

63, 1933

In the Privy Council.

No. of 1933.

ON APPEAL FROM THE COURT OF APPEAL  
FOR BRITISH COLUMBIA

BETWEEN

CANADIAN NORTHERN PACIFIC RAIL-  
WAY COMPANY (Defendants) - - - - *Appellants*

AND

KAPOOR LUMBER COMPANY LIMITED  
(Plaintiffs) - - - - - *Respondents.*

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**No. 1**  
**Amended Statement of Claim.**

*In the  
Supreme  
Court of  
British  
Columbia.*

No. 1  
Amended  
Statement  
of Claim,  
4th Septem-  
ber 1931.

1. The Plaintiff is a body corporate, carrying on business in the Town of Kapoor, in the Province of British Columbia.

2. The Defendant is a Railway Company, owning and operating a Railway in the Province of British Columbia.

3. The Plaintiff owns and operates a lumber mill at the Town of Kapoor, in the Province of British Columbia.

10 4. The Defendant owns a right-of-way between the City of Victoria, in the Province of British Columbia, and Kissinger, in the Province of British Columbia, which right-of-way runs through or past the Town of Kapoor, and past or adjacent to the lumber mill owned and operated by the Plaintiff hereinbefore referred to.

5. The Defendant owns and operates a Railway over the said right-of-way and between the said City of Victoria and the said Kissinger.

20 6. On or about the 18th day of August, A.D. 1930, the Defendant negligently caused or permitted a fire to start upon the said right-of-way of the Defendant, approximately 35.2 miles from the City of Victoria, and at or near the Town of Kapoor aforesaid, and the lumber mill owned and operated by the Plaintiff.

30 7. Through the negligence of the Defendant, its servants or agents, the said fire was allowed to get out of control and escape from the right-of-way of the Defendant, and to destroy or damage the mill-site, mill, bridges, cars, sheds, buildings, houses, lumber and other property belonging to the Plaintiff, whereby the Plaintiff suffered damages. Particulars of the negligence of the Defendant, its servants or agents, resulting in the said fire getting out of control and destroying or damaging the property of the Plaintiff, are as follows:

(a) The Defendant, its servants or agents, knowing of the said fire upon its right-of-way, failed or neglected to take any, or alternatively adequate steps to prevent the said fire from spreading or escaping from the Defendant's right-of-way, and doing damage to the property of the Plaintiff.

40 (b) The Defendant, its servants or agents, knowing of the said fire upon its right-of-way, failed or neglected to take any, or alternatively adequate steps to extinguish or control the said fire.

(c) The Defendant, its servants or agents, did not make or cause to be made, any or alternatively an adequate patrol of its right-of-way with a view to ascertaining the existence of, and if

## Amended Statement of Claim.

necessary, extinguishing or controlling any fires which might be upon its right-of-way.

(d) The Defendant, its servants or agents, failed or neglected to maintain and keep its said right-of-way free from dead or dry grass, weeds or other unnecessary combustible matter.

10 (e) The Defendant, its servants or agents, knowing that the said fire had originated upon the Defendant's right-of-way and had escaped therefrom and was liable to do damage to the property of others, and particularly of the Plaintiff, failed or neglected to take any or alternatively adequate steps to prevent the said fire from further spreading and damaging the property of others, and particularly the Plaintiff as aforesaid.

(f) The Defendant failed or neglected to comply with and or committed a breach of the provisions of Order 362 of the Board of Railway Commissioners for Canada, and particularly Sections 7, 9, 10, 12 and 14 of the said Order, in that it

20 1. Permitted fire, live coals or ashes to be deposited on its track or right-of-way without the same being extinguished immediately thereafter.

2. Did not take all reasonable precautions to eliminate the danger of fires being set along Railway lines by passengers and employees throwing burning smoking materials from trains, and particularly did not take the measures set out in the said Section 9 or any of them.

30 3. Did not establish and maintain fire guards along the route of its Railway as prescribed by the said Section 10, and particularly did not have stationed at Deerholme or Youbou, in charge of a competent man, a fire-fighting tank car with steam pump, hose and fire-fighting tools, and did not make adequate provision for the prompt use of such equipment on the fire in question herein, and did not use the same upon such fire.

4. Did not provide and maintain a force of fire-fighting rangers fit and sufficient for efficient patrol and fire-fighting duty as required by Section 12.

5. Did not instruct and require its section men or other employees or agents to take measures to report or extinguish the fire in question in this action as required by the said Section 14.

40 Particulars of the property of the Plaintiff which was damaged, and the damages suffered, are as follows:

Plant .....	\$ 11,299.00
Rolling Stock .....	3,132.00
Stock in Lumber Yard and Stock on premises.....	119,088.98
Dwellings, etc. and Buildings.....	48,444.74
Lumber Carriers .....	2,557.06
Yard Construction .....	29,367.61
Lumber Carrier Garage .....	872.00

*In the  
Supreme  
Court of  
British  
Columbia.*

No. 1  
Amended  
Statement  
of Claim,  
4th Septem-  
ber 1931.  
--continued.

Amended Particulars of Statement of Claim.

	Plank Road .....	1,739.00
	Bridge and Trestle .....	2,029.15
	Logging Railway Bridge .....	970.50
	Logging Railway .....	968.07
	Town Water System .....	1,674.09
	Lighting System .....	4,400.00
	Fuel Oil Tank and Contents .....	662.18
	Four Box Cars and Contents .....	1,850.00
10	Camp Equipment and Supplies .....	1,312.00
	Sundry Plant Supplies .....	669.25
	Damage to Timber .....	3,250.00
		<hr/>
		\$234,285.63
		<hr/>

*In the  
Supreme  
Court of  
British  
Columbia.*  

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*No. 1  
Amended  
Statement  
of Claim,  
4th Septem-  
ber 1931.  
--continued.*

WHEREFORE the Plaintiff claims the sum of \$234,285.63 and the costs of this action.

PLACE OF TRIAL: Vancouver, B. C.

DATED at Vancouver, B. C., this 4th day of September, A.D. 1931.

20

R. L. Maitland,  
Solicitor for Plaintiff.

\* \* \* \* \*

**No. 2  
Reply.**

*In the  
Supreme  
Court of  
British  
Columbia.*

The Plaintiff joins issue with the Defendant on its Defence.

DATED at Vancouver, B. C., this 13th day of October, A.D.  
1931.

No. 2  
Reply,  
13th Octo-  
ber 1931.

R. L. Maitland,  
Solicitor for Plaintiff.



No. 3

Amended Particulars of Statement of Claim.

In the  
Supreme  
Court of  
British  
Columbia.

No. 3  
Amended  
Particulars  
of State-  
ment of  
Claim, 28th  
October  
1931.

1. Particulars of the negligence of the Defendant as alleged in paragraph 6 of the Statement of Claim herein are as follows:

(a) The Defendant was negligent in using engines on its right-of-way which were liable to cause fire, without taking any or adequate precautions to prevent their doing so.

(b) The Defendant failed or neglected to maintain and keep its right-of-way free from dead or dry grass, weeds or any other unnecessary combustible matter.

(c) The Defendant failed to patrol or inspect its right-of-way so as to discover and extinguish or prevent any fire thereon.

(cc) The Defendant failed or neglected to comply with and or committed a breach of the provisions of Order 362 of the Board of Railway Commissioners for Canada, and particularly Sections 7, 9, 10, 12 and 14 of the said Order, in that it

1. Permitted fire, live coals or ashes to be deposited on its track or right-of-way without the same being extinguished immediately thereafter.

2. Did not take all reasonable precautions to eliminate the danger of fires being set along Railway lines by passengers and employees throwing burning smoking materials from trains, and particularly did not take the measures set out in the said Section 9 or any of them.

3. Did not establish and maintain fire guards along the route of its Railway as prescribed by the said Section 10, and particularly did not have stationed at Deerholme or Youbou, in charge of a competent man, a fire-fighting tank car with steam pump, hose and fire-fighting tools, and did not make adequate provision for the prompt use of such equipment on the fire in question herein, and did not use the same upon such fire.

4. Did not provide and maintain a force of fire-fighting rangers fit and sufficient for efficient patrol and fire-fighting duty as required by Section 12.

5. Did not instruct and require its section men or other employees or agents to take measures to report or extinguish the fire in question in this action as required by the said Section 14.

\* \* \* \* \*

2. The steps which the Defendant failed or neglected to take or alternatively the adequate steps which the Defendant failed or neglected to take as alleged in paragraph 7 (a) of the Statement of Claim herein are any steps which under the circumstances



Amended Particulars of Statement of Claim.

would have prevented the fire from spreading or escaping from the Defendant's right-of-way as alleged.

3. The steps which the Defendant failed or neglected to take or alternatively the adequate steps which the Defendant failed or neglected to take as alleged in paragraph 7 (b) of the Statement of Claim herein are any steps which under the circumstances would have extinguished or controlled the said fire as alleged.

10 4. The steps which the Defendant failed or neglected to take or alternatively the adequate steps which the Defendant failed or neglected to take as alleged in paragraph 7 (e) of the Statement of Claim herein are any steps which under the circumstances would have prevented the said fire from further spreading and damaging the property of others, and particularly the Plaintiff as therein alleged.

\* \* \* \* \*

DATED at Vancouver, B. C., this 28th day of October, A.D. 1931.

20

R. L. Maitland,  
Solicitor for Plaintiff.

*In the  
Supreme  
Court of  
British  
Columbia.*

Amended  
Particulars  
of State-  
ment of  
Claim, 28th  
October  
1931—con-  
tinued.

No. 4

Order.

*In the  
Supreme  
Court of  
British  
Columbia.*

IN CHAMBERS  
BEFORE THE HONOURABLE  
THE CHIEF JUSTICE.

} Tuesday, the 12th  
day of January, 1932.

No. 4  
Order,  
12th Janu-  
ary, 1932.

\* \* \* \* \*

AND IT IS FURTHER ORDERED that the Plaintiff do within six days from the date hereof deliver to the Defendant further and better particulars of the statement of claim herein in the following respects:

10 1. Further and better particulars of the negligence on the part of the Defendant alleged in paragraph 6 of the Statement of Claim, as supplemented by paragraph 1 (d) of the Plaintiff's particulars thereof.

2. Further and better particulars of the negligence of the Defendant alleged in paragraph 7 of the Statement of Claim, in the following respects:

20 (a) Further and better particulars of the steps which the Defendant failed or neglected to take as alleged in paragraph 7 (a) of the statement of claim to prevent the fire from spreading or escaping from the right-of-way and doing damage to the property of the Plaintiff.

(b) Further and better particulars of the steps which the Defendant failed or neglected to take as alleged in paragraph 7 (b) of the Statement of Claim to extinguish or control the fire.

(c) Further and better particulars of the steps which the Defendant failed or neglected to take as alleged in paragraph 7 (e) of the Statement of Claim to prevent the fire from further spreading and damaging the property of others and particularly the Plaintiff.

\* \* \* \* \*

## No. 5

## Particulars Pursuant To Order.

*In the  
Supreme  
Court of  
British  
Columbia.*

—  
No. 5  
Particulars  
pursuant to  
Order,  
18th Janu-  
ary, 1932.

2. Particulars of the steps which the Defendant failed or neglected to take as alleged in paragraph 7 (a) of the Statement of Claim herein are as set forth in the said paragraph 7 (a), and in paragraph 2 of the Particulars herein dated the 28th day of October, A.D. 1931, and as follows:

(a) The Defendant did not extinguish or control the said fire or prevent the same from spreading or escaping and doing damage.

(b) The Defendant did not cause the said fire to be watched or patrolled.

(c) The Defendant did not keep sufficient men in attendance at the said fire to keep it under control or to extinguish the same or prevent it from spreading or escaping and doing damage, or any men in attendance at all.

(d) The Defendant did not have or keep in readiness in the vicinity of the said fire, any of its fire-fighting equipment.

(e) The Defendant, having caused men to go to the scene of the fire, did not cause such men to extinguish, control or fight the said fire or prevent the same from spreading or escaping and doing damage, but on the contrary withdrew the said men without doing or causing to be done anything to extinguish, fight or control the said fire, or prevent the same from spreading, escaping or doing damage, and left the said fire burning.

(f) The Defendant did not put any water, dirt or any other substance on the said fire which would have or might have extinguished or controlled it, or prevented it from spreading, or escaping and doing damage, or made any effort or attempt to do so.

(g) The Defendant did not cut any fire guards or take any other steps whatsoever to control the said fire or prevent it from spreading or escaping or doing damage.

(h) The Defendant did not use upon or apply to the said fire, any of the equipment in its possession, the use of which might have controlled or extinguished the said fire or prevented the same from spreading or escaping or doing damage, and particularly did not use its tank car for the purpose of controlling and extinguishing the said fire or from preventing it from spreading, escaping or doing damage.

(i) The Defendant did nothing whatsoever relative to the said fire, with a view to controlling or extinguishing the said fire, or preventing it from spreading, escaping or doing damage, or which might tend to control or extinguish the said fire, or prevent it from spreading, escaping or doing damage.

3. Particulars of the steps which the Defendant failed or neglected to take as alleged in paragraph 7 (b) of the Statement



Particulars Pursuant to Order.

of Claim herein, are as set forth in the said paragraph 7 (b) and in paragraph 3 of the Particulars herein dated the 28th day of October, A.D. 1931, and as set forth in sub-paragraphs (a) to (i) of paragraph 2 hereof.

10 4. Particulars of the steps which the Defendant failed or neglected to take, as alleged in paragraph 7 (e) of the Statement of Claim herein, are as set forth in the said paragraph 7 (e) and in paragraph 4 of the Particulars herein dated the 28th day of October, A.D. 1931, and as set forth in sub-paragraphs (a) to (i) of paragraph 2 hereof.

\* \* \* \* \*

DATED at Vancouver, B. C., this 18th day of January, A.D. 1932.

R. L. Maitland,  
Solicitor for Plaintiff.

\* \* \* \* \*

*In the  
Supreme  
Court of  
British  
Columbia.*

*No. 5  
Particulars  
pursuant to  
Order,  
18th Janu-  
ary, 1932.  
--continued.*

**Amended Defence.**

*In the  
Supreme  
Court of  
British  
Columbia.*

—  
No. 6  
Amended  
Defence,  
16th March,  
1932.

1. The Defendant specifically denies each and every allegation of fact contained in paragraph 1 of the Statement of Claim.
2. The Defendant specifically denies each and every allegation of fact contained in paragraph 2 of the Statement of Claim.
3. The Defendant specifically denies each and every allegation of fact contained in paragraph 3 of the Statement of Claim.
- 10 4. The Defendant specifically denies each and every allegation of fact contained in paragraph 4 of the Statement of Claim.
5. The Defendant specifically denies each and every allegation of fact contained in paragraph 5 of the Statement of Claim.
6. The Defendant specifically denies each and every allegation of fact contained in paragraph 6 of the Statement of Claim and in particular (but without prejudice to the generality of the foregoing denial) the Defendant denies that any fire started on its right-of-way at or near the Plaintiff's lumber mill at Kapoor, B. C., on the 18th day of August, 1930, or at any other time, and denies that any such fire was caused or permitted by the Defendant either negligently or otherwise.
- 20 7. The Defendant specifically denies each and every allegation of fact contained in paragraph 7 of the Amended Statement of Claim and in particular (but without prejudice to the generality of the foregoing denial) denies that any fire started on the Defendant's right-of-way at or near Kapoor, B. C.; and denies that any such fire was allowed to get out of control and escape from the right-of-way of the Defendant; and denies that any such fire destroyed or damaged any mill-site, mill, bridges, cars, sheds, buildings, houses, lumber or any of them, or any portion thereof
- 30 or any other property, and denies that the property alleged to have been destroyed or damaged or any of it belonged to the Plaintiff; and denies that the Plaintiff suffered damage by reason of any such fire.
8. The Defendant specifically denies each and every allegation of fact contained in the particulars of the alleged negligence of the Defendant set forth in paragraph 7 of the Amended Statement of Claim, and in particular (but without prejudice to the generality of the foregoing denial) denies that the Defendant was guilty of the alleged or any negligence; and denies that the
- 40 Defendant had any knowledge of any such fire upon its right-of-way; and denies that the Defendant failed or neglected to take any or, alternatively, adequate steps to prevent any such fire from spreading or escaping from the Defendant's right-of-way and doing damage to the property of the Plaintiff; and denies

## Amended Defence.

- that it failed or neglected to take any or, alternatively, adequate steps to extinguish or control any such fire; and denies that it did not make or cause to be made any or, alternatively that it made or caused to be made an inadequate patrol of its right-of-way with a view to ascertaining the existence of, and, if necessary, extinguishing or controlling, any fires which might be upon its right-of-way; and denies that it failed or neglected to maintain and keep its right-of-way free from dead or dry grass, weeds or
- 10 any other unnecessary combustible matter; and denies that the Defendant knew that any such fire originated upon its right-of-way or had escaped therefrom or that any such fire was liable to do damage to the property of others and particularly of the Plaintiff; and denies that the Defendant failed or neglected to take any or, alternatively, adequate steps to prevent any such fire from further spreading and damaging the property of others, and particularly the Plaintiff as aforesaid, and denies that the Defendant failed or neglected to comply with or committed a breach of sections 7, 9, 10, 12 and 14 of Order 362 of the Board of Railway
- 20 Commissioners for Canada or any of the said sections, or any provisions of the said Order, and denies that it permitted fire, live coals or ashes to be deposited on its track or right-of-way, and denies that it did not take all reasonable precautions to eliminate the danger of fires being set along the railway by passengers and employees throwing burning, smoking materials from trains and denies that it did not take the measures set out in the said section 9 of the said Order, and denies that it did not establish and maintain fire guards along the route of its railway as prescribed by Section 10 of the said Order and denies that it did
- 30 not have stationed at Deerholme or Youbou in charge of a competent man a fire fighting tank car with steam pump hose, and fire fighting tools, and that it did not make adequate provision for the prompt use of such equipment on the fire in question herein, and denies that it did not provide and maintain a force of fire fighting rangers fit and sufficient for efficient patrol and fire fighting duty as required by Section 12 of the said Order, and denies that it did not instruct and require its section men or other employees or agents to take measures to report or extinguish the fire in question in this action.
- 40 9. In the alternative, if any fire was started on or about the 18th day of August, 1930, at or near Kapoor, B. C. (which is denied) the same was not and could not have been caused by the Defendant.
10. In answer to the whole of the Statement of Claim and in the alternative, the Defendant says that on the 18th day of August, 1930, at about mid-day, Norman S. Fraser, the Defendant's Assistant General Agent having charge of and supervision

*In the  
Supreme  
Court of  
British  
Columbia.*

No. 6  
Amended  
Defence,  
16th March,  
1932,  
--continued.

## Amended Defence.

over the Defendant's right-of-way in question herein, with headquarters at the City of Victoria, was verbally notified by W. N. Campbell, an officer of the Forest Branch of the Department of Lands of the Province of British Columbia, that a fire had broken out at or near the Plaintiff's mill at Kapoor, B. C., and thereupon the said Defendant's Assistant General Agent proceeded from the said City of Victoria to Kapoor, B. C. with a crew of men adequate to fight and control any such fire. Upon the arrival of the said Defendant's Assistant General Agent at the office of the Plaintiff at about 4 o'clock in the afternoon, he was met by one James Dunn, Assistant Forest Ranger, who informed the said Defendant's Assistant General Agent that he had taken charge of the work of controlling and extinguishing the fire in question, whereupon the said Dunn, accompanied by the Defendant's Assistant General Agent, proceeded to the scene of the fire, and made an inspection of the state and area of the said fire. At the conclusion of the said inspection the Defendant's Assistant General Agent proffered his said crew's assistance for the purpose of fighting the fire, whereupon the said Dunn made a further inspection of the said fire and thereafter decided that the said crew were not required and so informed the said Assistant General Agent and instructed the said Assistant General Agent to order his men to return to their respective posts. The said Dunn further stated to the said Assistant General Agent that he with other men, being employees of the Plaintiff, whom he had available for such purpose, and who were then engaged in controlling and extinguishing the said fire under the direction of the said Dunn, could handle, control and extinguish the fire without the assistance of the Defendant or its said crew of men. As a result of the verbal assurance of the said Assistant Forest Ranger that he would take charge of and control the said fire and would not need the Defendant's said crew, the said crew was withdrawn and sent home.

11. In further answer to the whole of the said Statement of Claim, and in the alternative the Defendant says that on the 19th day of August, 1930, the said Defendant's Assistant General Agent and also one George A. Roberts, the Defendant's despatcher, both acting and inquiring on behalf of the Defendant concerning the said fire, were verbally informed and assured by one Cowan and one Smith or one or other of them, employees and agents of the Plaintiff and acting for it in that behalf, that the said fire did not constitute any danger to the Plaintiff's buildings, mill or other property, and that the Plaintiff's employees were fighting the fire and had the same well under control. The said information was given by telephone from the mill at Kapoor at about two o'clock in the afternoon.

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10 12. In further answer to the whole of the Statement of Claim and in the alternative, the Defendant says that subsequently in the afternoon of the 19th day of August, 1930 the said Assistant General Agent by way of further precaution proceeded to Kapoor and with a considerable crew of the Defendant's men took part in fighting a fire which was burning in the neighbourhood of the said mill and which had been allowed to pass out of control by the Plaintiff's negligence and in the circumstances

10 herein set forth. The said crew consisted of ten track men and five of the train crew and the part taken in fighting the said fire consisted of cutting fire trails south of the lumber yard to the East and West of the track.

13. In the further alternative, if any damage occurred by reason of a fire at Kapoor, B. C. (which is denied), such damage was caused not by a fire set out or started by the Defendant but by a fire of unknown or incendiary origin started or set out by parties unknown to the Defendant and which proceeded from directions north and northeast of the lumber piles of the Plaintiff.

20 14. In the further alternative, the Defendant says that if any damage was sustained by the Plaintiff by reason of a fire (which the Defendant denies), such damage was caused or materially increased by an explosion or explosions of dynamite purposely or negligently placed by parties unknown to the Defendant under or amongst the lumber piles of the Plaintiff.

30 15. In the further alternative the Defendant says that if the alleged or any damage was caused by a fire started by any locomotive of the Defendant (which is denied) the Defendant's locomotives and appliances were modern and efficient and the Defendant has not otherwise been guilty of any negligence; and the total amount of damages or compensation recoverable from the Defendant by Statute does not exceed Five Thousand Dollars (\$5,000.00).

40 16. In the further alternative, the Defendant says that if the alleged or any damage was caused by a fire started by any locomotive of the Defendant (which is denied), it had used modern and efficient appliances and had not otherwise been guilty of negligence; the Plaintiff had insurance existing on its property destroyed or damaged (the amount and particulars of which are known to the Plaintiff but not to the Defendant) and the total amount of damages sustained by the Plaintiff in respect of the destruction or damage of its property must be reduced by the amount received or recoverable by or for the benefit of the Plaintiff in respect of such insurance as provided by Statute.

17. In the further alternative, the Defendant says that if the Plaintiff suffered damage by a fire (which is denied) the same was caused by the negligence or, alternatively, contributed to by

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the negligence of the Plaintiff, its servants, or agents.

PARTICULARS OF NEGLIGENCE OR CONTRIBUTORY NEGLIGENCE

10 (a) The Plaintiff having voluntarily assumed the task of fighting and extinguishing the said fire, and having brought the same under proper control, took no steps, or alternatively no adequate steps, to keep the fire from subsequently spreading, but negligently allowed it to get out of control. Such task was assumed by the Plaintiff by employing gangs of its own men on Monday, the 18th of August, up until after the departure of the said Fire Warden James Dunn, but subsequently the Plaintiff withdrew its men, or alternatively withdrew all but an inadequate force of men, and left the fire still burning and allowed it to cross the track.

(b) The Plaintiff's water works and water supply had been cut off, and were not available for the purpose of extinguishing or controlling the said fire or protecting the Plaintiff's said property.

20 (c) The Plaintiff had brought or suffered to be brought a quantity of dynamite into and upon its lumber yard and premises, where the same exploded, thereby scattering and spreading the said fire and causing the said damage or further damage by reason of the fire. The total quantity of dynamite as aforesaid is unknown to the Defendant, but fourteen sticks of dynamite with the caps and fuses were actually found by the Defendant under one of the lumber piles, and at least five times that amount was scattered about amongst the lumber piles.

30 18. In further answer to the whole of the Statement of Claim and in the alternative, the Defendant says that whatever may have been the cause or origin of any fire, the Defendant did all that was possible to control or extinguish any such fire, but its efforts were deprived of full success by reason of the facts herein set forth.

40 19. (a) By a contract in writing dated the 23rd day of January, 1928, and made between the Defendant and the Plaintiff and relating to the proposed construction of a railway spur or siding to serve a lumber mill and plant then proposed to be built and operated by the Plaintiff and being the lumber mill and plant referred to in the Statement of Claim, the Plaintiff agreed to keep fully insured all insurable buildings, goods, merchandise, and other property in respect of which it might have an insurable interest, wherever situated, that might be endangered by fire by reason of the operation (negligent or otherwise) of the said siding, and to assume all loss resulting from fires or from the

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Plaintiff's neglect or failure so to insure.

10 (b) By a second contract in writing dated the 8th day of August, 1929, and made between the Defendant and the Plaintiff and relating to the proposed construction of a second railway spur or siding to serve the said mill premises, the Plaintiff agreed to keep fully insured without any right of subrogation to the insurer all insurable buildings, goods, merchandise, and other property in respect of which it might have an insurable interest, wherever situated, which might be endangered by fire by reason of the operation (negligent or otherwise) of the said siding, and to assume all loss resulting from fires or from the Plaintiff's neglect or failure so to insure.

(c) All the property alleged to have been destroyed or damaged by the fire mentioned in the Statement of Claim was property to which the said agreements on the part of the Plaintiff extended.

20 20. No fire guards were prescribed by the Chief Fire Inspector of the Board of Railway Commissioners for Canada for the railway mentioned in paragraph 5 of the Amended Statement of Claim for the year 1930 under Section 10 of General Order No. 362 of the said Board.

21. The fire referred to in paragraph 6 of the Amended Statement of Claim was a fire which could be handled and extinguished by ordinary means without the use of the tank car or other equipment mentioned in paragraph 7 (f) 3 of the Amended Statement of Claim.

30 22. Paragraph 14 of the General Order No. 362, of the Board of Railway Commissioners for Canada or in the alternative, sub-paragraphs (c), (d), and (e) thereof are not authorized by the Railway Act and are invalid.

23. Regulations were made by the Chief Fire Inspector of the said Board under the powers contained in the said General Order and are in writing dated the 1st of March, 1930.

24. The Defendant carried out and complied with all the provisions of the said regulations.

40 25. In particular, the duty of inspection was delegated by the said Board under the said regulations to the forestry officials of the Province of British Columbia, and the Defendant obeyed and acted in conformity with all the orders of the said forestry officials.

DELIVERED the 16th day of March, 1932.

THIS AMENDED DEFENCE is delivered by Robert Wetmore Hannington, Defendant's Solicitor, whose address for service is Room 217, Canadian National Railways Station, Vancouver, B. C.

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## PROCEEDINGS AT TRIAL

Before the Honourable Mr. Justice W. A. Macdonald  
and a Special Jury.

Victoria, May 16, 1932, 11 a.m.

MR. R. L. MAITLAND, K.C., and MR. J. G. A. HUTCHESON appearing for the Plaintiff.

MR. E. C. MAYERS, K.C., and MR. A. ALEXANDER appearing for the Defendant.

The Jury were impaneled and sworn.

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**No. 7****Plaintiff's Evidence**

Mr. Mayers: I have two motions, my Lord; one is to strike out a paragraph of certain particulars which were delivered, according to my motion, on the 28th of October, 1931, but which I think were in fact delivered after amendment—after an order of the 15th of February, 1932. I understand that is not objected to.

The Court: It is struck out—no objection.

Mr. Mayers: My other application is to amend the statement of defence by alleging with more particularity two siding  
20 agreements which were made between the Canadian National Railway Company and the Kapoor Lumber Company. Your Lordship will find in paragraph 19 of the defence reference to these two contracts (reading it). Now that seemed to us rather brief, and we have amplified that—we are asking for leave to amplify that by referring to the particular words of the contract. I might read what I am asking for, so that your Lordship will see that it is really nothing more than setting out the particular terms of the contract on which we rely.

The Court: Any objection, Mr. Maitland?

30 Mr. Maitland: Yes, my Lord.

The Court: Did you serve notice of motion?

Mr. Mayers: Yes, my Lord. Your Lordship will see paragraph 2—for leave to amend by substituting the following: (reading it). The amendment I am asking for refers to the two contracts already mentioned in paragraph 19 of the defence. I see that by a stenographer's error in my notice of motion the second contract is recited to have been dated the 8th of May; but that is the same contract as referred to in paragraph 19 of the defence, and it should be the 8th of August, 1929.

40 Mr. Maitland: I have no objection to the change of the date.

Mr. Mayers: Your Lordship will see I am merely setting out the proposed amendment in terms of the particular section on which I am relying.

Mr. Maitland: May it please your Lordship; if your Lordship will look at the original paragraph 19 your Lordship will

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see that my learned friend set up a certain agreement; two contracts; and he said, In relation to those contracts we are taking this position on this trial, they amount to this, that you undertook to bear all loss resulting from fire. Now we are down to the morning of the trial, and we have gone through a great deal to get this far; now on the morning of the trial my learned friend comes in and says, I am taking two objections now, and the second one is that not only did you agree to assume all loss resulting from fire,  
10 but I am taking the position that you also assume all loss from neglect or failure to insure. That is an added cause of action. There is no question about that.

The Court: That is an additional right of defence?

Mr. Maitland: Yes; it sets up another additional defence. And I do submit, when he has these agreements in his possession, and when he sets them up in his original statement of defence, and he brings us right down to the date of trial saying, We are taking a certain position, and this is our position—but now he is coming in with an entirely separate, distinct and new defence—I  
20 submit that that should not be allowed at this time.

The Court: Why not?

Mr. Maitland: Because he should have pleaded it before.

The Court: Is it not only a question of costs? (Argument).

The Court: If I were to refuse this amendment, and the Court of Appeal was of opinion that it was a defence that might be set up, surely they would order a new trial. The case is of an important nature, and there is no doubt a great deal of expense attached to preparing for the trial. I bear in mind the remarks of Chief Baron Pollock in the case of Braden v. Hyatt, 1 Hurlston & Norman, 138, at 140. In that case the learned Judge said, If it  
30 should appear on the trial of a cause that defendant had a perfectly good defence to the action, but the pleadings did not raise the question, and the judge refused to amend the Court would grant a new trial. That case was cited in a case I have often referred to in the Ontario Court, of Peterkin v. Macfarlane, 4 Appeal Reports 45, at 46. The same learned Judge said in another case, Other considerations must give way to that of granting a fair trial. And in Re Gaboria, 12 Practice Reports, Ontario, 254, the Court said, Do justice in this particular case, where there  
40 is discretion, above all other considerations. So the amendment is allowed, on the basis, if this be a good defence the defendant should have the benefit of it. The question of costs is reserved, bearing in mind the situation as to that this morning. Proceed.

