

63, 1933

ON APPEAL FROM THE COURT OF APPEAL
OF BRITISH COLUMBIA

BETWEEN:

CANADIAN NORTHERN PACIFIC RAILWAY COMPANY
(Defendant) *Appellant*

AND

KAPOOR LUMBER COMPANY LIMITED
(Plaintiff) *Respondent*

AND BETWEEN:

KAPOOR LUMBER COMPANY LIMITED
(Plaintiff) *Appellant*

AND

CANADIAN NORTHERN PACIFIC RAILWAY COMPANY
(Defendant) *Respondent*
(Consolidated Appeals)

Case for Kapoor Lumber Company Limited
Respondent and Cross Appellant

1. This is an appeal and cross-appeal from the Judgment of the Court of Appeal of British Columbia, dated the 27th day of January, A.D. 1933, setting aside the Judgment directed to be entered at the trial of this action before the Honourable Mr. Justice W. A. Macdonald and a special Jury, and directing a new trial to be had between the parties.

Record.
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20 2. The action arises out of a fire which occurred on the 18th day of August, A.D. 1930 and subsequent days at the Town of Kapoor, situate between thirty-five and thirty-six miles west from the City of Victoria, on Vancouver Island, in the Province of British Columbia.

Page 19, L. 11

3. The action was tried before the Honourable Mr. Justice W. A. Macdonald and a special jury at the City of Victoria. The trial lasted some days, and the Jury assessed the Plaintiff's damages at \$117,830.00, and answered certain questions submitted to them by the trial Judge.

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4. On the answers given, the trial Judge on the 30th day of July, A.D. 1932, gave Judgment, awarding the Plaintiff damages in the amount assessed by the Jury.
- Page 97, L. 15
5. The Plaintiff owned and operated a large lumber mill at Kapoor, and in conjunction with the lumber mill were logging large tracts of timber.
- Page 29
Exhibits 6, 7
and 8
Pages 25 to 30
6. In connection with the mill, there was a townsite made up of the residences of the employees, school, offices, bunkhouses, dining halls, etc. The fire in question completely wiped out the townsite, and practically destroyed the Company's plant and equipment, with the exception of the mill itself, which was saved through the strenuous efforts of the employees of the Plaintiff Company; the largest single item of loss being the destruction of the yard containing the manufactured lumber and its contents. . 10
- Page 21, L. 7
Page 20, L. 10
Page 53, L. 10
Page 57, L. 27
Page 61, L. 14
Page 113
Page 164, L. 14
7. The fire started upon the right-of-way of the Defendant Company, approximately a third of a mile east of the Company's mill. The point where the fire started is spoken of throughout the evidence as 35.2, that being the distance in miles from the City of Victoria.
- Page 409, L. 9
8. The origin of the fire is unknown. 20
- Page 299, L. 22
9. The Defendant Company operated trains upon the right-of-way in question from Victoria past Kapoor to a terminus known as Kissinger and return.
- Page 207, L. 1
Page 462, Ex. 46
10. Under the Regulations of the Board of Railway Commissioners, the Appellant was under obligation to prevent fires upon the right-of-way and a duty was cast upon various employees, including engineers and conductors, to immediately extinguish, if possible, any fires they observed on or near the right-of-way and to report any such fires immediately.
- Page 19, L. 36
Page 120, L. 46
Page 126, L. 1
Page 251, L. 6
to 252, L. 22
Pages 288 to 290
11. At this particular period of the year in this territory there is a very high fire hazard and their patrol-men in this section had extinguished no less than four fires in this particular section of the right-of-way. 30
- Page 299, L. 28
12. On Monday, the 18th of August, 1930, a passenger train, described in the evidence as a "gas car", approached Kapoor passing the point 35.2 at approximately 10:25 in the morning in charge of Jones and Mulligan, the engineer and conductor respectively employed by the Defendant. They both observed the fire burning

upon the Company's right-of-way. At that time the fire was very small, only showing a little smoke.

