 541.

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facts of that case that the deceased, who was not an employee of the railway company, could not be said to have been upon the railway tracks by the invitation or licence of the railway company at the time he was killed, and that the action of the deceased's administrator under Lord Campbell's Act did not lie. That is all that the case decided. Counsel for the appellant further relied upon the judgment of this Court in *McMullin* v. *The Nova Scotia Steel and Coal Co.* (1), but the point of that case was very different from what we have in this case. In that case a provision of the *Nova Scotia Railway Act* provided that

> whenever any train of cars is moving reversely in any city, town or village, * * * the company shall station on the last car in the train a person who shall warn persons standing on or crossing the track

of its approach. McMullin, who was engaged at the time in keeping the railway track clear of snow, was killed by a train, consisting of an engine and coal car, which was moving reversely. No person was stationed on the last car to give warning of its approach, and, as the bell was encrusted with snow and ice, it could not be heard. It was held that the enactment was for the protection of servants of the company. The statute there said nothing whatever about highway crossings at rail level. The question we have to determine here did not arise in that case.

Lord Maugham (then Lord Justice Maugham) said very recently in *Monk* v. *Warbey* (2):

> The Court has to make up its mind whether the harm sought to be remedied by the statute is one of the kind which the statute was intended to prevent; in other words, it is not sufficient to say that harm has been caused to a person and to assert that the harm is due to a breach of the statute which has resulted in injury.

Upon a fair construction of sec. 308 of the *Railway Act,* a workman walking along the tracks without any reference to a level highway crossing is not a person whom the Legislature intended to protect. It was that kind of consideration which affected the Court in *Groves* v. *Wimborne* (3). Section 419 of the *Railway Act,* which imposes penalties for failure to comply with the provisions of sec. 308, cannot be read so as to extend the scope of sec. 308 to cover persons to whom the section was never intended to apply. It is not that workmen of the railway

(1) (1907) 39 Can. S.C.R. 593. (2) [1935] 1 K.B. 75, at 85.
(3) [1898] 2 Q.B. 402.

company are excluded from the benefit of the section; it is that the section was never intended for the protection of persons (whether workmen or the public generally) who are walking along the tracks, mile after mile, without any reference to a level highway crossing.

The findings of the jury of negligence in respect of the failure to sound the whistle and to ring the bell were obviously based upon the admitted breach of the statutory provision and the misdirection of the learned trial judge that failure to comply with the provision is absolute negligence in law. For these reasons, the findings in respect of the failure to sound the whistle and to ring the bell cannot be upheld. This was also the unanimous view of the Saskatchewan Court of Appeal.

It remains to consider the evidence with regard to the headlight. It was a rule of the railway company that a headlight be displayed to the front of every train by night (rule 17) and that, when weather or other conditions obscure day signals, night signals must be used in addition (rule 9). The learned trial judge put the question of the headlight to the jury as a matter for the jury to deal with on the meaning of the words in the company's rule book, and we may fairly attribute the finding of negligence of the jury in respect of the headlight to the disobedience of these rules by the railway company. The evidence as it stands upon the subject of the headlight is merely guesswork as to whether or not the accident would have been avoided had the headlight been burning at the time. I agree again with the unanimous view of the Saskatchewan Court of Appeal that upon the evidence as it stands the finding of the jury of negligence in respect of the headlight cannot be maintained.

But on the question of whether or not, quite apart from the statute, there was any negligence on the part of the railway company that caused the accident, the trial of the case was very unsatisfactory. I would therefore direct a new trial.

There should be no costs of this appeal but the costs of the appeal to the Saskatchewan Court of Appeal and of the abortive trial shall be in the discretion of the Judge at the new trial.

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LAMONT J.—This is an appeal by the plaintiff from the judgment of the Court of Appeal of Saskatchewan, which reversed a judgment of the trial judge in favour of the plaintiff based upon the verdict of the jury in a running down action.