Mr. Maitland opened the Plaintiff's case.

Mr. Maitland: I think I should, if your Lordship will permit me, file the order fixing the trial at Victoria, the action was started in Vancouver originally (marked Exhibit 1). I would like to file

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the certificate of incorporation of the Kapoor Lumber Company, Limited (marked Exhibit 2). Then the next exhibit, my Lord, is certificate of encumbrance, and attached thereto a letter from Mr. Hannington, solicitor of the Canadian National Railway, admitting ownership of the right of way in question in this action (marked Exhibit 3). My Lord, I would now like to put in a letter from Mr. Alexander, one of the Counsel for the Defendant, in  
 10 reference to the map we are using. We have agreed to this map; we may not agree on the exact location of some of the buildings and the platform; but subject to that, generally speaking, both sides agree to the use of that standard map for the purpose of this action. (Map marked Exhibit 4, and Letter Exhibit 5).

BAL MUKAND, a witness called on behalf of the Plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. MAITLAND:

- Q. Your full name, please? A. Bal Mukand.  
 Q. Where were you born? A. I was born in India.  
 20 Q. Where do you live at the present time? A. In Canada.  
 Q. How long have you lived in Canada? A. I have lived in Canada since 1906.  
 Q. And what have you been occupied in chiefly during that time? A. First in land clearing, since 1906.  
 Q. Where did you have your experience of land clearing?  
 A. When I was working for the Canadian Pacific Railway on Shaughnessy Heights, in Vancouver. I worked there 1906 to the end of 1911. Then I went back to India for a trip. Then I  
 30 came back from India in the beginning of 1914, just before the war broke out; and ever since that time I have been engaged in lumbering.  
 Q. Where, chiefly? A. In different mills, for different companies. I worked for Sperling Lumber Company on the Chilliwack line.  
 Q. On the B. C. line? A. On the B. C. line, yes. I worked for Robert Dollar Lumber Company, Fraser Mills, Anglo-American Lumber Company in Vancouver, Virginia Lumber Company, Coombs, on the Island, Alberni Canal Shingle Company Limited, Port Alberni, Great Central Sawmills, Limited, Great  
 40 Central, B. C., Alberni Pacific Lumber Company, Port Alberni, Mayo Lumber Company, Duncan, and Kapoor Lumber Company.  
 Q. Now what was your capacity in those various mill operations, or lumbering operations you were connected with? A. I

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started as mill hand first, and tallyman, grader, mill foreman, superintendent, and manager.

Q. What was your occupation at Kapoor? A. Superintendent of the mill.

Q. What interest have you got in the Kapoor Lumber Company now? A. I have no interest in the Kapoor Lumber Company.

10 Q. When did you cease working for them? A. I ceased working for them in September, 1930.

Q. Now the fire in question in this action was started on what date? A. It was started on the 18th of August.

Q. That was on the Monday? A. Monday.

Q. 1930? A. 1930.

Q. You quit the 18th of August? A. No, I quit in September.

Q. But the fire was on the 18th of August? A. Yes.

Q. And you quit the next month? A. Yes.

20 Q. Who were the owners of this Kapoor Lumber Company, Limited, do you know? A. I think Kapoor Singh and Mayo Singh.

Q. They are both Hindus, are they? A. Yes.

Q. How long had you been working with the Kapoor Company before the 18th of August, 1930? A. I started to work for them in May, beginning of May, 1928.

Q. In what capacity? A. Superintendent.

Q. And was that your position at the time of the fire? A. Yes.

30 Q. As superintendent you had control of what? A. Control of the mill, chiefly, operation of the mill.

Q. Now what were they doing when you joined them in 1928, how far had they advanced with their operations at that time? A. They were building the mill at that time.

Q. And did you take part in supervising the construction of the mill, and that sort of thing? A. Yes, I did.

Q. Now you remember the month of August, 1930? A. Yes.

Q. Can you tell us, taking first the middle of August, 1930, what the weather conditions were as to dryness at that time? A. Yes, it was very dry.

40 Q. What about it? A. The weather was very dry during that month.

Q. How long had it been dry before the fire, can you remember? A. I think for quite a while.

Q. You know the C.N.R. right of way—that is I am speaking of their main line, not their spurs; you know the C.N.R. right of way through Kapoor? A. Yes.

Q. I think it is called C.N.P.; when I used the word C.N.R.

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I mean the defendant—a subsidiary name is used.

Mr. Mayers: Yes, they always call it the C.N.R.; we know what you are referring to.

Q. You are familiar with their right of way? A. Yes.

Q. And do you know at what point the fire started on the 18th of August? A. Yes.

Q. How far, where would it be in relation to Kapoor and Victoria? A. It would be towards Victoria from Kapoor.

10 Q. And how far away from the mill at Kapoor was it that this fire started, about? A. One-third of a mile.

Q. Now had you any other fire around there within a few days of that fire on the Monday the 18th? A. Yes, we had another fire besides this fire on the 16th.

Q. And where was it? A. This was on the Canadian National right of way.

Q. And what happened to that fire, the one of the 16th? A. We put it out.

20 Q. And who had charge of these operations putting it out? A. Nuranjan Singh; I put him in charge of the men fighting. But of course I was in charge of the whole operation.

Q. You were satisfied that you put that fire out on the Saturday? A. We put that fire out Saturday morning, yes.

Q. Were you down there again on Sunday? A. I was down there again on Sunday.

Q. Were there any signs of fire there on Sunday? A. No.

Q. And where was it that this Saturday fire was? A. This Saturday fire was about 250 feet away from the Monday fire towards Victoria.

30 Q. That is 250 feet further away from the Kapoor mill than the Monday fire? A. Yes; on the upper side of the track.

Q. On the upper side of the track, by that you mean the right or left? A. Going towards Victoria, on the left.

Q. Just a minute, I am talking about going from Victoria to Kapoor. A. That would be on the right.

Q. On the right hand side? A. On the right hand side, yes.

Q. When was your attention first called to a fire on the Monday? A. During the noon hour, when I was in the mill.

40 Q. Will you come over here now to this map, please. Now you have seen this Exhibit 4 before, have you? A. I think I understand it all right.

Q. Just look at that map and study it for a moment. I want you to mark where it was that the fire was first noticed by you on the Monday. I want you to study that plan, so that you will know exactly what you are looking at, and those different points on it. A. What is the scale of this plan?

Mr. Maitland: Do you know the scale, Mr. Alexander?

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Mr. Alexander: One hundred feet to the inch.

A. 100 feet to the inch (marking plan).

Q. Now will you mark "A" there, please, in that red semi-circle, A; you say that is where you found the fire on Monday?

A. Yes.

Q. What was the condition at that time of this right of way of the Canadian Northern along there between 35 and 36, and particularly where you found that fire at that time? A. The  
10 condition on that right of way was not very good at the time.

Q. Why; what was there? A. Well, there were quite a few dry rotten old ties scattered around here where this fire was burning.

Q. Rotten old ties? A. And dry grass, weeds and some old logs.

Q. Where else did you see any ties along the line? A. I saw them all along the Canadian National line.

Q. What kind of ties? A. Rotten old ties taken out of the track and left there on the right of way.

Q. Now when you came across this fire on the Monday what  
20 time was it that you went down there? A. About one o'clock.

Q. Did you find any ties burning then? A. Yes, I found the ties burning then.

Q. And what was the area of that fire in relation to their railway track, their actual railway track, how far from it did this fire extend? A. You mean at the time I went there?

Q. Yes, at the time when you went there, how far was the fire away from the railroad track? A. Roughly about fifteen feet from the railway track; you know, in the hollow.

Q. Explain to the jury where the hollow is? A. The hollow is right about here (indicating).  
30

Q. Now you know the extent of their railway right of way, 50 feet on either side of the centre line? A. Yes.

Q. Can you say whether that fire was entirely on their right of way or not? A. It was entirely on their right of way at the time when I went there.

Q. Going from Victoria to Kissinger, that is the way you go (indicating)? A. Yes.

Q. Or to Kapoor—here is your rock cut here? A. Yes.

Q. As you approach the rock cut, on the right and on the left, is one side higher than the other—in the land, I mean?  
40 A. The right side is higher than the left side.

Q. That would be beyond this gulch that you mention, this hollow, would it? A. Yes.

Q. What did you do when you got there around one o'clock and saw that fire, what did you do then? A. I went down there with my men, and put one man in charge of that gang, and we

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put one dozen men to cut a fire trail around that fire, and one dozen men with buckets and shovels to put it out.

Where did they get their water? A. From Sooke River.

Q. This is Sooke River down here? A. Yes.

Q. A dozen men? A. A dozen men carrying water.

Q. And how long were these men there? A. They were there until six o'clock.

10 Q. And how long were you there? A. I didn't stay there all the time; I went down to the fire three or four different times, back and forward between the mill and the fire.

Q. They were really under your direction then? A. Under my direction.

Q. And what did you do in the way of general directions to them as to fighting that fire, what policy did you work under there? A. I had two dozen men there altogether, and I put one dozen men to cut a fire trail around the fire, and one dozen to fight, with shovels and buckets of water.

20 Q. When you were not there who did you have in charge?  
A. Nuranjan Singh in charge, the yard foreman.

Q. What were they able to do in their fire fighting by using shovels and buckets? A. They had the fire trail finished between four o'clock and five o'clock, but they could not put the fire out with water or with dirt.

Q. They couldn't put the fire out? A. No.

Q. With the buckets and with dirt? A. No. But they had the fire under control between four and five o'clock, on account of having the fire trail cut around the fire.

30 Q. Do you know Mr. Fraser of the C. N. R.? A. I know him.

Q. What is his position, do you know? A. I think Superintendent.

Q. Did you see him there at all that day? A. I think I saw him from far away, yes.

Q. Was he in the vicinity of the fire? A. Yes, he was standing on the railroad track; and I was coming down from the mill to the fire.

40 Q. When Mr. Fraser, the Superintendent of the C. N. R., was standing on the railway track what men were fighting that fire? A. Our men were.

Q. Did you ever get on that day any assistance or offer of assistance from Mr. Fraser or anyone else representing the C. N. R.? A. Nothing whatsoever.

Q. Did they help you in any way on Monday, the 18th of August, in any way in fighting that fire? A. No.

Q. Did they suggest to you in regard to getting assistance or further help, or anything of that kind? A. No.

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Q. Now how long did these two dozen men stay taking care of that fire on the 18th of August? A. They stayed there until six o'clock that evening.

Q. And then what? A. At last a ranger came along; I didn't know his name at the time, I knew his name after that. He went around there, and he had a talk with me; I met him on the C. N. R. track; and he told me to leave half a dozen men that night just for patrol duty. And I told him—

10 Q. Never mind what you told him. You did leave a half dozen men? A. Yes, according to his instructions.

Q. And did they stay there all night long? A. Yes, they stayed there all night long.

Q. What implements did they have? A. They had shovels, buckets, mattocks and axes.

Q. By way of identification, who was the Fire Ranger man you say, do you know his name? A. I know his name now.

Q. What is his name? A. Dunn.

20 Q. What did you do the next morning, on the Tuesday morning? A. I sent two dozen men again the next morning, Saturday morning, in charge of Nuranjan Singh. And they started to fight fire.

Q. Going back a bit, if I may, to the Monday—did anything happen to any of the C. N. R. trains that day? A. Yes.

Q. What? A. Their locomotive, between the noon hour their locomotive smashed our railroad, smashed our spur right close to the switch; went off the track.

30 Q. Mark it B, please (witness does so). Just put a cross actually on the track where it happened, put a cross there if you will right across the track. Now which track is it on? A. On our track.

Q. By that you mean your log dumping track? A. No, a spur.

Q. A spur? A. A spur.

Q. That is, just as you get past the mill, I take it. A. Yes.

Q. And what happened there? A. Well, I didn't pay much attention to that; I just went around there once or twice, and saw the locomotive was off the track.

The Court: It was not turned over?

40 Q. No, just off the track—derailed. A. Derailed, yes.

Q. And what time would you say it was that it was re-railed; or do you know? A. I don't know exactly, but I think it was re-railed between I think about five o'clock, or something like that. I do not remember the exact time; some time in the evening.

Q. Do you know how many men there were on this re-railing crew that day down there on the C. N. R.? A. No, I don't know.

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Q. Now did you have a tank car at all? A. Yes, we had a tank car.

Q. Where did you keep it? A. We kept it on our logging railway.

Q. And where would it be that day? A. On this logging railway here.

Q. On the Kapoor Logging Company's railway? A. Yes.

Q. Was any damage done to that track? A. Yes.

10 Q. As a result of the derailing? A. Yes.

Q. What was done? A. The section man foreman told me—

Q. Never mind what he told you, did you see it yourself? A. Yes, I saw it myself.

Q. Tell us what you saw yourself. A. The switch was kind of broken or out of order, and there were two or three rails bent.

Q. Could you use it? A. No, we could not use it.

Q. You could not use it? A. No.

Q. Could you get your tank car down over that? A. No.

20 Q. You could not. Do you know whether the C. N. R. had a tank car on that line or not? A. I don't know.

Q. You couldn't tell me that? A. No.

Q. Now will you tell me, tell His Lordship and the Jury—describe your water system that you had there, will you, please?

A. Yes.

Q. Just show us on that map what water system you had, and explain it. A. We had a big pump set about here (indicating), right here.

30 Q. That is at the point "Fire pump on top of dam"? A. Yes.

Q. You had a big pump there? A. We had a big pump there.

Q. Where did you get your water from? A. We got our water from the mill pond.

Q. You had it piped to where. A. We had pipes all around the mill and in the yard.

Q. And do these different marks on this plan, marked water pipe, etc., show the place? A. Yes.

Q. They are there from "s.p.", what does that mean?

40 The Court: Standpipe?

A. Stand pipe.

Mr. Maitland: Is that a true representation of your water service that you had there? A. I think so.

Q. And did you have water for the mill, and that sort of thing? A. Yes.

Q. And for fire protection around the mill? A. Yes.

Q. Do you remember how many houses you had there, Bal? A. Houses?

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Q. Yes? A. Around the whole townsite?

Q. Yes? A. I couldn't give you the exact number of them.

Q. Do you remember about how many people you had working there? A. We had roughly about 150.

Q. And they were living in this town of Kapoor? A. Yes.

Q. Where was the town, by the way? A. The town was here, right around here.

Q. Will you use your red pencil and enclose the town in red?

10 A. (Doing so). Inside of that line.

Q. Just mark inside there, between the track and the outer line? A. There were houses here, along here, and up on the hill there.

Q. By "along here" you mean to the left going from 36 to 35? A. Yes; houses here and houses all over here.

The Court: Where it is marked houses?

Mr. Maitland: No, my Lord, those are other houses across the track.

The Court: They are not shown on the map?

20 Mr. Maitland: Where your Lordship sees the word "Houses", that is on the left of the track coming from 36 to 35; but he says the main town was on the right of the track.

The Court: Not shown there at all?

Mr. Maitland: No.

The Court: In that space bounded by Deer Creek and the railway line, is it?

Mr. Maitland: Yes, my Lord. And also above Deer Creek again there are a few also. You better mark the main town. B is where the locomotive was de-railed? A. Yes.

30 The Court: Where is the de-railment?

Mr. Maitland: Right at the end of the words the Canadian National Railway siding. The two are right in there. C is where the main town was. Now what does D mean there, that space you have indicated? A. There were some houses there.

Q. Some houses on the left of the track, where the plan has printed the word School, and the word Houses? A. Yes.

Q. Now what happened, Bal, in relation to this fire on the Tuesday when you came down there? A. Tuesday morning?

40 Q. Yes, Tuesday morning. A. Tuesday morning my men were working around here; one of the dozen men were cutting trail and patrolling and trying to put out the fire. They worked till noon Tuesday. And those men had their trail finished, and they went back home to have their lunch; that is that one dozen men I told you were in charge of Nuranjan Singh, the yard foreman, to fight the fire. And about one o'clock somebody came up to me and told me that the fire was getting out of control; and I ran down to the fire, when I saw the fire across the Canadian

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National track.

Q. Across to where? A. Across to this side.

Q. Mark it E where it crossed to, please (witness does so).  
All right; and then what happened? A. Then I went back. I realized when I saw that fire had crossed the railroad track that it was getting out of control and spreading all over the Canadian National right of way, through the brush, and it was going towards our slashing.

10 Q. Where was your slashing? A. All along here, all along here.

Q. Where else is that in the area between the railway and Deer Creek or is it in that hairpin from the rock cut to the Canadian National? A. All along here, between the Sooke River and the Canadian National right of way.

Q. When did you log that? A. We logged that the same year.

Q. When did you finish logging that? A. I think early in June.

20 Q. And when did the fire season start? A. The first of May.

Q. Could you burn slashing after the first of May? A. No.

Q. You say you finished that about when? A. I think probably the early part of June.

Q. Of that year? A. Yes.

Q. 1930? A. Yes.

Q. You say it got into your slashing there? A. Yes.

Q. At the point E? A. Somewhere around here, yes.

30 Q. And then what direction did it take? A. It worked that way.

Q. Would you mind following with arrows the direction that it took, now, please? (Witness does so). Is this all on the Tuesday? A. All on Tuesday.

Q. Now that is a direction north, isn't it, the direction of that fire? there are little compass marks up there. A. Yes.

Q. North-east. And what happened when it got to this point F; is that as far as it went in that direction? A. Yes; right against the townsite.

40 Q. Is that townsite on the raised portion or not? A. On the raised portion.

Q. All right. A. Then we worked there from two o'clock until about four o'clock right around the townsite. We kept the fire there under control; that is, we worked there during that time.

Q. You were trying at that time to do what? A. To stop it there; to stop the town from burning.

Q. To save the town? A. Yes. I had about 150 men.

Q. How far did you succeed in that? A. We kept the fire

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checked there till about four o'clock.

Q. And how was it then, as far as the town was concerned?

A. The town seemed to be safe up until that time.

Q. How many men had you there then? A. Roughly about a hundred and fifty.

Q. Once it got started did it go fast? A. Very fast, yes.

Q. And she seemed to be all right? A. It was at two o'clock when I put all my men to fight fire. And I told my engineer to  
10 blow the fire bell.

Q. Up to this time had you any help from the C.N.R.?  
A. No.

Q. Just your own people? A. Just our own people.

Q. And what happened then? A. About four o'clock suddenly the wind changed, veered around this way; changed direction here.

Q. Draw a blue line from F to the new direction of the wind, with the blue end of your pencil (witness does so). It went up then to the mill did it? A. Yes.

20 Q. What did you do then? A. These houses started to burn.

Q. At the point D? A. At the point D.

Q. When did the houses in C burn? A. These houses in D, they caught fire first; then the fire seemed to be going every way, sparks were flying all over the place, and seemed to go everywhere.

Q. What time was it that they started, the houses burning at D? A. At four o'clock.

Q. At four o'clock on Tuesday the 19th? A. Yes.

30 Q. And what next? A. Then in this area here was burning.

Q. By "all the way here" you mean the area from D?

A. Leaving the Canadian National track and Deer Creek.

Q. Between the Canadian National track and Deer Creek?

A. Yes.

Q. Right around, including the platform—what is marked platform? A. No, this is the other side. The platform is on the other side.

Q. What happened at the point D? A. These houses got afire suddenly, all these houses here seemed to catch fire.

40 Q. That is in C? A. That is in C. And the fire was going towards the mill. And over here, when we found we could not save the townsite I got my men to go into the mill then, I ordered them to save the mill. Then we worked around the mill all afternoon. The fire jumped from this here into the yard.

Q. It jumped from the area between Deer Creek and Kapoor Lumber Company's spur? A. Yes. Jumped into the yard; and from the yard it went all around on top of this hill

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and burnt all the houses.

Q. You mean the hill away up where it says plank road, at the top of the plan? A. Yes. Burnt all the houses on the hill here.

Q. When did it get up behind there; by what time did it get up behind there? A. I think something like six o'clock in the evening.

10 Q. And up to that time had you any help from the C.N.R.? A. No.

Q. How far east did it go? A. It burnt all of the platforms here.

Q. All of the platforms here, that would be— A. Would be here, all the platform here, burnt the whole of the yard, the yard lumber, and yard.

Q. Wait a moment; the platform from G to H, put it. A. (Doing so). Burnt all these, and burnt part of here; burnt this here.

20 Q. Just make a square, tie those together; that square you have got there was burnt also? A. Yes.

Q. Make "I" there. A. (Doing so). Burnt all this here from G to H; and burnt all the yard here, the lumber and yard; and burnt the lumber carrier shed here.

Q. The lumber carrier shed, mark that J please (so done). Speaking of the lumber carrier shed,—I understand it burnt all of the space between G and J, did it? A. Yes. And then the fire spread this way; the houses here, and houses here, all burnt on top of the hill, all the houses we had there.

30 Q. All the houses from plank road over to tank? A. Yes. We saved only one house here.

Q. That house is marked blacksmith shop—the house between the blacksmith shop and the tank? A. Yes. And the garages were all saved.

Q. The garages were all saved, they were away up on top of the hill? A. Yes. But the houses all burnt.

Q. What is the size of those garages, do you remember? A. They are numbered from 1 to 20.

Q. You saved them, anyway? A. Saved them.

Q. What about your bridges? A. Bridges were all burnt.

40 Q. What about your conveyor? A. The conveyor was burnt. The main conveyor, I mean the mill conveyor, that was all gone.

Q. When did you first get any help in relation to this fire? A. Well, the only help we received that night, it was from the Mayo Lumber Company, Duncan. A gang of men came over from the Mayo Lumber Company, Duncan, and they relieved us at midnight.

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Q. I want to show you, now, a photograph; take that in both hands and look at it; is that a fair representation of the town before the fire? I will undertake to call the man who took the photograph, later, my Lord. A. Well, it does not show all the houses here.

Q. That is on the right-hand side of the picture it does not show all the houses? A. No, it does not show all the houses.

Q. It does not show all the townsite? A. No.

10 Q. That would be the north end of the town it does not show? A. Does not show properly.

Q. Does it show the south end all right? A. Yes.

Q. The lumber yard? A. The lumber yard.

Q. And the mill? A. Yes.

Q. And the C.N.R. main line? A. Yes, it shows the C.N.R. main line.

Mr. Maitland: I better put this in for identification, and prove it later.

20 The Court: You can put it in as an exhibit; he says it is a fair picture (marked Exhibit 6).

Q. Have you seen this picture before? That is a picture from the air, taken before the fire; do you recognize that as a true representation of what you would see from the air?

Mr. Mayers: Has he been there?

Q. Have you been up in the air around there? A. Not in the air.

Q. Well, can you say, looking at that picture, is it a true representation of Kapoor? A. I think I understand it all right.

30 Q. Does that give you a true representation of the town?  
A. Yes.

Q. And the mill? A. Yes.

Q. Townsite? A. Yes.

Q. And the right of way of the railway? A. Yes, it does (put in as Exhibit 7).

Q. Now, do you recognize that as an enlargement of any portion of the last picture we put in, Exhibit 7? A. Yes.

Q. That is an enlargement? A. The enlargement, yes.

Q. Around the mill? A. Around the mill, yes.

40 Q. And the lumber yard? A. And the lumber yard, yes (put in as Exhibit 8).

Q. Now, you were trying to save the mill. Did it do any damage to the timber or anything of that kind, this fire? A. Yes.

Q. Where? A. Up in the woods.

Q. That would be away up in the east? A. Yes.

Q. Now, how long did you fight that fire on Tuesday?

The Court: There was not anything said in the opening—do I understand that this trial concerns the question of liability,

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and the extent of damage?

Mr. Mayers: I think the whole question comes up.

Mr. Maitland: Oh, yes. We made an application, my friend opposed, and his Lordship the Chief Justice ordered that we are not allowed to separate the assessment of damages from the question of liability. I thought we would save a lot of time. But we are both going now on that basis, that we are going to prove our damage as we go along.

10 Q. How did you fight that fire in the town, when it got to the town—by the town I mean the houses and the— A. We had three lines of hose right along the town here, from the mill, and we had lots of men there with water-buckets, shovels and mat-tocks. We had a trail cut right around the townsite here. We were using hoses, spraying water.

Q. How was your water service at that time? A. The water service was very good at the time.

Q. How was your supply of hose at that time? A. We had enough hose there at the time.

20 Q. What happened to the hose? A. Well, the hose, when the fire went out of our control these lines of hose we had here in the townsite to protect the townsite, the men over there had run away to save their lives, and some of the hose was left there in the townsite and got burnt.

Q. How did you fight the fire in the mill? A. We fought the fire in the mill with water, with hoses; we wet the whole mill.

Q. The hose that you lost in the townsite, and burnt, and that sort of thing, do you remember how much you had, what length? A. Well, I could give you perhaps a rough idea.

30 Q. Give it to me in the rough, and we will check it later. Approximately how many feet? A. All the hoses all around the plant there?

Q. Yes? A. I think we had 1,000 feet of two and a half inch hose, and about 1,500 feet of two inch, and twenty-five hundred feet of inch and a half.

Q. And how much was destroyed? A. They were destroyed here.

40 Q. How much was destroyed? A. Well, most of the inch and a half was destroyed here in the townsite; some of the two inch was destroyed there, and some two and a half inch was destroyed here.

Q. How did you fight the fire in the mill? A. With hose.

Q. What about your water system, what condition was it in the day of this fire? A. It was in good condition. There was all kinds of water there.

Q. Did anything happen to it? A. Nothing happened to it.

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Q. Did you hear anything in the nature of explosions during that fire at all? A. Yes, I heard some explosions.

Q. What? A. About evening time.

Q. Where did you hear them, or did you see anything as you heard them? A. I didn't see anything. I was in the mill at the time; I just heard small explosions; not big, but something exploding.

10 Q. Did you have anything there that would explode?  
A. Only gas drums.

Q. Where were the gas drums? A. About one dozen gas drums were here in the lumber carrier's shed; right up there.

Q. That is at the point J? A. Yes. And there were some here in the freight shed.

Q. The freight shed? A. The freight shed and platform here.

Q. The freight platform shed, that is so marked? A. Yes.

20 Q. And you say you heard the explosions? A. I heard explosions here in the freight shed, and up there in the lumber carrier's shed.

Q. Now after the fire was over, from your examination were you able to ascertain whether or not any of these gas drums actually did explode or not? A. Well, I went around there and saw them pretty near all exploded, that is they were pretty near all opened.

Q. Yes. Some suggestion in the pleadings here about dynamite in the yard; do you know anything about the dynamite? A. No.

30 Q. When did you last use dynamite there? A. I think we used dynamite there in 1929.

Q. For what purpose? A. Well, to blow some stumps—I mean to blow some rocks, and we used stump powder to blow some stumps.

Q. What were you clearing at that time? A. Clearing the yard site.

Q. Now I come to the lumber yard. Did you have a knowledge of the stock of lumber that was on hand? A. When?

Q. At the time of the fire? A. Yes.

40 Q. And up to that time had you been running your mill regularly? A. Yes.

Q. For how long? A. You mean that year?

Q. Yes. When did you start operations? A. Do you mean in 1930?

Q. No, when did you start running your mill cutting lumber? A. The latter part of 1928.

Q. And were you running continuously up to the time of the fire? A. I think so; we were down for perhaps around Christ-

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mas time every year.

Q. Over what line would most of your lumber be shipped?

A. We were shipping lumber to Eastern Canada, British States and Canada, and Middle States of the United States and Eastern States of the United States.

Q. What line would you ship it over, what railway line would you use? A. We mostly shipped it on Canadian National, through Canadian National, and some C.P.R.

10 The Court: Has the C.P.R. got a line in there? A. No.

Mr. Maitland: The C.P.R. would get it through the C.N.R. A. The cars were delivered on the C.P.R. on the mainland somewhere. It was all shipped over the Canadian National Railway from the mill.

Q. It all initiated on the Canadian National? A. Yes.

Q. What was the capacity per day you could turn out from your mill? A. One hundred thousand feet board measure on the average.

20 Q. Looking at this Exhibit 6, does that show the location of your lumber yard where all the lumber is piled there? A. Yes.

Q. At the time of the fire how much lumber did you have in these yards? A. Roughly about eight million feet.

Q. Something I forgot to clean up—how long did you stay with this fire, fighting it? A. We stayed—I stayed until about twelve o'clock.

Q. What day? A. Tuesday, on the 19th.

Q. And what happened to you? A. I was overcome by heat and smoke, and I became unconscious, and I was taken to the hospital.

30 Q. And that was the last you had to do with the fire? A. Yes.

The Court: What time? A. About twelve o'clock.

Mr. Maitland: On the night of Tuesday?

A. The night of Tuesday.

Q. Were you burnt at all? A. No, I was not burnt, but I couldn't see, I was almost blind, I couldn't see anything; and my lungs were kind of burning.

40 Q. Were any of the other men fighting with you overcome that way? A. Well, quite a few men, yes, complained about eyes burning and lungs burning.

Q. How long were you in the hospital? A. Three days.

\* \* \* \* \*

Q. Now were there any C.N.R. trains that passed there before you noticed the fire on the 18th day of August? A. Yes.

Q. At what time? A. A little after 12 o'clock.

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Q. Going which way? A. The freight train passed there going up the Island.

Q. That would be from Victoria to Kissinger? A. Yes.

Q. Did anything else pass the scene of the fire that morning? A. The gas car passed.

Q. That is another C.N.R. car? A. That is another C.N.R. car.

10 Q. And which way would it be going? A. The same direction.

Q. Do you know what time the freight would pass going west? A. Well, the freight generally used to pass there between twelve and one.

Q. And what time did the gas car pass? A. About half past ten, something like that, in the morning, around about that time.

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CROSS EXAMINATION BY MR. MAYERS:

Cross-  
examina-  
tion.

20 Q. You read and write English as well as you speak it, do you not? A. I can read and write.

Q. You are familiar with the management of the Kapoor Lumber Company's railway lines, are you? A. Kapoor Lumber Company's railway lines?

Q. Yes? A. Well, not about the management.

Q. You know how they run, do you, or you know how they did run at the time? A. Yes.

Q. Looking at Exhibit 4, you see the logging spur of the Kapoor Lumber Company coming off the Canadian National Railway? A. Yes.

30 Q. And a little away from the point where it deboucles from the Canadian National Railway Company you see a siding? A. Yes.

