

63, 1933

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No. 39 of 1933.

In the Privy Council.

**ON APPEAL FROM THE COURT OF
APPEAL FOR BRITISH COLUMBIA.**

BETWEEN

CANADIAN NORTHERN PACIFIC RAILWAY
COMPANY (Defendants) - - - - - *Appellants*

AND

KAPOOR LUMBER COMPANY LIMITED (Plaintiffs)
Respondents

AND BETWEEN

KAPOOR LUMBER COMPANY LIMITED (Plaintiffs)
Appellants

AND

CANADIAN NORTHERN PACIFIC RAILWAY
COMPANY (Defendants) - - - - - *Respondents*

(CONSOLIDATED APPEAL AND CROSS-APPEAL).

**CASE FOR THE CANADIAN NORTHERN
PACIFIC RAILWAY COMPANY.**

1. This is an appeal by the defendant from a judgment of the Court of Appeal for British Columbia, setting aside the judgment of the Supreme Court for the plaintiff and ordering a new trial of the action.

2. The action was brought to recover damages for the loss sustained by the plaintiff by reason of a fire alleged to have been due to the negligence of the defendant.

20 3. The facts out of which the action arose are as follows:

CASE FOR THE CANADIAN NORTHERN
PACIFIC RAILWAY COMPANY.

Record,

4. The plaintiff company, in the summer of 1930, when the fire occurred, was carrying on the business of cutting timber and manufacturing it into lumber at its mill, situate at a place called Kapoor, on the defendant's line of railway, which ran from Victoria to Kissinger, a distance of 95 miles.

5. Kissinger is westward from Victoria, and the trains running from Victoria to Kissinger are spoken of as travelling west, while the trains running from Kissinger to Victoria are spoken of as travelling east, although, owing to the nature of the ground, the line bends and turns upon itself, following a very devious and abruptly changing route. 10

6. At the locality in question the line of railway forms a complete loop, in the form of the letter U, with Kapoor Station at the apex of the loop.

p. 221,
l. 3.

7. This station was merely a stopping-place for trains, and the defendant maintained no agent or employee at the station.

8. The plaintiff's mill, planing-mill, mill-platforms, and lumber-yard were grouped around the station.

p. 38,
ll. 21-25.
p. 39,
ll. 40-43.

9. The land on both sides of the line of railway, which is called the right of way, was owned by the plaintiff, and was forest land, part of which had been cut over by the plaintiff, and other parts of which were in process of being logged by the plaintiff at the time of the fire. 20

p. 35,
ll. 35-42.

10. The plaintiff's employees at Kapoor, some of whom were engaged in and about the mill, and the rest of whom were occupied in logging in the forest in the vicinity of the mill, numbered upwards of 150.

11. The miles on the right of way are numbered westward from Victoria, and the loop in question extends roughly from mile 35 to mile 36, as shown on the mile-boards set up upon the side of the line. 30

12. The general view of the locality is seen upon Exhibit 4.

Exhibit 6.
(Separate
document).

13. The ground shown upon this plan on the right-hand side, proceeding towards Kapoor, is a hill-side, sloping towards the railway.

14. At mile 35.2 the railway track is laid upon an embankment or "fill" about 15 feet high, 16 feet wide at the top, and 50 feet wide at the base. Exhibits 11 and 50. (Separate documents).
15. The defendant's right of way is 100 feet wide, and the embankment and track are in the middle of the right of way. Record, p. 386, ll. 2-5.
16. From the foot of the slope of the embankment a shallow gully extends almost at right angles upon ground that rises towards and up the hillside. Exhibit 12 (Separate document).
17. Within a few yards, towards Kapoor, of Mile 35.2 the railway is cut through a hillock (marked "rock-cut" upon the plan, Exhibit 4) and the ground at the side of the gully rises towards this hillock. Exhibits 4 and 13 (Separate documents).
18. The ground between Mile 35 and the rock-cut was "a sandy rocky country, with not very much vegetation" and there was no vegetation at all on the slopes of the fill. Record, p. 255, ll. 17-24; p. 241, ll. 21-24.
19. In the year 1929 the plaintiff had been logging on the upper side of the right of way and in the autumn of that year there had been a fire on the hillside which extended to the right of way. p. 241, l. 33, to p. 242, l. 16.
20. Bal Mukand, the plaintiff's Mill Superintendent, admitted that on the 18th of August, 1930, all the plaintiff's property to the boundary of the right of way was "a burnt and blackened area" and that there had been no barrier, except "logs and stumps and other stuff" to prevent the 1929 fire from spreading on to the right of way. p. 38, ll. 21-43. p. 74, l. 36, to p. 75, l. 11.
21. On the other side of the railway, the ground on both sides of the railway spur marked upon the plan "Grade Kapoor Lumber Company's Spur" was covered with slash resulting from the plaintiff's logging operations upon this ground in the spring and early summer of 1930. p. 26, ll. 10-19.
22. In the early morning of the 18th of August, 1930, smoke was seen by the plaintiff's employees, rising alongside the right of way, near Mile 35.2.
23. The evidence (on behalf of the defendant) as to the discovery of the fire by the plaintiff was (1) that smoke from the fire was observed between 7 and 8 o'clock in the morning by p. 233, l. 6, to p. 234, l. 31.

Record,

p. 349,
ll. 2-41.
p. 351, l. 3,
to
p. 352, l. 17.
p. 233, l. 43,
to
p. 234, l. 13.

p. 350,
ll. 2-41.