The plaintiff was an employee of the railway company for thirteen years, first as section hand until 1920, and from that date until the 10th of February, 1933, as section foreman. The section of which the plaintiff had charge ran east from Weyburn, a distance of 6·8 miles, and his duty was to patrol that section daily each way, inspecting it for broken rails or any other possible cause of accident. When the weather was fine he used the hand-car, but in stormy weather this mode of transportation was forbidden and his instructions were to walk between the rails.

On the morning of February 10, 1933, the temperature stood at 40 degrees below zero. At eight o'clock the plaintiff, after a visit to the railway station to inquire if there were any special instructions for him, and receiving none, proceeded to inspect his section, the eastern end of which he reached about ten o'clock. Only one train had passed him as he went east—a passenger train going in the same direction. He says that he heard the whistle of this train blow and the bell ring, and as it was coming behind him, he got off the track. At the east end of his patrol, he turned and started to walk back. It was then 10.10 a.m. At a few minutes after eleven o'clock, at a point about two miles from the eastern end of his section, he was overtaken by a freight train belonging to the defendants—a special train which was then one day behind its schedule time. This train was running from Arcola to Regina, and without any warning it struck the plaintiff and knocked him down at a point about 150 yards west of the whistle post, near mile post 57.

The first intimation the plaintiff had of the proximity of the train was a sound that caused him to jump sideways to get off the track. His jump, however, did not succeed in carrying him clear of the track. His right leg was caught by the train and crushed so badly that it had to be amputated between the foot and the knee. For this injury the

plaintiff brought an action, contending that the damage was caused by negligence on the part of the defendant's servants.

It is admitted by the railway company that at the time of the accident the plaintiff was lawfully on the track in the execution of his duty, and it is contended on his behalf that he was entitled to have the provisions of sec. 308 of the *Railway Act* and the provisions of the train rules of the company complied with for his protection. Section 308 of the *Railway Act* (R.S.C. 1927, ch. 170) reads as follows:

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.

In his opening to the jury at the trial, counsel for the plaintiff said:—

Mr. Hessler contends the railway company was negligent in this way: that at the whistle post they did not blow the whistle and they did not ring the bell from the whistle post to the crossing, as they should have done, according to the rules which we will put in, and that the headlight of the engine was not burning.

Train Rule 9 reads:—

Night signals are to be displayed from sunset to sunrise. When weather or other conditions obscure day signals, night signals must be used in addition.

Under the heading "Audible Signals," Rule 14 (L) provides that on approaching public road crossings at grade the engineer shall give two long and two short sounds with the whistle.

Rule 31 says:—

Signal 14 (L) must be sounded at least 80 rods (¼ mile) from every public road crossing at grade, and the engine bell be kept ringing until the crossing is passed.

Signal 14 (L) must be sounded at every whistle post.

Under the heading of "General Notice," I find the following:—

Obedience to the rules is essential to the safety of passengers and employees, and to the protection of property.

The rules, therefore, were promulgated for the protection of employees as well as for the protection of passengers and others using the railway crossing.

The jury answered the questions put to them as follows:—

(1) Was there negligence of the defendant company which caused the accident?—A. Yes.

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2. If so, in what did such negligence consist?—A. No sounding of whistle, no bell ringing, no light in headlight of engine.

(3) Was there negligence of the plaintiff which contributed to the accident?—A. No.

(4) If so, in what did such contributory negligence consist?—A. No.

(5) Did the plaintiff with a full knowledge and appreciation of the risk arising from the circumstances nevertheless voluntarily elect to assume the same?—A. No.

(6) In what amount do you assess the damages, if any?

A. (*a*) General damages $8,500 00

(*b*) Special damages 350 00

$8,850 00

In his charge to the jury, the learned trial judge, in instructing the jurors with reference to the statutory enactment of sounding the whistle and ringing the bell, said:—

I conceive it my duty to say, with some diffidence, but it is my duty to say that this provision, sec. 308 of the *Railway Act*, is an absolute provision which has to be carried out, no matter what the weather conditions might be.