Q. That siding leads up to the oil tank, doesn't it, or it leads past the oil tank? A. Well, the lumber railway leads past the oil tank.

Q. And the siding also reaches the oil tank? If you want to take a car of oil up to the oil tank you use the siding, don't you? A. Yes.

40 Q. When did you on Monday see the place of derailment? A. It was some time after noon.

Q. You actually saw it, did you not? A. Yes, I went near by there and I saw it.

Q. Now the only effect of the derailment was to turn over a rail on the siding, wasn't it? A. No, there were some ties smash-

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ed, and the rails were turned over, bent.

Q. Of the siding? A. And some damage done to the switch.

Q. The rail was turned over, of the siding, that is the rail of the siding was turned over? A. Yes.

Q. Now, what do you say, that the frog was interfered with?  
A. Well, some damage was done.

Q. To the frog? A. The frog and switch, perhaps. I didn't pay much attention to that, but I went around there.

10 Q. Can you tell me whether there was any damage done to the frog? A. Some damage was done, perhaps.

Q. Did you see it? A. Yes, I saw it.

Q. You saw damage to the frog; is that right? A. Yes.

Q. Now, are you saying that it was not possible to use the main logging spur of the Kapoor Lumber Company? A. Yes, we could not use it.

Q. You are saying that, are you? A. Yes.

Q. You are saying that from your own knowledge?  
A. From my own knowledge.

20 Q. I suggest to you that that is quite wrong, that the spur of the Kapoor Lumber Company was actually used on that Monday afternoon before the derailment effect was mended; what do you say to that? A. I don't know.

Q. You don't know; is that so? A. Yes.

Q. Your tank car was left up on this little spur of the Kapoor Lumber Company's main logging spur, was it not?  
A. Yes.

30 Q. We will just mark that. This is the spur you mean, is it not? A. To the best of my recollection, I used to keep that tank car out on the logging road.

Q. If you could have used the Kapoor Lumber Company's main logging spur you could have brought the tank car down?  
A. Yes.

Q. On the main line of the C.N.R. to the point of fire, and used it? A. We could use it if we could bring it.

Q. And you could then put the fire out with that tank car?  
A. No.

40 Q. Why? A. Because that tank, the capacity of that tank is very little.

Q. How much? A. Not very much, I don't know how much it is, but it doesn't contain very much water.

Q. How much, do you say? A. I do not know the capacity, but only a small tank on the top of the car.

Q. Have you any approximate idea of the quantity?  
A. No.

Q. No approximate idea? A. No.

Q. Is it a thousand gallons? A. Not much more than a

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thousand gallons.

Q. A thousand gallons? A. Somewhere around there.

Q. And you could have brought that tank car down to the scene of the fire and used it, and taken it back and replenished it, and used it again, and so on, until you put the fire out? A. We could have used it if we brought it down.

10 Q. Assuming now you could have brought it down, you could have put the fire out with that tank car by repeated use of it, couldn't you? A. No.

Q. Why? A. That tank is only a small tank.

Q. Couldn't you have put out a certain portion with a thousand gallons, taken it back and replenished it, and brought it back and put out another portion? A. Only small hose and small pump on the locomotive, so that we could not put all the fire out with that tank and locomotive.

Q. Could you not have put it out by repeated applications of the tank car? A. No.

20 Q. Do you understand clearly what I am suggesting to you, that you could have used it to put out a portion, taken it back, filled up, and brought it down again, and again, repeating that until you had put it out, and you say you could not do that? You understand what I am putting to you? A. Yes.

Q. And you say that is impossible? A. Yes.

Q. Now, you also had on Saturday a fire down within 250 feet of the Monday fire, is that right? A. Yes.

Q. And you put that out completely by water from Sooke River? A. Yes.

30 Q. Could you not on Monday have put out the Monday fire completely by water from Sooke River? A. No; because it was a bigger fire than that fire.

Q. How many men could you have availed yourself of if you wanted to? A. I could spare only two dozen men, so I put two dozen men on there.

Q. How many men could you have got if you wanted to? 150? A. At the time I thought two dozen men would be sufficient to keep that fire under control.

40 Q. Could you not have obtained the help of 150 men if you had wanted to? A. Well, I thought I could put the fire out with the men I took.

Q. No doubt; but you could have got 150 men if you wanted to? A. If I wanted to.

Q. Could you then have put out that Monday fire by carrying water from Sooke River, just as you did the Saturday fire? A. I don't think so.

Q. Not with the 150 men? A. Not with the 150 men.

Q. You also remember the rock cut? A. Yes.

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Q. It extends on the Kapoor side of the Monday fire; is that right? A. Yes.

Q. Just on the Kapoor side of the rock cut there is a spring and a damp piece of ground, isn't there? A. Yes.

Q. You could have got all the water you wanted from that place, and taken it down by car to the scene of the Monday fire, and put out the Monday fire, couldn't you? A. I couldn't put out the Monday fire.

10 Q. Why? A. The Monday fire was too big.

Q. Will you mark the place I am talking about, this is the place where there is the spring and the damp ground, isn't that right? A. Yes.

Q. I will mark that "spring"; and that is some hundred feet from the scene of the Monday fire, isn't it? A. Yes.

Q. You could have dug all the earth you wanted to at the point marked "spring", and carried it down to the place of the Monday fire and put out that fire, couldn't you? A. No, I had no means to do it.

20 Q. Why? A. No locomotive; the locomotive was not working there. You couldn't get a logging car across there.

Q. You say the same objection applies, that you couldn't get your locomotive over the spur? A. Even by that way we could not put that fire out by those means.

Q. Why? A. The only way I could—

Q. (Interrupting): Well, why couldn't you put it out? A. Because it was too big; in too big an area, I mean.

Q. That is the only reason, you say? A. And the weather was exceptionally dry at that time.

30 Q. That would not affect throwing dirt on the fire? A. To put a fire out completely during a time like that is to put it out with water; that is the best means. That is the best way to put it out, with water.

Q. No doubt that is the best way. But this other way that I suggest, it was simply a question of digging enough earth up here, putting it in cars, and dumping it on the area of the fire, that is all it required. A. We could put fire out that way if we had a locomotive and crew.

40 Q. If you had your locomotive available down the spur; and you say the locomotive was not available, is that it? A. Yes.

Q. That is it. Now how many men—by the way, what do you say was the area of the fire when you saw it first on Monday afternoon? A. The radius was smaller at the time.

Q. A quarter of an acre? A. No.

Q. How much? A. It was a small fire when I saw it first.

Q. A quarter of an acre? A. No, I don't think so, not that one.

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- Q. Not so much? A. Not so much.
- Q. Not so much as a quarter of an acre. And you say you had how many men working on the fire on Monday?
- A. Two dozen.
- Q. Monday was the 18th of August, wasn't it? A. Yes, sir.
- Q. I suggest to you that you really had six men working and their names were Udham Singh, Ran Singh, Naranjan Singh, Harnam Singh, Magher Singh, and Kewal Singh. A. No, that is not correct.
- 10 Q. Is that your signature (indicating)? A. That is my signature, yes.
- Q. And this is also your signature (indicating); cannot you tell me if that is your signature? A. No, that is not my signature. This is mine here (indicating).
- Q. How does it come that your name is signed in this book?
- A. I don't know.
- Q. You don't know. This book in which you recognize your signature, is this one (indicating)? A. Yes.
- 20 Q. And this book shows the number of men employed on the fire payroll; that is right, isn't it? A. Yes.
- Q. Now I see on the 18th of August that you have down six men; can you show me any others? A. Well, I take the timekeeper's time, I take it as correct; I take the timekeeper's figure.
- Q. Well, can you show me any entries of any men employed on fire fighting on the 18th of August except those six? A. Not on this book.
- Q. Or in any other book? A. No.
- Q. And you also said, I think, that you employed some Chinese on that Monday, did you? A. Yes.
- 30 The Court: Is there any way of distinguishing these two books?
- Mr. Mayers: Book 1 has his signature. Can you show me in this fire fighting payroll any entry on the 18th of August for Chinese? A. Not the Chinese.
- Q. In fact the fire fighting payroll which you signed shows that the only men employed on the 18th of August were six Hindus, each for six hours, that is right? A. Well, that is the timekeeper's writing, not my time at all. I never kept that time, I never kept that book.
- 40 Q. That book signed by you shows that the fire fighting payroll, six Hindus employed for six hours? A. Yes, it is right according to the book, but not the number of men; it is wrong.
- Q. It is the book that you signed, isn't it? A. The timekeeper—
- Q. Isn't that the book that you signed? A. That is the book that I signed.

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Q. And this is supposed to be your return on that fire fighting? A. Really the timekeeper's return. He asked me to sign it and I signed it.

Q. It is the assertion of the Kapoor Lumber Company Limited by you as Superintendent, of your fire fighting payroll, isn't it. A. I didn't look over the whole payroll.

10 Q. Just answer my question; isn't this book, as you can see, the statement by the Kapoor Lumber Company Limited, signed by you as Superintendent, of your fire fighting payroll on the 18th, 19th and 20th of August? A. Yes.

The Court: The people with fire fighting activities?

Mr. Mayers: People with fire fighting activities.

The Court: Or, if not, where is the other one? A. Not all, no.

Mr. Mayers: Well, where is the rest of it? A. I don't know.

20 Q. I suggest to you, witness, that these two books show conclusively that it contains all your fire fighting activities for those three days. Now what do you say about that? A. Yes, for the three days.

Q. Yes. In 1929 the Kapoor Lumber Company had been logging on the right of the right of way going towards Kapoor, had they not? A. 1929?

Q. Yes. A. On the upper side.

Q. On the right going towards Kapoor? A. Yes.

Q. And all that area on the right of the railway to mile 35 going towards Kapoor had been burnt over, partly accidentally and partly intentionally, hadn't it? A. Yes.

30 Q. It was all just a burnt and blackened area on the right of the railway, was it not? A. On our property; not on the Canadian National right of way, though.

Q. All your property up to the mill, you say, and the right of way, was a burnt and blackened area; is that right? A. Yes.

Q. Now was there any physical obstacle between your land and the right of way? A. That country is a broken country, logs and stumps, and hard working, not easy.

Q. Was there any physical barrier between the right of way and your property? A. Yes.

40 Q. What? A. Well, there were old logs and stumps and a lot of other stuff scattered there on the ground. It is hard walking, I mean; there is barrier, it is not easy walking.

Q. What does the barrier consist of? A. Logs and stumps and other stuff, whatever it is there.

Q. Well, what is there? A. Some brush.

Q. What was there? A. Mostly logs and stumps—

Q. And you say that that was the barrier between the right of way and your land, do you? A. Yes.

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Q. Is that right? A. Yes.

Q. Do you recognize that photograph as being the scene of the Monday fire? (indicating). A. I cannot recognize this.

Q. You don't recognize that at all, is that so? You cannot recognize it? A. If it had been big enough perhaps I could recognize it, but it is too small.

Q. You don't recognize that photograph? A. No.

10 Q. Now what was there to prevent the fire which burned your land in 1929 from spreading to the right of way? A. Well, it might have burnt on the right of way as well, perhaps; not very much, though.

Q. It might have burned on the right of way as well? A. Yes. But it didn't burn very much around there.

Q. Well, how do you know? A. Well, I can see a lot of logs and stumps and brush around there, so I take it that it could not burn good in that year 1929.

Q. You say you saw logs on the right of way, did you? A. Yes.

20 Q. At the scene of the fire? A. At the scene of the fire, yes.

Q. Before the fire or after the fire? A. Before the fire. And ties, some old rotten ties taken out of the track.

Q. Now how did those ties come to be taken off the track? A. I don't know.

Q. You have no idea at all? A. Well, the section gang must have taken them out of the track, the C.N.R. section gang.

Q. The C.N.R. section gang; that is what you think, is it? A. I think so.

30 Q. Do you know at all that the Kapoor Logging Company was using the main line of the C.N.R. down near the scene of the fire a short time before the fire? Did you know that? A. The Kapoor Logging Company was using the C.N.R. track when we were logging there; using the main line of the C.N.R. when we were logging there.

Q. On the left of the railway? A. On the left.

Q. On the left going towards Kapoor? A. Yes.

Q. Do you remember the last time the train came out from the lower spur on to the main line of the C.N.R.? A. I do not remember the date.

40 Q. I think you said you had been logging this area to the left going towards Kapoor in the early part of 1930? A. Yes.

Q. And you finished early in June, is that right? A. Some time in June, yes.

Q. You had logged steadily there from what time? A. Logged steadily?

Q. Yes, from what time, the beginning? A. Well, I don't remember it.

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Q. You remember when you began to log on the left of the line going to Kapoor? A. I think we began to log the early part of the year and finished about either the end of May or early part of June.

Q. Yes. So that up to the first of May you had logged quite a lot in this area to the left of the railway? A. Not very much; most of the logging I think was done in May?

Q. In May? A. Yes.

10 Q. And you began to log near the C.N.R. and proceeded away from the C.N.R. as you went on; is that right? A. Yes.

Q. You saw Mr. Dunn in conversation with Mr. Fraser on that Monday afternoon, did you not? A. I did not hear their conversation.

Q. But you saw them in conversation, did you? A. Well, I just saw them standing on the track.

20 Q. Yes. And it was then that you went on and spoke to Mr. Dunn? A. I was going down the railroad track and he came towards me. He was walking up to the mill and I was going down; we met on the railroad track.

Q. And you had a conversation? A. I had a conversation with him.

Q. Mr. Dunn is the Forest Ranger? A. Yes.

Q. And you asked him for a fire pump, did you not? A. I asked him, yes.

Q. And he said he would bring along a fire pump on the Tuesday morning? A. Tuesday, yes.

Q. You also discussed with him the state of the fire, did you? A. Yes.

30 Q. The fire was then less than a quarter of an acre in extent, wasn't it? A. No, I think it was perhaps bigger.

Q. How big do you say? A. I say about three-quarters of an acre.

Mr. Maitland: What time is this?

Q. What time was it when you were talking to Dunn? A. Between four and five.

Q. Then the fire originally was less than a quarter of an acre, and you tell me it had grown to three quarters of an acre, is that it? A. Yes.

40 Q. I think you told me the other day that it was a half an acre? A. Well, approximately; I didn't measure it; I am just telling by my—just telling you see by looking at it, I might be a little bit off, it might be a little more or a little less.

Q. It was completely under control when you and Dunn were talking, was it not? A. It was practically under control at the time.

Q. Completely, not practically? A. Practically under

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control.

Q. It was completely under control, wasn't it? A. Well, it was under control at the time, it seemed to be under control.

Q. It was under control, wasn't it? A. Yes.

Q. And you were quite satisfied with the condition of it, weren't you? A. Yes.

Q. And Dunn was quite satisfied with the condition of it?

10 A. Well, he was satisfied in the way that the fire was kind of surrounded, and it was under control, it wasn't getting away at the time.

Q. Dunn was satisfied with the condition of the fire, was he not? A. He was satisfied at that particular—he was satisfied with the way we fought the fire.

Q. Yes. On the Tuesday morning you had two dozen men there, you say? A. Yes.

20 Q. And you sent a dozen home at lunch time? A. I sent a dozen home after they finished their work. They were put there to cut a new fire trail Tuesday morning; they finished just about noon, so I sent them home to have their lunch.

Q. You had been running the mill on Tuesday morning, had you not? A. Yes.

Q. And you continued to run the mill after the lunch interval? A. Yes; until two o'clock that afternoon.

Q. Yes. The first intimation you had that there was any trouble was when somebody came and told you that the fire had jumped the track into your slash? A. Yes.

Q. That is right? A. Yes.

30 Q. And it was some time after one o'clock and before two? A. About one o'clock.

Q. Then you went down to the scene of the fire, did you? A. Yes, I went down myself to see it.

Q. And you found the fire burning in your slash on the left-hand side going to Kapoor? A. I found the fire burning on the Canadian National right of way, and it was spreading into our slash at the time.

Q. By the way, is there any fence—are there any fences at all at the edge of the right of way? A. No, there is no fence there.

40 Q. Come over here to the map. This cross you have made, is that E? A. E.

Q. The cross you made at E is intended to represent what distance from the left-hand rail going to Kapoor? A. What is that?

Q. What distance do you intend to represent by that cross from the left-hand rail of the line going towards Kapoor? A. Well, it would be about half way between the edge of the right

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of way to the railroad track.

Q. How many feet do you intend that to represent from the left hand rail? A. Something like twenty-five feet, something like that.

Q. 25 feet? A. Somewhere around there, roughly.

Q. And this other mark you have made at A, you intend that, do you, to represent the area of the fire when you first saw it at noon on Monday? A. Yes, sir.

10 Q. And you intend by your drawing to say that the fire when you saw it at noon on Monday was actually touching the rail? A. No.

Q. How far do you say the point marked A is from the right hand rail going towards Kapoor? A. Well, the fire was burning about 15 feet away from the track.

Q. Fifteen feet from the right hand rail, is that what you say? A. From the centre of the track.

Q. Fifteen feet from the centre of the track? A. Roughly about that much.

20 Q. At noon on Monday? A. At noon on Monday, yes.

Q. Now this particular place where you have marked A on the ground there is a slight drop, is there not? A. Yes.

Q. And then it rises I think steadily? A. Yes.

Q. And the rock cut rises a little on the Kapoor side? A. Yes.

Q. Now I suggest to you that the nearest fire to the line there was on the slope of the rock cut; what have you got to say to that? A. No.

Q. You say it was not? A. No.

30 Q. You say it was within 15 feet of the centre line? A. From the rail, yes.

Q. Well, which? A. Well, from the rail, I mean.

Q. 15 feet from the right hand rail, is that it? A. Yes.

Mr. Maitland: Travelling which way?

Q. Towards Kapoor. A. No, not towards Kapoor, towards this way, towards the hill.

Q. That is, you mean the point where you say you saw the fire was fifteen feet from the right hand rail going towards Kapoor? A. No, no, towards going the hill.

40 Q. The fire was towards the hill; but the fifteen feet you mean measured from the right hand rail when you are facing towards Kapoor? A. Away from the track, not towards Kapoor.

Q. 15 feet from the centre line? A. Roughly about 15 feet or a little more.

Q. From the centre line? A. It might be a little more from the centre line.

Q. Well, how much from the centre line? A. Just enough

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to be about 15 feet from the rail. From the rail would be a little less.

Q. That is the rail nearest the fire? A. Yes.

Q. Now, Mr. Dunn after he had told you that he was satisfied with the way you were handling this fire, did he give you any other instructions? A. The only instruction he gave me was to leave six men there for the night for patrol duty and look after the fire until he come along with the pump the next day.

10 Q. That is all the instructions he gave you? A. That is all the instructions he gave me.

Q. Now I again show you an enlarged photograph that I am going to prove to be the scene of the fire; and you say that you can or cannot recognize that? A. I cannot recognize; if it had been bigger perhaps I could recognize it, but it is too small.

Q. Too small. You thought the condition was quite safe until four o'clock, didn't you, on the Tuesday? A. I beg your pardon?

20 Q. You thought the condition was quite safe on the Tuesday up until four o'clock, didn't you? A. No.

Q. Didn't you? A. No.

Q. You remember being examined for discovery? A. Tuesday up until four o'clock—when?

Q. On Tuesday? A. Yes, yes, yes.

Q. That is right? A. Yes, yes; I thought the situation was safe, yes, up till about four o'clock.

Q. Up till about four o'clock you thought the situation was quite safe? A. Yes.

30 Q. The wind that day was blowing always either towards the northeast or the northwest, wasn't it? A. Towards the northwest.

Q. Either towards the northeast or the northwest? A. Yes.

Q. It could not be blowing towards the northeast? A. What time do you mean, northeast?

Q. Well, say at noon on Tuesday the wind was blowing towards the northeast? A. No, not Tuesday; it was blowing northwest perhaps. And about four o'clock it turned, it changed towards the east; it seemed to be kind of veering around.

40 Q. From noon to four o'clock the wind was blowing towards the northwest, is that it? A. I think so, to the best of my knowledge.

Q. That is blowing towards the northwest? A. Blowing towards the northwest.

Q. And after four o'clock it changed and blew towards the northeast? A. Yes.

Q. That is right? A. Yes.

Q. And continued to blow towards the northeast the rest of

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the day? A. I cannot say that; it seemed to change around.

Q. Well, we have got up to four o'clock it blew towards the northwest, and after four o'clock it blew towards the northeast?

A. Yes.

Q. When did it change again, if it did change? A. Well, I have no recollection now. It seemed to change around at that time; everything was in confusion at that time.

Q. Change around at what time, four o'clock? A. After  
10 four o'clock.

Q. What happened, did it change after four o'clock? A. It seemed to change towards the northeast at that time. When the fire went out of our control.

Q. No, witness, you have told me that at four o'clock it changed and blew towards the northeast. A. Yes.

Q. That is right. Now did it ever change after that, to your knowledge? A. I don't remember; I have no recollection.

Q. No. As a matter of fact after the houses caught fire there were dense clouds of smoke over everything? A. Yes.

Q. And for much earlier than that, as soon as your slash  
20 caught fire there were dense clouds of smoke rolling over the country, weren't there? A. Yes.

Q. In fact when you went down to the scene of the fire, before you stopped the mill, the smoke was then pretty heavy, wasn't it? A. Well, I stopped the mill about two o'clock.

Q. Well, you went down to the scene of the fire shortly before that, didn't you? A. Yes.

Q. And the smoke was pretty heavy then, wasn't it? A. I  
30 could see everything then.

Q. Was not the smoke heavy? A. There was smoke, but I could see everything at that time. The smoke was heavy after four o'clock, after the fire went out of control the smoke was heavy all around; then we couldn't see anything; but before that we could see everything.

Q. Before you went, about four o'clock, was not the smoke blowing across the railway? A. Yes, the smoke was blowing across the railway.

Q. That is it was blowing from your slashing across the railway; isn't that right? A. No.

Q. What do you say is wrong? A. It was blowing from the  
40 fire, from the other side of the railway towards the west.

Q. The smoke was blowing towards the west, you say? A. Northwest.

Q. Towards the northwest. And you are quite clear about the time I mean; this was before two o'clock? A. Before two o'clock, yes.

Q. Before two o'clock. You had noticed pedestrians pass-

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ing up and down that line, hadn't you? A. I beg your pardon?

Q. You had often seen people walking up and down the railway grade? A. Yes.

Q. That is people going for picnics? A. I haven't seen people going there for picnics, but I have seen people walking up and down the track.

Q. They walk to Leechtown, for instance? A. Sometimes, perhaps.

10 Q. And other people would be going for their mail? A. There are some people around there go for mail.

Q. The first time that you saw or knew anything about the Monday fire was afternoon, wasn't it? A. Yes, about 12:30?

Q. Had you seen any signs of fire there at all before 12:30? A. No.

Q. Heard nothing? A. No.

Q. Heard nothing, eh? A. No.

Q. You had also had a number of previous fires that summer, hadn't you? A. I think one fire in July.

20 Q. No more than one? A. We had one on the 16th, in the same month, on the Canadian National right of way.

Q. Just come over here again. Will you look at Exhibit 4. Had you not a fire up here on July the 23rd; here I will mark P; was there a fire there about July 22nd? A. There was a fire here, around here (indicating).

Q. There was a fire coming from the bottom of the map Exhibit 4 and spreading on your property? A. Yes.

30 Q. What area did that fire cover? Did it not burn right along the foot of the knoll and continue burning over the knoll, and went across the railway? A. No. It did not go any further; right about here somewhere.

Q. There was a fire in the neighbourhood of P, was there? A. No, right in here.

Q. Well, put it where you say. A. Going that way.

Q. Was that the edge of the fire? A. The edge of the fire yes.

Q. I will mark that more strongly; Q to R is the approximate edge of the fire of the 23rd of July, is that right? A. 16th of July.

40 Q. Oh, you say this is the 16th of July? A. Yes. Went from here that way, and from here that way (indicating).

Q. Everything going from the line Q to R down towards and beyond the bottom of Exhibit 4 had been burnt? A. Not everything.

Q. But there was fire went through there? A. Yes.

Q. Now you say that was the 16th of July? A. 16th of July.

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Q. Well, I suggest to you that there was another fire on the 24th of July at P; do you know anything about that? A. No.

Q. Nothing about that. Then was there another fire lower down the Sooke River about the 25th of July, do you know of that? A. No, that was on the same day, on the 16th of July, out here (indicating).

10 Q. Well, you say there was another fire in the angle between the two branches of Sooke River, is that right? A. The same day or the next day, some sparks went around and set fire out here.

Q. Then S is the place that you are pointing to, where the fire spread from the 16th of July fire, is that right. A. Yes.

Q. I suggest to you that there was another fire still further down the Sooke River on the 25th of July? A. I don't remember that.

Q. You don't know anything about that? A. This fire down here was part of this fire. It spread from this fire to there (indicating).

20 Q. Then on the 18th of August did you know that there was another fire burning still lower down on Sooke River and nearer the Canadian National? A. No, there was no fire burning there at that time. These fires were absolutely put out.

Q. Do you mean to say you did not see this fire on the 18th of August down the Sooke River? A. No.

Q. You did not? A. No.

Q. By the way, the capacity of that tank car was between two and three thousand gallons, was it not? A. I do not know.

Q. That is the Kapoor Lumber Company's tank car. Was the water cut off from the yard on the 19th of August? A. No.

30 Q. Are you sure of that? A. Yes.

Q. You say that water could have been obtained in the stand pipes on the 19th of August in the lumber yard; is that what you say? A. Well, the fire cut it off. The fire burnt up and broke the pipes; so naturally it would be after the fire went through the yard.

Q. What is that? A. Naturally it would be cut off after the fire went through the yard.

Q. But before the fire went through the yard? A. No, not before the fire.

40 Q. You remember being examined for discovery the other day? A. Yes.

Q. I read to you Question 242: "The water system was cut off, the water to the yard, and the fire when those piles was burning the water pipe was put out of order, broken, then the fire spread through the houses on top of the hill, several houses started to burn one after another—did you say that, first of all? (A.) I said that, yes."

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“(243 Q.) And that is right is it? (A.) Yes, that is right, yes.” Do you remember giving those answers? A. After the piles caught fire—

Q. Just tell me first, did you give those answers? A. Yes.

Q. The other day? A. Yes.

Q. And they are correct? A. They should be correct.

Q. Well, are they correct? A. I haven't seen them there.

10 Q. Well, I have read them to you; didn't you hear what I said? A. Yes.”

Q. Did you hear what I read to you? A. Yes.

Q. And your answers were correct? A. Yes.

Q. I suggest to you, witness, that the water was cut off from the stand pipes in the lumber yard before the lumber yard caught fire? A. No.

Q. You say that you don't know, or that you are sure that it was not; which do you say? A. I am sure it was not cut off.

Q. Then did you try them? A. I tried them.

20 Q. When, what time? A. On the 19th, when the yard caught fire.

Q. What time? A. About five o'clock.

Q. Five o'clock you say that you tried the stand pipes at five o'clock on Tuesday the 19th of August, and you could get water? A. Yes.

Q. Is that so? A. Yes.

Q. That is what you say. Now the stand pipes in the lumber yard are controlled by a valve which is just outside the lumber yard; is that right? A. Perhaps, yes.

30 Q. Do you say that the fire did any harm to the distribution system in the lumber yard? A. Yes.

Q. What? A. Well, when the fire went through the yard and burnt the lumber it broke all the pipes.

Q. It broke all the pipes, did it? A. Well, it damaged them or broke them.

Q. Which is it, do you say the fire broke or damaged the pipes; is that right? A. Yes.

Q. And it was the pipes leading to the stand pipes; do you say the fire broke or damaged; is that it? A. Yes.

40 Q. What time do you say, or do you know, that the lumber yard commenced to catch on fire? A. I cannot give you the exact time, but I think it was about five o'clock, to the best of my recollection I think it was about five o'clock.

Q. Well, I don't want to lead you into any misstatement; you were concentrating your efforts on fighting the fire around the mill, weren't you? A. Yes.

Q. So that you don't know what time the lumber yard caught fire; isn't that correct? A. I think it was about five

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o'clock, to the best of my recollection.

Q. You say that the lumber yard caught fire at five o'clock; and how long did it burn? A. I beg your pardon?

Q. How long did it burn? A. It burnt all night.

Q. All night. A. It burnt up until the time I was there.

Q. From five o'clock to twelve? A. From five o'clock it burnt, yes.

10 Q. From five o'clock to twelve. A. Well, the time I was there it was burning yet.

Q. What time did you leave? A. I think about twelve o'clock.

Q. The lumber carrier shed is on the side of the lumber yard away from the railway, isn't it, the C.N.R. railway? A. Away from the C.N.R. railway, yes.

Q. The explosions which you heard were all from gasoline drums, were they? A. Yes.

Q. And you heard explosions in two places? A. Yes, two places.

20 Q. The freight shed and lumber carrier's shed? A. Yes.

Q. And the explosions you heard in the freight shed you heard about five o'clock? A. About five o'clock.

Q. And the explosions you heard in the lumber carrier's shed you heard about six o'clock? A. About six o'clock.

Q. This dynamite, witness—you are used to getting stumps out with dynamite, are you? A. With powder?

Q. Yes, and that is what you call twenty per cent. powder, isn't it? A. There is some powder, yes.

30 Q. You use twenty per cent dynamite for blasting out stumps, don't you? A. Yes. That is, I don't just exactly know, you see, what per centage of dynamite is used; we used to use powder there to blow stumps and dynamite to blow rocks.

Q. Let us talk about the dynamite. Do you know what per centage of dynamite is used in the sticks that are used for blasting stumps? A. I don't know exactly.

Q. You saw the bucket of dynamite, or the bucket containing the dynamite which was produced at the Fire Marshall's enquiry, didn't you? A. Yes, I saw it.

40 Q. And the bucket that was produced was a bucket similar to the buckets used by the Kapoor Lumber Company, wasn't it? A. Similar to that, yes.

Q. You were not in charge, I take it, of clearing the lumber yard? A. Yes.

Q. You were in charge of clearing the lumber yard when you began to make it? A. I was in charge, yes.

Q. And you issued any dynamite that was required, did you? A. We used some dynamite and powder.

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Q. You issued it, you were responsible for issuing it? A. I did not use it myself; there was another man using it, a powder man.

Q. But you issued it to the powder man? A. I didn't give it to him, he took it just from the powder shack.

Q. Did you keep any record? A. I just forget now, I don't remember.

10 Q. Isn't it the case that you did keep a record of every-  
thing you used? A. The powder and dynamite, it was kept away  
from the building, away from the mill, on the logging railroad,  
and it was under the charge of the logging foreman; and I used  
to have the key for that shack. And my powder man used to go  
there and get it just as much as he wanted to use around there,  
yes.