Record.
Page 225, L. 11
Page 229, L. 41
Page 331, L. 1-12

Page 228, L. 30
to 229, L. 25
Page 232, L. 38-
46
Page 302, L. 15-
27
Page 334, L. 24

13. Jones and Mulligan, although both observing the fire, took no steps to extinguish it nor did they report it, although a few moments after passing the fire, they stopped at Kapoor where the Defendant had installed telephone service by which the fire should have been reported. They did not notify the section foreman, one, Reece. They did not even report the fire to the Plaintiff.

10 14. On the same day, a freight train, also operated by the Defendant Company, running from Victoria to Kissinger, passed the point 35.2 at approximately noon, and Miller and Mineau, conductor and engineer respectively, observed smoke from the fire still burning upon the Company's right-of-way. Mineau discussed the fire with the conductor Miller, which fire is described by Mineau as a "little bit of smoke", but neither Miller nor Mineau made any report of the fire upon their arrival at Kapoor. They stopped at Kapoor and proceeded to carry out shunting operations on the sidings there, in the course of which operations, the engine became derailed. Miller inspected the derailment and then went back to
20 the caboose to have his lunch. He then left the caboose to re-rail the engine and at this time noticed that the fire was gaining considerable volume, as the smoke was rising and getting bigger. Mineau also noticed that there was quite a bit more smoke coming up in a body. Miller did not then report the fire, but attempted to re-rail his engine without success. He then, from the office of the Plaintiff Company, which was near at hand, communicated with headquarters by telephone, requesting assistance for re-railment, and then for the first time reported the fire. This was at about 1
30 o'clock, and up to this time the freight crew of five men had done nothing in connection with the said fire and although they were held at Kapoor until the arrival of the relief train some three hours later, they took no steps whatever in connection with the said fire, other than the 1 o'clock report made by Miller.

Page 217 L. 16
Page 189, L. 15

Page 194, L. 28
to 195, L. 12

Page 190, L. 23

Page 218, L. 8-31
Page 221, L. 44
to 223, L. 20

Page 196, L. 40

Page 198, L. 20-
40

15. Shortly before 1 o'clock, the Mill Superintendent of the Plaintiff Company noticed the fire and at once proceeded with a crew of men to fight it, arriving at the scene of the fire at approximately 1 o'clock.

Page 21, L. 20
Page 21, L. 45
Page 52
Page 60, L. 39

16. The Plaintiff Company kept a crew of men day and night continuously endeavoring to keep the fire under control.

Page 21-32
Page 143, L. 28

40 17. A wrecking train, in charge of one, Fraser, the highest official in the operating Department of the Defendant Company on this line, proceeded from Victoria to re-rail the engine, arriving at Kapoor approximately at 4 o'clock in the afternoon. This train

Page 328, L. 44
Page 329, L. 1

Record.
Page 136, L. 22
Page 171, L. 30
Page 241, L. 28

Page 305, L. 22

Page 105, L. 13
Page 145, L. 9

Page 116, L. 18
Page 118, L. 31

Page 113, L. 8
Page 117, L. 21
Page 114, L. 2
Page 119, L. 17
Page 121, L. 18

Page 116, L. 36

Page 136, L. 12
Page 139, L. 4-40

Page 113, L. 30
Page 117, L. 28
Page 174
Page 241, L. 28
Page 156, L. 25
Page 330, L. -1-15

Page 306, L. 6

Page 97, L. 28

Page 22, L. 41
Page 100, L. 39

carried a wrecking crew, and was equipped with shovels, buckets and fire-fighting equipment. It passed the fire and went on to the scene of the derailment. This train brought not only the crew, but also two section gangs, who were available for the use of the Defendant Company. Fraser not only had had a report of the fire, but also observed it as they were passing it in the wrecking train.