I conceive it my duty to charge you that the failure to comply with that provision in this case is absolute negligence in law, and that you are not free to find anything else with respect to it.

No objection appears to have been taken by either counsel to this part of the charge, but, in my opinion, it is a misdirection on the part of the trial judge. There is no such absolute and cast iron rule of law. We do not know whether the finding of the jury, that there was no blowing of the whistle or ringing of the bell, was a finding induced by the misdirection in the judge's charge or whether it was a finding based on the evidence.

If this finding was induced by a misdirection in the judge's charge, different considerations would apply than if it were dealt with as a question of fact for the jury. It is essential that we know how the jury looked at this: whether as a matter of law, or as a question of fact.

It is clear from the evidence and admitted by the company that the whistle did not sound nor the bell ring at the whistle post near which the plaintiff was injured. Although the engineer did say that he sounded the whistle oftener than he was required to, he admits that he could not see the whistle posts or the mileage posts on account of the violence of the storm, so he adopted the practice of whistling wherever he thought a crossing or a whistle post should be, but he could not swear that he whistled at the

whistle post 150 yards east of where the plaintiff was injured, and the plaintiff swore he had not whistled there.

It is admitted, also, that there was no light showing from the headlight of the engine; that it had been burning but was extinguished by the engineer before the train reached Stoughton, which is about twenty-five miles west of Arcola, and the evidence is that it was not again lighted. This evidence was accepted by the jury, who found that it was negligence contributing to the accident not to have a light burning in the headlight of the engine under the circumstances. It was one of the plaintiff's contentions that under the weather conditions then prevailing the servants of the company should have taken the additional precaution of having the headlight of the engine burning, because the high wind and the snow made it at times impossible to see more than fifteen feet ahead of the engine.

In the Court of Appeal, the judgment which the trial judge entered for the plaintiff, based upon the verdict of the jury, was reversed on the ground that, although section 308 of the *Railway Act* provides for the blowing of the whistle and the ringing of the bell when a train is approaching the highway crossing at level rail, the result of the decisions upon that and similar sections is that the statute was intended only for the benefit of persons coming upon the crossing and that others lawfully on the track in the proximity of the crossing were not entitled to the protection afforded by it, and that, as the train rules are practically to the same effect, the plaintiff cannot get any assistance from them; and the Court cited the cases of *Gorris* v. *Scott* (1); *Le Lievre* v. *Gould* (2); and *Atkinson* v. *Newcastle & Gateshead Waterworks Co.* (3); as well as a number of American authorities.

It is admitted that in the United States it has been specifically held that statutory enactments, imposing a duty upon a railway company to blow the whistle and ring the bell when approaching public crossings at level rail, are only for the protection of those using or about to use the crossing, and do not impose any duty in respect of other persons, so that a failure to comply with such requirement

(1) (1874) L.R. 9 Ex. 125. (2) [1893] 1 Q.B. 491.
(3) (1877) 2 Ex. D. 441.

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is not evidence of negligence of which an employee injured when walking on the track can complain. (See *Norfolk & Western Ry. Co.* v. *Gesswine* (1); *Connelley* v. *Pennsylvania Ry. Co.* (2)). I do not find that the English cases have gone so far.

In *Gorris* v. *Scott* (3) the statutory provision relied on was the *Contagious Diseases (Animals) Act,* under which the Privy Council made orders, which they were authorized to do, in reference to animals brought into Great Britain on board vessels. One order was that the space in the vessel occupied by these animals should be divided into pens of a certain size. By neglect to observe the precautions prescribed by these orders, a number of sheep, which were being brought into England by the defendant in one of his vessels, were washed overboard, which they would not have been had the orders been complied with. In an action brought for damages for their loss, it was held that the owner of the sheep could not recover damages for the omission to comply with the order, because the statute and the orders were not intended for the benefit of the owner of the sheep in this way. The object of the statute and orders was to prevent the spread of contagious diseases among the sheep, but with no relation to the danger of loss at sea.