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Q. And there would be a record of what he had taken, wouldn't there be? A. I don't know.

\* \* \* \* \*

20 Q. Yes. Could you give me, Mr. Hutchinson, number 55  
in your affidavit of documents? Just while I am getting that—  
you started to work fighting fire at the mill at what time, did you  
say? A. Four.

Q. At what time did you start fighting fire at the mill to  
protect the mill? A. About four o'clock.

Q. And you kept on how long; how long were you concen-  
trating your attention? A. Kept on all night.

Q. All night. A. Until when I was taken to the hospital,  
another gang came from Duncan from the Mayo Lumber Com-  
pany to take our places.

30 Q. You were constantly concentrating your attention on  
the mill from four o'clock to twelve? A. Yes, the lumber yard  
and mill.

Q. How long did you attend to the mill? A. Most of the  
time.

Q. Did you stop attending to the mill at any time? A. Not  
before twelve o'clock.

\* \* \* \* \*

The Court: You are going to call Cowan, anyway?

40 Mr. Mayers: Yes, my Lord. You say you left the Mayo  
Lumber Company's employment— A. In September.

Q. Of 1930? A. 1930, September, yes.

Q. Have you worked for them since? A. No.

Q. Did you get a loan from them in 1931? A. Not that I

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know of.

The Court: Can you get these loans in this country without knowing about it? A. I didn't get a loan, no.

Mr. Mayers: Did you get any money from them in 1931?

A. I got my money that was coming to me, wages, I mean.

Q. How much? A. I don't remember now how much.

10 Q. Did you get no wages, or had you to wait for your wages until 1931? A. Well, I got, received some money from them in wages, and there was another money owing to me from Mayo Singh, I received that too; that was not a loan.

Q. Well, did you not get \$750 in August, 1931? A. Yes.

Q. What for? A. Wages perhaps.

Q. Well, was it wages? A. Perhaps it was wages.

Q. You say perhaps; was it or was it not? A. Well, I couldn't tell now.

20 Q. If it was not wages what was it? A. Well, I had some money coming to me from them previously, previous to the time I worked for them.

Q. On what account? A. Some dealings I had with them before.

Q. What dealings? A. Business dealings.

Q. They owed you money? A. They were invested in some other business before.

Q. And the Kapoor Lumber Company owed you money, did it? A. Not the Kapoor Lumber Company.

Q. Who? A. Mayo Singh.

30 Q. And you say the Kapoor Lumber Company paid you \$750 in August, 1931? A. Yes.

Q. That may or may not be wages? A. Perhaps it was wages.

Q. If it wasn't wages, what was it? A. If it wasn't wages it would be perhaps some money that I had coming from them, from Mayo Singh personally perhaps.

Q. The Kapoor Lumber Company would not pay you money because Mayo owed you? A. Well, it could pay it and charge it up to Mayo's account.

40 Q. Well, how much wages had you owing to you when you left? A. I don't remember now.

Q. Was it anything like \$750? A. Yes, it might be.

Q. It might be? A. Yes.

#### RE-DIRECT EXAMINATION BY MR. MAITLAND:

Mr. Maitland: These books that my learned friend has referred to should go in.

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The Court: I thought he was going to put them in. There is no exhibit number on them; we call them for the moment number 1 and 2.

Q. There were some Forest Branch fire payroll books— A. Yes.

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Q. —shown to you by Mr. Mayers, you remember? A. Yes.

Q. Signed with rubber stamp Kapoor Lumber Company Limited, and then Bal Mukand, Superintendent, under the  
10 Kapoor name? A. Yes.

Q. Did you have anything to do with making out any of the entries in these books? A. No.

Q. Who would do that? A. The timekeeper.

Q. And you signed that as an official of the Company?  
A. As an official of the Company.

Q. You looked at these books when Mr. Mayers showed them to you a few minutes ago, did you? A. Yes.

Q. Now, does that change your evidence, or your opinion at all, when you told us you had twenty-four men there on the  
20 eighteenth? A. I had twenty-four men on the 18th, yes.

The Court: Who is putting the little red books in?

Mr. Maitland: My learned friend should put them in, he referred to them.

The Court: Does it make any difference who puts them in?

Mr. Mayers: It makes no difference to me. There is no particular object in putting them in, because it is all identified in the notes. And these books contain 213 names, which is a very burdensome thing.

Mr. Maitland: They will be available to me if I want to see  
30 them?

Mr. Mayers: Yes, any time. Perhaps we better put them in, and we can arrive at some arrangement, if there is any necessity.

The Court: Very well (Books marked Exhibits 9 and 10). If they are paged, put in pages so and so.

Mr. Mayers: Exhibit 9, I will put in the frontispiece, the declarations dated September 13, 1930, and page 3. Exhibit 10, I don't want to put in anything except the frontispiece and declaration of September 13, 1930; because the only other point of  
40 the book is that it does not contain any names on the 18th of August.

The Court: Take it in that way, it is not connected with the Kapoor Lumber Company at all?

Mr. Mayers: Yes, it has a whole list of names on the 19th and 20th.

The Court: To make your point you have got to put it in, then?

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Mr. Mayers: Then Exhibit 10 will go in.

(Witness stands aside).

J. S. Hundal was here sworn as Interpreter.

BISHEN SINGH, a witness called on behalf of the Plaintiff, being first duly sworn, testifies through Interpreter as follows:

DIRECT EXAMINATION BY MR. MAITLAND:

- 10 Q. Your full name, please? A. Bishen Singh.  
 Q. Where do you live now? A. Mayo Lumber Company.  
 Q. Where were you working in August, 1930? A. Kapoor Lumber Company.  
 Q. What work were you doing? A. Loading, in the shipping crew loading cars.  
 Q. Do you remember the 18th of August last? A. Yes.  
 Q. What were you doing then? A. I was working at the mill at the time.  
 Q. And then where did you go from the mill—August 1930 is what I meant? A. He was working at Kapoor at the time.  
 20 Q. And what work were you doing? A. Shipping crew and loading cars.  
 Q. Do you remember the date of the fire of the 18th of August, 1930? A. Yes, I was having dinner, and as I came out from dinner I heard that there was a fire, and everybody was calling for me to go down and help them.  
 Q. Where did you go? A. I went down to the fire.  
 Q. And where was the fire? A. At Kapoor Lumber Company towards Victoria, at the cut.  
 Q. The rock cut? A. The rock cut, in a depression.  
 30 Q. Was it on the Victoria side of the rock cut or the Kapoor side of the rock cut, do you remember? A. It was on the right, going from Victoria, and on your left going from Kapoor to Victoria.  
 Q. On your right coming from Victoria? A. Yes.  
 Q. What I am trying to get at, which side of the rock cut was it on, nearer Victoria or nearer Kapoor?  
 A. On the Victoria side.  
 Q. How close to the rock cut on the Victoria side?  
 A. About 60 feet approximately from the rock cut.  
 40 Q. Now you said there was a depression there, did you?  
 A. Yes.

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Q. What was burning at the time; what did you see burning? A. There was an old pile of ties there that were on fire.

Q. Anything else? A. In the right of way there was some other obstructions that were also on fire.

Q. You said this is on the right hand side going from Victoria to Kapoor? A. On the right hand side; on the upper side of the track, towards the hill.

10 Q. How far was this fire from the track? A. About 14 or 15 feet from the rail.

Q. Which rail? A. The rail on the side towards the fire.

Q. Now was the wind blowing the fire to the track or from the track? A. It was blowing it in a catecornered way away from the track towards the cut.

Q. Towards the cut? A. Towards the cut and a little away from the track.

Q. How long did you stay working there? A. I got there before the whistle was blown, and stayed there until six o'clock.

20 Q. You stayed there until when? A. To six o'clock.

Q. What were you doing? A. I was bringing buckets of water from the creek to the fire.

Q. Well, who was working on the fire trail, how many? A. Twelve men were at the trail.

Q. And how many were packing water? A. Three or four of were packing water buckets, and the rest were working with shovels.

CROSS-EXAMINATION BY MR. MAYERS:

30 Q. You got there some time before one o'clock on Monday, did you; or what day of the week was it that you got there? A. Monday.

Q. Some time before one o'clock? A. It was about 20 to one when I found out about the fire; and about fifteen minutes we got there.

Q. And the only thing you saw burning were ties, is that it? A. The ties were burning, and also the rest of the rubbish and stuff around there was also burning.

40 Q. Now we have it that the ties were burning. How many ties did you see burning? A. I didn't count them.

Q. Well, approximately how many? A. I don't remember the number, but I know there was a pile about two feet high.

Q. A pile of ties two feet high was burning; is that right? A. Yes.

Q. And that, you say, was on the right of the track going

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towards Kapoor, is that right? A. It was on the upper side of the track, and going away from Kapoor it would be on the left side.

Q. Yes, away from Kapoor on the left-hand side. And you say these ties were in this depression? A. Yes.

Q. What else did you say you saw burning? A. Some of the small shrubs that had been cut were burning also.

10 Q. You say small shrubs that had been cut and were lying there, is that it? A. They had evidently been there a long time; they were not very fresh. There was other things there, grass and stuff.

Q. Some shrubs cut and lying there, is that what you say? A. Yes.

Q. How many men altogether were working there Monday afternoon? A. Twenty-four or twenty-five men there, and I know that about half of us were working on the trail and about half were working on the fire fighting.

20 Q. Half working on the trail and half were doing what? A. Fire fighting.

Q. Well, what were they doing? A. I was bringing water.

Q. How many others were bringing water? A. Three or four other men with me.

Q. And you were bringing water from the Sooke River? A. There is a creek running about three or four hundred feet from there, and I don't know what the name of it is, and that is where we got the water from, on the lower side of the track.

Q. On the side of the track away from the fire or on the same side as the fire? A. On the lower side, on the opposite side.

30 Q. Did you see the train come from the mill in the afternoon and stop opposite the fire; did you see the C.N.R. train coming from the mill and stopping at the site of the fire on Monday afternoon? Isn't that rather long to say yes or no? All I want is that he tell me whether on Monday afternoon he saw the C.N.R. train stop at the scene of the fire. A. He saw one train going by but it did not stop there.

Q. Did he see no train that afternoon stop at the scene of the fire? All I want is yes or no. A. The train that came, that stopped there, went by first and then came back.

40 Q. And stopped? A. Yes.

Q. And stopped there. He saw that, did he? A. I was away on an expedition for a bucket of water, and the train did stop there.

Q. The train did stop there? A. For a few minutes.

Q. And there were a number of white men got off the train, were there? A. He didn't notice, he was hidden by some bush, and he didn't see whether there were any men got off or not.

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Q. Did he see any of the white men walk around the scene of the fire and examine it? A. One man got off and walked, one man went around the fire; a little short man, just walked around the fire.

Q. Did you know that that was the Fire Ranger? A. I did not know who he was.

Q. Did you see what happened to the short man that you saw walking around the fire; where did he go afterwards? A. I noticed him, but I don't know what happened to him.

Q. Didn't you see him go back to the train that was waiting there? A. The train stopped about 5:30 and I didn't know whether the man got on the train or where he went.

Q. How many white men approximately were there on the train. A. I was down in the bush, I don't know how many men were on the train.

Q. Didn't you see about 14 men there? A. I don't even know of one man on the train; the train only stopped for about two minutes there.

20 Q. Were you down at the Saturday fire? A. I heard that there was a fire and it had been put out, but I wasn't there.

Q. Where were you on the Tuesday? A. We went back to the fire to work on it again.

(Witness stands aside).

(Court here adjourned until tomorrow (May 17, 1932), at 10:45 a.m.)

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Discussion.

Mr. Maitland: My Lord, Mr. Mayers intimated to me last night that he contemplated a view in this matter. I am very much in accord with that suggestion, but the difference between us is this, that he thinks the view should be taken after the evidence has all been heard, I think it should be taken at the earliest possible moment. It could be accomplished, in my opinion, this afternoon, if my friends in the Company will co-operate with us.

10 The Court: You agree—it is a question of time—What do you say, Mr. Mayers?

Mr. Mayers: I should much prefer the view to be had after the conclusion of the evidence, because we propose to give evidence of other fires in different parts of this area and other matters relating to other things in this matter. If the Jury go out now, all they can see is a stretch of country. If they go after the evidence has been heard, they will be able to identify things in the evidence. It would be idle to go out now and see a stretch of  
20 country which conveys nothing to the Jury at all; if they went out after, they could pick out on the ground the different points to which they have been referred.

The Court: If they could pick them out then, why not now?

Mr. Mayers: Because that would possibly mean giving evidence on the ground.

Mr. Maitland: I don't think so. I think it is a great advantage to have a mental picture.

The Court: Well, seeing the importance of this case, we might go out twice.

Mr. Maitland: How long would it take to go out?

30 Mr. Mayers: An hour and a half to go out and an hour and a half to return.

The Court: Your suggestion is we might go out this afternoon? My view at present would be that an observation of the scene early in the case is better than at the close of it.

Foreman: I should like to see the ground myself.

(After further discussion it was arranged to adjourn at 12 o'clock to go out to view the ground this afternoon).

The Court: Arrange for transportation at 1 o'clock.

Mr. Maitland: I call Kishen Singh.

40 KISHEN SINGH, a witness called on behalf of the Plaintiff, being first duly sworn by Christian oath, testified as follows:

DIRECT EXAMINATION BY MR. MAITLAND:

Mr. Maitland: This man speaks a little English, if your Lordship thinks I can try it.

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The Court: It is so much faster.

Mr. Maitland: Try and answer me in English, do the best you can.

Q. You remember August, 1930? A. Yes.

Q. Where were you working at that time? A. In the office, as a time-keeper and paymaster.

Q. Of what company? A. Kapoor Lumber Company.

Q. Where? A. Sooke Lake.

10 Q. At Kapoor? A. Yes.

Q. You remember the time of the fire there in 1930?

A. Yes.

Q. At that time were you book-keeper? A. Yes.

Q. Did you keep all the time? A. Yes.

Q. Do you remember the first day of the fire, Monday, 18th August? A. Yes.

Q. What were you doing that day? A. I was eating my dinner in the cook house about 12:30.

20 Q. And what happened? A. I heard the fire. I finish my dinner and I go up to the fire.

Q. Where was the fire? A. Fire about I think quarter mile—other side of the rock cut.

Q. Do you mean at the Victoria side or the Kapoor side? A. Victoria side.

Q. Where was the fire when you saw it? A. About 60 feet from the rock cut.

Q. How far was it from the railway track? A. About 15 or 16 feet.

Q. From which track? A. C.N.R. track.

30 Q. Right or left? A. Came from the Kapoor Lumber Company, and on the left hand—left hand from the track.

Q. Going which way? A. To Victoria.

Q. That would be the right, going from Victoria to Kapoor?

A. Yes, from Victoria, right, yes.

Q. You remember at that time when you got there which way the wind was blowing? A. Wind was blowing away from the track.

Q. How long did you stay there? A. Till 4:30.

Mr. Maitland: We put in two red books (produced).

40 Q. Do you remember while you were there how many men were working on that Monday at that fire? A. Yes, about 24 or 26.

Q. Are you the man who kept these books? A. Yes.

Q. These are the various branch payrolls and fire claim books—look at these—when were these made up— A. Yes.

Q. I say when—when did you make them up? A. In September, 1930.

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Q. Did you keep a record of the men who were working that day? A. Yes.

Q. What happened to that record? A. The time book burnt in the fire on the 19th.

Q. That would be on the Tuesday? A. Yes.

10 Q. And how late in September was it that you made these red books up? A. I do not remember now—about half into September.

Q. And it was stated here yesterday that there was no record there of 24 men working on the 18th. What do you say about that?

(Question repeated by Interpreter).

A. About three or four days after the fire there was no accommodation for the men of any sort to sleep or to eat, and they were living in garages around there, and so he was unable to make up the records immediately.

20 Q. Yes—anything else? A. After that time he made up his time sheets as best he could remember.

Q. I understand the night crew were not there either—six Chinamen at night time were not in that book, were they? A. No.

Q. Why is that? A. I cannot remember after a few days.

#### CROSS-EXAMINATION BY MR. MAYERS:

Q. You were down at the site of the fire on Monday?  
A. Yes.

Q. And it was your business to keep the men's time, was it? A. Yes.

30 Q. And you say you made all these books up after—you say you wrote these books in September? A. Yes.

Q. That is the month following August, the month of the fire? A. Yes.

Q. You then knew the men that you were claiming should be paid, did you? A. Yes.

Q. The month after the fire you knew how many men had been employed on the Monday, did you not? A. Pardon?

Q. In the month following the fire you knew how many men had been employed on the Monday? A. In the mill?

40 Q. No, at the fire on the Monday, you knew that? A. Yes.

Q. And you knew that you ought to put down all the men who were employed on any day, so that they could get their pay. You know that, don't you? A. I do not remember now.

Q. You knew that at the time that it was your duty to put down all the men employed so that they could get their money—

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you knew that? A. Yes.

Q. And you did therefore, when you wrote these books you put down the names of all the men who were entitled to be paid for the work that they did on any one day. Is not that right? A. Yes.

Q. And your memory, of course, of the number of men employed was much better in the month after the fire than it is now. Is not that right?—that is right, surely? A. Again question.

10 Q. You had a much clearer and better recollection in the month after the fire than you have now—is not that right?—Mr. Interpreter, will you put that to him?

(Question repeated by Interpreter).

A. At that time immediately afterwards, we were so busy and so mixed up that my recollection had more or less diminished.

Q. Your recollection two years afterwards, or nearly two years afterwards, is better than your recollection a month afterwards. Is that what you say? A. Yes, I think I remember more clearly now, because I have thought the thing over.

20 Q. And in the month after the fire, in September, you knew that the men would only get paid if you put their names down in that book. You knew that, did you?

Mr. Maitland: Hardly correct.

Mr. Mayers: Well, is that so? A. Yes.

Q. That is right?—what I have said is right? A. They took my word for it, that the pay that I got for them was correct.

Q. So only the men that you put down in these books got paid, is that right? A. After these books were sent away some men came to me and told me that their time was not included.

30 Q. What did you do? A. I did not do anything about it. A little while later the men all went off.

Q. So only the six men that you got down on the 18th got paid, is that right? A. I do not remember, but possibly in the second month the other men may have been paid.

Q. Well, how could they get paid if you have not got them down in the book. A. As they claimed their time that was missing I tried to get it for them in the second month.

Q. Well, did you get it, and from whom? A. I don't remember.

40 Q. How long did you stay down at the scene of the fire on Monday? A. Until 4:30.

Q. Why did you leave at 4:30? A. I am timekeeper for the mill, and I had to go round and get the time for the whole mill.

Q. What work were you doing when you were at the site of the fire on Monday? A. I was hauling water buckets.

Q. Did you see the C.N.R. train come down to the scene of the fire about four or half-past? A. That train went up towards

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the upper end.

Q. You saw the train come down, did you? A. Yes.

Q. And stop at the scene of the fire? A. No, he did not stop, he went up to Kapoor.

Q. And came back and stopped? A. I did not see it, I was at the mill.

Q. You had gone, you say, before that.

10 The Court: Ask him, he said he made some claim afterwards for some pay for his men. Is there anything in writing about that? A. No claim in writing.

Q. Did not write out anything about it? A. No.

Q. Just talked about it? A. Yes.

Q. Did he make any claim for the Forestry Department about it? A. Not after these claims were in.

Q. Is this in the witness' handwriting—those names—what portion of them is your work? A. This is not my writing.

The Court: Is that your writing? A. No.

20 Q. Then—this is your signature here, is it not? A. Yes, that is my signature.

Q. There is nothing of yours on that, except your signature? A. No.

Q. Well, where is that got from? A. That is from the Fire Warden, I guess.

Q. Made up on September 13th, apparently? A. Yes—not my handwriting.

(Witness stands aside).

30 NARANYAN SINGH, a witness called on behalf of the Plaintiff, being first duly sworn, testifies as follows:

Naranyan  
Singh,  
Examina-  
tion.

**DIRECT EXAMINATION BY MR. MAITLAND:**

Q. What was your occupation in 1930? A. I was foreman, yard foreman.

Q. Where? A. Kapoor Lumber Company.

Q. How long had you held that position? A. In January, 1930, I began working there.

Q. What does the yard foreman do? A. To have the lumber properly piled in the yards and look after it.

40 Q. Now you remember Monday, 18th August, the first day of the fire at Kapoor? A. Yes.

Q. Did you see anything that day? A. Yes.

Q. What? A. About 12:30, I noticed some smoke in the

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direction from Victoria, and Mr. Bal Mukand told me to take our men over there.

Q. What men were your men? A. I was told to take the yard men and the shipping crew.

Q. How many men did you take, do you remember?  
A. About 24 or 25 men, I remember quite well.

Q. And where did you go to? A. To where the smoke was coming from?

10 Q. Well, where was the smoke coming from? A. Past the cut on C.N.R. track, where the fire was.

Q. On the Victoria side or the Kapoor side of the cut?  
A. On the Victoria side.

Q. And where was the fire—when you got down there, where was the fire? A. Right alongside the track.

Q. How far from it? A. About fourteen feet from the track.

20 Q. And what did you do? A. About twelve men were put to building a trail around the fire, four or five men went out and got water, while the rest of the men were fighting the fire with shovels.

Q. What were you doing yourself? A. I was working with a shovel.

Q. What time did you stop? A. Six o'clock.

Q. And then what happened?—when you quit what happened? A. Bal Mukand sent down six Chinese and told me as soon as they arrived, for us to go back.

Q. Oh, I see, for you to quit? A. As soon as the six men arrived we went home.

30 Q. That was on the Monday, was it? A. Yes.

Q. And did you go back again on the Tuesday? A. Same number went back next morning at seven o'clock.

Q. What did you do that day, on the Tuesday? A. Did exactly the same thing as we did the day before.

Q. Did anything happen to that fire on the Tuesday?  
A. During the night the fire had jumped the trail that we had built the night before, so we set about building a new trail around that fire.

40 Q. How far back was it then, when you started building this new fire trail? A. The fire had jumped the old trail, and we set it back a little further, where we knew it would be safe to complete the trail.

Q. Well, how far back was the old trail from the track?  
The Court: Fire guard, is it not?

Mr. Maitland: Well, I always thought it was a fire guard.  
The Fire Warden described it as a fire trail.

The Court: Well, it is a new term.

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Witness: Approximately one hundred feet.

Mr. Maitland: On which side of the track?

A. The upper side of the track.

Q. Right or left?

The Court: Going to Kapoor?

A. On the right hand side, coming from Victoria to Kapoor.

Mr. Maitland: And how far back from the track was your  
10 second fire trail that you built on the Tuesday morning?

A. Further up the hill, about 275 to 300 feet.

Q. Did anything happen on Tuesday afternoon to that fire?

A. In the afternoon the fire jumped over the track.

Q. To where? A. In the direction of the town, right across  
the track.

Q. And did it keep going? A. The fire jumped the track  
and due to the high wind it carried it along towards the town  
through the slashing and Mr. Bal Mukand told me—

Mr. Maitland: Never mind what he told you. I think that  
20 is all.

#### CROSS-EXAMINATION BY MR. MAYERS:

Q. You speak English, don't you, witness? A. Just slight-  
ly, not much.

Q. Do you remember the Monday when the C.N.R. train  
came down from Kapoor and stopped opposite the fire? A. Going  
up it did not stop, but coming back it stopped for just a few  
minutes.

Q. You know Mr. Fraser, the C.N.R. agent, don't you?  
A. I don't know Mr. Fraser, but I did notice a man getting off  
30 the train and when the train left the man was not there either.

Q. You saw a number of men getting off the train, did you  
not, when it stopped opposite the fire? A. No, I did not. I saw  
one man I am sure, but I was off in the direction of the other end  
of the fire and was not sure of any others.

Q. The one who got off was the Fire Ranger, was it not?  
A. I do not know, I don't even remember whether the man got  
off that particular train, or whether he got on again. I just saw  
that one man.

Q. Did you see anyone go from the train and walk round  
40 the range of the fire, examining it? A. I did not see him. Some-  
one else may have. I just saw the one man.

Q. Well, this one man that you saw, did he not walk round  
the fire and examine it? A. I do not remember, he might have  
and he might not have.

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Foresew (Chinaman), for Plaintiff—Direct Examination.

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Q. What were you doing at the time? A. I was working with a shovel, trying to put out the fire. Sometimes I would go around and examine the trail and he may have been around where I was, while I was away.

Q. On the Tuesday did you stay down at the scene of the fire the whole morning? A. Yes, I was with the fire all day.

10 Q. You did not go back to lunch at noon? A. I sent 12 men off, and 12 stayed there. I was with the twelve men that stayed there.

Q. The first trail you built, one hundred feet back from the right of way, that was up on the side hill, was it? A. No, it ran round the bottom of it.

Q. The bottom of the hill? A. Yes, the first one was.

Q. Did it go—did your fire guard, your fire trail, carry on up the slope of the rock cut? A. I don't remember, but I think so.

Q. And then your second fire trail was further up the hill side, was it? A. Yes, it was further up over the hill.

20 Q. Had you anything to do with the burning of the slash on the right of the right of way going towards Kapoor in the autumn of 1929? A. I don't remember anything about that.

(Witness stands aside).

FORESEW (Chinaman), a witness called on behalf of the Plaintiff, being first duly sworn, by paper oath, testified as follows:

Foresew,  
Examina-  
tion.

(Harry Hastings, sworn as Interpreter)

DIRECT EXAMINATION BY MR. MAITLAND:

30 Q. What is your occupation? A. Railway.

Q. What are you? A. Make roads in the railway.

Q. Where you working in 1930 on the 18th August? A. At Kapoor sawmill, on a track of the Kapoor sawmill.

Q. Do you remember the day of the fire, the 18th of August?  
A. Yes, I remember the fire.

Q. What did you do that day? A. I was repairing the track.

Q. What did you do in relation to the fire, if anything?  
A. I worked on the road until five o'clock, when I went home and at six o'clock I went to help look after the fire.

40 Q. And who did you take with you, anybody? A. Including myself six Chinese.

Foresew (Chinaman), for Plaintiff—Direct Examination.

Hagara, for Plaintiff—Direct Examination.

Q. Who sent you down there? A. The foreman.

Q. And how long did you stay there? A. I started work at six o'clock in the evening, and I remained there till seven o'clock the following morning.

Q. What were you doing? A. Sometimes we shovelled some stuff on the fire to smother it, and then we were making trails.

10 Q. And the other men were working with you, were they?

A. We were spread out, the six of us, were spread out and each of us was looking after a part.

Q. What happened in the morning, when you quit?

A. After I left work I went to eat, had my breakfast, then I went to sleep.

Q. Well, did anybody take your place at the fire? A. Yes, there were some Hindus took our place.

The Court: Where was this fire? A. Below the sawmill.

Mr. Mayers: No questions.

20

(Witness stands aside).

HAGARA, a witness called on behalf of the Plaintiff, being first duly sworn, testifies as follows:

DIRECT EXAMINATION BY MR. MAITLAND:

Q. You remember Monday, 18th August, 1930? A. Yes.

Q. Where were you working at that time? A. Out in the camp.

Q. Where, what company? A. Kapoor Lumber Company.

Q. And what was your occupation? A. Railway foreman—track foreman.

30 Q. Now, do you remember a C.N.R. freight engine being derailed on the 18th? A. Yes.

Q. Where were you at that time? A. I was out working on my job.

Q. What were you doing? A. Building a track.

Q. That is a railway track? A. Yes—building track out at the camp.

Q. Did you get word of this derailment? A. The Superintendent notified me about 2:30.

40 Q. Did you have anything to do in relation to that fire at all? A. I sent some men during the night.

Q. And what men were they? A. Sent my six Chinese.

Q. Was the last witness one of them? A. Yes, he was one

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tion.

Hagara, for Plaintiff—Direct Examination.

of them.

Q. Now was any of your track—by that I mean the Kapoor Lumber Company Limited's track damaged in the fire? A. Not the same day, but the next day.

Q. Well, I know, but by the fire, the whole fire, that is what I mean? A. Yes.

Q. Did you make an investigation of that yourself? A. Yes, I remember the number of rails and ties.

10 Q. Did you make a note of it at the time, a memorandum?

A. I remember, about probably 200 ties.

Q. Would you ask him if any of that is his writing (memorandum produced to witness)? A. This marking on the side is mine.

Q. On the left-hand side—what is that—a memorandum of what? A. These are the rails.

Q. What rails? A. The ones that were destroyed by the fire.

20 Q. Did you make that note at the time? A. Yes, at that time.

Q. Now how many rails were destroyed by the fire? A. I don't remember now, but I have them marked down as stated here.

Q. Well, using that to refresh your memory, how many—I want the various items, and lengths and weights? A. 56 lb. rails.

Q. Now give us the different items, please, of the rails—the lengths. A. 23 rails 30 feet long; 5 pieces 29 feet long—

30 Q. That is five rails, is it? A. 5 rails. 3 rails 28 feet long; 1 rail 27 feet long; 5 rails 26 feet long; 5 rails 25 feet long; 8 rails 24 feet long; 2 rails 23 feet long; 1 rail 20 feet long; 1 rail 32 feet long.

Mr. Maitland: That is the total—all right.

Mr. Mayers: No questions.

(Witness stands aside).

Mr. Maitland: If your Lordship will let me speak now to the question of the view. I can take any of my witnesses with me. Bal Mukand, if your Lordship thinks he should point out the position of the fire as indicated yesterday—what is your Lordship's wish in regard to that?

40 The Court: My experience of taking a view with a jury, it is a most difficult proposition to carry out with any degree of satisfaction, that is to keep the proper environment.

Mr. Maitland: That was why I spoke on this question. I thought that if he confined himself to just giving the locality of where he said that fire was and nothing else.

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The Court: If you call witnesses and point out to the Jury and say, That is where the fire is—the defence when they come to their part of the case they are at a disadvantage. We cannot call the witnesses in defence. I think it better in the meantime for the Jury to go out and see the locality—you can take that man along if you want to, and Mr. Mayers can bring who he likes.—My feeling at present is not to take evidence on the ground, just view the ground with a map and get conversant with the situation.

10 The Foreman: Ought we not to have someone to tell us where the fire started?

Mr. Mayers: That is the disadvantage of going out now, the Jury will at present have only heard one side.

The Court: That is why I did not want Mr. Maitland to take his witnesses to point out any particular locality.

Mr. Mayers: That is the disadvantage of the Jury going out now when they have not heard the respective stories. They have not heard my side at all.

The Court: Have you been there, Mr. Mayers?

Mr. Mayers: Yes, my Lord.

20 The Court: Is there any object in viewing the ground at all—if I were a juryman the object would be to get a picture of the locality.

The Foreman: The ideal would be for us to go out now.

The Court: And do without any evidence and take a map.