18. In the meantime, one, Campbell, a forest ranger at Victoria, having been notified by the Plaintiff of the fire, despatched a young man named Dunn, one of his assistant rangers, to Kapoor for the purpose of observing the fire and reporting conditions to Campbell. 10

19. Dunn went to Kapoor and found the employees of the Plaintiff Company doing their utmost to control the fire which had then spread to an area approximately 200 ft. x 50 ft. along the right-of-way of the Defendant Company. He was satisfied with the efforts these men were making to control it.

20. Having made his investigation of the fire, he returned up the track to the office of the Plaintiff Company on his way back to report to Campbell.

21. After re-railing the engine, Fraser went to the Kapoor office to report his trains out, where he had a conversation with one, Cowan, Accountant of the Plaintiff Company. Fraser took the position that the Defendant Company was not obliged to fight the fire and during the conversation, Dunn came into the office, and at Cowan's suggestion, Fraser and Dunn went down to the scene of the fire on the wrecking train. 20

22. The wrecking train stopped at 35.2 with a large crew and fire-fighting equipment, but no steps were taken by them to extinguish the fire. Fraser was ready to take his men back to their respective stations, and apparently pursuant to some private arrangement between the forestry officials and the Defendant Company, inquired of Dunn if his men were needed. 30

23. Dunn inspected the fire again, and, according to the evidence given by Fraser, being satisfied with the fire-fighting methods which were being adopted by the men sent down by the Plaintiff, expressed it as his opinion that there was no necessity for Fraser and his men to remain. Fraser and his men left the scene of the fire, and Dunn left to make his report to Campbell.

24. During Fraser's visit to the scene of the fire, he did not, except for the interview with Cowan, consult with the officials of the Plaintiff Company, nor did he make any offer to them of assistance in fighting the fire. 40

25. The men sent down by the Plaintiff Company continued to fight the fire throughout the night, and although they thought they had succeeded in controlling it, a wind sprang up about noon of the following day and the fire became completely beyond control.
26. The fire swept west, burned out the townsite lying to the south of the Railway, swung north, jumped the right-of-way, destroyed the lumber yard, swept around the mill and up the hill into the woods. It was some days before the fire was finally extinguished. The employees of the Plaintiff Company fought strenuously to save the mill and their belongings. Some of them being overcome by heat and smoke were taken to the hospital. The mill itself was saved, but the townsite, the logging equipment and the lumber yards were burned out.
27. Fraser returned the next day to the scene of the fire with the same crew that he had the day before, but it was then beyond control.
28. The following day, Fraser requested the Forestry Department to take over the fire for the Defendant Company.
29. The Plaintiff Company carried Insurance upon the mill which was saved, and also partial Insurance upon the property that was destroyed. The Insurance Company paid approximately \$107,500.00.
30. The Defendant Company is subject to special statutory requirements in respect of their duty to maintain fire-fighting equipment and their duty to extinguish fires upon or near their right-of-way. These are to be found in the Order of the Board of Railway Commissioners for Canada, known as General Order No. 362. This Order provides in Section 12, 13, 14 and 15 as follows:
- “12. That the railway company provide and maintain a “force of fire rangers fit and sufficient for efficient patrol and “fire-fighting duty during the period from the first day of “April to the first day of November of each year; and the “methods of such force shall be subject to the supervision and “direction of the Chief Fire Inspector or other authorized “officer of the Board.
- “13. That the Chief Fire Inspector each year prepare “and submit to each and every railway company a statement “of the measures such railway companies shall take for the “establishment and maintenance of said specially organized

Record.

Page 70, L. 11
Page 81, L. 24
Page 147, L. 31Pages 81-85
Pages 25-30
Pages 140-142
Page 151, L. 48
Page 152
Page 160, L. 30
Page 32, L. 27
Page 143, L. 28
Page 100, L. 16Page 125, L. 23
Page 158, L. 13
Page 493, Ex. 23

Page 132, L. 3

Page 207, L. 1

Page 462, Ex. 46

“force. Said statements, among other matters, may provide
“for—

“(a) The number of men to be employed on the said
“force, their location and general duties, and the methods
“and frequency of the patrol;

“(b) The acquisition and location of necessary
“equipment for transporting the said force from place to
“place, and the acquisition and distributing of suitable
“fire-fighting tools and;

“(c) Any other measures which are considered by 10
“him to be essential for the immediate control of fire and
“may be adopted at reasonable expense.