O'Malley, the conductor of the plaintiff's logging train, when he was on his way along the logging-railway to his work in the woods, and that he reported it to Ardyn (or Arjan) Singh, the plaintiff's "woods boss," and that Ardyn Singh said that "the men down at the mill would look after the fire"; and (2) that the smoke was noticed between 10 and 11 o'clock in the morning by Jure, the plaintiff's millwright, from "upstairs on the mill floor," and that he mentioned it to the mill foreman. The point where O'Malley was when he saw the smoke is marked "O'M 1" upon the plan, Exhibit 4, and the approximate place of the smoke which he saw is marked "O'M 2." At noon on his way back from the woods towards the mill he noticed that there was still smoke in the same place. The direction in which Jure saw the smoke is indicated upon Exhibit 4 by a blue line with an arrow head and the word "Jure" at the end of the line. 10

p. 299,
ll. 28-33.

24. The first of the defendant's trains which passed through Kapoor on that morning of the 18th of August was what is called "the gas car," that is, a motor train, propelled by gasoline.

25. The gas car reached Kapoor at 10:25 o'clock in the morning, and was manned by the driver Jones and the conductor Mulligan. 20

~~p. 299~~
p. 230, l. 36,
to
p. 230, l. 8.
p. 225,
ll. 2-24.

26. On passing the scene of the fire, the smoke was seen by Jones at the point marked "J" on Exhibit 44, and by Mulligan at the point marked "M.L.G."

p. 300,
ll. 6-9.

27. The next of the defendant's trains to arrive at Kapoor was what is called the way-freight, drawn by an oil-burning engine, and which reached Kapoor at 12:05 o'clock of the same morning.

p. 217,
ll. 10-21;
p. 189,
ll. 13-20.

28. The conductor of the way-freight, Miller, and the engineer, Mineau, both saw the smoke, when passing Mile 35.2. 30

p. 302,
ll. 8-14;
p. 303,
ll. 11-28;
p. 312,
ll. 25-29;
p. 20,
ll. 22-29.

29. The 18th of August, 1930 was a Monday: none of the defendant's trains had traversed the line on the preceding Sunday, and it is admitted by the plaintiff that no fire or smoke existed at the spot in question on that Sunday.

p. 217,
ll. 38-42;
p. 305, l. 45
to
p. 306, l. 3;
p. 218,
ll. 15-22.

30. The engine of the way-freight became derailed at Kapoor and about 12:30 p.m. Miller telephoned to Fraser, the Assistant General Agent, at Victoria, and asked him to send out the "auxiliary." At the same time he told him there was a fire and that the smoke was increasing.

31. Fraser left Victoria with the auxiliary train (which carried fire-fighting equipment) about 2:30 p.m. and on the way picked up the two section foremen whose sections were between Victoria and Kapoor and their men, with their fire-fighting apparatus, and arrived at Kapoor about 4:00 p.m.

Record,
p. 304,
ll. 22-41;
p. 347,
ll. 24-36.

32. The place where the engine was derailed was on the plaintiff's track which is marked "run-around track" upon the plan Exhibit 45 near the plaintiff's oil tank, marked upon the same plan.

p. 305,
ll. 2-9;
p. 217,
ll. 40-42.

10 33. Fraser examined the derailed engine and found it would take only a few minutes to re-rail it. He then went to the plaintiff's office with a view to meeting a forest ranger whom he expected to meet at Kapoor in connection with extinguishing the fire.

p. 305,
ll. 8-16.

20 Under the provisions of the "Forest Act" (Revised Statutes of British Columbia, 1924, Chapter 93) there is in the Department of Lands a branch known as the "Forest Branch" (Section 4). The Forest Branch has the control and administration of all matters relating to forestry and particularly the prevention of forest fires. (Section 5). The Statute provides for the appointment of a Chief Forester and such District Foresters and other officers and servants as are required for the proper conduct of the Forest Branch (Section 6). Provision is also made for constituting forest districts (Section 9).

34. The defendant carries on its operations under the orders and directions of the Board of Railway Commissioners constituted under the Railway Act (R.S.C. 1927, C. 170).

30 35. In March, 1930, the Chief Fire Inspector of the Board of Railway Commissioners had transmitted to the defendant, a statement (Exhibit 47), under Section 13 of the Board's Order, of the measures to be taken by the defendant, and by this statement the defendant was informed that certain officers of the Provincial Forest Branch had been designated to exercise locally on behalf of the Board the inspection and general supervision over the work of the defendant under the Board's Order.

p. 483;
p. 468,
ll. 19-32;
p. 486, l. 37
to
p. 487, l. 3.

Record,
p. 487,
ll. 4-7,

ll. 8, 9,
18-21.

36. The officers designated in respect of the defendant's railways in British Columbia were the Provincial Fire Inspector and two Assistant Fire Inspectors at Victoria and, for local inspection of the railways on Vancouver Island (which include the railway between Victoria and Kapoor), the District Fire Inspector at Vancouver, assisted by Assistant District Fire Inspector Conway.

p. 155, l. 35,
to
p. 156, l. 7;
p. 116,
ll. 18-23;
p. 118,
ll. 31-38.

37. The fire had been reported, earlier in the day, to Mr. Campbell, the officer in charge of the Forest Branch at Victoria, who was a subordinate of Mr. Conway and this officer had deputed the Forest Ranger Dunn to proceed to Kapoor to examine and report. 10

38. This Forest Ranger Dunn was the officer of the Forest Branch, whom Fraser met at the plaintiff's office on that afternoon of the 18th of August, 1930.

p. 305,
ll. 36-44.

39. After rerailing the engine, Fraser, with Forest Ranger Dunn, went on the auxiliary train to the scene of the fire at Mile 35.2.

p. 67, l. 39,
to
p. 68, l. 8;
p. 218,
ll. 27-29;
p. 305,
ll. 33-35.

40. Between noon and one o'clock of that Monday some of the plaintiff's employees had been sent to the fire with pails and shovels, and these men were there when Fraser passed on his way to Kapoor in the auxiliary train, and when Fraser and Dunn returned. 20

p. 306,
ll. 6-21;
p. 329, l. 41,
to
p. 330, l. 22;
p. 117, l. 24
to
p. 118, l. 28.