Mr. Mayers: It would be better if Counsel did not go, if the jury took a map and went by themselves.

30 The Court: If I were a juryman I would like to get that locality in mind. I will have to give you—So that the records will show, I will have to say something to them.—It is agreed then, that you have a view, whether there will be a second view will be considered later on. (Addressing Jury): You go out and take a view of the locality, the object being that you become conversant with the locality so that it will be applied more readily to the situation. I am required to give you certain directions as to your conduct at the time. Do not allow anybody out there or during the course of the trial to talk to you about this case at all. When you are out there, in charge of the Sheriff, try and keep together as much as you can, and do not, as it were, form a conclusion, by saying to each other, This is so-and-so. Just keep it in your own  
40 mind without forming any decision on any particular point.

(The Court then adjourned to meet at the Court House at 1:30 for the purpose of proceeding to the view. The trial to be resumed at 10:45 tomorrow, (May 18, 1932).)

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Teja Singh, de bene esse, for Plaintiff—Direct Examination.

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Teja Singh  
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esse)  
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tion.

- 1 Q. You are Teja Singh? A. Yes.
- 2 Q. And you have just been sworn outside in the Registry  
Office? A. Yes.
- 3 Q. How long have you been in this country? A. Since  
August, 1913.
- 4 Q. Do you know the Plaintiff, the Kapoor Lumber Com-  
pany Limited? A. Yes.
- 10 5 Q. Were you ever employed by them? A. Yes.
- 6 Q. During what period? A. Oh, I started there in  
November, 1929.
- 7 Q. And you worked until when? A. Until the fire—  
August, 1930.
- 8 Q. Were you working there on the 18th August? A.  
Yes.
- 9 Q. And what day did you leave there? A. After the  
fire—about two days, I guess, after the fire.
- 10 Q. And that was at Kapoor, on Vancouver Island? A.  
20 I beg your pardon?
- 11 Q. At Kapoor, on Vancouver Island? A. Yes, I left  
there for Vancouver then.
- 12 Q. Now, do you remember a fire that occurred near the  
mill on or about the 18th August? A. Yes.
- 13 Q. First give me, what was your employment in the  
mill, what occupation? A. Grader.
- 14 Q. Grader? A. Yes.
- 15 Q. Is that working in the mill itself? A. On the  
chains, where the lumber comes out of the mill—where it is sorted.
- 30 16 Q. Now, what was the first you knew of this fire on the  
18th August? A. All I know is the superintendent came and  
told me—  
Mr. Mayers: I object to that.  
Mr. Hutcheson: Well, we can take it subject to your objec-  
tion.  
Mr. Mayers: No, I certainly object to what he was told by  
somebody else. This witness is not being examined for discovery;  
he is being examined as a witness in chief.  
Mr. Hutcheson: 17 Q. You were told something by  
40 whom? A. The superintendent.
- 18 Q. Who was that? A. Bal Mukand.
- 19 Q. And following that you did what? A. It was noon  
—twelve.
- 20 Q. And you did what? A. Went home and got a little  
lunch and started off for the fire.
- 21 Q. And where was this fire? A. The fire was along the

Teja Singh, de bene esse, for Plaintiff—Direct Examination.

C.N.R. track. I guess it is—I can't figure out the direction—towards Victoria, where the track was going towards Victoria.

22 Q. From the mill? A. From the mill, yes.

23 Q. And did anyone accompany you to the scene of the fire? A. Yes, there were several men.

24 Q. Will you tell me how many? A. Oh, about a dozen, I think.

10 25 Q. And where was this fire relative to the track of the C.N.R.? A. Oh, it was pretty near the tracks. I would figure around—oh, about 20 feet or more.

26 Q. How large an area did the fire cover when you arrived there? A. The fire was fairly large—I think around half an acre.

27 Q. And at what time did you arrive at the scene of the fire? A. I arrived there about 12:30.

Mr. Hutcheson: I think you are admitting this plan, aren't you, Mr. Mayers.

Mr. Mayers: Yes.

20 Mr. Hutcheson: 28 Q. Just take a look at this plan, witness. I will just explain, this is a plan representing the neighbourhood of the mill, this is supposed to be the mill up towards the corner. A. Yes.

29 Q. This line indicates the right-of-way, and the centre of these two lines the track on the right-of-way? A. Yes.

30 Q. Now, looking at that plan, could you mark on there where the fire was burning when you got there at 12:30? I might say the scale is about 100 feet to the inch. A. It would be along here.

30 31 Q. Just draw lines enclosing the area of the fire as you found it at 12:30. A. I think it was something like that.

32 Q. You might just mark that "F"? A. "F"?

33 Q. Yes. A. (Indicating).

34 Q. Now, was there anybody at the fire when you got there? A. No, I was amongst the first.

35 Q. How long did you remain at the scene of the fire? A. I remained there till about 5:30.

40 36 Q. Did those men who accompanied you to the scene of the fire remain there or go away? A. No, we all—I think most of us went, anyway.

37 Q. Did any other employees of the mill come to the scene of the fire after you got there with this first group?

Mr. Mayers: Well, I object to that question. The witness is not being examined for discovery.

Mr. Hutcheson: No, I know he is not. I asked him if any other employees came there.

Mr. Mayers: I object to leading questions, which that clearly

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is.

Mr. Hutcheson: It is not a leading question at all. I have just asked if any other employees came there; there is nothing leading about that.

Mr. Mayers: Well, it won't be possible for either of us to decide that, so I object to the question.

Mr. Hutcheson: He can answer it subject to the objection then.

10 Mr. Mayers: I am not accepting that position at all. I object to the question.

Mr. Hutcheson: 38 Q. Well, go ahead, witness; answer it? A. There may have been some men came in there after. I don't know. You see, we were all working.

39 Q. You say you remained there until when? A. Until 5:30.

40 Q. And what were you doing between the time you got there and 5:30? A. Trying to clear the roads so as to keep the fire from spreading, and throwing on dirt and so on.

20 41 Q. What were the other men, who you say went with you and remained there till 5:30, what were they doing? A. The same sort of thing.

42 Q. Now, when you left there at 5:30, did any persons remain behind?

Mr. Mayers: I object to that question.

A. I don't know that.

Mr. Hutcheson: 43 Q. You don't know. Did you go to the scene of the fire again? A. I went the next morning.

30 44 Q. What time? A. I guess around seven or seven-thirty.

45 Q. Did anyone accompany you to the scene of the fire then? A. There was pretty near the same bunch of men, or a few more.

46 Q. Were there any men at the scene of the fire when you went there on Tuesday morning? A. There were some Chinamen. I don't know how many there were, though.

40 47 Q. What was the condition of the fire when you arrived there on Tuesday morning? A. Well, the fire had died down considerably, and it hadn't increased any since we left it that night.

48 Q. Since you had left it Monday night? A. Yes.

49 Q. What was the area of the fire when you left it on Monday night as compared to the area when you got there Monday noon? A. Oh, it was practically the same; it didn't increase any.

50 Q. How long did you stay at the scene of the fire on Tuesday? A. Tuesday, we stayed there practically all the time. We were there, at the first place there, about noon, and then it

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began to spread, and then it developed into the big fire.

51 Q. Now, what were you and the men who accompanied you there on Tuesday morning doing that morning? A. I beg your pardon?

52 Q. What were you doing on the Tuesday morning, you and the men who accompanied you to the scene of the fire? A. Well, we were getting mostly dirt and throwing it wherever we found the fire was starting up, and more or less watching it lest it should develop—get away.

53 Q. And what do you say happened about noon? A. About noon a little wind began to spring up, and the fire began to spread out.

54 Q. That wind sprang up blowing in what direction? A. It was more or less parallel to the track.

55 Q. Yes. In which direction did the fire spread? A. The fire went—you see, the track gives a little curve there.

56 Q. Just draw a line on there—on that map, indicating which direction the fire spread after this wind sprang up at noon on the Tuesday? A. Right along here.

57 Q. Well, draw a line just showing the course the fire took, as you saw it? A. (Indicating).

58 Q. And how far did it spread in that direction? A. Well, right up against the mill.

59 Q. You might put an arrow at the head of that line to show the direction. A. This way (indicating).

60 Q. When you arrived there on the Monday noon was there any wind blowing? A. There was, a little.

61 Q. What direction was that wind blowing? A. It was blowing pretty near up in this direction.

62 Q. Well, before we get confused, would you mark that line you made as indicating the course the fire took at this time as "A"? A. (Indicating).

63 Q. Now, would you draw a line on this map indicating the direction of the wind when you arrived there on Monday noon? A. (Indicating).

64 Q. Would you mark that "B"? A. (Marking "B").

65 Q. Now, what did you do when the fire started on the course indicated by the line "A"? A. Well, we went across and tried to put it out in every way we could, and it looked as if we stopped it at first, but the material around was rather dry, and the wind seemed to be getting stronger and we just couldn't stop it; it was developing too fast.

66 Q. How long did you personally continue your efforts fighting the fire on the Tuesday? A. Well, we fought till about eleven o'clock that night.

67 Q. And up till that time the fire had reached where?

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A. Up to that time the fire was all over the place, except the mill portion, was the only one that was safe, otherwise it was all around.

68 Q. Where was the lumber yard of the Kapoor mill situated in reference to the mill? A. It was towards the Victoria side, right on the tracks.

69 Q. And did it burn? A. Yes.

10 70 Q. Do you know what time it caught? A. I wouldn't be able to tell you; it was in the evening.

71 Q. Now, when you went to the scene of this fire on the Monday noon, tell me generally what was the nature of the material that was burning? A. Oh, there were some stumps and shrubs and things—all material that is generally left after logs are taken out.

Mr. Hutcheson: That is all.

#### CROSS-EXAMINATION BY MR. MAYERS:

20 72 Q. You left the Kapoor Lumber Company's employment in August, 1930, did you? A. Left?

73 Q. Yes? A. Yes.

74 Q. What did you do after that? A. I have been going different places. I was up at Kelowna since that, working—

75 Q. You have been up at Kelowna ever since? A. Yes.

76 Q. Working for whom? A. Oh, picking fruit.

77 Q. Not in a mill? A. No.

78 Q. Are you leaving Canada? A. Leaving?

79 Q. Yes? A. No.

30 80 Q. Aren't you leaving Canada now? A. No, I am leaving Vancouver.

81 Q. And going where? A. On to the prairies.

82 Q. Going on to the prairies. To do work in a lumber mill? A. No.

83 Q. You have given up lumbering, have you? A. Well, more or less, unless I can see something in it for me.

84 Q. When you went to the scene of the fire which you have described on the Monday at noon, was there anybody there when you got there? A. No.

85 Q. How many men went with you? A. About a dozen.

40 86 Q. And was Bal Mukand with you? A. No.

87 Q. Did Bal Mukand come at any time that day? A. While I was there—I don't know whether he did, he might have done it.

88 Q. You never saw him? A. No.

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89 Q. During the whole of Monday you never saw Bal Mukand at the scene of the fire? A. No. I didn't look for him, anyway.

90 Q. Well, you didn't see him? A. No.

91 Q. Now, then, these twelve men, including yourself, worked till half past five, did they? A. Yes.

92 Q. And then they left, did they? A. Yes.

93 Q. And went home? A. Yes.

10 94 Q. Yes. You say that that fire covered what area when you got there at noon on Monday? A. Oh, about half an acre.

95 Q. And it did, or did it not, increase in size during the Monday? A. No.

96 Q. So that when you left at half past five—when all you men left at half past five on Monday the condition of the fire was just the same as when you got there, is that right? A. Yes—it was a little less than it was when we got there.

20 97 Q. Now, what did you do during the whole of that time—you yourself to start with? A. Well, I worked on clearing the road on the side that the wind would be blowing to stop it from spreading and—

98 Q. That is, you worked on making a fire trail, is that it? A. Yes.

99 Q. On which side of the fire was that? A. Towards the mill side.

100 Q. Yes, and you worked at that the whole time, did you? A. Well, not all the time, I was doing that and throwing dirt on the fire and so on.

30 101 Q. Yes, now, you were working on the fire trail and you were also throwing earth on the fire, is that it? A. Yes.

102 Q. Did you do anything else? A. No.

103 Q. The other men who were with you, did they do anything else? A. I don't know. I can't remember that.

104 Q. What is that? A. I can only remember the part that we were throwing dirt on the fire and clearing the trails.

105 Q. Yes, that is all you remember that anybody did; building or making fire trails and throwing earth on to the fire, is that right? A. That is all I remember.

40 106 Q. Yes, the men were just working by themselves, there was no one directing them, isn't that right? A. There was Narangan Singh.

107 Q. Narangan Singh, who was he? A. He was the yard foreman.

108 Q. The yard foreman, when did he get there? A. He was there with us.

109 Q. Oh, he went down with you? A. Yes.

110 Q. Yes, he was directing the operations? A. Yes.

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- 111 Q. Telling you what to do? A. Yes.
- 112 Q. Yes, and you carried out all his directions, did you?  
A. Yes.
- 113 Q. Now, was there any slash at that place where the fire was burning? A. Slash?
- 114 Q. Yes? A. Oh, there were shrubs and things burning round the stumps.
- 115 Q. Was there any slash? Do you know what slash is?  
10 A. Slash—as far as I can understand, is just small material—sticks and things.
- 116 Q. Yes, how long have you been working in the woods?  
A. Oh, I have been working off and on ever since I have been here, pretty near, during the holidays and things you know, because I have been going to school.
- 117 Q. Have you ever heard the word “slash” before? A. No—I have heard it, yes, but—
- 118 Q. You don’t know what it means? A. There are a lot of words you use are rather indefinite.
- 20 119 Q. Well, do you know what slash means? A. Well, that is my idea of it.
- 120 Q. What? A. That it is small sticks and things.
- 121 Q. Is that all? Is that all? A. That is about all. Well, it might be anything that you had in it, weeds and so on.
- 122 Q. Well, tell me what you understand by the word “slash?” A. Well, that is it—sticks and weeds.
- 123 Q. Sticks and weeds, is that all? A. Yes.
- 124 Q. That is all. Well, were there any small branches or trunks of trees lying at the scene of the fire? A. There may have  
30 been—probably were.
- 125 Q. Well, don’t imagine, just take your memory back to that time? A. Well, there were—
- 126 Q. There were, were there? A. There were stumps and things.
- 127 Q. And shrubs and small trees lying down on the ground? A. I think—well—
- 128 Q. What is that? A. I say there were a lot of things lying around.
- 129 Q. Well, there were shrubs and small trees? A. Yes.
- 40 130 Q. That is right, is it not? A. Yes.
- 131 Q. Yes, cuttings and loppings from the trees that had been felled? A. Yes.
- 132 Q. And that extended all over that rising bank on the side of the railway where the fire was, is that right? A. There was some on the other side, there wasn’t so much on the side that the fire was on.
- 133 Q. No, most of the slash was in the area between the

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railway and the mill, was it not? A. Yes.

134 Q. Yes. There was some slash starting up the hillside on the other side, isn't that right? A. Yes.

135 Q. That is, that was between the railway and the mill—just right near the railway? A. I mean this area across here.

136 Q. Yes, you see that sort of horseshoe, the space enclosed by the horseshoe between the railway and Deer Creek and the mill. You see that, do you? A. Yes.

10 137 Q. And this area here was full of slash, was it? A. Yes.

138 Q. We will mark that "slash." You understand the area, do you? It is between the Canadian Northern Railway Company's grade and the Kapoor Lumber Company's spur, Deer Creek and the mill. You understand what I am talking about? A. Yes.

139 Q. And that was all full of slash? A. Yes.

20 140 Q. On the other side of the railway where you have marked the position of the fire there is a hillside going up, isn't there? A. Yes.

141 Q. And there was also slash there? A. Yes, there was—it was more or less burned, you know.

142 Q. There wasn't so much slash on the far side of the railway as on the other side? A. Yes.

143 Q. That is what you say, but there was slash on both sides? A. Yes.

144 Q. This point "F" where you have put the fire is in a little depression, isn't it, that rock cut? A. Yes.

145 Q. Towards the mill side? A. Yes.

30 146 Q. Did the gang who were there on Monday build fire trails? A. Yes.

147 Q. Just draw for me the fire trails that they made? A. (Indicating). Something like that.

148 Q. Yes, that is the fire trail, which we will mark "fire trail" (Indicating). From P to Q is the fire trail? A. Yes.

149 Q. Now, you said that the area on the side of the railway where the fire was had been burned? A. Yes.

150 Q. That burn had extended right from the area of the fire, had it? A. I don't know—

40 151 Q. Well, what you saw, of course, were blackened stumps and blackened logs and blackened slash? A. Yes.

152 Q. Well, that condition prevailed right over the area of the fire, did it? A. Yes.

153 Q. And all round the fire? A. Yes.

154 Q. And in fact it extended right along the railway grade, did it not? A. Well, I don't know—

155 Q. Well, you saw it, you know. You saw it, didn't

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you? A. Well, I have been round there lots of times, you are not noticing all these things.

156 Q. Did you see any difference in the condition of the blackened area at any particular point? A. I don't know—I never thought about that.

157 Q. Well, you didn't notice it then. Is that right? A. No, I didn't.

10 158 Q. So far as you could see the condition of the blackened area was the same all over that neighborhood of the fire. A. Yes, as far as I know.

159 Q. Yes. Who told you to leave at half past five on Monday the 18th of August? A. Narangan Singh.

160 Q. Had any white men come on the scene while you were there? A. There were some men, I don't know who they would be or anything. I don't know any of their names.

161 Q. You don't know. Did you see any trains pass that day? A. I don't know about that. I never thought about it.

20 162 Q. You don't remember seeing any trains pass? A. Well, there generally is a train going by, but I don't know—I don't remember anything on that day.

163 Q. You can't recall any trains passing the place where you were at work? A. No.

164 Q. Well, I tell you that a train passed there twice. A train passed you in the afternoon coming from Victoria—in the early afternoon, and going up to the mill. Don't you remember that? A. In the early afternoon?

165 Q. Yes? A. No, I don't.

166 Q. What? A. No.

30 167 Q. You don't recall that. Did you know that there had been a derailment on the spur at the mill? A. No. I don't remember anything like that at that time.

168 Q. Didn't you hear about it at the time? A. No.

169 Q. Did you hear about it after the time? A. I don't remember. I know there had been derailment before, but I don't know anything about that time.

170 Q. You don't remember a derailment at the time of the fire? A. No.

40 171 Q. Well, then, you didn't see the train that came down there in the early afternoon. Well, the train I am speaking of arrived at four o'clock in the afternoon, from Victoria to Kapoor. Don't you remember that? A. From Victoria to Kapoor?

172 Q. Yes? A. No.

173 Q. Did you see this locomotive with a breakdown car, or more than one—perhaps several breakdown cars. You don't recall that at all? A. No.

174 Q. Then at five o'clock that same train came back from

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the mill to the scene of the fire and stopped there. Don't you remember that? A. No.

175 Q. Don't you remember this locomotive coming back from the mill, stopping at the scene of the fire, loaded with white men? A. I don't remember the locomotive at all. I was doing my work around there.

176 Q. I see. And these white men that you speak of as having visited the scene of the fire on that day, what time was it that they came? A. I don't know about the time.

177 Q. No idea at all? A. No.

178 Q. Was it soon after you got there or soon before you left, or what? A. Oh, after I had been there—quite a while after I got there.

179 Q. Yes, how long before you left? A. I can't tell.

180 Q. Well, approximately. Was it a short time or a long time before you left. A. Oh, I should think it would be about somewhere half ways between.

181 Q. Half way between, then, that would be about two or three o'clock, is that it? A. Probably about that.

182 Q. Wasn't it really about five o'clock? A. I don't know.

183 Q. Half an hour before you left? A. I couldn't tell you.

184 Q. How many white men came along? A. I couldn't tell you how many white men did come along—there were two or three.

185 Q. Two or three. What did they do, where did they go? A. Oh, I didn't—I wasn't looking after them.

30 188 Q. Did you see them? A. Yes.

187 Q. Where did they go? A. Just came around and looked round, that is all I know, and I kept on working. I wasn't going around—

188 Q. They walked over your fire trail, did they? A. Maybe they did.

189 Q. Well, did they? A. Oh, they were walking all around.

190 Q. I see. They walked all around the fire, is that it? A. Yes.

40 191 Q. Did they say anything? A. Not to me.

192 Q. Did any of them say anything to anybody? A. No.

193 Q. They were entirely silent? A. Oh, they might have been talking for all I know, but I wasn't—

194 Q. So far as you heard, they never said a word, is that it? A. Yes.

195 Q. Did they talk to Narangan Singh? A. I don't know.

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- 196 Q. You didn't see them or hear them, is that right?  
A. Yes.
- 197 Q. Narangan Singh was there at the time, was he? A. Yes.
- 198 Q. Well, whence did these men come. How did they get there? A. I don't know.
- 199 Q. You didn't see them? A. No.
- 200 Q. They suddenly appeared? A. Yes.
- 10 201 Q. They suddenly appeared. For all you knew they might have dropped down from the sky? A. Yes.
- 202 Q. They didn't come from the train that was stopped on the line, did they? A. I don't know. I don't remember anything about the train.
- 203 Q. I see. Now, it was Narangan Singh who told you and your companions to leave at half past five, was it? A. Yes.
- 204 Q. And you were satisfied that everything was all right then—quite safe? A. I don't know that, it wasn't my place to know whether it was or not.
- 20 205 Q. Well, Narangan Singh wouldn't have called you off unless he was satisfied, would he? A. No.
- 206 Q. And you went back and had supper? A. Yes.
- 207 Q. Just exactly what was the condition of the fire when you left? A. There was just a small fire, it more or less burned right down.
- 208 Q. It had pretty well died down? A. Yes.
- 209 Q. And there was just a slight smoldering or smoking, is that it? A. Yes.
- 210 Q. Yes, no flame? A. No, I don't think so.
- 30 211 Q. No. So that as far as you could see, it was perfectly safe? A. Yes.
- 212 Q. Wherever you had thrown the earth, I suppose you had put the fire out? A. We generally—you can't always put it out that way, it still keeps on smoking.
- 213 Q. Yes, but if you throw earth on a flame it kills the flame, doesn't it? A. It kills the flame, yes.
- 214 Q. Had you any buckets down there on that day? A. There might have been buckets down there, I don't know.
- 215 Q. You don't remember. Was there any hose? A. No.
- 40 216. Q. Hadn't you got—What is that? A. You can't use hose round there.
- 217 Q. Can't you? Why is that? A. Well, there is no way of getting the water round.
- 218 Q. Haven't you barrels of water distributed along the track? A. Yes.
- 219 Q. Yes, just show me where that was? A. I don't

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know where the barrels were.

220 Q. You didn't see them that day? A. Well, I couldn't tell you where they are, it is such a long time. I have seen them often.

221 Q. Yes, you have often seen them and they, of course, were put there for the purpose of extinguishing a fire? A. Yes.

222 Q. Yes. How many barrels do you think there were in the vicinity of the fire? A. I don't know anything about that.

10 223 Q. I see. You didn't observe them that day? A. No.

224 Q. Did you use them? A. I didn't.

225 Q. Did anybody? A. I don't know they might have.

226 Q. As far as you saw, nobody did? A. As far as I saw, yes.

227 Q. Nobody did? A. I didn't see—look around and see everybody that day.

228 Q. No, so far as you know, nobody used them. That is right, is it? A. Yes.

20 229 Q. Who was the last man to leave there on Monday, you or Narangan or who? A. I don't know, I wasn't the last one.

230 Q. You all came together, did you? A. Well, more or less. Some of them started a little bit ahead and some came after.

231 Q. Yes, what time did you all get back to the mill? A. I don't know—I got back a little before six.

232 Q. Yes. Who told you to go back on the Tuesday morning? A. Narangan Singh.

233 Q. At what time was that? A. He told us in the morning when we went for our breakfast.

30 234 Q. That would be about eight o'clock? A. No, just about six thirty, I guess.

235 Q. 6:30. How many of you went down to the fire on the Tuesday morning? A. Oh, I didn't count the men, but quite a bunch.

236 Q. More than the ones who went on Monday? A. Yes.

237 Q. More than a dozen? A. Yes.

238 Q. And was Narangan Singh with you then? A. He was there. I don't know whether he came with us or not, but he was there.

40 239 Q. Did he stay there all day? A. He was there all the time, yes.

240 Q. Did Narangan come down with the men? A. Not in the morning, he probably did come in the afternoon or some other time, though.

241 Q. But in the morning he was not there? A. No.

242 Q. No. You said something about some Chinese, what was that? A. That was when we went there in the morning, there

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were some Chinese there looking after the fire.

243 Q. What? A. Looking after the fire.

244 Q. Who were they? A. I don't know, they were mill men.

245 Q. Did you know their names? A. No.

246 Q. You had seen them before, had you? A. Oh, I had seen them, but I wouldn't be able to tell you who they were at all.

10 247 Q. Are you able to tell one Chinese from another? A. Oh, the ones I know well, yes.

248 Q. But not these ones? A. No.

249 Q. How many did you say there were there? A. I don't know. I didn't count them.

250 Q. What were they doing? A. Oh, when I went there they were just starting off. I don't know what they had been doing.

251 Q. Starting off where? A. Starting from the fire.

252 Q. Starting from the fire? A. Yes.

20 253 Q. They left you, did they? A. They left us when we went there, yes.

254 Q. I see. And you don't remember how many there were? A. No.

255 Q. Or their names. A. No.

256 Q. Or their occupations? A. No.

257 Q. Or anything about them? A. No.

258 Q. As soon as you got there they left, or did they leave before you got there? A. No, they left when we got there.

30 259 Q. Yes, and what was the condition when you arrived on the Tuesday morning? A. Oh, the fire was—it looked pretty well down. It was smoldering, though.

260 Q. It was just the same as when you left it? A. Yes.

261 Q. Just the same as when you left it, that is right, is it? A. Yes.

262 Q. That is right, is it, the fire on the Tuesday morning was just the same as you had left it on the Monday night? A. More or less.

263 Q. Well, which was it, more or less? A. Well, just about the same as it was.

40 264 Q. So it was not more or less, it was about the same? A. Yes.

265 Q. Had it started to cross your fire trail. A. No.

266 Q. Had the fire trail been extended at all? A. No.

267 Q. It was just the same? A. Yes.

268 Q. And there was no flame, but just smoldering or smoking, is that it? A. Yes.

269 Q. And you had more men than you had had on Mon-

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- day? A. Yes.
- 270 Q. Double the number? A. I don't know .
- 271 Q. Quite a number more, eh? A. Yes.
- 272 Q. Yes, what did you do on that morning? A. Well we threw dirt around wherever the fire had started up or anything, and others kept on watching more or less.
- 273 Q. Watching what? A. Keeping a lookout on the fire, just strolling around and seeing that it didn't get away any-  
10 where.
- 274 Q. I see. How many men were throwing earth on the fire? A. I don't know.
- 275 Q. Well, you must know approximately? A. No, you don't go round counting the people, you know, when you are work-  
10 ing.
- 276 Q. Were you throwing earth on the fire? A. Yes.
- 277 Q. Well, how many other men were throwing earth on the fire? A. It is hard to tell.
- 278 Q. Well, this is a very small area—about half an acre,  
20 wasn't it? A. Yes.
- 279 Q. You could see over it without any trouble at all? A. Oh, yes.
- 280 Q. And you could see everything that anybody was doing, couldn't you? A. If you were looking, yes.
- 281 Q. Well, you occasionally looked, or did you keep your eyes fixed entirely on the earth? A. No, I don't know, but when I was working, I am not—I am just working—I don't go round looking at anybody.
- 282 Q. You are utterly oblivious of everything else, are  
30 you? A. Yes.
- 283 Q. You say then that you don't know at all what other people were doing, is that it? A. Well, no more than just generally, that is what they were doing. I can't tell you any particular thing.
- 284 Q. Yes, you can't tell me how many men were throwing earth on the fire? A. No.
- 285 Q. Or how many men were just watching it? A. No.
- 286 Q. The others were just watching it, is that it? A. Well, I don't know sure, some were and some were more or less  
40 like guarding the fire, and others were going round and putting it out.
- 287 Q. Well, how would you guard a fire. Now did you guard the fire? A. Well, people walking round the trails there, when they get a fire subdued, they generally walk up and down the trails.
- 288 Q. Was there any water used on that morning? A. I don't know. I didn't use any.

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- 289 Q. You didn't use any? A. No.
- 290 Q. Is that right? A. I didn't use any.
- 291 Q. Did you see anybody using it? A. No.
- 292 Q. Well, why didn't you put that fire out. It was only half an acre, you know. That is not very big? A. Yes, there are lots of small fires that are pretty hard to put out.
- 293 Q. Now, approximately how many old stumps were there in that area? A. I can't remember all that stuff.
- 10 294 Q. Approximately? A. Well, it is about a year and a half since I have been around there and you go through hundreds of these fires every year.
- 295 Q. There is no picture— A. I can't remember these things. Why, I didn't know you are going to have to tell about that.
- 296 Q. There is no picture in your mind? A. No.
- 297 Q. Was it thickly covered with slash? A. No, it wasn't thickly covered.
- 298 Q. No, it was sparsely covered, is that right? A. Yes.
- 20 299 Q. We will now go on from the time when the fire jumped the fire trail. I presume it did jump the fire trail at some time. Is that right? A. No, it jumped across the track.
- 300 Q. Didn't jump the fire trail? A. No.
- 301 Q. Well, by the way, the wind blew up the fire into a flame, is that right, A. Yes.
- 302 Q. Yes, and then the flame leaped across the track? A. Yes.
- 303 Q. Into the slash on the other side? A. Yes.
- 304 Q. And the fire began to run away in the direction
- 30 that you have marked "A"? A. Yes.
- 305 Q. Now, what were you doing all that time? A. I ran around and tried to come on this side and see what we could do about it.
- 306 Q. I see. You tried to head the fire? A. Yes.
- 307 Q. So that you came into this area between the railway company and the Sooke River? A. Yes.
- 308 Q. Where the fire got to from the point that you have marked "A"? A. It just kept on developing, a little on—
- 309 Q. Yes, did it go out towards the Sooke River? A.
- 40 Well, it kept on going all the way down this way; you see.
- 310 Q. By this way, you mean towards the mill? A. Well, the mill is up there, you see, the fire kept on coming this way first.
- 311 Q. Oh, I see. Wait a minute, it followed the grade of the Kapoor Lumber Company's spur? A. More or less, yes.
- 312 Q. I see? A. And—
- 313 Q. Wait a minute. Then it did go up to the end as shown on this plan, of the spur? A. I don't know, I wasn't on

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the spur end, I went round when the fire got away, seeing that you couldn't manage it anywhere round there, I went round the other way.

Mr. Mayers: You have never had this plan marked.