In *Atkinson* v. *Newcastle & Gateshead Waterworks Co.* (4), it was held that the mere fact that a breach of a public statutory duty had caused damage does not vest a right of action in the person suffering damage as against the person guilty of the breach. Whether the breach does or does not give a right of action must in each case depend upon the object of the legislation and language of the particular statute.

In *Groves* v. *Wimborne* (5), Vaughan Williams, L.J., says:—

> Where a statute provides for the performance by certain persons of a particular duty, and some one belonging to a class of persons for whose benefit and protection the statute imposes the duty is injured by failure to perform it, *prima facie,* and, if there be nothing to the contrary, an action by the person so injured will lie against the person who has so failed to perform the duty.

(1) (1906) 144 Fed. Rep. 56.
(2) (1915) 228 Fed. Rep. 322.
(3) (1874) L.R. 9 Ex. 125.
(4) (1877) 2 Ex. D. 441.
(5) [1898] 2 Q.B. 402, at 415.

The above paragraph from the judgment of Vaughan Williams, L.J., in my opinion, lays down the principles applicable to the case at Bar.

Did the statute or the train rules impose a duty upon the company to blow the whistle and ring the bell at every whistle post; and did the plaintiff belong to the class of persons for whose benefit and protection the rules were made? As between the plaintiff and the company, the rules are as effective as the statute and are evidence of what the railway company considered to be the exercise of due care. The rule is explicit that the whistle should be sounded at every whistle post, and there is nothing in the rules to the contrary, and, in my opinion, the plaintiff was one of the classes for whose benefit the rules were promulgated. He was an employee who was on the track in the performance of his duty. Not only was he on the track, but he was expressly directed to walk between the rails in stormy weather. He was aware of the existence of the rules, and knew that it was the duty of the train hands to comply with them, for the rule book expressly states: "Obedience to the rules is essential to the safety of passengers and employees." The rules were not complied with, and the plaintiff was injured through the failure of the company's servants to comply with them. Unless, therefore, the jury find that the failure to comply with the rules can be justified or excused, the plaintiff, in my opinion, has an individual right of action for the injury he received.

In view of the rules and the finding of the jury, it cannot be said that the risk of injury was a danger incident to the employment which the plaintiff had agreed to assume and did assume. I cannot see anything in the general scope of the rules nor the language in which they were embodied, that would justify a limitation of the application of the rules to those persons only who were crossing or approaching the crossing at level rail.

Where the statute or rules aim at the protection of a particular class, or at the attainment of a particular purpose, which in the ordinary course is calculated to benefit a particular individual or member of a class, an individual injured by a neglect of the obligation, either as one of that class, or by reason of being affected by the failure to attain

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that particular purpose, may have his remedy although a penalty is imposed by the statute.

It was argued that the evidence shows that the fierceness of the storm was such that what the defendants did was a reasonable precaution against accident. That was a matter wholly for the jury.

The plaintiff had heard both the whistle and the bell of the train that passed in the morning, and the view of the jury was that the engineer's failure to blow the whistle and ring the bell contributed to the accident by which the plaintiff was injured. It was for the jury to say, under all the circumstances, whether or not the plaintiff would have heard the whistle and the bell. Train rule requires that, when the weather or other conditions obscure the day signals, night signals are to be used in addition. Engineer Neazor testified that sometimes he could not see more than fifteen feet ahead of the train owing to the storm, and at other times he could see a considerable distance.

It was also for the jury to say if, under the circumstances, the plaintiff would have seen the light of the headlight had it been burning. I must confess, however, that the evidence leaves my mind in a state of doubt on this point, but I take the jury's finding to mean that they were satisfied that he would have seen it.

As it is impossible to tell whether the finding of the jury as to the sounding of the whistle and the ringing of the bell is a finding of fact on the evidence, or was induced on the misdirection of the trial judge, there should be a new trial.

The appeal will be allowed, but without costs. The costs of appeal to the Saskatchewan Court of Appeal and of the abortive trial, shall be in the discretion of the judge at the new trial.