41. Dunn, after examining the fire told Fraser that the men whom Fraser had brought up with the auxiliary would not be required, and Fraser and his men then left in the auxiliary for Victoria.

p. 117,
ll. 21-23.
p. 119,
ll. 17-21.

42. The fire was then, according to Dunn, not more than a quarter of an acre in extent, and Dunn was perfectly satisfied that there was no danger at all. 30

p. 40,
ll. 12-22.

43. Bal Mukand, the plaintiff's superintendent, arrived on the scene when Fraser and Dunn were standing on the track and had a conversation with Dunn about the state of the fire.

p. 40,
ll. 24-29;
p. 40, l. 44,
to
p. 41, l. 14;
p. 118, l. 29
to
p. 119, l. 23.

44. He asked Dunn for a fire-pump and Dunn said he would bring one the next morning. Both were satisfied that the fire was then under complete control.

45. Fraser's meeting with Dunn at Kapoor was by arrangement made by Fraser before he left Victoria with Forest Ranger Campbell of the Forest Branch there. Record, p. 175, ll. 18-22.
46. Campbell was the Ranger in charge, under Conway (who lived at Nanaimo), of the Victoria Forest District, which included Kapoor. p. 155, l. 35 to p. 156, l. 7; p. 157, l. 38.
47. Cowan, the plaintiff's accountant, when he found there was a fire near Mile 35, telephoned, at about 1:30 p.m. to Forest Ranger Campbell at Victoria, and reported the fire and asked 10 him to send out a forest ranger. p. 131, ll. 34-37; p. 145, l. 3, to p. 146, l. 10.
48. He told Campbell that they had sent out a crew of men to fight the fire.
49. Soon afterwards, Fraser, who had heard of the fire from Miller, had a telephone conversation with Campbell. p. 303, ll. 37-41; p. 304, ll. 22-26.
50. Campbell sent Dunn out, and Fraser and Dunn thus met in Cowan's office. p. 116, ll. 18-23.
51. Cowan says that, soon after Fraser and Dunn left, Dunn came back alone and told Cowan that a crew of men had been put to work at the fire and a fire guard thrown around the fire and 20 that he had left instructions as to what should be done and would come back the next day. p. 146, ll. 3-38.
52. The Forest Ranger Dunn had the most extensive powers under the Forest Act to requisition all the help which he considered necessary, and both under that Act and also under the Board's orders, Fraser was bound to obey all Dunn's directions. p. 117, ll. 15-20; p. 486, l. 38, to p. 487, l. 3; p. 487, ll. 8, 9, 18-21.
53. The plaintiff had, thus, on the 18th of August, assumed control of the fire, and this action on the part of the plaintiff had been approved and confirmed by the responsible official Dunn.
54. Both Bal Mukand, the mill superintendent, and Mayo 30 Singh, the president of the plaintiff Company, had visited the scene of the fire on that 18th of August, and at the trial, admitted that they were, on the evening of the 18th of August, completely satisfied with the condition of the fire, and the measures which had been taken. p. 41, ll. 3-7; p. 102, l. 16, to p. 103, l. 11; p. 104, ll. 20-25.

Record,
p. 120,
ll. 1-5.

pp. 494, 502.

p. 37, l. 6,
to
p. 38, l. 20.

p. 498,
ll. 3, 10,
25-27,
29, 30, 32.

p. 61,
ll. 25-27.

p. 22,
ll. 19-20;
p. 21, l. 45,
to
p. 22, l. 6.

p. 52,
ll. 11-14;
p. 54,
ll. 15-29.

p. 57,
ll. 6-8,
ll. 40-42;
p. 57, l. 43,
to
p. 59, l. 24.

p. 61,
ll. 6, 7,
ll. 18-23,
31-34.
p. 23,
ll. 2-4;
p. 53, l. 20;
p. 61, l. 24;
p. 57, l. 38.

p. 67,
ll. 6, 7;
p. 89, l. 15;

55. When Dunn left Kapoor, he left the fire in the charge of the plaintiff. The account of the efforts made on the 18th and the morning of the 19th, to extinguish the fire is contained in the evidence of Bal Mukand, Bishen Singh, Kishen Singh, Naranyan Singh, Foresew, and Teja Singh. Exhibits 9 and 10 (put in by the defendant) are the Fire Pay-Roll and Claim Books submitted by the plaintiff to the Forest Branch, and certified as correct by Bal Mukand, for the purpose of recovering the wages of the crew working at the fire under the direction of the plaintiff. For the 18th of August the names of six men are entered—in Exhibit 9— 10 and each man is shown as having worked for nine hours. The only one of these six men who was called as a witness was Naranyan Singh. Of the six witnesses above named the evidence of one, Teja Singh, was taken on behalf of the plaintiff de bene esse. Foresew was one of the six Chinese who were said to have relieved at 6 p.m. the men who went to work at 1 p.m. The other four witnesses were all agreed as to the approximate number of men, the division between them of the work, and the time spent. There were 24 or 25 or 26 men. As to the division of the work Bal Mukand said that he put Naranyan Singh in charge of the gang 20 and put one dozen men to cut a fire trail around the fire and one dozen men with buckets and shovels to put it out. Bishen Singh (whose occupation was loading lumber on railway cars) knew that there were 24 or 25 men there and that about half were working on the trail and about half on the fire fighting. Of these last, four or five (of whom he was one) were carrying water from the Sooke River. Kishen Singh, the time-keeper and pay-master, remembered that there were about 24 or 26 men. (He remembered the number more clearly at the trial in May, 1932, "having thought the thing over," than in the middle of September, 1930, 30 when he entered the six names in the claim book, notwithstanding the fact that he had then recently written the names of the two dozen men in his time-book). He was not asked as to the division of the work. Naranyan Singh, the yard foreman, remembered quite well that there were about 24 or 25 men. His account of the division of the work is identical with that of Bishen Singh. He himself was working with a shovel. As to the time spent, Bal Mukand, Naranyan Singh, and Bishen Singh said that the two dozen men remained there until six o'clock on the 18th. Kishen Singh had to leave at 4:30. 40