(PLAN MARKED No. 1 FOR IDENTIFICATION.)

314 Q. Now, then, you didn't see the fire get as far as the end of the spur? A. No.

10 315 Q. No. How far had the fire got down the spur when you left? A. Well, I wasn't along on the spur at all, I was around here—in between here somewhere.

316 Q. I see. You were roughly at the point "C", were you? A. Well, I won't say anywhere, I couldn't tell you exactly.

317 Q. Well, I say around where you think you were working approximately? A. I was working around there.

318 Q. We will call that "C" to "D", and it represents your approximate position when you were trying to head the fire, is that it? A. Yes.

20 319 Q. How long did you stay there? A. Oh, pretty hard to tell about time, you know.

320 Q. Well, first of all, when do you think that the fire leaped from one side of the grade to the other of the Canadian Northern? A. It leaped between twelve and one.

321 Q. Well, then, approximately how long did you spend around "C" to "D"? A. Oh, I couldn't hardly tell you a definite time. You can't figure out the time when you are working round anything like that, it is pretty hard. Sometimes you are just there about ten minutes and you think you are there half an hour.

30 322 Q. Then from "C" to "D", you went where? A. Well, when I found the fire had gotten away where you couldn't stop it by making attempts around here, I just went along here, went back towards the mill.

323 Q. You followed the railway round to the mill? A. Yes.

324 Q. Yes, and you got to the mill about what time, do you think? A. I don't know what time.

325 Q. Well, was it late in the afternoon or early in the afternoon? A. It was about the middle of the afternoon, I guess.

40 326 Q. The middle of the afternoon? A. Yes.

327 Q. That would be around four? A. Oh, I don't know about the—I guess—

328 Q. Between three and four? A. It might be around three somewhere.

329 Q. Around three. What did you do after that? A.

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Well, we—I found that they were clearing the trail around there, some people.

330 Q. Wait a minute? A. Right behind the house, wherever they were.

331 Q. Some of your people were clearing the trail behind—what people were? A. Japanese, Chinese and everybody.

332 Q. Yes, doing what—clearing the trail? A. Clearing the trail right round here somewhere.

10 333. Yes, well, just draw that approximately? A. (Indicating.)

334 Q. That is the bridge, you see? A. It was about there (indicating)—somewhere around like that.

335 Q. I see, on both sides of Deer creek? A. Yes.

336 Q. Yes, from “G” to “H”. And what did you do? A. Well, I just began to help them all around there.

337 Q. You were working on this fire trail? A. Yes.

338 Q. From “G” to “H”? A. Yes.

20 339 Q. How long did you spend at that? A. I can’t tell how long I stayed there.

340 Q. No, it is difficult, of course, but was it dark by the time you left? A. No, it wasn’t dark. It was still light.

341 Q. Late in the evening? A. I don’t think it would be very much after eight—not so very long after I came down there.

342 Q. I see. Well, approximately how long did you spend on that fire trail from “G” to “H”? A. I don’t know. I might have spent about half an hour, maybe three quarters of an hour.

343 Q. I see. And then what did you do and where did you go? A. Well, the fire came in right along here then by that time.

30 344 Q. It had got up from “G” to “H”? A. Yes.

345 Q. Yes? A. And then it was coming this way first and then these people—

346 Q. Wait a minute, it was going— A. More or less this way.

347 Q. That is, you mean across the railway? A. It wasn’t going across the railroad, it was some on this side, but it was more in this direction.

348 Q. It was going in the direction of this house on the other side of the railway? A. Yes.

40 349 Q. Did it cross the railway? A. No, not there.

350 Q. It didn’t cross the railway? A. No.

351 Q. Just what did it do? A. Well, the first began to develop this way.

352 Q. It began to go towards the mill? A. Yes.

353 Q. What were you doing? A. I ran around the track here and found that the fire was getting in around this—the cook-house, around there.

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- 354 Q. Yes, where is the cookhouse? A. It is shown on here somewhere. There is the bridge.
- 355 Q. Yes? A. Well, it is just around here somewhere.
- 356 Q. I see. Well, there is a knoll or little hill somewhere down there, is there? A. I don't know—
- 357 Q. Don't you know that. It is between Deer Creek and the Sooke River? A. I don't remember it.
- 10 358 Q. Isn't there a sort of Japanese town or Chinese town down there or wasn't there? A. Yes.
- 359 Q. There was? A. Yes.
- 360 Q. Well, wasn't that building at the foot of a small hill? A. I never thought of it that way.
- 361 Q. I see. You don't recall the knoll or hill there at all? A. No.
- 362 Q. Did you see the fire go across the Sooke River at all? A. I don't remember.
- 363 Q. You don't remember that? A. No.
- 20 364 Q. By the way, had you anything to do with clearing the lumber yard? A. No.
- 365 Q. You were just a grader? A. Yes.
- 366 Q. And that is all the work you ever did? A. Yes.
- 367 Q. What time was there fire in the lumber yard that Tuesday? A. It was pretty late in the evening, I don't know just—I wouldn't be able to tell you the time.
- 368 Q. Was it after dark? A. It wasn't after dark, it was just—
- 369 Q. Just as the dark was falling? A. Yes.
- 370 Q. In the gloaming? A. Yes.
- 30 371 Q. That was when the lumber yard caught fire, was it? A. Yes.
- 372 Q. How near to the lumber yard were you? A. Oh, I was around here in the mill at that time when I saw the flames.
- 373 Q. In the mill? A. Yes.
- 374 Q. You were in the mill when you saw the flames springing up in the lumber yard? A. Yes, this part had burned down then, you see, and we were just—
- 375 Q. The fire that cross "G" to "H" had burned down? A. Yes.
- 40 376 Q. You had thrown water on it? A. It had been burned down, it had burned all the houses around here and had jumped across the tracks.
- 377 Q. I see. The fire from "G" to "H" had burned everything in its path? A. Yes.
- 378 Q. It burned the bridge, didn't it? A. Yes.
- 379 Q. And went on right across the track? A. Yes.
- 380 Q. Yes, you were in the mill? A. Yes.

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- 381 Q. Or somewhere outside round the mill, I suppose?  
A. Yes.
- 382 Q. And you saw flames springing up in the lumber yard? A. Yes.
- 383 Q. Yes. Did you hear any explosions? A. No.
- 384 Q. You never heard a thing? A. No.
- 385 Q. How long did you watch the fire in the lumber yard?  
A. Oh, I didn't watch it as long as—I was keeping the fire around  
10 here. You see the fire is all over here too at the same time.
- 386 Q. By all over here, you mean over towards the burner?  
A. Yes.
- 387 Q. And the conveyor? A. Yes, I was in there working around there and just had a chance to look over and see that the fire was blazing towards the yard.
- 388 Q. I see. You were working on the fire which was spreading towards the conveyor and the burner? A. Yes.
- 389 Q. I see and while you were doing that, you looked and saw that there were flames springing up in the lumber yard?  
20 A. Yes.
- 390 Q. Well, did you go on working around the conveyor?  
A. Yes. I was there most of the time.
- 391 Q. I see? A. I did come down and work here for a time at tearing up the yard here so the fire wouldn't burn.
- 392 Q. You were tearing up the delivery platforms? A. Yes.
- 393 Q. That was after or before you had seen the flames in the lumber yard? A. After.
- 394 Q. After, yes. The platforms are marked here, aren't  
30 they? Yes, that is what you are referring to, is it not? A. Yes.
- 395 Q. Platform, just next to the words "lumber piles."  
A. Yes.
- 396 Q. Yes? So then you left your work round by the conveyor, did you? A. Yes.
- 397 Q. And you went to tearing up the platforms? A. Yes.
- 398 Q. Yes, and before that, you had seen the lumber yard in flames? A. Yes.
- 399 Q. Were you amongst the first to start in tearing up  
40 the platforms? A. No, I don't think so, I can't remember that.
- 400 Q. You don't remember? A. No.
- 401 Q. You don't remember whether any part of it had been torn up before? A. Yes, they were tearing it up.
- 402 Q. When you got there? A. Yes.
- 403 Q. Were they just beginning? A. I don't know—I don't know when they began, they were—they had gone before I got there.

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- 404 Q. They had gone before you got there? A. Yes.
- 405 Q. What progress had they made? Had they torn up much of it? A. There was a bunch of them working there, I didn't see how much they had—
- 406 Q. You can't recall that? A. No.
- 407 Q. Well, when you were working on the platform, didn't you hear any explosions in the lumber yard? A. No.
- 10 408 Q. Never heard any explosions that night? A. I can't remember anyway if I did.
- 409 Q. You don't recall a single one? A. No.
- 410 Q. Where had you lived before the fire? Where was your house? A. My house was around here somewhere, right close to the cookhouse—next to the cookhouse.
- 411 Q. That is between "G" and "H" on the railway company grade? A. Yes.
- 412 Q. Your house was burned, was it? A. Yes.
- 413 Q. Had you received your wages at the time of the fire? A. After it
- 20 414 Q. After the fire? A. After, yes.
- 415 Q. How long? A. I can't remember exactly. I came to Vancouver and I told them to send my wages to a friend of mine—give them to a friend of mine.
- 416 Q. How many months were owing to you? A. Just the last month.
- 417 Q. The last month's wages? A. Yes.
- 418 Q. That would be July? A. Well, July and—
- 419 Q. Part of August? A. Part of August, yes.
- 30 420 Q. Yes, July and a part of August before the fire? A. Yes.
- 421 Q. Now, you don't remember how long it was before you got the wages? A. No, I don't.
- 422 Q. Was it a month or two months? A. No, it was—
- 423 Q. A few days? A. It was—it might be a couple of weeks.
- 424 Q. A couple of weeks? A. Yes.
- 425 Q. Did you hear that anybody had found dynamite in the lumber yard? A. No.
- 426 Q. Never heard that? A. No.
- 40 427 Q. You remember when the lumber yards were made, do you? A. No.
- 428 Q. You don't remember? A. No, they were made before I went there.
- 429 Q. Made before you went there? A. Yes.
- 430 Q. And you went there in August, 1929? A. Yes.
- No. Not August, 1929, November.
- 431 Q. November, 1929? A. November, 1929.

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432 Q. Oh, you didn't go there until November, 1929? A. Yes.

433 Q. And the lumber yard had all been prepared when you got there? A. Yes.

434 Q. How long did you work on tearing up the platforms? A. I didn't work there very long. I was working more or less on my own inclinations about then, everything was in a mix up, I didn't know what to do, the fire was all around and it was just a case of doing whatever you could to save the place.

435 Q. Where did you have lunch on Tuesday? A. Tuesday? I don't remember having lunch.

436 Q. Didn't you have any? A. No.

437 Q. Didn't you have lunch with you? A. No.

438 Q. Had you a messhouse? A. Yes.

439 Q. Did you go back to the messhouse for lunch? A. No.

440 Q. Did anybody go back to the messhouse for lunch? A. I don't remember.

441 Q. You don't remember that? A. No.

442 Q. Your work was to grade the finished product—the lumber, was it not? A. Yes.

443 Q. As it came out of the mill? A. Yes.

444 Q. And you had been doing that from November, 1929, until the fire, had you? A. Yes.

445 Q. Roughly, what were the grades? A. Well, I just had to mark the orders and things that came, they didn't grade everything—just the orders and things that were necessary for the people to know where to put that lumber and so on.

446 Q. How many grades are there? A. What do you mean how many grades?

447 Q. Well, there is a No. 1 grade, is there? A. Yes.

448 Q. No. 2 grade? A. Yes.

449 Q. No. 3 grade? A. Yes.

450 Q. Yes, any more? A. And culls.

451 Q. Yes. 1, 2, 3 and culls, is that right? A. Yes.

452 Q. Was that common lumber? A. Yes.

453 Q. All common? A. What do you mean? Everything, select, and common and clear and everything came together.

454 Q. Well, did you grade them into different classes? A. No. It was just a case of giving—marking the orders.

455 Q. Well, explain to me what you did. What orders are you referring to. That is the orders for lumber? A. Orders for lumber.

456 Q. That came into the mill to be supplied? A. Yes.

457 Q. Or to be filled? A. Yes.

458 Q. And they were handed to you? A. Yes.

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- 459 Q. And you checked up the stuff that came from the mill to see that you got the full order, is that it? A. No, I didn't do anything, I just—all the lumber that came from the mill, I just put a certain "O" mark on the order that went out, going out—shipped.
- 460 Q. I see. Well, you selected the lumber as it was cut and appropriated it to the orders, is that it? A. Yes.
- 10 461 Q. That is what it is, is it? A. Yes.
- 462 Q. Yes. And you would cause the lumber to be piled in different places? A. Yes.
- 463 Q. Corresponding to the orders? A. Yes.
- 464 Q. So that you would have one pile here, that would be an order from "A" and another pile there which would be an order from "B" and so on, is that it? A. Yes.
- 465 Q. You didn't grade the stuff for the purpose of sorting it into classes? A. No.
- 466 Q. I see. What were most of the orders—for common mostly? A. Common, select, and everything—most of the
- 20 orders were generally common.
- 467 Q. The orders would differentiate between cedar, spruce, fir, hemlock and balsam, would they? A. Well, of course, fir and hemlock were together, too.
- 468 Q. Fir and hemlock went together, did they? A. Yes.
- 469 Q. Well, what were most of the orders—hemlock? A. No.
- 470 Q. What were they? A. Mostly fir.
- 471 Q. Mostly fir? A. Yes.
- 30 472 Q. Yes. You knew roughly, I suppose, what classes of timber they were cutting in the mill, did you? A. No, I—
- 473 Q. Well, you would see what they were cutting in the mill, wouldn't you? A. I generally stayed around the table, that is all, I never did—I never went around to see anything.
- 474 Q. Well, what they would cut in the mills would come down to the tables, wouldn't it? A. Yes.
- 475 Q. Well, it was mostly what kind, what species of lumber? A. I don't know—it was all good timber.
- 476 Q. What species of timber? A. Fir.
- 477 Q. Fir? A. Yes.
- 40 478 Q. Well, the majority of it was fir, is that it? A. Yes..
- 479 Q. Is that what you say? A. Yes.
- 480 Q. Approximately what percentage? A. Oh, I could hardly say what percentage. The majority of it was fir and the rest of the stuff generally comes in pretty near cedar or hemlock—
- 481 Q. You can't remember the percentages? A. No.
- 482 Q. Did you get paid for fire fighting? A. I don't

know now, I can't—I couldn't—it all came in a lump sum to me, you know.

483 Q. Didn't you satisfy yourself that you did get paid?

A. No, I had never counted what hours or anything—especially when the last was.

484 Q. Why? A. Well, it was pretty hard to do it.

485 Q. Well, didn't you make sure that you were paid for the work that you did? A. Oh, I generally do that.

486 Q. Well, you were paid for the fire fighting, were you not? A. Yes, I guess so.

487 Q. Well, by whom—by Kapoor? A. No, I got all my money from Kapoor.

488 Q. You got all your money from Kapoor? A. Yes.

489 Q. Where were you educated? A. Vancouver.

Mr. Mayers: You are quite a compliment to Vancouver. Thank you. That is all.

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REGINALD G. WOOD, a witness called on behalf of the Plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. MAITLAND:

20 Q. Your full name, please? A. Reginald G. Wood.

Q. Where do you live, Mr. Wood? A. Living at present at Kinsaw.

Q. Where is that? A. That is out of Duncan, about seven miles out of Duncan.

Q. Are you employed at the moment? A. At the present moment I am.

Q. What doing? A. Running a donkey engine for the Glenora Lumber Company.

30 Q. The Glenora Lumber Company of Duncan? A. Yes; it is out of Duncan, at Glenora.

Q. Who operates that? A. A party by the name of Eldridge & Son.

Q. Eldridge & Son? A. Yes.

Q. Do you remember the month of August, 1930? A. Yes.

Q. Where were you working then? A. Working for the Kapoor Lumber Company.

Q. In what capacity? A. Carrier driver.

Q. How long had you been there up to the date of the fire on the 18th of August? A. Approximately eight or nine months.

40 Q. You remember the 18th of August, do you, the Monday morning? A. Yes.

Q. Now when did you first hear of any fire? A. Shortly after one o'clock at Monday noon.

Q. What were you doing at that time? A. I had just finished dinner.

Q. And what happened? A. Well, as I came out after dinner I noticed smoke down there, and I saw the men running from the lumber yard down towards the fire, down towards Victoria. And I went down to the carrier and put some gas in and

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moved two loads, and then went down to the bottom, and walked down to the track, leaving the carrier idling.

Q. You know the rock cut? A. Yes.

Q. Where was the fire in relation to the rock cut? A. The fire in relation to the rock cut was just on the fill at this side of the rock cut towards Victoria from Kapoor.

Q. How far back was it from the C.N.R. track? A. The fire, how far back did it burn, you mean?

10 Q. When you got there? A. It was right from the foot of the fill up on top of the rock cut and around that way, around about—well, I am not sure how big the area was; around half an acre.

Q. Which way was the wind blowing, away from the track or toward it? A. The wind was blowing away from the track. It was blowing north.

20 Q. Now what was the condition of the right of way along there? A. Well, there was ferns and shrubs and things on the right of way, at the foot of the fill, and a few like as if there had been old windfalls, a couple of old windfalls were in the bottom of this fill, and grown over with blackberry vines and a lot of dead ferns. And I don't know at the time I got there whether there was a couple of short pieces of like as if they had been old growth cut down and dried, the ends of them was burnt.

The Court: Old what? A. Old growth—I mean windfalls.

Mr. Maitland: Yes. A. And they were burning at the bottom of the fill like.

Q. Where were you working, just in what locality were you working? A. At the time of the fire?

30 Q. When you went down there on Monday? A. When I went down there on Monday, well, I had been working in the—

Q. No, no, I mean at the fire itself? A. Well, at the fire when I first went down, we tried to get up in behind, up on the closest side to the mill, on the rock cut, to stop the fire from spreading that way, anyway; but it was impossible, on account of the smoke. You couldn't do anything. So I went down to the bottom of the fill on the back side of the fill, and put a fire guard up around the edge of the fill.

40 Q. How long were you there? A. I was there until somewhere between three and four o'clock, I believe. I do not remember the time.

Q. Now you have told us I think that you were a lumber carrier; what work would that be? A. Well, that is keeping the shippers supplied with lumber, and taking lumber from the mill and putting it in the yard to be piled.

Q. Then you were working around that mill yard quite a bit? A. Yes.

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Q. Can you tell us what the state of the lumber yard was, as to it being occupied with piled lumber at the time of the fire?

A. Well, no, I cannot just state that, I don't just exactly remember. There were a lot of pile bottoms, some empty, some being rebuilt and re-packed up again with new stuff.

Q. Can you tell us how the stock was at the time of the fire?

10 A. Well, it seemed to be just about the same; they were shipping all the time and re-cutting all the time, putting more in; but I couldn't state that.

Q. Did you see any ties there burning at the time of the fire? A. The only ties that—that statement I don't—I am not positive, though, but I put the fire out on the end of ties, whether it was that day or the day after that following that I went on that work I don't remember. But the tie ends were burning at either one of those points, and I cannot state for sure which place it was.

CROSS-EXAMINATION BY MR. MAYERS:

20 Q. You spoke about putting out the fire burning at the end of the ties? A. The second day when we were working down at the track there—I am pretty sure it was the second day afterwards, that the end of the ties started to smoulder from the low side, and whether it was there that I got to the top of the ties to put it out or whether it was at the end of the fill I don't remember.

Q. That is the ties on which the rails were spiked?

Mr. Maitland: Excuse me, Mr. Mayers. I was under the impression—I thought this man was over there on Monday—

Q. You were there on Tuesday? A. Yes.

30 Q. Were you there when the fire got away, jumped the track? A. Yes—I don't remember whether the fire jumped the track when I was there, it was in the afternoon.

Q. Were you there on Tuesday? A. Yes.

Q. What time? A. When I went on Tuesday it was when it started to go along the draw, between the fill and the mill and the Sooke River, the pipe line, when I was there they put a draw along the hollow until the fire got down.

Q. I am talking about the original rock cut. Did you go there Tuesday morning? A. No.

Mr. Maitland: I am sorry, all right, Mr. Mayers.

40 Mr. Mayers: Do you recognize that as being the fill at the point you went to on Monday (producing photograph). A. It looks like it all right.

Q. When you were down in the hollow looking towards the ground you remember that little culvert? A. Yes.

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Q. You recognize that as being the aspect of the ground?

A. It looks very much like it, as far as I can tell by the photograph.

Mr. Mayers: I am going to prove all these, my Lord. I want to use this on examination. (Marked Exhibit 11-I for identification). I am going to prove it afterwards.

Witness: I don't remember the culvert though. Let me have another look at that—the rock cut would be along this way.

10 Q. That is right, the rock cut is there, that is going towards Victoria and that is to Kapoor. A. It looks very much like the rock cut. I should like a bigger picture of that.

Q. I will show you the whole series—probably these three together will enable you to locate yourself.—That is the fill when you are standing down in the hollow looking towards the railway—on the right-hand side going to Kapoor. This is the next piece. There is the rock cut, here is the grade, here is the track. The rock cut would rise just like the picture. A. The fill then evidently is right down here, the culvert would be underneath here  
20 —yes, that looks very much like it, although I do not remember very much about the culvert.

Q. And then looking at the same place from where that man is standing—standing on the grade looking down into the hollow, the fill is hidden under that rail? A. Yes.

Q. You recognize this place as being the scene of the fire, and these are the criss-cross logs or windfall which you spoke about? A. Yes, out on the top here there was a few little green trees growing (photograph marked 12-I, for identification—Exhibit).

30 Q. And would you give me a blue pencil, or red pencil.—Now on Exhibit 12-I where I mark—what is your name, Wood?  
A. Wood.

Q. I will mark a "W"—I will mark an X with ink. Where I mark an ink X are the windfalls where the fire was when you saw them on the Monday—is that right? A. (Examining) Yes, the fire when I got there was up around here; spread around in that way at the time I came over from the back.

Q. You remember this little gully? A. Yes.

40 Q. And the windfalls are at the point I have marked with a cross, that is right, is it? A. Well, yes, there was windfalls just as you see it now. There was these windfalls along there and shrubs growing.

Q. Just indicate with this pen where the line of the fire was that you showed me a moment ago.—This is the slope of the rock cut? A. This is looking north about that direction, is it not?

Q. Yes.

Mr. Maitland: The track lies north and south.

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Mr. Mayers: The rock cut, you remember, lies along that gully? A. If I remember right the fire was smouldering by this gully.

Q. Just one moment while I recall this to you—you remember that the track is built on the fill? A. I know.

Q. And the fill is at least 26 feet in the slope. A. Yes.

Q. There was no fire on the slope? A. No, what I mean this spot would probably be about four or five feet from the bottom of the fill. I cannot mark this place up here without marking around the edge, and that would indicate from this point here down. (Indicating).

Mr. Mayers: You were here at what time Tuesday—at this locality here? A. Would be probably two o'clock, a little later.

Q. Just so that you can orient yourself in this way—you remember this bank, this fill? A. Yes.

Q. From the fill and bank as shown on Exhibit 11 there, not shown on Exhibit 12 due to the perspective, the man who took the photograph standing back on the other side of the railway grade—there there is this bank stretching out a distance of some 26 or 28 feet below this rail. From that bank, from the toe of that bank, how far do you think was the nearest fire or the nearest smoke—the nearest indication of burning? A. I should judge it would be about 10 feet round—you want me to mark this?

Mr. Maitland: Now, my Lord, the witness has tried—this is the fourth time—to mark on this Exhibit 12-I for identification.

Mr. Mayers: Please do not interrupt.

The Court: Mr. Maitland has a right to make an objection, Mr. Mayers.

Mr. Mayers: Not to state what is not the fact.

Mr. Maitland: This is the fourth time the witness has taken the pen to mark on that exhibit where the fire was and every time, he has been stopped.

The Court: Well, whatever he does he has to do it over again because the Jury cannot see it. Have you got the mark to suit you as Mr. Maitland suggests. Why not give the Jury a chance to see, if he has any doubt about it. I cannot see—he seems to be marking all over.

Mr. Mayers: There is a little difficulty; it is a small scale. I will show your Lordship.

Mr. Maitland: They will have no difficulty in seeing that photograph.

Mr. Mayers: The difficulty the witness is in is this, that if you look at this photograph you get no conception of the fact that the shoulder of the grade about 18 inches from this rail is on this bank.

The Court: Because it does not show perspective.

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Mr. Mayers: And so far from trying to stop the witness doing anything I have been trying to get him to mark on Exhibit 12 the position where he saw the windfalls, and the fire coming up the rock cut, and he has been hesitating quite properly, because he wants to orient himself. I want to show the Jury.

The Court: Take it to the Jury.

Mr. Mayers (With witness, goes over to the Jury): I want to show you in detail. This is the railway grade when you are  
10 looking down, standing on the grade going to Kapoor at the hollow. If you were standing right back here you would then photograph this scene. If you were standing where this man is standing you would photograph this scene (indicates other photograph). This point X is where the witness has found the windfall spoken of in his evidence, and this is the gully.

The witness: This is the gully.

Q. Can you indicate on this picture the nearest point where you saw any marks of burning? A. From the two pictures it looks as if this stump is on the fill—it looks very much to me as  
20 if this is near where the stumps were. (Indicates).

Q. When you were standing at the bend and photographing this scene you could only take something which would be in view of the camera, you could not see this stump?

Mr. Maitland: I want him to mark that stump he thinks should be these stumps X 1 and X 2.

Mr. Mayers: Mark anything Mr. Maitland wants you to mark. A. I am coming to these stumps figuring the culvert going out there. I will mark this here, where I saw the fire when I went down there—I cannot mark it along here—it went up here somewhere, it went along the edge here. Close to the bottom of the  
30 fill and I am not just positive of this fire; it was alongside of that creek bed, it was smouldering along here.

The Foreman: This culvert is the termination?

Mr. Mayers: This culvert is right under this rail.

The witness: The culvert is at the end of this creek bed, below the rail.

Mr. Mayers: The culvert shown on Exhibit 11 is the end of the creek bed, shown on Exhibit 12.—That is the fire trail, is the edge of it and was burning right around there? A. When I was  
40 there they built a fire trail along there.

Mr. Mayers: The line which you have drawn on Exhibit 12, from the stump to the windfall, marked with an X, is the outside edge of the fire as you saw it at two o'clock on Monday afternoon? A. Yes, I am pretty sure that was the one trail alongside the side there. I am pretty sure it was along the grassy stuff of the creek bed, I remember the creek bed.

Q. On the right-hand side of the creek bed, looking away

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from the hollow? A. Yes.

Q. And it extended up the rock cut away from the railway track? A. I cannot remember how it went here. I know it was burning over in the back along here and it went around that, seemed to go up the hill and by this rock cut.

Q. And the further line which you have drawn from the windfall, this one here is the direction in which the fire was burning? A. Yes.

10 Mr. Maitland: What time was that? A. Between two and three o'clock.

Q. On what day? A. On Monday.

Mr. Mayers: I would like to put a letter at the end of your indication. A. I might be out; it might not have been quite so far back or further back.

Q. It might have been further from the railway? A. Yes.

Mr. Maitland: Mark it with a "B".

Mr. Mayers: How far would the fire extend up the slope to the rock cut? do you remember that? A. No, I could not tell how far it was up. There was so much smoke there I could not tell how far. I know they were falling snags. There was old snags sticking up there. It was on the left-hand side of that creek bed, and how far back I don't remember. It was right around from here that the fire was.

Q. The snags you were speaking of were falling snags? A. No, I think they had some men up there falling tops that were burnt, just as I left.

Q. And that would be in the neighbourhood of B on Exhibit 12? A. Yes, to left of B here.

30 Q. Did you do any logging there in the summer or fall of 1929? A. No.

Q. You were there at that time, were you not, 1929? A. Yes, I think it was the latter part of 1929 I went to work for them.

Q. Had they logged already on the land going to Kapoor? A. They were logging that at that time. (Referring to plan).

Q. You see this on Exhibit 4 Kapoor Lumber Company's logging railway to the right of C.N.R. track going to Kapoor?

A. Yes.

40 Q. That was where they had been logging, was it, in the late part of 1929? A. Yes, they had been logging up there. I don't remember what date it was they came down across the track.

Q. That does not matter very much—this is the hillside, is it? A. Yes.

Q. They had been logging before the end of 1929? A. Yes.

Q. And it had been burnt, had it not, partly accidentally and partly intentionally? A. Yes.

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- Q. The whole logging area had been burnt to the track?  
 A. Yes.  
 Q. Partly accident and partly intention? A. I could not tell you.  
 Q. You don't remember? A. No.  
 Q. So the whole part was a blackened hillside? A. Yes.  
 Q. And that extended right down to the C.N.R. track?  
 10 A. Yes.  
 (The third photograph marked Exhibit 13-I for identification).

(Witness stands aside).

MAYO SINGH, a witness called on behalf of the Plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. MAITLAND:

- Q. You are Mayo Singh? A. Yes.  
 Q. What position do you hold in the Kapoor Lumber Company. A. President of the Lumber Company.  
 20 Q. Who are the owners of that Company? A. Me and Kapoor Singh.  
 Q. Where is Kapoor Singh? A. Back in India.  
 Q. You remember the 18th August, 1930? A. Yes.  
 Q. That was the day of the beginning of the fire? A. I heard so.  
 Q. Where were you that day? A. Vancouver.  
 Q. What were you doing there? A. To Vancouver, buying some rail and wire rope.  
 Q. Rail and cable? A. Yes.  
 30 Q. What were you going to use it for? A. For the logging.  
 Q. Now, before I forget, the fire was on the 18th and 19th August, was it not? A. 18th and 19th.  
 Q. After the fire, what have you done in relation to either re-building or getting further equipment for that mill? A. Well, we buy some more equipment to complete the mill.  
 Q. What equipment did you buy? A. We took some spikes and buy some rails and buy some sheet iron and buy couple thousand dollars' worth from McLennan, McFeely & Prior, Victoria, and re-built the rail.  
 40 Q. Was it all completed? A. Tracks all completed.  
 Q. Did you get any new machinery at all? A. No, not after the fire we did not get any machinery.

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Q. Another matter to clear up.—There has been a suggestion about dynamite around here. A. I don't know anything about the dynamite.

Q. When did you last use dynamite there? A. Some time in 1929.

Q. For what purpose? A. To clean out the area.

Q. That would be the lumber area? A. Lumber area.

10 Q. Have you any knowledge yourself of any dynamite previous to the fire being left round any time? A. Never heard of it.