“14. That every such railway company instruct and re-
“quire its sectionmen and other employees, agents, and con-
“tractors to take measures to report and extinguish fires on
“or near the right-of-way as follows:

“(a) Conductors, engineers, or trainmen who dis-
“cover or receive notice of the existence and location of a
“fire burning upon or near the right-of-way, or of a fire 20
“which threatens land adjacent to the right-of-way, shall
“report the same by wire to the Superintendent, and shall
“also report it to the agent or persons in charge at the
“next point at which there shall be communication by
“telegraph or telephone and to the first section employees
“passed. Notice of such fire shall also be given immedi-
“ately by a system of warning whistles, or by such other
“method as may be approved by the Board.

“(b) It shall be the duty of the Superintendent, or
“agent, or person so informed to notify immediately the 30
“nearest forest officer and the nearest section employees
“of the railway of the existence and location of such fire.

“(c) When fire is discovered, presumably started
“by the railway, such sectionmen or other employees of
“the railway as are available shall, either independently or
“at the request of any authorized forest officer, proceed to
“the fire immediately and take action to extinguish it;
“Provided such sectionmen or other employees are not at
“the time engaged in labours immediately necessary to
“the safety of trains.

“(d) In case the sectionmen or other employees
 “available are not a sufficient force to extinguish the fire
 “promptly, the railway company shall, either indepen-
 “dently or at the request of any authorized forest officer,
 “employ such other labourers as may be necessary to
 “extinguish the fire; and as soon as a sufficient number of
 “men, other than the sectionmen and regular employees,
 “is obtained, the sectionmen, and other regular employees
 “shall be allowed to resume their regular duties.

10 “(e) The provisions of this section shall apply to
 “all fires occurring within 300 feet of the railway track,
 “unless proof shall be furnished that such fires were not
 “caused by the railway.

20 “15. That every such railway company give particular
 “instructions to its employees in relation to the foregoing
 “regulations, and cause such instructions to be posted at all
 “stations, terminals, and section houses along its line of rail-
 “way. In case said instructions are not also carried in em-
 “ployees’ time tables during said prescribed period, or in
 “‘operating’ and ‘maintenance of way’ rule books, they shall,
 “previous to April 1st of each year, be re-issued to all em-
 “ployees concerned, in the form of special instructions. The
 “Chief Operating Officer or the said Chief Fire Inspector, as
 “the case may be, may waive the above requirements in whole
 “or in part, as to lines or portions of lines where, in his judg-
 “ment, the fire danger is not material.”

30 31. Under date of March 1, 1930, the chief fire inspector
 issued to the Canadian National Railways, of which system the
 Defendant Company is a part, instructions under General Order
 No. 362. In those instructions, the portion of the line running past
 Kapoor is designated as Cowichan Sub-division, and the instruc-
 tions being:

Page 207, L. 14
 Page 483, Ex. 47

“Between Junction and Kissinger, 93.4 miles working
 instructions. A fire-fighting tank car with steam pump, hose
 and fire-fighting tools shall be stationed at Deerholme or You-
 bou in charge of a competent man. Adequate provision shall
 be made for prompt use of this equipment on any fire which
 cannot be handled by ordinary means.”

32. By way of definition, it is provided—

40 “For the purposes of supervision, inspection and reports,
 all mileage mentioned herein is to be regarded as forested
 territory. Where some form of special patrol is not pres-

Page 484, L. 20

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cribed, the classification is indicated by the words 'working instructions'. Where this occurs, special patrol is not required, but the fire protection work is to be handled by section men and other regular employees in accordance with standard working instructions issued by the Company under regulation 15 of the Board's General Order No. 362."