56. The evidence of Teja Singh is in sharp contrast to that of the four witnesses at the trial. Teja Singh had been in Canada since 1913, and had been educated at Vancouver. At the time of

- his examination he had left the employment of the plaintiff and was about to go to the prairies. His evidence was that there were only about a dozen men at the fire on Monday the 18th. On the Tuesday morning, the 19th, there were a few more men there. In his examination in chief in answer to the question as to what all these men were doing on the 18th, he said that they were making a fire trail and throwing earth on the fire. Upon his cross-examination he could not remember that any men were doing anything except making fire trails and throwing earth on the
- 10 fire. They all left at 5:30 p.m. Naranyan Singh told them to leave. When they left, the fire had pretty well died down, and there was just a slight smouldering or smoking. When they came back about 7:00 a.m. on the 19th, the fire (at which there had been during the preceding 14 hours six Chinese, tired after their day's work at building a railway track) was "pretty well down" but was still smouldering and about the same as they had left it at 5:30 p.m. the day before. No water had been put on the fire by the Chinese. In the morning of the 19th the day-crew "threw dirt around wherever the fire had started up or anything and
- 20 others kept on watching more or less." They were "just strolling around and seeing that it didn't get away anywhere." Teja Singh could not say how many men were throwing earth on the fire nor how many men were just watching it, but some were watching it "and some were more or less like guarding the fire, and others were going round and putting it out." The manner of guarding the fire was by "walking round the trails there, when they get a fire subdued, they generally walk up and down the trails." He did not see any water used. Teja Singh's evidence shows that there was no activity until about noon on Tuesday the
- 30 19th when a wind sprang up and the fire began to spread. According to Naranyan Singh, the fire up to that time had been considered safe. Teja Singh said Naranyan was not there in the morning of the 19th. (Naranyan Singh said he was there the whole morning and was there with twelve men between noon and 1 p.m., when the fire spread, as described by Teja Singh).
57. The plaintiff had, for the purpose of protection against fire, a railway tank-car which was kept on a little spur connected to the logging railway at the point marked "O'M 3" on Exhibit 4. On this car there were two tanks of a total capacity of 4,750 imperial gallons, and, between the two tanks, a steam pump, operated by steam from the locomotive. The capacity of this
- 40 pump was, at normal speed, 20 gallons per minute, or, at normal high speed, 30 gallons per minute. The plaintiff's witnesses Bal

Record,
p. 71,
ll. 19-35;
p. 68,
ll. 5-8, 34, 35;
p. 71,
ll. 36-39;
p. 69,
ll. 27-33;
p. 69,
ll. 17-22;
p. 72,
ll. 18-38.
p. 68, ll. 36-40,
p. 72, ll. 6-9,
p. 75, ll. 12, 13,
p. 77, ll. 23-31.
p. 63, ll. 29-41.
p. 64, l. 32,
to
p. 65, l. 2.
p. 79,
ll. 29-46.
p. 64,
ll. 4-12.
p. 80, l. 5
to
p. 81, l. 4.

p. 70, l. 11
to
p. 71, l. 5;
p. 81,
ll. 20-30.
p. 130, ll. 30-40.
p. 78, ll. 42-45.
p. 61, ll. 31, 32.
p. 63, ll. 7-11.

p. 234,
ll. 34-44.
p. 24,
ll. 2-8;
p. 353, l. 36,
to
p. 354, l. 14.

Record,
 p. 23, l. 23,
 to
 p. 24, l. 19;
 p. 33, l. 27,
 to
 p. 35, l. 24;
 p. 136,
 ll. 26-38;
 p. 235,
 ll. 4-18.
 p. 242,
 ll. 32-44;
 p. 251,
 ll. 3-39;
 p. 262,
 ll. 23-44;
 p. 254,
 ll. 5-16;
 p. 260,
 ll. 3-13;
 p. 268,
 ll. 17-23;
 p. 235,
 ll. 35-47;
 p. 236,
 ll. 7-10;
 p. 304, l. 40,
 to
 p. 305, l. 9.

Mukand and Cowan contended that the derailment on the 18th of August had been at the lower junction of the run-around track with the main logging railway (Exhibit 45) and that the switch had been left broken and some rails bent, and consequently the tank-car could not be brought down to the fire. (Bal Mukand also contended that the tank-car was too small to be of any use). The red dot was marked on Exhibit 45 by the logging-train-conductor O'Malley to indicate the place of the derailment. The evidence of the defendant's witnesses Davies, Trestain, Cann, Bishop and others, was that, immediately after the engine was re-railed, the rail which had been turned over was spiked in and the track restored to a good passable condition. This would be at about 4.30 p.m. or 5 p.m. on the 18th. This evidence was confirmed by O'Malley who said that at 7 a.m. on the 19th he actually hauled out an oil-car with his locomotive from the run-around track over the switches and on to the main logging spur. The jury believed the defendant's evidence in respect of the repair of the track at the point of derailment and that it was possible to get the tank-car out at any time after 5 p.m. on the 18th.

58. The plaintiff made no attempt to use its tank-car in order to extinguish the fire at Mile 35.2, and in breach of its duties under the Forest Act, continued its logging and milling operations until the afternoon of the 19th of August, instead of calling out its 150 employees to extinguish the fire.

p. 70,
 ll. 6-43;

59. Towards mid-day of the Tuesday, the 19th of August, a wind sprang up, and blew the fire, which the plaintiff had allowed to persist, out of control.

p. 81,
 ll. 20-30;

60. The flames jumped the railway line and set on fire the slashing, on the left hand side of the line going to Kapoor, consisting of the debris from the plaintiff's logging operations.

p. 285, l. 46
 to
 p. 286, l. 35.