Q. When was the first time you heard of it? A. At the fire enquiry.

Q. Up to that time had you ever given thought to dynamite at all? A. No.

Q. How big a capacity have you got at Kapoor? A. About a hundred thousand capacity per day.

Q. What timber had you there? A. Roughly figured to be there about another thirty years.

Q. How old are you now? A. 42.

20 Q. You might make it—Have you any personal knowledge of the stock you had in the stock yards at the time of the fire? A. No.

Q. You have no personal knowledge of that? A. No.

Q. When did you first hear of this fire? A. From Mr. Dunn.

Q. And who is Mr. Dunn? A. I believe he is one of the Forestry Department—Fire Warden.

30 Q. When did you hear about it from Mr. Dunn? A. When I came back from Vancouver. Crossed by ferry from Steveston to Sidney, and then I drove my car to Victoria and then coming to Sooke Lake I met Mr. Dunn half-way between Goldstream and Kapoor. The road was narrow. We stopped there; I asked Mr. Dunn where he had been.

The Court: You were driving yesterday? A. Yes—Mr. Dunn told me there is a fire near your place on the C.N.R. railway. I said, Who done it—

Mr. Maitland: Don't give us the conversation. He was the first man to tell you about this fire? A. Yes.

Q. What did you do? A. I just met him and passed on.

40 Q. You were not there when Mr. Fraser was there on the Monday? A. No.

Q. On Monday afternoon then, did you go to the fire yourself that evening? A. After I went to the house I went to the fire.

Q. Where was it burning that evening? A. Near the railway.

Q. In relation to the rock cut? A. Just below the rock

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cut going to Victoria.

Q. That is the Victoria side of the rock cut? A. Victoria side.

Q. How far from the railway track? A. Not very far.

Q. What do you mean? A. Roughly 20 feet or 40 feet to one hundred feet long.

Q. How far back from the railway track? A. Fifteen to twenty feet from the rails.

10 Q. Would that be the right-hand rail going to Kapoor? A. Right-hand going to Kapoor, left-hand to Victoria.

Q. Leave it at the right hand going to Kapoor.—When you went down there how many men did you see working there? A. I saw four or five Chinamen only.

Q. Nobody else? A. Nobody else.

The Foreman: The Jury want to know if this was Monday? A. Monday, about nine o'clock in the evening.

Mr. Maitland: What time Monday night was it, you were down there? A. Roughly about nine o'clock.

20 Q. That was the night shift you saw? A. Night shift, yes.

Q. Did you go back on Tuesday? A. I went a little after seven o'clock.

Q. What was the condition then? A. Fire about the same but jumping the trail at a couple of places.

The Court: What time did you get there? A. After seven.

Mr. Maitland: How many men were there there? A. I saw a couple of dozen Hindus.

30 Q. Did anything develop in regard to this fire—what happened next that you saw? A. I noticed round afternoon it jumped the track.

Q. Where were you then? A. At the office at that time.

Q. Did you go down when you heard that? A. I was in the fire before that, fifteen minutes before.

Q. When was it that it jumped the tracks? A. Noon hour.

Q. Where were you then? A. At the office then.

Q. And when did you go down to the scene after she jumped the tracks? A. After.

Q. How long after? A. After — I believe one o'clock, I don't remember now.

40 Q. Do the best you can. A. After one o'clock.

Q. When you got there after one o'clock, what fire did you see around that place at that time? A. I saw the fire burning to the other side, the Sooke Lake side of the track.

Q. Did you watch the course of the fire from now on? A. Nearly, yes.

Q. Now come over to that plan.—Will you take this black pencil, please, and mark for us at—N 1—Mark N 1 where you

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first saw this fire, will you, on the Monday? A. On the Monday night, do you mean?

Q. Yes, when you first got there on Monday.

The Court: That is Monday evening?

Mr. Maitland: Yes, my Lord.—Yes, that yellow pencil, that is better.

The Witness: Is the rock cut here?

10 Q. Yes, that rock cut is printed on here. A. I think somebody has already marked it.

Q. Well, mark it again.—You have made a yellow circle where you think the fire was? A. Yes.

Q. Show us where the fire went from there on the Tuesday—put it there hard. (Marked) Now from M 1—I mark that M 2—you don't mind, Mr. Mayers.—Now what does from M 1 to M 2—what does that show? You have drawn a line through—What does that line show? A. That is the direction of the fire.

Q. When it jumped the track, what course did it take then?

Mr. Mayers: M 1 to M 2 is what you saw on Monday night?

20 A. On Monday night.

Mr. Maitland: What course did the fire take from M 2?

A. About to the town-site.

Q. In that direction? A. Yes.

Q. Now that yellow line is yours? A. Yes.

Q. Did you follow that fire through that day? Did you see the course it took? A. Yes.

Q. Now what Lot was this mill on? A. Block 103.

Q. And you got that from whom? A. From the Home Bank.

30 Mr. Maitland: I am putting in the Land Registry Certificate of encumbrance. (Exhibit 14).

Q. You had an agreement with the Home Bank, had you, in relation to that? A. Yes.

Q. Is this your agreement with the Home Bank?—Mayo Singh, Secretary—is that your signature? Hurry up and look at it? A. Yes, that is my signature.

Mr. Maitland: I put that in. (Exhibit 15).

The Court: What does that cover? A. It covers timber—the whole lot.

40 Q. Is that the lot the townsite is on, Block 103? A. Yes.

The Court: The whole property we considered is in it?

Mr. Maitland: Yes, I think so.

Q. Does it show the acreage? A. Roughly about 2400 acres.

Mr. Maitland: Now I have another agreement between the Mayo Lumber Company and the Kapoor Lumber Company, Limited. That is an assignment from the Mayo Company to you? A. Yes.

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Q. Both these documents cover the same property? A. Yes, sir. (Exhibit 16)

Q. Can you tell me generally what destruction was made by this fire to your premises there? Just give us a description of that, will you? Do the best you can—a description of the destruction that was made by the fire. Can you tell us what it destroyed, or what it damaged? A. I can tell you roughly.

10 Q. Yes, give us a rough picture of it. Up to the time of the fire you were running your mill? A. Yes.

Q. Up to that time you were running your mill? A. Yes.

Q. Have you run your mill since then? A. You mean after the fire—No.

Q. If you don't understand, tell me, or get the interpreter. A. I have never been in Court before.

Q. What damage was done by this fire to your mill? A. I believe everything except the mill.

Q. Everything except the mill? A. Except the mill.

20 Q. Did you yourself know about the stock of lumber you had on it. A. I had roughly an idea, but I no keep track.

Q. Give us a rough idea of what you were carrying? A. White pine and some cross commons, some selected commons, some dimensions, some No. 2 dimensions, some cribbing stuffs, what they call No. 3 commons, that is all I know.

Q. Now what about white pine? A. They have been cutting last two years white pine, it was piled there.

Q. What you call it? A. We call white pine.

30 Q. Well, I am dealing—Common, selected? A. From clear to common, all makes. Some clear, some selected, some No. 2, some culled—mostly just selected.

Q. What position did Mr. Cowan hold? A. He was second accountant and book-keeper.

Q. How long had he been there? A. Pretty well two years.

Q. Did you or Mr. Cowan adjust the settlement of the insurance claim in connection with this fire? A. We did.

Q. That was both of you? A. Yes.

Q. In that action he was acting for the company, or assisting you? A. Yes, both time.

40 Q. Did you see Mr. Fraser there at all? A. I believe I saw him Tuesday evening some time.

Q. Up till Tuesday evening had you seen him before? A. No.

Q. And in connection with this fire, had you, as president of this company, received any offer of assistance in this fire? A. No.

Q. Did they take any steps at all to help you with it? A. They never did.

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- Q. Did you say you had never been in Court before? A. One time before.
- Q. Just now did you say you had never been in Court before?—What did you say a short time ago? A. I mean I am not used to this kind—
- Q. I want you to answer that question. When you were answering Mr. Maitland, did you or did you not say that you had never been in Court before? A. My idea I have not been, yes, of that kind of court.
- Q. Can you answer that? A. I have been in one.
- Q. Did you tell Mr. Maitland you had never been in Court before? A. Yes, I did say that.
- Q. Then that was wrong? A. I have been one time since, myself.
- Q. Will you answer my question. You are saying what is not true? A. You can put it as you like.
- Q. You were President of the Mayo Lumber Company? A. Yes.
- Q. And you were sued by Harman Singh? A. Yes.
- Q. And you gave evidence in this Court before? A. Two minutes.
- Q. Did you not? A. Yes.
- Q. You were a defendant in that action, were you not? A. Yes.
- Q. And you were examined for discovery at considerable length, were you not? A. Yes.
- Q. And you gave evidence in this Court room for a considerable length of time? A. I say yes, for two minutes.
- Q. You were for two minutes? A. In this box, yes.
- Q. You were here for two minutes in Harnam Singh's action? A. Yes.
- Q. Well, we may get the records? A. All right.

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- Q. I want to prove two documents by you—these are the siding agreements.
- Mr. Maitland: Are they with the map attached?
- Mr. Mayers: Yes. I show you a siding agreement with the defendant, dated the 23rd of January, 1928; is that your signature? A. Yes that is my signature.
- Q. And this is the signature of Kapoor Singh. A. Kapoor Singh.
- Q. And that is signed for Kapoor Lumber Company Lim-

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ited by Mayo Singh, President, and Kapoor Singh as Secretary. (Put in as Exhibit 19). I show you a second agreement between Kapoor Lumber Company and the Defendant of 8th of August, 1929; is that your signature? A. Yes.

Q. And that is Kapoor's signature? A. Yes.

Q. And that is also signed the Kapoor Lumber Company Limited by Mayo Singh, President, and Kapoor Singh, Secretary (put in as Exhibit 20). The spurs or sidings that were mentioned  
10 in these agreements were actually built by you, weren't they? A. Yes, built by the Company.

Q. And you had operated those spurs, had you not? A. We are.

Q. You had operated them until the time of the fire? A. Yes.

Q. Now I want to read to you from your examination for discovery—and if Mr. Hutcheson has a copy to give the witness it will help him (handed to witness). A. Somebody must read over for me.

20 Mr. Hutcheson: Cannot you read it? A. Not very much.

Mr. Mayers: Will you look at page 29?

Mr. Maitland: He says he cannot read very well, he will just listen to you.

Mr. Mayers: How long have you been in Canada? A. Twenty-five years.

Q. And you have been operating lumber mills most of that time? A. Yes.

Q. You have done a great deal of business, haven't you? A. Yes.

30 Q. You prefer to listen to me; if you don't understand what I am saying, just tell me. 272 to 274, inclusive. A. Better take an Interpreter.

Q. You can speak English just as well as I can. A. I don't think so.

Q. You were examined for discovery by me, and I asked you 578 questions, and you answered them all without any difficulty, didn't you?

Mr. Maitland: I would not say that, and I was there.

40 Q. You answered the questions, didn't you? A. Well, I said yes and no, but some I couldn't understand. I want an interpreter.

Q. Listen to me and see if you do not understand: "Half-past eight on Monday evening, the 18th of August? (A) Yes. (273Q) And you met Mr. Dunn, and you are going to tell me what happened? (A) I asked Mr. Dunn where he been, and Mr. Dunn told me I have been up to your plant. Mr. Dunn said, 'There is some fire on the Canadian National right of way. I asked

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him did they put that out? He said Yes, there is about fourteen or fifteen men work all day, now six men working there now; I think there is no danger, it will be under control; however, I will come up in the morning to look at it again. That is all he said. I went up to the mill. (Q.) You were satisfied with that? (A) Yes, sir." Did you give those answers? A. I think I did.

Q. And they are correct, are they? A. I think they are correct.

10 Q. Then, on the Monday evening after you got to Kapoor, you went to the scene of the fire, did you not? A. Yes.

Q. And you say, or you told Mr. Maitland, the fire was burning 15 feet from the rail; is that what you told him? A. Yes.

Q. Do you want to alter that? A. What do you mean alter that?

Q. Do you want to change your evidence? A. No, no.

Q. You also said that the back of the fire was one hundred feet from the rail. Is that right? A. May be I am wrong.

20 Q. May be you are wrong. Now what is it you want to say now; did you tell Mr. Maitland before lunch that the back of the fire was 100 feet from the rail? A. Did I speak to Mr. Maitland, you say?

Q. Didn't you answer Mr. Maitland before lunch? A. To-day?

Q. Yes? A. No.

Q. Do you know Mr. Maitland? A. Yes, I know Mr. Maitland.

Q. Didn't he ask you questions in this room when you were in this box this morning? A. You mean 100 feet Monday night?

30 Q. Well, if you want to go on with that—did you tell Mr. Maitland that the back of the fire was 100 feet from the rail? A. I don't think so.

Q. You don't think so. What is your present answer? Was the back of the fire 100 feet from the rail? A. Say 100 feet along the rail.

Q. You say that it was 100 feet parallel to the rail; is that what you say? A. Alongside the rail.

40 Q. Well, I suggest to you that you told Mr. Maitland that the back of the fire was 100 feet from the rail. Did you say that, witness? A. May be different meaning; I say 100 feet along the rail.

Q. I will read you what you said at 291: "How far from the rails was the nearest point of the burning? (A) Well, from—not over from the railway but it was spread out a little bit, you see, from the railway; say about twenty feet from the railway and the back about may be one hundred feet from there." Did you say that in your examination for discovery? A. May be I

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did.

Q. Was it right? A. I am not sure.

Q. You are not sure. Well, I suggest to you, witness, that you have the very vaguest idea of where the fire was on that Monday evening; isn't that right? A. Where the fire was Monday evening, you say?

10 Q. Could you answer that question, is it not the case that you have only the vaguest idea of where the fire was on the Monday evening; is that right? A. Yes.

The Court: Now be careful about that, do you know what "vague" means? A. No, I could not get. I would like the interpreter, this question.

Q. Do you know what "vague" means? A. No, sir.

Q. You may answer questions and not know what the meaning is. A. He press me to answer.

Q. Why didn't you say you don't understand? A. I want an interpreter, please.

The Court: Go on.

20 Mr. Mayers: 299 and 300: "How long did you stay at the scene of the fire? (A) Oh, about ten minutes. (Q) You were satisfied with what you saw there, were you? (A) Yes." Did you give those answers on your examination for discovery? A. I think I did.

Q. Are they correct? A. I think they are correct.

30 Q. 303 to 310; and these are inclusive: "Did you go to the fire on the following morning Tuesday the 19th of August, 1930? (A) Yes. (Q.) What time? (A.) A little after seven. (Q) And what did you see then? (A) I saw some men working there; I did not count them. (Q) How many about? (A) I think about over a dozen. (Q.) Over a dozen. Had the fire increased or diminished? (A) About the same. (Q.) Was Bal Mukand there then? (A) I didn't see Bal Mukand. (Q) How long did you stay at the scene of the fire? (A.) Oh, about fifteen minutes. (Q.) You were satisfied with the condition then? (A.) Yes." Did you give those answers? A. I think I did.

Q. And are they correct? A. Yes, I think correct.

40 Q. 312 to 321: "Did you see Bal Mukand that day? (A) He was in the mill. (Q.) Did you see him? (A) No. (Q.) You never saw him or spoke to him? (A) I see him later on. (Q.) What time? (A.) I would say about eight o'clock. (Q.) In the morning or the evening? (A.) In the morning. (Q.) In the morning. What conversation had you with Bal Mukand? (A) I just asked him how the fire started. He told me the fire started yesterday noon, we done all we could, he sent all the men; and last afternoon Mr. Dunn give me instructions to leave six men all night, so I did. (Q.) Yes. Did he tell you anything else?

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(A) And he told me I sent all the yard crew this morning. I said all right. (Q.) And you were satisfied with that? (A) Yes, sir." Did you give those answers? A. I think so.

Q. And they are correct? A. I think correct.

Q. 322 to 334: "Did he tell you that he had asked Mr. Dunn for a pump? (A) I forget now. (Q.) Had you seen Cowan on the evening of the Monday? (A.) No. (Q.) Did you see him on the morning of the Tuesday? (A.) Yes. (Q.) Did he say anything to you about the fire? (A) Well, Tuesday morning? (Q.) Yes. (A.) He asked me, You see the fire? I say Yes, I had been to the fire. (Q.) What else? (A.) That is all. (Q.) Did he tell you that on the Monday he had telephoned to the Fire Department of the Government? (A.) Yes. (Q.) He told you that? (A.) Mr. Cowan told me that. (Q.) And you were satisfied with that? (A.) Yes, sir. (Q.) Did he tell you that he had asked for a ranger, a Government Ranger to be sent? (A.) I think he did. (Q.) And you were satisfied with that? (A.) Yes, sir. (Q.) Did he tell you that Mr. Fraser had come up on a train on the Monday afternoon? (A.) Yes, sir. (Q.) And did he tell you that Mr. Fraser and Dunn had gone to look over the fire together? (A.) Yes, sir." You gave those answers, did you? A. I think I did.

Q. And they are correct? A. I think they are.

Q. What was the latest time you were down at the scene of the fire on the Tuesday morning? A. Tuesday morning?

Q. Yes. A. Somewhere around 11 o'clock.

Q. That was the latest time, is that right? A. I think so.

Q. 343 to 347: "How many men had you employed in the mill and the yard? (A.) About seventy-five. (Q.) Wasn't it ninety? (A.) Something like that, between 75 and 90. (Q.) Between 75 and 90? (A.) Yes. (Q.) And you had a gang of fifty men in the woods, had you not? (A.) Yes. (Q.) And they were three miles away by the logging railway? (A.) Yes, sir." You gave those answers, did you? A. Yes.

Q. And they are correct? A. I think correct.

Q. You had a tank car, had you not, the Kapoor Lumber Company had a tank car? A. Yes.

Q. That was for fighting fire, wasn't it? A. Yes.

Q. 357 to 364: "Why didn't you take the tank car down there on Monday morning? (A) I wasn't there; Monday evening. (Q.) I thought you told me that you had gone to look at the fire? (A.) Fire Monday nine o'clock. (Q.) Why didn't you take the tank car down there? (A.) I see the C.N.R. loco off the track, our tank car could not get past there. They spoil our ties. (Q.) When did you repair that? (A.) Tuesday morning. (Q.) How long did it take? (A.) I don't know. (Q.) When had

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you repaired it? (A.) Tuesday morning. (Q.) What time? (A.) I don't know the time. We spent the whole morning I think. (Q.) Well, do you know the time it took? (A.) I could not tell you that; I don't know." Did you give those answers? A. I did.

Q. And they are not correct, are they? A. What do you mean not correct?

10 Q. Are they correct? A. I think they are correct.

Q. You never did see the C.N.R. loco off the track, did you? A. No.

Q. Well, why did you say so? A. Well, I cannot speak English, make a mistake.

Q. You never did see the C.N.R. loco off the track? A. No.

Q. The Kapoor Lumber Company never did repair that track, did it? A. I didn't see anybody; nine o'clock nobody there.

Q. It wasn't repaired on Tuesday morning, was it? A. Tuesday morning our crew wasn't working.

20 Q. You say that the Kapoor Lumber Company's crew repaired that track on Tuesday morning. A. Yes.

Q. I suggest to you that the track was repaired on Monday afternoon. A. The section men were working there Tuesday too.

Q. The rail which was turned over by the C.N.R. locomotive was repaired on Monday afternoon, was it not? A. May be they did; but I see some railroad men, our railroad men there.

Q. So that you cannot say at all that any of your men had anything to do with the repair of that track, can you? A. I could not swear for Monday.

30 Q. 377 to 380: "Now Bal Mukand, as you have told me, reported to you on the Tuesday morning what he had done at the fire on the Monday? (A.) Yes, sir. (Q.) Did he tell you that he had finally got the fire under control? (A.) Yes. (Q.) And the time when he got the fire under control was four o'clock in the afternoon, he told you that? (A.) Monday? I don't know about the time; he just told me fire was under control all right. (Q.) That was on the Monday? (A.) Monday." You gave those answers, did you? A. Monday? I didn't see Bal Mukand on Monday.

40 Q. You saw Bal Mukand on Tuesday? A. Yes.

Q. And what I have read to you is what he told you Tuesday, isn't it? A. Yes.

Q. And it is correct, isn't it? A. Yes.

Q. 384 to 393: "Why was the water system of the lumber yard cut off? (A.) I never see the water system cut off. (Q.) Why was it cut? (A.) I didn't see it cut off, I don't know. (Q.) You don't know why it was cut off? (A.) No. I didn't say cut it off. (Q.) Do you know where it was cut off? (A.) No.

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- (Q.) Have you never heard that it was cut off? (A.) No. (Q.) Never heard that the water system in the lumber yard was cut off? (A.) Never. (Q.) Bal Mukand never told you? (A.) Never. (Q.) Can you suggest any reason why it should be cut off? (A.) No. (Q.) What was the capacity of your pump in the mill? (A.) Say about thirty-five—roughly 3500 gallons per minute, more or less roughly, you see; a big fire pump they call Underwriter. (Q.) It was the Underwriters fire pump? (A.)
- 10 Yes; especially for the mill and yard.” Did you give those answers? A. Yes.
- Q. And they are correct? A. I think correct.
- Q. 394 to 430; “Especially for the mill and yard. Now did you ever hear of the dynamite being discovered in the lumber piles? (A.) No. (Q.) Never heard of that? (A.) Never. (Q.) Today is the first time you ever heard there was any dynamite discovered in the lumber piles? (A.) No, sir. (Q.) Is today the first time that you ever heard there was any dynamite discovered in the lumber piles? (A.) No, sir. (Q.) When did you
- 20 hear about it? (A.) I didn't hear at all. (Q.) So that today is the first time that you ever heard about it? (A.) No, sir. (Q.) Did you ever hear before? (A.) No, sir. (Q.) Did you ever hear before that dynamite was discovered in amongst the lumber piles? (A.) No, sir. (Q.) You never have? (A.) Before they put in the lumber pile, and cleaned that place a year before—1929. (Q.) Have you said all you want to say about that? (A.) They used some dynamite then. (Q.) But have you ever heard before today that dynamite was discovered amongst the lumber piles? (A.) No, sir. (Mr. Maitland): I think, Mr. May-
- 30 ers, it would be fair to ask him, did he ever hear anyone say that. (Q.) Have you ever heard anyone say that dynamite was discovered amongst the lumber piles? (A.) No, sir. (Q.) Now you were saying that dynamite had been used in the lumber yard, is that it? (A.) To clean the lumber yard, to clean the place for the lumber yard in 1929, use some dynamite then, some powder to clean, to blow the stump. (Q.) You used what to blow the stump out? (A.) Some dynamite and powder. (Q.) In the autumn of 1929? (A.) 1929. (Q.) Do you suggest that a bucket of dynamite was left in the lumber yard after you had cleared
- 40 it? (A.) I don't know. (Q.) Well, do you suggest that? (A.) No. (Q.) Then you cannot give any explanation of why dynamite should be found amongst the lumber piles, is that right? (A.) I don't know. (Q.) Can you offer any suggestion as to why the dynamite was there if it was there? (A.) Well, somebody made a mistake and left it there. (Q.) When? (A.) Somebody made a mistake and left it, I don't know. (Q.) When? (A.) I don't know when. (Q.) Do you suggest it was

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- left there by mistake? (A.) Oh, may be; I cannot swear for it, it may be. (Q.) You suggest that it might be? (A.) It might be. (Q.) Left there by mistake? (A.) Made by mistake. (Q.) Who would leave it there by mistake? (A.) Some of the section men, or whoever worked there. (Q.) Whoever worked there when they were clearing the lumber yard, is that it? (A.) Yes. (Q.) Is that what you suggest? (A.) Yes. (Q.) Did you keep any check on your dynamite? (A.) Oh, yes. (Q.) You did? 10 (A.) Yes. (Q.) You knew exactly how much you used to work each time, and everything about it? (A.) Yes. (Q.) Do you think it would be safe to leave pails of dynamite in the lumber yard? (A.) I don't know; I don't believe anybody did leave it. (Q.) Would it be safe to leave it? (A.) It won't hurt. (Q.) It wouldn't hurt? (A.) No. (Q.) It would be quite safe to leave dynamite in amongst the lumber piles; is that right? (A.) Not supposed to leave it. But if a man made a mistake it wouldn't hurt the lumber. (Q.) It would be quite safe? (A.) I wouldn't say quite safe. (Q.) Would or would it not be quite safe to leave 20 dynamite in amongst the lumber piles? (A.) I believe not. (Q.) Then it would not be safe? (A.) It would not be safe." Did you give those answers? A. I think I did.

Q. And are they correct? A. I think they are correct.

Q. Well, you know that before I examined you you had heard that dynamite had been found beneath the lumber piles hadn't you? A. What?

Q. You had heard before I examined you that dynamite had been found beneath the lumber piles? A. You asked me.

- 30 Q. You had heard it, hadn't you? A. Yes, I have heard it.

Q. Of course you had heard it. You were at the Fire Marshall's enquiry, weren't you? A. Yes.

Q. And you heard Bal Mukand give evidence at the Fire Marshall's enquiry, didn't you? A. I heard the part. Q. You heard all? A. No.

- 40 Q. You say not? 571 to 577: "By the way, you were at the Fire Marshall's enquiry, weren't you? (A.) Yes, I was. (Q.) You heard Bal Mukand give evidence, did you? (A.) Not very much. (Q.) Did you hear any of his evidence? (A.) I saw him give evidence all right, but I don't know what. (Q.) You were there when Bal Mukand was giving evidence, weren't you? (A.) Yes. (Q.) The whole time? (A.) The whole time, yes. (Q.) And you heard what he said? (A.) I forget now. (Q.) You heard at the time what he said? (A.) I heard all right." Did you give those answers?

Q. And they are correct? A. I think so.

Q. And you heard Bal Mukand at the Fire Marshall's enquiry being asked all about that dynamite, didn't you? A. Well,

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if you press me I would say yes.

Q. 436 to 443: "Did you hear any explosions coming from the lumber yard itself? (A.) No. (Q.) None? (A.) No. (Q.) Never heard one? (A.) No, sir. (Q.) All the explosions you heard were from some place other than the lumber yard? (A.) Yes, outside of the lumber yard. (Q.) Outside of the lumber yard? (A.) Yes. (Q.) What were you saying about the cause of these explosions? (A.) The gasoline drums, I should say.

10 (Q.) Where were they situate? (A.) Two places. Some oil stopped by the freight shed near the railways, and some on the other side of the lumber yard, where the lumber carriers. (Q.) Both of those places were well outside the lumber yard? (A.) Outside the lumber yard, yes." You gave those answers? A. Yes.

Q. And are they correct? A. I think correct.

Q. Do you mean to say you did not hear the explosions in the lumber yard? A. What?

20 Q. Did you mean to say now that you did not hear the explosions in the lumber yard? A. Not in the lumber yard, outside the lumber yard.

Q. You never heard any explosion in the lumber yard? A. I didn't hear any in the lumber yard.

30 Q. 461 to 477: "Now the slash on the north side of the railway line had been burnt in the autumn of 1929, hadn't it? (A.) Yes. (Q.) All that slash on the north side, including this spot marked 'MFH' had been burnt in the previous autumn?" By the way, do you mind coming over here to the map (Exhibit 4). The place that we were speaking about when I began the question at 461 was the right of the C.N.R. right of way going towards Kapoor. You know that, didn't you? A. Yes, sir.

Q. You knew that I said north, but I made a mistake; according to the indication on the plan it should be south. But you knew, and I knew, that we were both speaking about this area on the right of the right of way going towards Kapoor; you knew that, didn't you? A. Yes.

40 Q. Instead of north, it should be the right side of the railway going towards Kapoor. "(461Q) Now the slash on the right side of the railway line going towards Kapoor had been burnt in the autumn of 1929, hadn't it? (A.) Yes. (Q.) All that slash on the right side of the railway line going towards Kapoor, including this spot marked 'MFH' had been burnt in the previous autumn? (A.) That is the Kapoor Lumber Company property, yes, sir. (Q.) Did you superintend that burning? (A.) What? (Q.) Did you look after that burning? (A.) No. (Q.) Who did? Bal Mukand? (A.) The wood foreman. (Q.) The wood foreman. You saw the area after it had been burnt? (A.) Yes.

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(Q.) And the burning on the north side of the railway had extended right on to the railway grade, hadn't it (A.) Up to—yes, near there, outside of the right of way. (Q.) No, it had extended right onto the railway grade, hadn't it? (A.) Yes, sir. (Q.) So that when you burnt in the autumn of 1929 you cleared all your own space? (A.) Yes. (Q.) And you also cleared the railway grade? (A.) No. (Q.) What? (A.) I didn't clear the railway grade. (Q.) No, but the fire did spread to the railway grade? (A.) Sometimes she did and sometimes she didn't. (Q.) What do you say as to that on that occasion? (A.) I don't know. (Q.) You didn't see that? (A.) I didn't see that—may be I did see it, Mr. Mayers, but I didn't notice. (Q.) You say that you may have seen but you didn't notice? (A.) Didn't notice. (Q.) All right. Well, anyhow, fire does not stop until it has burnt everything within its reach, does it? (A.) No." You gave those answers, did you? A. Yes.

Q. And they are correct? A. I think correct.

Mr. Maitland: I think you should read the next, Mr. Mayers.

20 Mr. Mayers: Do you think I ought to read your suggestions?

Mr. Maitland: Yes.

Mr. Mayers: Your suggestions, I submit, my Lord, that I am not bound to put in the suggestions of the opposing Counsel. But I will do so.

Mr. Maitland: Don't be too generous.

The Court: You are not bound to do so. I rule in your favour. You are always at liberty to call your own witness to explain anything you state, Mr. Maitland, but you cannot put in the suggestion of Counsel.

30 Mr. Mayers: I don't mind, it is not worth while taking up time.

The Court: There is nothing in it; it is axiomatic that it would burn on—just what he says there. But that has nothing to do with the witness' answer.

Mr. Mayers: Nothing to do with his answers, but just the suggestion of Mr. Maitland: "(Mr. Maitland): It depends on the wind. That could change? (A.) Some time if the wind quit blowing. (Mr. Maitland) And rainy weather? (A.) She would stop anywhere. But hard wind would take it anywhere." You

40 gave those answers, did you? A. Yes.

Q. And are they correct? A. I think they are correct.

Q. 542 to 553: "You had two platforms, had you not, for the Canadian National Railway line? Perhaps you can tell better by looking at the plan; that is one? (A.) That is our own (indicating). (Q.) That is your own. Did that join on to the Canadian National? (A.) Yes, somewhere here. (Q.) That is one spur? (A.) Yes. (Q.) And is this a second spur? (A.) This

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is our spur there. (Q.) I know; I am talking about your spurs. (A.) This is the next spur (indicating). (Q.) This is one spur, that is two spurs, and there is a third spur. (A.) That is our private. (Q.) Here is the third one, isn't it? (A.) One here. (Mr. Maitland): Better mark them 1, 2 and 3." And they were marked. Have you got that plan, Mr. Hutcheson? Mr. Hutcheson: Yes (produced).