Page 164, L. 28
to 165, L. 20
Page 483, Ex. 47
Page 182, L. 38
Page 199, L. 42
to 200, L. 28
Page 220, L. 42
to 221, L. 33

33. Standard working instructions under that Order were issued by the Defendant Company, and particularly were issued to all the employees of the Defendant Company employed upon the line running past Kapoor, and who had any connection with the fire in question. Those working instructions provide as follows: 10

"To all Employees generally—

"In carrying out this Order, it will be the duty of all "Officers and employees generally to take precaution to prevent fires on or along the roadway of the Company, to promptly extinguish and prevent spread of fires outside the "right-of-way and to investigate and report fires and probable "cause thereof.

"To All Conductors, Enginemen, Trainmen—

"Conductors, Enginemen or Trainmen who discover or 20
"receive notice of the existence and location of a fire burning
"upon or near the right-of-way, or of a fire which threatens
"lands adjacent to the right-of-way, shall report same by wire
"to the Superintendent, and also to the Agent or person in
"charge at the next or nearest point where there shall be tele-
"graph or telephone communication, giving exact location by
"mileage.

"Enginemen shall, on discovering or receiving notice of
"a fire, stop and notify the first section employees passed of 30
"such fire, unless it is practicable for the train crew to extin-
"guish same immediately, in which case this action shall be
"taken.

"No employee shall do or cause damage or injury to any
"of the fire-protective appliances on any engine.

"Fire, live coal or hot ashes shall not be deposited on the
"tracks or right-of-way unless extinguished immediately
"thereafter, except in pits provided for the purpose. On no
"account shall ashpans be dumped, or ashes from cars or
"caboose be thrown out on the right-of-way while running.
"Burning or smouldering waste taken from hot-boxes shall be 40
"covered with earth or otherwise completely extinguished.

Page 228, L. 30

“To All Agents, Despatchers and Operators—

“Conductors, Enginemen and Trainmen have received
 “instructions to report all fires occurring on or adjacent to the
 “right-of-way, and it shall be your duty, on receiving such
 “report, to notify immediately the Superintendent and Road-
 “master by wire, also the section foreman and local Fire In-
 “specter of the Railway Commission, giving the exact loca-
 “tion, by mileage, of the fire, its extent, and any other inform-
 “ation which may be of value, particularly as to the number of
 10 “men needed to fight same.

“To Section Foremen, Extra Gang Foremen, Bridge Foremen,
 “Telegraph or Other Construction Gangs, and Other
 “Track Employees—

“In all cases where fire occurs, it shall be your duty to
 “proceed immediately to such fire and extinguish same, re-
 “maining as long as may be necessary to do this. It must be
 “understood that this is the most important work that can be
 “done, and that the carrying on of your work, though it may
 “be important, must be set aside until the fire is completely
 20 “extinguished. In case the fire cannot be extinguished as
 “above, additional help shall be immediately requested by tele-
 “graph or telephone message to the Superintendent or Road-
 “master. The section foreman on whose section the fire occurs
 “shall, in the absence of an official of the Company, make a
 “thorough investigation regarding the origin of the fire, and
 “submit a full report to the roadmaster. A report shall be sub-
 “mitted covering every fire starting or burning within three
 “hundred feet of the track, regardless of size or damage done.

“Between April 1st and November 1st, no ties, cuttings,
 30 “debris or litter upon or near the right-of-way shall be burned
 “except under such supervision as will prevent such fire from
 “spreading beyond the strip being cleared.

“Officers of the Railway Commission may at any time
 “request that no such burning be done along specified portions
 “of the line.

“To Superintendents, Roadmasters and other Officials Con-
 “cerned—

“If the fire is of such an extent that the section gang, or
 “other local force available, cannot control it unaided, the
 40 “Superintendent or, in his absence, his representative, must

Record. "immediately arrange for the dispatch of the Roadmaster or
 "other competent officer with the necessary additional men,
 "who can be drawn from those available in any Department,
 "and all necessary fire-fighting appliances, to the scene of the
 "fire, and must so arrange the train service that they will get
 "to the fire with the least possible delay, in order that no time
 "be lost in getting it under control.