61. The section foreman Reece, making his patrol of the track on his hand car on the 19th, reached Kapoor at 1:20 or 1:30 p.m. He saw, from Mile 36, the smoke in the slash on the lower side of the railway and proceeded to the Victoria side of the rock-cut. He then went to the plaintiff's office and telephoned to the defendant's dispatcher Roberts at Victoria. Immediately afterwards, according to Roberts, Cowan telephoned to Roberts that the fire was practically under control and he did not think there was any danger. Forty-five minutes or an hour afterwards Reece again telephoned to Roberts, and Cowan again followed

p. 300, l. 42,
 to
 p. 301, l. 33;

- Reece on the telephone and said that the fire was under control and he did not think assistance was necessary. Fraser, who was then between Victoria and Kapoor, cut in on this conversation. About forty minutes before, Fraser had been speaking on the telephone from Mile 31 to Cowan, and Cowan had told him that the fire was a little worse but they had it fairly well controlled and quite a number of men there. When Fraser cut in on the second conversation between Cowan and Roberts, he asked Cowan to get Reece, and Reece told Fraser that the fire was much worse.
- 10 Fraser then arranged with Cowan to have orders given to the nearest section gang to proceed at once to Kapoor on their hand car, and also ordered the train out of Victoria. He met and got on this train and picked up the other section gangs and arrived at Kapoor at 5:30 p.m. In the morning, about 8:30, Fraser had telephoned to the plaintiff's office at Kapoor and had been told that the fire was practically out.
62. When Fraser arrived at Kapoor with the train at 5:30 p.m. the railway bridge across Deer Creek was in flames and impassable. There was no locomotive beyond the Deer Creek bridge, and consequently it was impossible to bring to the fire the defendant's tank-car which was stationed at Deerholme, 22 miles beyond Kapoor. After rescuing some railway cars, he sent the foreman Davies, at about 6:45 p.m., into the lumber yard to see if he could do anything. Davies and his men Cann and Bishop went up the gangways between the lumber piles and turned on the hydrants with a view to flooding the gangways, but found no water. Fraser then put his men at making fire guards. At these they worked through the night and continued working on the 20th.
- 20
63. Once the fire had got into the slashing, it was found to be impossible to check it, and it eventually reached the buildings and the lumber and caused the damage complained of.
- 30
64. On the 20th a dispute arose between Fraser and Conway and Orchard, another Forest Branch official, as to the costs of fighting the fire. Conway, although the fire was then threatening standing timber and the employees of the plaintiff were not fighting it, refused to put them to work unless Fraser gave him a letter accepting on behalf of the defendant responsibility for the costs. Fraser refused to accept this responsibility, but, after the letter Exhibit 48 had been rejected, gave to Conway, under protest, the
- 40 letter Exhibit 23.

Record,
p. 309, l. 30,
to
p. 310, l. 26;

p. 308, l. 23,
to
p. 309, l. 29;
p. 333, l. 25
to
p. 334, l. 23.

p. 310,
ll. 22-40;
p. 244,
ll. 38-46;
p. 347, l. 8
to
p. 348, l. 30.
p. 312, l. 34,
to
p. 313, l. 19;
p. 314,
ll. 1-8;
p. 245,
ll. 2-41;
p. 256, l. 23,
to
p. 257, l. 21;
p. 260, l. 31,
to
p. 261, l. 16;
p. 318,
ll. 22-35;
p. 247, l. 13,
to
p. 248, l. 29;
p. 319, l. 40,
to
p. 320, l. 3.

p. 318, l. 38,
to
p. 321, l. 42;
p. 325, l. 16,
to
p. 327, l. 5;
p. 161, l. 6,
to
p. 162, l. 11;
p. 130,
ll. 8-26,
41-45;
p. 492,
p. 493.

Record,
p. 409.

65. The action was tried with a jury, who found, in answer to questions, as follows:

(1) *Q.* Was the fire of the 18th August, 1930, near Mile 35.2 on defendant's railway and which destroyed property of the plaintiff on the 19th August, 1930, and subsequent dates, started by any engine of the defendant? *A.* No.

(2) *Q.* Was the defendant in the month of August, 1930, using modern and efficient appliances on its engines? *A.* Yes.

p. 409,
ll. 9, 10.

(3) *Q.* If the answer to the first question is in the negative then was the origin or starting of the said fire unknown? *A.* Yes.

(4) *Q.* Did the said fire originate on the right of way of the defendant? *A.* Yes.

p. 409,
ll. 13-17.

(5) *Q.* If the answer to the 4th question be in the affirmative then (a) did the defendant become aware of the said fire? (b) if so where was the said fire then burning? *A.* (a) Yes. (b) On right of way on right hand side of track going from Victoria to Kapoor near Mile 35.2.

(6) *Q.* If the answer to the 4th question be in the affirmative then did the said fire spread from the defendant's right of way to the plaintiff's lands? *A.* Yes.

(7) *Q.* If the answer to the 6th question be in the affirmative then did such spreading of said fire destroy the plaintiff's property? *A.* Yes.

(8) *Q.* Did the defendant at or near said Mile 35.2 keep its right of way free from dead or dry grass, weeds and unnecessary combustible material? *A.* Yes.

(9) *Q.* If the answer to the last question be in the negative then did non-compliance with such statutory provisions result in the said fire spreading to the plaintiff's land? *A.* See No. 8.

p. 409,
ll. 30-36.

(10) *Q.* If the defendant had knowledge of the said fire and if you have found that it originated on its right of way, then did defendant take proper precautions to prevent said fire from spreading from its right of way and doing damage to the plaintiff's property? *A.* Yes, except as qualified by answers to questions No. 15 and 16.

(10) (a) Q. If so, in what did those precautions consist? A. Consisted of Fraser, of defendant Company securing all available employees of said Company with all necessary fire-fighting equipment and proceeding to scene of the fire, and remaining available for fire-fighting purposes until assured by Forest Ranger Dunn that he could withdraw his men as there was a sufficient force available to cope with said fire at that time.