CANNON J. (dissenting)—After having the advantage of reading the opinions carefully prepared by my learned brethren Lamont, Crocket and Davis, I am rather inclined to say that section 308 protects the railway employees at or near a railway intersection with a highway as well as any other person, in view of section 419 (2) of the *Railway Act* which enacts clearly and without restriction to any particular class of persons that,

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. The company shall also be liable for all damage sustained by *any* person by reason of any failure or neglect so to sound the whistle or ring the bell.

I feel that the spirit of our *Railway Act* is better interpreted in the words of Davies J. in *McMullin* v. *Nova Scotia Steel and Coal Co.* (1), than in judgments of English or American courts in cases concerning the application of statutes which may be different from our own legislation. Besides, the action is based, not only on the statutory duty of the respondent, but also on common law negligence and default in obeying the rules of the company.

The train was a special or extra one and the respondent took the risk to run it under difficult circumstances which, it is claimed, prevented the engineer in charge of the locomotive to give the signals provided for by the book of rules of the company, and especially rules 9, 14 (L), 17 and 31, which read as follows:

9. Night signals are to be displayed from sunset to sunrise. When weather or other conditions obscure day signals, *night signals must be used in addition.*

14. *Engine Whistle signals.*

* * *

(L) Approaching public road crossings at grade and at whistle posts [two long and two short sounds].

* * *

A succession of short sounds of the whistle is an alarm for persons or animals on the track.

17. A headlight will be displayed to the front of every train by night * * *

31. Signal 14 (L) *must* be sounded at least 80 rods (¼ mile) from every public road crossing at grade, and the engine bell be kept ringing until the crossing is passed.

Signal 14 (L) *must* be sounded at every whistle post.

The company agrees before us that the whistle was not sounded and the bell not rung at the whistle post. It is also common ground before this Court that the appellant would have heard the whistle if sounded within 80 rods from the public road crossing near which the accident happened. These two points were closed to the respondent, said Mr. Tilley.

Now, the rules of the company respondent, in my opinion, are sufficient evidence of the proper care that should be taken in the running of their trains. The jury found that they were not complied with, that this negligence by omission caused the accident. I cannot substitute my

(1) (1907) 39 Can. S.C.R. 593.

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opinion, on this question of fact, to their verdict based on sufficient evidence.

Besides, the fact that the appellant was not told, contrary to custom, by the station agent that an extra train was coming on that morning, would aggravate the imprudence of the company in persisting to run this special freight train in such weather, when it was impossible for the engineer in charge, at times, with the window of the cab down and the front windows all frozen, to see through them.

Under such weather conditions, when the company could not comply with the statute and their own rules, it would have been better to desist from running that special freight train than to run the risk of injuring or killing the appellant who was admittedly rightly at his work inspecting the track. For train movements, Rule 97 says:

> Extra trains must not be run without train orders.

and Rule 106:

> In all cases of doubt or uncertainty the safe course must be taken, and no risks run.

Under those circumstances, I would allow the appeal and restore the judgment of the trial court with all costs against the respondent.

CROCKET J. (dissenting).—I am of opinion, after a perusal of the entire record in this case, that there is sufficient evidence to warrant the jury's findings and that the plaintiff is entitled to hold the judgment which the learned trial Judge ordered thereon.

There seems to be no doubt that, had the locomotive engineer blown the engine whistle at the whistle post or rung the bell as he passed it, the plaintiff would not have been struck, as he was, at a point over 600 feet west of the whistle post and approximately 750 feet east of the level crossing, nor that the plaintiff's injury is directly attributable to the neglect of the engineer to blow the whistle or ring the bell as he approached or passed the whistle post.