"The officer in charge must also arrange to obtain
 "promptly complete statements from all witnesses, so that the
 "origin of or responsibility for, the fire can be accurately deter- 10
 "mined.

"PENALTY—General Order No. 362 of the Board of
 "Railway Commissioners provides as follows:

"If any employee or other person included in the said
 "regulations fails or neglects to obey the same, or any of them,
 "he shall, in addition to any other liability which he may have
 "incurred, be subject to a penalty of twenty-five dollars for
 "every such offence."

Page 169, L. 20
 Page 284, L. 5
 Page 285, L. 5
 Page 296, L. 7-19
 Page 328, L. 37

34. The Section Foreman in the employ of the Defendant
 Company, whose duty it was to patrol the right-of-way in ques- 20
 tion, was one Reece, whose section extended from mile 34 to mile
 44, which included the locality of the fire in question. On Monday,
 August 18th, he did not make any patrol at all. He admits that
 had he been notified of the fire he would have immediately gone to
 the scene and put it out.

Page 277 and 278
 Page 173, L. 14
 Page 174, L. 30
 Page 175, L. 3

35. In accordance with the instructions of the Chief Fire
 Inspector, the Defendant Company maintained a fire-fighting tank
 car at Deerholme, which was approximately an hours' run west of
 the scene of the fire. This tank car was available for use but was 30
 not used. It was not ordered out by Fraser, either when he re-
 ceived the report of the fire at 1 o'clock on Monday or when he
 visited the scene of the fire at 5 o'clock in the afternoon.

Page 97, L. 15
 Page 24

36. The Plaintiff Company was carrying on logging oper-
 ations over an extensive area in the neighborhood of their mill and
 had some miles of logging railroad on their own property which
 were connected with the main line of the Defendant Company. On
 this logging railroad not far from the mill they had a water tank
 car, which they maintained for their own fire protection.

Page 23, L. 23
 Page 34, L. 3

37. The evidence of the witnesses for the Plaintiff was to the
 effect that this car could not be used, as the line and switch over 40

which it had to pass to reach the line of the Defendant Company was made impassable by the de-railment of the freight engine or the subsequent efforts made to re-rail it. It is common ground that this tank car could not be brought out until the engine which was derailed was re-railed and removed.

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Page 136, L. 26
Page 186, L. 7
Page 191, L. 14

38. The case was tried at the City of Victoria, commencing on the 16th day of May, 1932, and finished the 2nd day of June, 1932.

10 39. The questions put to the jury by the Judge and answers given are as follows— Page 409 and 410

Questions and answers of Jury:

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.

20 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.

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.

30 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.

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

10A. 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.

11. Q. Did N. S. Fraser on behalf of the Defendant Company tender the services of himself and his men for the purposes of fighting the said fire? A. Yes. To Forest Ranger Dunn. 20

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.

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. 30

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.

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. 40

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.

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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.

10 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.

“Reg. N. Hincks”,
Foreman.

20 40. Upon this verdict, the trial Judge gave Judgment for the Plaintiff on the 30th day of July, A.D. 1932. The Defendant appealed to the Court of Appeal for British Columbia and on the 27th day of January, A.D. 1933, the Court, comprised of the Chief Justice; Martin, J.A.; Galliher, J.A.; McPhillips, J.A.; and Macdonald, J.A. gave Judgment setting aside the Judgment of the trial Judge and directing a new trial. Mr. Justice McPhillips dissented and would dismiss the appeal. Mr. Justice Martin, while concurring in the Order for a new trial was inclined to dismiss the action. Mr. Justice Galliher, having in the meantime become ill, took no part
30 in the Judgment.

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41. From the Judgment of the Court of Appeal the Defendant is now appealing to the Privy Council, seeking a dismissal of the action, and the Respondent cross-appeals asking that the Judgment of the trial Judge be restored.