Record,
p. 410,
l. 32.

10 (11) Q. Did N. S. Fraser on behalf of the defendant Company tender the services of himself and his men for the purpose of fighting the said fire? A. Yes. To Forest Ranger Dunn.

p. 409,
l. 37.

(12) Q. Was said Fraser instructed by Forest Ranger Dunn to take his men away or was he informed by him that there was sufficient force available to cope with said fire at that time? A. Mr. Fraser was informed by Forest Ranger Dunn that there was no necessity to keep his (Fraser's) men at the scene of the fire as there was sufficient force available to cope with said fire at that time.

p. 409,
l. 40.

20 (13) Q. Were the buildings of the plaintiff destroyed by fire other than that which originated at or near said Mile 35.2? A. No.

(14) Q. Was the lumber of the plaintiff destroyed by fire other than that which originated at or near said Mile 35.2? A. No.

30 (15) Q. Was the defendant guilty of negligence causing or contributing to the said fire, if so in what did such negligence consist? A. Yes. Negligence of crew of gas car in not reporting the fire on Monday, August 18th and delay of crew of way-freight in not reporting promptly on arrival at Kapoor the same day.

p. 410,
ll. 6-10.

(16) Q. If the defendant Company became aware on the 18th of August of said fire was it negligent thereafter in connection with said fire? A. No—except as stated under answer to question 15.

p. 410,
ll. 11-14.

(17) Q. If so, in what did its negligence consist? A. Specified in answer to question 15.

(18) Q. Was the plaintiff Company guilty of negligence in connection with said fire? A. Yes.

p. 410,
ll. 17-22.

Record,

(19) *Q.* If so, in what did its negligence consist?
A. In not using their water tank car as soon as it was possible to do so.

(20) *Q.* If there was any fault on the part of both parties which was a real and substantial cause of the ultimate damage in what degree was each party at fault? *A.*

(21) *Q.* Damages? *A.* We find that the total loss sustained by the Kapoor Lumber Company in the fire on August 19th, 1930, was \$117,830.00.

pp. 1, 5.

66. On comparing this verdict with the relevant charges in the statement of claim, it is apparent that those charges failed.

67. The plaintiff accused the defendant of negligence in three particulars, viz. :—

(A) that sparks from the defendant's engines had caused the fire;

(B) that the defendant's line of track or right of way was foul;

(C) that the defendant had failed in a duty to prevent the spread of the fire.

68. The jury found that the fire was not caused by the engines, that the right of way was clean, and that the defendant did not commit any breach of duty in permitting the fire to escape.

p. 409, l. 13.
 p. 410, l. 6.

69. The only answers, upon which the plaintiff can rely, are those responsive to questions 5 and 15.

70. With regard to the answer to question 5, it is submitted that there is no evidence at all to support the finding that the fire *originated* on the defendant's right of way.

71. The first point of time, with respect to which there was any evidence on the part of the plaintiff as to the position of the fire, is about 1 o'clock in the afternoon of the Monday, the 18th of August.

72. The fire had then been burning for at least 5 hours, and no attempt was made by the plaintiff to trace the track of the fire to its source, even if such an attempt would have offered any likelihood of success.

73. Since the whole of the hillside had already been burnt over in the previous year right up to and on to the right of way, leaving a burnt and blackened area, any such attempt would seem to have been ordained to failure, and this may have been the reason why no such attempt was made by the plaintiff.

Record.

74. The finding of the jury that the fire was of unknown origin does, it is submitted, exonerate the defendant from all responsibility, but, before dealing with this aspect of the matter, the appellant desires to say something with regard to the answer
10 to question 15.

75. The appellant would wish first of all to direct attention to the form of the question: "Was the defendant guilty of negligence causing or contributing to the said fire, if so in what did such negligence consist?"

p. 410,
ll. 6-8.

76. It is submitted that no answer to such a question could possess any legal significance, since negligence, in order to impose any liability in law, must be such as was the effective cause of the loss, and not a merely contributory condition. That this is so is made plain by the language in the following cases:

20 77. In the case of *Brenner v. Toronto Railway Coy.* (1907, 13. O.L.R. 423), Mr. Justice Anglin said at page 438:—"the distinction between causes described as 'proximate,' 'efficient,' or 'decisive' on the one hand, and causes spoken of as 'merely inducing,' or 'sine qua non,' or 'amounting rather to conditions' on the other, is well established in jurisprudence."

In the case of *British Columbia Electric Railway Coy. v. Loach* (1916. 85 L.J.P.C. 23), Lord Sumner said at page 28:—"it is surprising how many epithets eminent Judges have applied to the cause, which has to be ascertained for this judicial purpose
30 of determining liability, and how many more to other acts and incidents, which for this purpose are not the cause at all: 'efficient or effective cause,' 'real cause,' 'proximate cause,' 'direct cause,' 'decisive cause,' 'immediate cause,' 'causa causans' on the one hand, as against, on the other, 'causa sine qua non,' 'occasional cause,' 'remote cause,' 'contributory cause,' 'inducing cause,' 'condition,' and so on."

While Lord Sumner may have deprecated the multiplication of adjectives, it is clear that he was recognizing the substantial

Record, distinction between the true cause and the contributory circumstance.

p. 367,
 ll. 11-26;
 p. 384,
 ll. 40-47;
 p. 366,
 ll. 9-13;
 p. 367,
 ll. 27-30;
 p. 368,
 ll. 34-40;
 p. 369,
 ll. 7-12.

78. This question, along with all the others, was framed by the learned trial judge with the acquiescence of the plaintiff and (except as to question 20) against the expressed opposition of the defendant, which submitted what it humbly considered to be an appropriate list of questions, which, however, was rejected by the learned trial judge on the motion of the plaintiff. The defendant thereby, it is submitted, completely discharged its duty (*Redican v. Nesbitt*, 1924 S.C.R. 135 at p.156). 10

p. 410,
 ll. 6-14.