The learned counsel for the defendant frankly admitted that the plaintiff was rightfully on the track in the course of his duty as section foreman and that the finding of the jury that the whistle was not blown or the bell rung between the whistle post and the point where the plaintiff was hit was one which upon the evidence could not well

be disturbed. He argued, however, that, although the failure to blow the whistle or ring the bell as the train approached or passed the whistle post was a breach of s. 308 of the *Railway Act* and of Rule 31 of the Railway Company's own printed rules, the defendant owed no duty to the plaintiff to give the required signals at this point, because s. 308 was enacted by Parliament for the protection only of vehicles and persons proceeding along the public highway towards the railway crossing and not for the protection of the employees of the railway or anyone else proceeding along the track unless possibly at its intersection with the highway. He relied mainly on the principle affirmed in the English cases of *Gorris* v. *Scott* (1), *Le Lièvre* v. *Gould* (2) and *Atkinson* v. *Newcastle & Gateshead Waterworks Co.* (3), and the decision of the Supreme Court of the United States in 1929 in *Chesapeake & Ohio Ry. Co.* v. *Mihas* (4), where that court quoted with approval a judgment in 1859 of the Supreme Court of Rhode Island in *O'Donnell* v. *The Providence & Worcester Railroad Co.* (5). This appears to be the principal ground upon which the Appeal Court of Saskatchewan reversed the trial judgment in the case at Bar—this and the fact that in the Appeal Court's opinion the finding as to the headlight could not reasonably be supported by the evidence. Another more recent American decision was also relied upon before us, viz., *Jacobson* v. *Chicago, Milwaukee, St. Paul & Pacific Rd. Co.* (6), where the plaintiff, a section foreman, sought to maintain an action for negligence against that railway company upon the ground that the engineer had not blown the whistle or rung the bell of the locomotive which struck him. There is no doubt that, in the American cases relied upon, the decisions of the United States courts proceeded upon the principle that the railway company owed no duty to its employees in respect of the sounding of train signals required by the public statutes in approaching public highway crossings, but none of the English cases cited go to any such length, and, so far as I can discover, none have ever done so.

(1) (1874) L.R. 9 Ex. 125.
(2) [1893] 1 Q.B. 491.
(3) (1877) 2 Ex. D. 441.
(4) 280 U.S. 102; 50 Sup. Ct. Rep. 42.
(5) 6 R.I. 211.
(6) (1933) 66 Federal Reporter, 2nd series, 688.

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This Court, on the other hand, definitely, in my view, laid it down in *Grand Trunk Ry. Co.* v. *Anderson* (1), that the provision of the *Railway Act,* s. 256, as it then stood in 51 Vict. (Dom.), cap. 29, relating to the sounding of the whistle and the ringing of the bell, which in all material aspects is the same as s. 308 of the present *Railway Act,* was not to be read as being intended exclusively for the protection of vehicles or persons proceeding along the public highway, but that all persons rightfully upon the railway track were entitled to the benefit of that provision. In that case the action was brought, not by an employee of the railway, but by the administrator and administratrix under Lord Campbell's Act, of a passenger who had disembarked from a train at an improvised station, from which no safe and reasonable means of egress were provided to the public highway, and who was struck and killed by a train while walking along the right of way. The action was brought in the Supreme Court of Ontario and was dismissed by Meredith, C.J. The Divisional Court on appeal reversed the trial judgment and this decision was affirmed by the Court of Appeal. The Divisional Court (Armour, C.J., Falconbridge and Street, JJ.) held that the deceased was lawfully upon the railway and that all persons, whether travelling on a highway or not, were entitled to the benefit of the provisions of s. 256 of the *Railway Act* requiring warning by bell or whistle on approaching a highway, and that the neglect of this statutory provision was evidence of negligence. The Divisional Court therefore ordered that judgment should be entered for the plaintiffs for the sum of $3,000.

While this Court, per Gwynne, Sedgewick and Girouard, JJ., allowed the appeal from the Appeal Court of Ontario (Taschereau and King, JJ., dissenting) the majority, as well as the dissenting Judges, distinctly affirmed the principle, enunciated by the Divisional Court, that all persons rightfully travelling upon the railway were entitled to the benefit of the provisions of s. 256 of the *Railway Act.* Sedgewick, J., who wrote the majority judgment, distinctly states:—

(1) (1898) 28 Can. S.C.R. 541.