CONTENTIONS OF RESPONDENT

42. The Respondent contends that the finding of the Jury clearly established the following:

(1) That the fire originated on the property of the Defendant Company;

(2) That the Defendant became aware of the said fire at 10:25 o'clock of the morning of August the 18th and that the fire was then burning on the right-of-way of the Defendant Company's track, going from Victoria to Kapoor near mile 35.2.

(3) That the fire spread from the Defendant's right-of-way to the Plaintiff's lands.

(4) That such spreading of the said fire destroyed the Plaintiff's property.

43. The Respondent further contends— 10

(a) That the answers to questions 15, 16 and 17 clearly establish that the Jury decided that the Defendant was guilty of negligence, causing or contributing to the fire, which destroyed the Respondent's property, in not reporting the fire on Monday, August the 18th by either the crew of the gas car or the crew of the way freight, as answered in question 15, and this is fortified by the answers to questions 16 and 17. The Jury heard all of the evidence extending over many days and also had the advantage of a view, so that they were well entitled to conclude that the failure to report was negligence on the part of the Defendant Company. 20

(b) It is clearly established by the evidence of Reece, the Defendant's section foreman, that he had put out other fires in this vicinity upon becoming aware of the same and he further expressed the opinion in his evidence that he could have put this one out.

(c) That while the Jury in the answer to questions 10 and 10A say that the Defendant Company took proper precautions to prevent the fire from spreading and doing damage, they specifically except the negligence found in the answers to questions 15 and 16 and they carry this negligence through-out. 30

(d) That in the answers to questions 10 and 10A the Jury excuse the Defendant Company only on the ground that the Defendant Company accepted Dunn's advice, which it is contended would not excuse them as far as the Plaintiff is concerned.

(e) That the negligence was in allowing the fire to continue to burn and to escape, which fire was not the Plaintiff's

fire but the Defendant's fire, having originated upon and escaped from the Defendant's right-of-way.

10 (f) That it was not inevitable that the fire started upon the Defendant's right-of-way should continue to burn and to escape therefrom but could easily have been prevented by the Defendant after it became aware of the existence of the fire. The fire which did the damage is not, therefore, an accidental fire within the meaning of the Statute, 14 Geo. III., Ch. 78, Sec. 86 and the Defendant is not protected by that Statute but is liable for the damage which followed.

(g) That negligence is further established by reason of failure of the Defendant Company to observe the precautions and take the steps ordered by the Board of Railway Commissioners for the purpose of preventing the escape of any fire from the right-of-way of any Company.

20 (h) That the Plaintiff, having no duty cast upon it to extinguish or control a fire upon the lands of the Defendant, cannot be guilty of contributory negligence and especially upon the facts of this case could not be, and was not, guilty of contributory negligence.

44. The Plaintiff (Respondent) therefore submits that the Judgment of the Learned Trial Judge was right and should be restored and that the appeal should, therefore, be dismissed and the cross-appeal allowed for the following among other reasons—

1. That the Learned Trial Judge was right in holding that the Jury had found the Defendant guilty of negligence in respect of the said fire and liable for the damage caused.
- 30 2. That the Court of Appeal was in error in directing a new trial and particularly in directing a new trial upon the grounds that the issue of contributory or ultimate negligence should have been left to the Jury, as upon the facts of the case the Plaintiff was not and could not be guilty of negligence in relation to the escape of the said fire.
3. That there was no duty upon the Plaintiff for breach of which the Plaintiff could be guilty of contributory negligence upon the facts.

R. L. MAITLAND.

J. G. A. HUTCHESON.

No 39 of 1933.

In the Privy Council

ON APPEAL FROM THE COURT OF
APPEAL OF BRITISH COLUMBIA

BETWEEN

CANADIAN NORTHERN PACIFIC
RAILWAY COMPANY,
(Defendant) Appella

—AND—

KAPOOR LUMBER COMPANY LIMITED
(Plaintiff) Respond

(and Cross Appeal Consolidated)

**Case on
Appeal and Cross-Appeal
for the Respondent**

BLAKE & REDDEN,
17, Victoria Street, S.W.1