79. But even if question 15 possessed any significance, the answer, it is submitted, especially when read in conjunction with the answer to question 16, effectively relieves the defendant from liability.

80. These two answers show that the only "negligence" imputed to the defendant was the failure to report the fire and the delay in reporting the fire by the train crews of the gas car and the way-freight.

81. Now the gas car passed through Kapoor about 10:25 o'clock in the morning and its train crew did not report at all. 20 The way-freight reached Kapoor at 12:05 o'clock in the afternoon, and its conductor Miller did report at about 12:30 o'clock.

82. The utter immateriality of these failures is shown by several facts which are not in dispute.

83. The existence of the fire was known to the plaintiff's employees at 8 o'clock and 11 o'clock in the morning. Measures were taken by the plaintiff to control and extinguish the fire at 1 o'clock in the afternoon, twenty-four hours before there was any threat of danger. The defendant's agent, Fraser, was on the scene of the fire with a complete fire-fighting crew and equipment 30 at 5 o'clock in the afternoon. The Fire Ranger Dunn assumed control of the fire at the same time, and issued instructions to the plaintiff as to what it was to do, in order to extinguish the fire. The president of the plaintiff Company came to the scene of the fire late in the evening of the same day, and satisfied himself that there was no danger. The plaintiff had available 150 men and a powerful tank car, which could have been used to put

out what Dunn describes as a very insignificant patch of burning stumps and logs.

Record,
p. 120,
ll. 1-17.

84. There is a very serious question as to whether the men of the train crew were under any duty to the plaintiff to report in the circumstances, but having regard to the undisputed facts, it is submitted that it is impossible reasonably to contend that the failure to report at 10:25 o'clock on the morning of the Monday had anything whatever to do with the disaster which occurred on the afternoon of the Tuesday. Of course, what the plaintiff
10 has to make out is that this failure to report was the 'dominant,' 'substantial,' or 'effective' cause.

85. The real import of the answer to question 15 becomes apparent from a consideration of paragraph 7 (f) of the statement of claim, of the evidence and the exhibits.

p. 410,
ll. 6-10;
p. 2,
l. 14.

86. The crew of the gas car were, it is true, under a duty—to the defendant—to report. The defendant was not under any corresponding duty to the plaintiff.

87. The command and supposed duty to report fires were presented in evidence before the jury as emanating from the
20 highest railway authority. Fraser, the defendant's highest local officer, had admitted, in cross-examination, that it was part of the "duty" of the crew of the gas car to report the fire and that both Mulligan and Jones knew that it was "part of their duty." The "working instructions" contained in the time-table have a heading clearly indicating that they purport to be made under the authority of the Board's Order and are, in form, categorical and unconditional: every fire upon or near the right of way was to be reported. In cross-examination these instructions had been
30 called and admitted to be "instructions by the Board of Railway Commissioners."

p. 328, l. 44,
to
p. 329, l. 14.

p. 441,
ll. 1-6,
13-20.

p. 229,
ll. 6, 7.

88. The jurisdiction of the Board to make orders and regulations in respect of protection against fire is specially conferred by Section 281 of the Railway Act. (R.S.C. 1927, C. 170). Section 34 gives a general jurisdiction to make orders and regulations. It is submitted that Section 281 relates primarily to fires arising from the fire carried in locomotives and extends only to fires having their source in the operation of the railway.

89. Under sub-section (e) of Section 14 of the Board's

Record,
p. 469.
ll. 7-13;
ll. 22-24.

Order, the only fires in respect of which, upon receiving a report, "action to extinguish" is to be taken, are fires "presumably started by the railway." It is submitted that by the correct interpretation of sub-section (e), when read together with these words in sub-section (c), the section does not apply at all to any fire which was not started or caused by the railway.

90. If, however, the above submission as to the meaning of sub-section (e) is wrong, it is submitted that no right of action for damages can arise out of a violation of the regulations contained in the Order and that, if the Order is to be interpreted as purporting to create a right of action, the Board had no power or authority under the Railway Act to make the Order. If Parliament had intended to impose upon railway companies a liability in damages to adjoining property-owners arising from the mere ownership of the strip of land from which the fire spread, one would expect to find such liability created in the clearest terms in the Railway Act itself. Parliament did, indeed, consider whether, in view of the right conferred upon railway companies to carry fire through the country, it ought not to alter, as against such companies and in favor of persons owning property near railways, the general law respecting the escape of fire. It decided to alter the general law and what it did was to create, by Section 387 of the Railway Act, a special liability in respect to fires started by locomotives. It is submitted that it is unquestionably apparent from this section that the rights and liabilities of property-owners and railway companies in respect of fire were considered by Parliament and are dealt with in the clearest terms in the Act itself, and that if it had been intended to impose a further special liability, in respect of the same subject matter, arising out of bare ownership of land, such further alteration of the general law would have been provided for with equal clearness by the Act itself, or, if it had been decided that power in the same regard should be conferred upon the Board, that the creation and extent of such power would have been expressed in the Act in unmistakable terms. It is submitted that there is nothing at all in the Act which could be construed as giving the Board such a power; that the authority given by Section 281 (c) generally to define "the duties of the company and of the fire rangers in respect thereof" is merely an authority to prescribe precise measures in respect of the patrol and is not an authority to create a liability in damages; and that the only remedy for a violation of the Board's regulations in respect of fire is the penalty provided in the Act or in the regulations.

91. The jury, therefore, in answering question 15, meant that the train crews were to blame, in that they failed to carry out their instructions.

Record,
p. 410,
ll. 6-10.