It must be admitted for the purposes of this case that the provision of the Railway Act, section 256, relating to the sounding of the whistle and the ringing of the bell was not complied with, and that all persons rightfully upon the railway track as well as upon the highway crossing next to the coming train are entitled to the advantage of this provision, and the sole question to be determined in this case is whether or not the deceased Mackenzie at the time he was killed was lawfully walking upon the railway track. In other words whether he was a trespasser or a licensee or invitee of the defendant company.

It was solely upon the question as to whether the evidence shewed the deceased to be a trespasser or an invitee that the appeal was allowed. Taschereau, J., was not disposed to interfere with the judgments of the Divisional Court and the Court of Appeal. King, J., simply stated that he thought the judgment in the court below was free from error and that the appeal should be dismissed.

Later in *McMullin* v. *The Nova Scotia Steel & Coal Co.* (1), this Court (Sir Charles Fitzpatrick, C.J., and Girouard, Davies and Duff, JJ.) held that s. 251 of the *Nova Scotia Railway Act,* enacting that,

whenever any train of cars is moving reversely in any city, town or village, * * * the company shall station on the last car in the train a person who shall warn persons standing on or crossing the track

of its approach, was an enactment for the protection of servants of the company standing on or crossing the track as well as of other persons, and allowed the appeal from the Nova Scotia Supreme Court. I reproduce the following passages from the reasons given by Davies, J., with whom all the other Justices named, concurred:—

With respect to the proper construction to be given to section 251, I am unable to agree with the contention that the section only applies to persons *not* railway servants, and, as to them only "while standing on or crossing the track of the railway" *at a highway crossing.*

There does not appear to me to be any justification arising either from the language of the section itself or from its position in the Act and its relation to its context which would justify the courts in importing such limitations into it. Nothing is said in the section with respect to a "highway crossing." What is said is that "persons standing on or crossing the track of such railway" within the limits of a town, city or village, shall be entitled, so far as trains moving reversely are concerned, to have a certain specified precaution and warning observed. It does seem to be an arbitrary and unreasonable construction to exclude workmen from the benefit of such a prudent and beneficial section as this. In fact, it would seem rather more necessary for the workman's protection than for that of the outside public. Business might occasionally, no doubt, take some of the general public on or across these railway tracks within cities, towns or villages, but, apart from public highways,

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the presence of any of the general public would be a rare occurrence on these tracks.

On the other hand, the duties of many of the workmen, trackmen, switchmen, etc., require them to be "on or crossing the track" frequently, and it would seem reasonable to conclude that the section was enacted as much, if not more, for their benefit than for the benefit of the small section of the general public who would legally go "on or across the track." Of course, the section is not for the benefit of trespassers and they, I assume, not to be within it.

The section applies in terms to any and all parts of the company's track within the city or town, and I see as little reason for excluding from the section the grounds of the company itself within such city as the workmen of the company.

These judgments of our own Court I regard as conclusive against the respondent upon this question. Even if they were not, I should not be disposed, in the absence of any authority actually binding upon me, to assent to the proposition that an employee of a railway, who is rightfully walking along the railway track in the course of his duty, is not entitled to rely upon the neglect of the locomotive engineer to blow the engine whistle or ring the bell when approaching a highway crossing at rail level in accordance with the provisions of s. 308 of the *Railway Act* as negligence, if that negligence is the direct cause of injury to him. The railway surely owed a duty to its sectionmen to exercise reasonable care to avoid injury to them.

The evidence here shews clearly to my mind that the plaintiff, when he reached the whistle post, where he knew that the rules of the railway required the blowing of the whistle and the sounding of the bell, relied upon the engineer's compliance with those rules as his protection between the whistle post and the highway crossing. He had a right to assume that, if any train came along, two long and two short blasts of the whistle would be sounded on reaching this point, which it is idle to my mind to suggest, had they been sounded, might not have been heard by him.