92. It is submitted that the jury cannot by any stretch of the imagination be held to have found that the failure to report the fire on Monday forenoon was the effective cause of the loss which occurred on Tuesday afternoon, since any such finding would have been devoid of any foundation in the way of evidence. There was, indeed, no causal connection: *Metropolitan Railway Company v. Jackson* (1877 3. A.C. 193 per Lord Cairns at p. 198).

93. It is further submitted that the finding that the fire was of unknown origin relieves the defendant from all liability: *McAuliffe v. Hubbell* (1930, 46 O.L.R. 349). *Job Edwards Ltd. v. Birmingham Canal Navigation Coy.* (1924, 93 L.J.K.B. 261).

94. There is also a further consideration, which the appellant wishes to submit:

95. By the answer to question 19, the jury found that the plaintiff was negligent in failing to use its tank-car, and a recollection of the circumstances must have convinced the jury that this was, indeed, a very substantial cause of the ultimate loss.

96. The questions prepared by the learned judge, as well as those originally submitted by the defendant, included one numbered 20, the introduction of which was prompted by the Contributory Negligence Act (Statutes of British Columbia 1925, C. 8).

p. 410,
l. 23.

97. Sections 2 and 3 of that Statute read as follows:

(2) Where by the fault of two or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss shall be in proportion to the degree in which each person was at fault:

Provided that:—

(A) If, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally; and

Record,

(B) Nothing in this section shall operate so as to render any person liable for any loss or damage to which his fault has not contributed.

(3) In actions tried with a jury the amount of damage, the fault (if any), and the degrees of fault shall be questions of fact for the jury.

98. It is submitted that this was a proper question to be asked in the first instance.

99. It is further submitted that it became improper to ask this question after the jury had answered, in the way it did, the first nineteen questions, since those nineteen answers negatived any negligence on the part of the defendant, which was a substantial or effective cause of the ultimate loss. 10

100. If, however, it could have been said that there was any negligence, in the legal sense, on the part of both parties, then it is submitted that it was plainly the duty of the plaintiff to obtain an answer to question 20.

p. 384,
ll. 40-47;
p. 392,
ll. 20-33;
p. 402,
ll. 9-16;
p. 406,
ll. 19-36.

101. The plaintiff, in the first place, recognized this duty and moved the learned trial judge to submit the question: but, on further consideration, induced no doubt by somewhat obvious motives, deliberately abandoned and withdrew its application, and declined to have the question submitted to the jury. 20

102. It is submitted that it was the plaintiff's duty to obtain all the answers necessary for its success in the action: (*Rickards v. Lothian*, 1913, 82 L.J.P.C. 42 at p. 47): and that the plaintiff must be held to the result of its conduct at the trial, on the authority of the decision referred to by Mr. Justice Martin.

p. 14,
l. 35.

103. The defendant relies further on the defence raised in paragraph 19.

pp. 471, 480.

104. It is submitted that the action ought to have been dismissed on the ground that clauses 13 of the two agreements (Exhibits 19 and 20) were a good and sufficient defence. It is submitted that the words in these clauses "which may be endangered by fire by reason of the operation (negligent or otherwise) of the siding" are merely words of description of the buildings and other property which were to be insured and that the clauses 30

p. 474,
ll. 20-25.

p. 481,
ll. 21-27.

extend to all loss resulting from fire, whether arising from the operation of the sidings or not. It is submitted that it is apparent from the location of the sidings as shown in red upon the plans attached to the agreements, and referred to in the first paragraph of the agreements, that the buildings and other property destroyed by the fire in August, 1930, (of which the location appears from Exhibit 4 and is referred to in the evidence) were within the description, contained in clauses 13, of buildings and other property "wherever situated which may be endangered by fire by reason of the operation (negligent or otherwise) of the siding."

10

105. The Appellant therefore submits that the judgments of the Court of Appeal and of the learned trial judge should be set aside and judgment given dismissing the action for the following amongst other

REASONS.

- (1) BECAUSE the action ought to have been dismissed by the learned trial judge upon the findings of the jury.
- 20 (2) BECAUSE the action ought to have been dismissed by the Court of Appeal upon the findings of the jury as interpreted in the light of the evidence and the charge to the jury.
- (3) BECAUSE the jury has found that the fire upon the right of way was not started nor caused by the defendant nor any one for whose acts the defendant is responsible.
- (4) BECAUSE the jury has found that the fire upon the right of way was an accidental fire, within the statute.
- 30 (5) BECAUSE in law there was no duty upon the defendant to extinguish or to take steps to extinguish the fire.
- (6) BECAUSE the jury has not found any negligence, in the legal sense, against the defendant.
- (7) BECAUSE the jury has not found that there was any negligence on the part of the defendant which was the proximate cause of the damage.

- (8) BECAUSE there was no evidence to support such a finding.
- (9) BECAUSE there was no evidence upon which a jury of reasonable men could make such a finding.
- (10) BECAUSE the plaintiff failed at the trial to establish its case.
- (11) BECAUSE the judgment of the Court of Appeal is wrong and should be set aside.
- (12) BECAUSE the judgment of the learned trial judge is wrong and should be reversed. 10

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Counsel for the Appellants.

No. 39 of 1933.

In the Privy Council.

ON APPEAL

*From the Court of Appeal for
British Columbia*

BETWEEN

**CANADIAN NORTHERN PACIFIC
RAILWAY COMPANY** (Defendants)
Appellants

AND

**KAPOOR LUMBER COMPANY
LIMITED** (Plaintiffs)
Respondents.
and Cross-Appeal Consolidated

Case

FOR THE APPELLANT.

*Canadian Northern Pacific
Railway Company*

WHITE & LEONARD
BANK BUILDINGS,
LUDGATE CIRCUS, E.C. 4

R. W. HANNINGTON,
Solicitor for the (Defendants)
Appellants.

MAITLAND, MAITLAND,
HUTCHESON & REMNANT,
Solicitors for the (Plaintiffs)
Respondents.