Apart from the failure to blow the whistle and ring the bell in pursuance of the statute and the Railway Company's printed rules, the jury found that there was negligence on the part of the defendant also in not using the headlight in the weather conditions which prevailed at the time. They no doubt meant that, had the headlight been on, as it ought to have been, it also would have warned the plaintiff in time to enable him to avoid his injury. That, it seems to me, was a finding upon a straight question

of fact, depending in a very large measure upon the credibility of the testimony of the trainmen that the storm had caused such an accumulation of snow and ice on the glass of the headlight as to render it entirely useless as a train signal, and that for this reason they had turned it off. The jury were surely not bound to accept this evidence of the engineer and fireman at its full face value, simply because it was not specifically contradicted. The jurors had a right to test its credibility by the light of their own experience and knowledge. They may have regarded it as altogether improbable and inconsistent in itself or as inconsistent with indisputable facts or the testimony of the plaintiff and his witnesses, which they believed. As a mater of fact, there was undisputed testimony that another train running over the same track in the opposite direction two hours before used its headlight as a signal. Moreover, it is a matter of common knowledge that railway engine headlights are very powerful and can be seen, where the track is straight, as it was here, for miles in clear weather and that they cast their rays for long distances along the track, so as to serve as a warning of an approaching train, not only to persons walking towards it, but to persons going the other way. With all respect, it seems to me that it was entirely a question for the jury to determine, whether in the weather conditions, as they found them to exist, it was probable or improbable that such a powerful headlight was so obscured by the accumulation of snow and ice on its clear glass front that its reflection would not extend for more than ten feet along the track and consequently to render it completely useless. I should myself rather be disposed to think that, if the weather conditions were such as to make it impossible for the engineer or fireman to see any of the whistle posts along the track or to know whether they were approaching a level highway crossing or not, it was little short of foolhardiness to deliberately turn off the headlight as useless and continue to run the train along a section where the trainmen must have known there were highway crossings at rail level with the likelihood that sectionmen were going along the track in the discharge of their duty.

It was contended that engine headlights are not such signals as fall within the intendment of the railway rule

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No. 9. There may be some force in the argument, but it is clear from the evidence nevertheless that when weather conditions were such as to obscure day signals the engine headlights were in fact used as additional warning signals. Whether the rule itself required their use or not, the question was whether in the existing circumstances it was negligence to turn off the headlight on the engine, which caused the plaintiff's injury. In my view, it is a matter of no consequence that the trial Judge erroneously left, as it is contended he did, the interpretation of railway rules, Nos. 9 and 17, to the jury, instead of directing the jury himself as to their meaning.

It was objected also that the learned trial Judge misdirected the jury as to the effect of s. 308 of the *Railway Act,* and particularly in telling them that they were not free to find anything else than absolute negligence with respect to the engineer's failure to blow the whistle at the whistle post and ring the bell as thereby required. I think this objection is met by *Grand Trunk Railway Co.* v. *Anderson* (1), and the very clear directions of the learned trial Judge to the jury that, before the railway could properly be held to be liable for the plaintiff's injury by reason of the breach of the statutory requirement, they must be satisfied that it was the direct consequence of such negligence. In view of the admission that the jury's finding as regards the failure to blow the whistle at the whistle post and ring the bell in approaching the highway crossing, as required by the statute, could not be disturbed upon the evidence, and there being no doubt that such failure does constitute negligence, if it directly causes injury or damage to any person rightfully on the track, as it is admitted the plaintiff was, the defendant cannot very well be held to have been prejudiced or any substantial wrong or miscarriage occasioned by the alleged misdirection.

As to the point that the action must be treated as founded entirely on the statutory breach of duty, the record, in my opinion, plainly shews that the plaintiff throughout was relying on common law negligence as well as the breach of the particular statutory duty.

(1) (1898) 28 Can. S.C.R. 541.

I think, for the reasons stated, that this appeal should be allowed and the judgment of the trial court restored with costs throughout.

New trial ordered.

Solicitors for the appellant: *Anderson, McDaniel & Alexander.*

Solicitor for the respondent: *O. S. Black.*