10 Q. You remember this plan being produced to you on your examination for discovery, do you; you remember these letters "MFH"; and you remember the spurs that you were asked to define? A. I don't know. That is the railroad all right.

Q. Well, here is the Stenographer's indication, 19th of January, 1932, which is the day that you were examined for discovery. That will be Exhibit B-4 (map that was used on discovery put in as Exhibit B-4).

The Court: When you saw the fire on Monday evening which side of the track was it on? A. If you are coming down to Victoria, left-hand.

20 Q. Left-hand going to Victoria? A. Yes.

Q. Any fire on the other side of the track? A. Right-hand?

Q. Yes? A. No.

Mr. Mayers: Where is Dodd? A. In India.

Q. What part of India? A. Punjabe.

Q. Do you know his address? A. I could find out.

Q. Bal Mukand was in India until quite recently, wasn't he? A. Yes.

Q. He just came back from India? A. Yes, a couple of weeks.

30 Q. Kapoor Singh and Ganda Singh were directors of the Mayo Lumber Company Limited, weren't they? A. Yes.

Q. And those are their signatures on Exhibit 16 signing for the Mayo Lumber Company Limited, is that right? A. Yes.

Mr. Mayers: I show you Exhibit 4-B; you see this spur which you have marked 3 coming off the Canadian National? A. This one here?

Q. Yes, you see the Kapoor Lumber Company's spur No. 3 on Exhibit 4-B? A. Yes.

Q. That was your logging spur, was it not? A. Yes.

40 Q. And you had been freely using the Canadian National right of way coming down from your mill on to the logging spur and back? A. That would be—

Q. All through 1930? A. Not at the time of the fire, but before.

Q. During 1930, before the fire? A. A month before.

Q. A month before, yes, you had been using it from the beginning of the year up to the time you stopped logging on spur

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3? A. Yes.

Mr. Maitland: That date has been fixed about the 1st of June, I think.

Mr. Mayers: Well, I am not accepting that date. A. Just roughly the month before, I don't know.

Q. It may have been well on to July for all you know? A. I am not sure. It may be; sometime in 1930.

10 Q. That is your signature too, is it not? A. Yes.

Q. This is a return to the Government showing the logged off lands between the 15th of October, 1927 and the 15th of October, 1928, signed Kapoor Lumber Company by Mayo Singh (put in as Exhibit 21). And this is also your signature (indicating)?

A. The other one my signature.

Q. Isn't that your signature, witness, you know your own signature, don't you? A. I know the other one. I believe both mine.

20 Q. This is a return showing logged off lands between 15th October, 1929 and the 30th of September, 1930, signed for Kapoor Lumber Company Limited, Mayo Singh (Put in as Exhibit 22).

(Witness stands aside).

HERBERT JAMES DUNN, a witness called on behalf of the Plaintiff, being first duly sworn, testified as follows:

H. J. Dunn,  
Examina-  
tion.

DIRECT EXAMINATION BY MR. MAITLAND:

Q. Your full name, please? A. Herbert James Dunn.

Q. What is your occupation? A. At the present time?

Q. Yes? A. I am Junior Clerk in the Forest Branch, Court House, Duncan.

30 Q. What was your occupation in 1930, August? A. Assistant Forest Ranger, stationed at Colwood.

Q. And did that include Kapoor and that country around there? A. That was not in my district.

Q. Do you remember the time of the Kapoor fire in 1930? A. Yes.

Q. Did you go up there on the 18th of August? A. Yes.

Q. About what time did you go up there? A. I arrived there around four o'clock.

40 Q. And that would be at four o'clock in the afternoon of the 18th of August? A. Yes.

Q. What did you find there when you got there on the 18th of August? A. I found a fire burning about a quarter of a mile

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below the Kapoor Lumber Company, alongside the C.N.R. track.

Q. Well, do you know the rock cut? A. Yes.

Q. Where was it from the rock cut? A. It was on the Victoria side of the rock cut.

Q. Right or left going from Victoria to Kapoor? A. On the right-hand side.

Q. And how far was it from the tracks? A. Between 15 and 20 feet.

10 Q. And what was the length of the fire? A. Along the track?

Q. Yes? A. I judge to be about 200 feet.

Q. And what was the breadth of it? A. Approximately 50 feet.

Q. Which way was the wind blowing? A. The wind was blowing away from the track.

Q. How long did you stay on that occasion? A. I stayed about an hour.

20 Q. Did you see anybody else there while you were there? A. I went back to the mill and saw Mr. Fraser and Mr. Cowan.

Q. Mr. Fraser is the Superintendent of the Canadian Northern Pacific Railway Company? A. Yes.

Q. And Mr. Cowan? A. Yes.

Q. Was Mr. Fraser at the scene of that fire that afternoon?

A. I went back with Mr. Fraser to the scene of the fire.

Q. And how long did he stay there? A. I couldn't definitely say.

Q. Well, roughly, please? A. It might have been 15 or 20 minutes.

30 Q. And what was he doing there? A. He was looking over the fire.

Q. Where did he stand at the time? A. On the track.

Q. And where did you go, did you do anything? A. I was talking to Mr. Fraser, and I went around the fire trail.

Q. And how far back was the fire trail from the right-hand track going from Victoria to Kapoor? A. I estimated about 50 feet.

The Court: How far what?

40 Q. How far back was the fire trail from the right-hand track; about 50 feet? A. Yes.

Q. Had the fire crossed it? A. No.

Q. Do you recollect how many men were working fighting that fire at that time? A. I did not count them; I should judge between 20 and 30 men.

The Court: White or coloured?

A. I think they were mostly Hindus, my Lord.

Mr. Maitland: Now when did you leave? A. I left in about

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an hour's time.

Q. What condition was the fire in when you left? A. It appeared in good condition.

Q. What do you mean by that; what were they doing?  
A. The fire was surrounded by a trail, and the trail was holding.

Q. And what were these men doing? A. They were employed on the trail; holding the trail.

10 Q. Did you consider at that time that that was an adequate crew to hold that fire. A. Yes.

Q. How long have you been connected with the Forestry Department? A. A little over five years.

Q. In what capacity during that time? A. With the exception of two summers as Junior Clerk in the office, and two summers as Assistant Forest Ranger.

Q. What two summers were you Assistant Forest Ranger?  
A. 1930 and 1931.

Q. Then you were Assistant Forest Ranger in this summer, I mean? A. Yes.

20 Q. And your season started when? A. The first of May.

Q. Did you go back there on Tuesday the 19th of August?  
A. Yes.

Q. What time did you get back there on Tuesday? A. I should judge it would be around four o'clock.

Q. What was the condition then? A. The fire had broken away and was sweeping towards the mill.

Q. Could you follow the direction of the fire? A. I think so.

30 Q. Would you come to the map over here and show it to us, please. Take this green piece, and show us the direction of that fire; just make a green mark D 1 where you first saw the fire, please. A. On the Monday?

Q. On the Monday, yes. A. It would be down in here.

Q. Mark it D 1, please (so done). Now what course did you see it take on the Tuesday, or had taken? A. When I got there the fire was sweeping in this direction.

Q. Draw a green mark from the D 1.

Mr. Mayers: No, I submit he can only say what he saw at four o'clock on Tuesday.

40 Mr. Maitland: I asked him if he had followed that fire through. Did you follow that fire through from the D 1 and where it had burnt to the time you got there?

The Court: Did he see the path of the fire?

Mr. Maitland: Yes, my Lord. A. No, I didn't see the path of the fire, I saw where the fire was when I got there.

Q. Did you see where it had been in the meantime, the course it had taken? A. I could judge from the burnt over area what course it had taken.

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Q. Give us that, if you please? A. It swept along this way.

Q. Draw the green pencil from D 1 to—

Mr. Mayers: I object to that; my learned friend has told him where to start from; this is not the witness' evidence.

Mr. Maitland: I didn't tell him where to start from; he says he saw the fire there.

The Court: Ask him to mark on the map where he saw the fire on Monday noon. And you have done that? A. Yes.

10 Q. Now you have in mind where you saw it on Tuesday?  
A. Yes.

Q. And you say you point out the area between, is that right? A. Yes.

Mr. Maitland: I want the course, then.

Mr. Mayers: I submit, my Lord, that all he can draw is a burnt area that he saw.

Mr. Maitland: That is what he is drawing.

Mr. Mayers: It does not at all mean that it started at D 1. It might have started from a number of other points.

20 The Court: He is an independent witness; ask him. You are used to fighting fires, Mr. Dunn, it is part of your business to get acquainted with it and its path? A. Yes, my Lord.

Q. Was there a wind blowing at the time? A. Most of the time I was in front of the fire, it was pretty hard to tell what kind of a wind was blowing.

Q. It was not at your back? A. No.

Q. Tell what you saw, what your observations were.

Mr. Maitland: My Lord, I would ask him to outline it as he saw it.

30 The Court: Was it freshly burnt, or was it area that had been burnt before?

Mr. Maitland: Can you tell the course this fire had taken from D 1?

Mr. Mayers: That is what I am objecting to; the witness is being actually told and the words put in his mouth as to where the fire started—which he could not possibly know, because he didn't get there until four o'clock.

The Court: He is talking about where a fire started; the fire he saw on Tuesday was not the same fire he saw on Monday.

40 Mr. Mayers: All he can say is what he saw. He told us he was in front of the fire; I submit that he must show then what was the front of the fire.

The Court: How did you get to the fire, which way? A. I came by car, my Lord.

Q. You couldn't get to that point with the car? A. I left my car at the garage and walked down the hill to the mill.

Q. Where did you go to then? A. I could see the face of

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the fire right from the mill.

Q. You didn't go up to the cut off? A. No; I went straight down on to the trail that was being cut across the face of the fire.

Mr. Maitland: And you saw the smoke from where you were, the part that had been recently burnt over, smoking? A. Yes.

Q. How far back, what did you see then that was freshly burnt over, what did it cover? would you put an arrow at the head of that green line, so that we see the direction (witness does so).

10 The Court: On Monday afternoon was there just one in sight? A. That is all I saw.

Q. That was all in your sight? A. Yes.

Q. You could see over the country pretty generally? A. Yes.

Mr. Maitland: Did I ask you which way the wind was blowing on the Monday? A. Yes.

Q. Which way? A. I said away from the track.

Q. Why did you go there? A. On which day?

20 Q. Monday? A. I was sent there by Forest Ranger Campbell to get a report on the fire and to report back to him.

Q. Now was this C.N.R. right of way under your jurisdiction? A. Not directly under my jurisdiction; it was under the jurisdiction of Ranger Campbell I should judge.

Q. Were you familiar with the condition of the C.N.R. right of way in that vicinity? A. Just from seeing it along there.

Q. And what condition was it in from the standpoint of fire hazard? A. There was a certain amount of hazard in the right of way.

30 Q. Made up of what? A. Light slash and stumps and bracken.

Q. Anything else? A. Ties—old ties strewn along at different places.

Q. Do you know what kind of a hazard old ties are, that is what kind of a hazard it is to have old ties there? A. They ignite very readily when dry.

Q. Where were you going when you met Mr. Fraser on the Monday? A. I was returning home.

The Court: Then you came back with him, did you? A. Yes, my Lord.

40 Q. Then Fraser came up by automobile, he didn't come up by train? A. I met Mr. Fraser on the—I think he was on the work train, I understand.

Q. He happened to be at Kapoor? A. At the Kapoor Lumber Company office.

Q. He had arrived while you had been up on the scene, is that it? A. I understand that Mr. Fraser and his crew were down re-railing an engine, my Lord.

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Q. And you came in the other way? A. Yes.

CROSS-EXAMINATION BY MR. MAYERS:

Q. Mr. Conway held what position in the summer of 1930?  
A. Forest Supervisor stationed at Victoria.

Q. Mr. Campbell was under him, was he? A. Yes.

Q. And you were under Mr. Campbell? A. Yes.

Q. And Mr. Campbell's authority extended over this area?

10 A. Yes.

Q. That is the area we are speaking about at Kapoor?

A. Yes.

Q. And you were instructed by Mr. Campbell to go up there on Monday? A. Yes.

Q. You knew that you had very wide powers, did you not, for putting out fires and obtaining assistance? A. Yes.

Q. You could call upon anybody to assist you in putting out a fire, who was in the neighbourhood, couldn't you? A. Yes.

20 Q. And any person you called upon was bound to obey your directions? A. Yes.

Q. When you got up there on the Monday the fire was less than a quarter of an acre in extent, was it? A. Approximately, yes.

Q. You had already looked over the fire before you went back and met Mr. Fraser at the mill? A. Yes.

Q. You had met Mr. Fraser at the mill? A. Yes.

Q. And you boarded the work train with him? A. Yes.

Q. And he had a crew with full fire fighting equipment there, had he not? A. So I heard.

30 Q. And he had at least a dozen men? A. I don't know how many men Mr. Fraser had with him.

Q. Well, you saw there were quite a number? A. I saw a number of men.

Q. Then you and Mr. Fraser went down on the train to the scene of the fire? A. Yes.

Q. Again—that is right? A. That was the first time I went with Mr. Fraser.

Q. The first time you went with Mr. Fraser, but the second time that you had been? A. Yes.

40 Q. And the train stopped on the track at the scene of the fire? A. Yes.

Q. And Mr. Fraser and you both got off? A. Yes.

Q. You went around the fire? A. Yes.

Q. In fact you went around the fire twice, did you not?

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A. Yes.

Q. And then Mr. Fraser asked you—or, first of all, you went around the fire by yourself, did you not? A. Yes.

Q. Leaving Fraser behind you, that is right, isn't it?

A. Yes.

Q. And then you returned, and Mr. Fraser said to you, What do you think about it? and you said, I will go over it again. You then went around the scene of the fire again, and returned  
10 to Mr. Fraser; is that right? A. I cannot recall the conversation at this time, but I remember going around the fire.

Q. Well, you don't deny that that is what was said, do you?

A. I do not confirm it.

Q. You don't deny it? A. I cannot recall it, I cannot very well deny it.

Q. Then after you had returned the second time you said to Mr. Fraser, Are the section men who are here men on this section? and Mr. Fraser said, No, these are the Milne's Landing and Metchosin section men. Do you remember that? A. I cannot recall it.  
20

Q. You don't deny that that was said, do you? A. No, I don't deny it.

Q. Mr. Fraser then said to you, Do you want our assistance, we are ready for work if you want us; and you replied, No, there is nothing to this, we will have it out in an hour, you can take your men home; is that right? A. I do not remember saying that.

Q. You don't deny that? A. No, I don't deny that it might have been said.

Q. Now then, you know of course that Fraser did take his  
30 men home? A. Yes.

Q. And unless you felt perfectly satisfied with the state of affairs you would not have let him do that, would you? A. It was not in my power at that time to order anybody on the fire. I was simply up there to take a report back to Ranger Campbell.

The Court: If you found a serious situation you would have assumed authority, I presume? A. Yes, my Lord.

Q. You were to come back to Campbell; where was he?

A. In Victoria, my Lord.

Q. In the meantime the destruction would have ensued?

40 A. Yes.

Q. But you did not think the condition was such as to warrant you in taking any steps; is that it? A. Yes, my Lord.

Mr. Mayers: "Any person who, in case of a fire, no matter how or by whom the fire may be set: Burning on the person's own property, or Burning on property on which he is conducting any land clearing, lumbering, industrial, engineering, or construction operation,—fails to do his utmost to prevent the spread of the

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fire, or refuses to place at the disposal of any officer of the Forest Branch for the purpose of preventing such fire from spreading from the property on which it is burning, and at the person's own expense, his services and the services of any men employed by him, or who, without the written consent of any officer of the Forest Branch, continues to carry on, in whole or in part, any land-clearing, lumbering, industrial, engineering, or construction operations while the fire is burning, or who without such  
 10 consent resumes any such operations before the fire is wholly extinguished, shall be guilty of an offence against this Act, and shall, in addition to all other penalties imposed by this Act, be liable for all expenses incurred by the Forest Branch or by any other person in controlling and extinguishing the fire should it spread beyond the boundaries of such property, or should it threaten to do so." You know you had that power? A. Yes.

Q. So that you must have been perfectly satisfied when you let Fraser and his men go, that there was no danger from that fire at all; isn't that right? A. The fire was in good condition at that  
 20 time.

Q. Isn't what I have said right? A. Yes.

Q. When you left, the fire had not increased in area from the time you saw it first, had it? A. No.

Q. On Tuesday when you arrived you came in by the road, I understand? A. Yes.

Q. And you went to the mill? A. Yes.

Q. And from the mill you went to the place of the fire?  
 A. Yes.

Q. Come and show me where the place of the fire was on that  
 30 Tuesday. A. Right along here; the face of the fire appeared to be across here (indicating on map Exhibit 4).

Q. Just draw a line.

Mr. Maitland: Let him use his green pencil.

Q. (Witness does so). I will letter that D-2. D-2 is the line of the fire when you saw it on Tuesday at four o'clock?  
 A. Yes.

Q. And it was a pretty considerable fire? A. Yes.

Q. No end of smoke? A. Yes.

Q. Smoke blowing all over everywhere? A. Yes.

40 Q. You could not possibly see behind that fire? A. Not from where I was at that time.

Q. Afterwards when was the first time that you went down behind the line D-2? A. On the next day I was over the track of the burnt area.

Q. You saw nothing on Tuesday behind the line D-2?  
 A. No.

Q. What I said is right, isn't it? A. Yes.

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Q. When you left on the Monday you left the fire in charge of the Kapoor Lumber Company, didn't you? A. Yes.

Q. In fact the Kapoor Lumber Company had taken over the fire and were fighting it, that is right, isn't it? A. Yes.

Q. Is this what you say, witness, that the fire on Monday covered an area of a quarter of an acre? A. Approximately a quarter of an acre.

10 A. Q. And there was no spreading while you were there?  
A. No.

Q. And one edge of that fire was on the right of way?  
A. It was at the bottom of the fill.

Q. One edge of the fire? A. Yes.

Q. The other edge was right away up the gully, was it?  
A. Yes.

Q. How far did the outer edge extend from the inner edge; what was the width of the fire? A. Approximately 50 feet.

Q. Now you have told Mr. Maitland that one edge of the fire was 15 feet from the track? A. Yes.

20 Q. Did you say that? A. Yes.

Q. Did you mean from the rail? A. Yes.

Q. Well, witness, you surely are mistaken there, aren't you?  
A. Maybe I misunderstood your question.

Q. I think you misunderstood Mr. Maitland's question. You are not suggesting for a moment, are you, that any fire was within 15 feet of the right rail of the C.N.R. track? A. What is that, again?

30 Q. Are you suggesting that any burning existed within 15 feet—are you now suggesting that there was any fire or smoke 15 feet from the right rail of the track? A. Yes.

Q. Well, do you know, witness—well, you see that, do you?  
A. Yes.

Q. All right.

The Court: At the fill, at that point that you are speaking of? A. Yes, my Lord.

Q. The locality is the whole cut and fill? A. Yes, my Lord.

Mr. Mayers: After the first of May no burning is allowed, is it? A. No; without a permit.

40 Q. So that you could not do any burning on the right of way or anywhere else after the 1st of May?

The Court: You could give a permit? A. Yes; you could have a permit to burn.

Mr. Mayers: Do you suggest that permits would be granted for burning in that locality after the 1st of May? A. It depends upon conditions.

Q. In the conditions of that year are you suggesting that they would be allowed to burn? A. During a rainy season it

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might be quite possible.

Q. When is the rainy season? A. Any time that the weather might be suitable, is what I mean.

The Court: On the 18th of August would you have granted a permit in that locality? A. No.

Mr. Mayers: You know, witness, or is it the case, witness, that bracken, green bracken growing is a very good fire guard?  
10 A. Green bracken growing?

Q. Yes? A. I couldn't say that it is.

Q. Well, would you say that it is not? A. You mean green bracken growing is a good fire guard?

Q. Yes.

The Court: What is your opinion? A. No, I don't think it is.

#### RE-EXAMINATION BY MR. MAITLAND:

Q. You saw the manner in which these Hindus were dealing with this fire? A. Yes.  
20

Q. And the equipment that they had there, that is the buckets and shovels? A. Which day?

Q. On the Monday. A. Yes.

Q. And the manner in which that was being carried on, did you expect them to have put that fire out? A. It would be some little time before the fire would be out; but it would be quite safe at the time that I saw it.

The Court: That is, you mean to cope with the fire? A. Yes, my Lord.

The Court: Mr. Foreman, and Gentlemen of the Jury, may  
30 be you think this is an important witness. I have not said it to you before because I know you appreciate the fact that you have the right to ask the witness any questions you may desire. Now if anything occurs to you to ask about, you may do so; or you may have him recalled.

Mr. Maitland: My Lord, this witness is going back to Vancouver.

Juror: I think, my Lord, the witness made an error in some of his answers; he gave the distance of the fire as started as 15  
40 feet wide and 200 feet long; and then in estimating it he gave the answer that the back of the fire was 50 feet from the nearest rail.

The Court: He used the words track and rail as the same.

Juror: It couldn't be 50 feet back—if that is of importance.

A. I am afraid that I misunderstood the question there. I

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think that the question was from the track, the same as the previous question.

The Court: When the word track is put to you in the question, do you mean the railway rails themselves or do you mean for example the edge of the ties? A. Well, the fire was burning when I got there, at the bottom of the fill, which was—yes, burning right up to the bottom of the fill, which is within fifteen or twenty feet from the right-hand rail.

Q. That would be something in your mind; you would not measure it of course? A. No, my Lord.

Juror: Quite apart from the possibility or impossibility of getting that tank car to that fire, if it had been possible you would have advised bringing it down, when you were there? A. Which tank car?

Q. The tank car owned by the Kapoor Lumber Company.

A. It would have been of great help, to bring it down.

Q. Did you think it necessary to order that it should be brought down, whether it could be or not? A. The fire was in good shape at that time; and as I was sent up there only to take a report back to Ranger Campbell, I did not consider that I should do so.

Q. And do we understand that you considered that that crew was sufficient to confine the fire, but not to extinguish it? A. Yes.

#### RE-CROSS-EXAMINATION BY MR. MAYERS:

Q. They could have extinguished the fire if they had worked on it, couldn't they? A. In the course of time.

Q. How long? A. It is hard to say.

Q. Well, six hours? A. No, I wouldn't say six hours; it would take more than six hours.

Q. Twelve hours? how long? A. It is hard to say. It depends on conditions; it depends on what is burning.

Q. Well, you saw what was burning? A. Yes.

Q. Well, how long would it have taken to have put that fire completely out? A. I am afraid I could not give you a definite answer on how long it would take to put any fire out.

Q. It was only a question of getting enough men there to put it out completely, wasn't it? A. Yes.

The Court: Were there any stumps that came in amongst there—you know that fire getting in amongst stumps, it is a difficult matter to deal with, is it not? A. Yes.

Q. Were any of those there? A. Yes, my Lord.

Mr. Mayers: Was not the scene of the fire nearly all rock

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and boulder and gravel? A. On the side of the rock cut, yes.

The Court: But out in the depression, though, that you speak of, what was it there? A. It was more dirt down there.

The Court: However, the Jury saw it. You remember the point?

(Witness stands aside).

10 The Court: This witness has to go back to Vancouver, but if you think he is of importance you can ask him to be brought back.

CHAUNCY DONALD ORCHARD, a witness called on behalf of the Plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. MAITLAND:

Q. Your full name, please? A. Chauncy Donald Orchard.

Q. What is your occupation? A. A Forester in the B. C. Forest Service.

Q. How long have you occupied that position. A. That particular position since two months ago.

20 Q. Before that what was your position? A. Oh, various capacities in the last twelve years.

Q. In the Forest Service? A. In the Forest Service.

Q. With what particular department? A. In practically every department of the Service.

Q. Now have you made a study at all of fire hazards and that sort of thing in this Province? A. The forest protection has been one of my principal duties since 1925.

30 Q. What do you say as to the risk of an engine, being a coal burner, as a fire hazard? A. A coal-burning engine is considered as a definite fire risk.

Q. Why? A. Their propensity to throw sparks under forced draught, and throw sparks and embers and such like from their fire-box—for which definite provisions are made to prevent—regulations.

Q. What about oil burners? A. Oil burners are not as bad a hazard, are not considered as bad a hazard.

40 Q. In what way is an oil burner a fire hazard? A. They throw glowing embers the same as coal burners; not from the same source, but the same type of source, because out of the chimney or smokestack, due to incomplete combustion, the accumulation of carbon which goes out at a highly heated state.

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Q. Are you familiar with that particular district, the Cowichan district, I think it is, of the C.N.R.? A. Not particularly familiar with it.

Q. Did you make any investigation after this fire in relation to it? A. I was on the fire area on Wednesday, August the 20th.

Q. Did you make any investigation as to whether they had a tank car on that line or not? A. No, we made no enquiries regarding it.

10 Q. You were there on the 20th you say? A. Yes.

Q. After you made this examination when did you return to Victoria? A. The same day. If you are asking for hours I cannot recall exactly.

Q. That would be on the 20th? A. That would be on the 20th.

Q. Who did you see when you got to Victoria? A. I went to see Mr. Fraser.

Q. That is the Superintendent of the Canadian Northern Pacific? A. Yes.

20 Q. Did you have any discussion with him as to the origin of this fire? A. I should say that I was accompanied by Mr. Conway, and that largely the discussion was with Mr. Conway; I had some talk with him.

Q. What were the discussions? A. Discussions between the three of us were regarding the responsibility of the railway for the fire.

30 Q. And what was said? A. Mr. Fraser told us that he understood that the fire in question had—that is the fire which had destroyed the mill property and so on, on the previous day, had originated, as I remember, from a fire on the far side of the Sooke River.

Q. Yes? A. Saying that that report had been given to him by his section foreman, Mr. Reese. That was an entirely new angle of the situation to us, we had not heard of it before, and so we asked Mr. Fraser to accompany us back to Kapoor, and see what we could make out of that suggestion.

Q. And did you? A. We went back to Kapoor.

40 Q. And what happened; just carry on, please? A. Returning to Kapoor—on our first visit we had enquired as to who had been on the fire at mile 35.2, two days before, when it started, and we were told that one of the first was a man I believe Naranyan Singh.

Q. You cannot tell what Naranyan Singh said. What was Reese's position with the Company? A. Reese was section foreman.

Q. Was Fraser there when you were discussing with Naranyan? A. I have to come back that far to make it intelligible

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what I had to do when I got Mr. Fraser there.

Q. Yes. A. Earlier in the day we had been there to examine the conditions, and we had seen Naranyan Singh. Returning with Mr. Fraser we went to Naranyan Singh, and with Mr. Fraser went down to the alleged origin of the fire and repeated the investigation.

Q. Where was that? A. At mile 35.2.

Q. Where from the rock cut? A. Oh, just south—or I  
10 suppose the railway would call it west of the rock cut.

Q. What took place there? A. We got Naranyan Singh to repeat his story he had told us in the morning, in Mr. Fraser's presence.

Q. And did Mr. Fraser make any comment? A. We asked Mr. Fraser then—we asked Naranyan Singh if he had any knowledge of any other fire, and he said he had not. And we asked Mr. Fraser to indicate where the fire, the second fire had been. And he was unable to do so, or did not do so. After that we met Mr. Reese, the section foreman, almost immediately after; and we repeated the story to Mr. Reese, and asked him to comment on it, to  
20 throw any doubt on the origin of this fire; and he corroborated the story which we had had from Naranyan Singh.

Q. Did you get any letters from Mr. Fraser in connection with the fighting of this fire? A. We gave Mr. Fraser written instructions to take charge of the fire, or at least to take steps to extinguish the fire. And Mr. Fraser gave us a written request to take the fire over for the railway.

Q. Have you got that request, that letter? A. Yes.

Q. Let me see it. (Produced). Who did you get that from?  
30 A. Mr. Fraser.

Q. May I remove this from the file? A. You can; I will take it off for you.

The Court: Put a little notation on to show where it goes—on the back.

Q. Who is that signed by? A. I think it is signed by Fraser. There were only two men present, and he gave it to us with his signature; I don't know that I watched him sign it.

Q. He was there when you got it? A. Yes.

Q. August 20th (reading letter marked Exhibit 23). Did  
40 you receive in the Department other reports of the various fires—or do you? A. Eventually all fires in the Province are reported in our office.

Q. Did you receive any report for any other fire except this 35.2 at that time there? A. There was a fire there a week or ten days before, at 35.1.

Q. I mean after the 18th? A. After the 18th there were no reports that I know of around that time.

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- Q. Do you remember the weather conditions at that time?  
 A. I remember that they were clear; clear summer weather, dry.  
 Q. Do you know how long it had been dry? A. No, I have no recollection; I don't recall exactly.

CROSS-EXAMINATION BY MR. MAYERS:

- Q. Did not Reese tell you on this occasion that he, Reese, was just repeating what Naranyan Singh had told him, Reese?  
 10 A. No, he did not. Did Mr. Reese—would you repeat your question, please?  
 Q. Did Reese tell you on the occasion you have mentioned that he, Reese, was repeating what Naranyan Singh had told Reese? A. No—you put that in a most peculiar way.  
 Q. Do you understand? A. I am not sure that I do.  
 Q. I will repeat it. Did Reese tell you on the occasion that you have mentioned that he, Reese, was repeating to you what Naranyan Singh had told Reese? A. Told him himself, Reese? No, he did not.  
 20 Q. You say he did not? A. He did not.  
 Q. What? A. No—I won't say no, I don't recall that he told me that.  
 Q. You won't deny that he did tell you that? A. No.  
 Q. Now you know quite well that Mr. Fraser gave you that letter under strong protest as to your conduct and that of Mr. Conway? A. No, sir, he made no protest.  
 Q. Made no protest? A. No.  
 Q. I will read to you what he says happened, and you can tell me whether it is correct.  
 30 The Court: What are you reading from, Mr. Mayers?  
 Mr. Mayers: From Fraser's examination for discovery.  
 The Court: By the other side?  
 Mr. Mayers: Yes. You might listen to me: "So after we finished with Reese, and considerable more swearing, mostly on the part of Conway, he, Conway, went over and sat down on a stick of timber, and came back and threw a piece of paper at me—I haven't it now, and don't remember just what was on it, something turning over the responsibility of the fire to the Canadian National Railways. I said, Mr. Conway, I don't think it is  
 40 in your province to start handing out these orders this way; who constituted you judge, jury and witnesses, and everything else? we are not even asked the question. Mr. Conway said, Well, you have heard the story this Hindu tells you, and that is my business; those are instructions from the Chief Forester. I said, It is

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strange, I have never heard of these instructions. So with the preaching and one thing and another we have heard from the Forestry officials at our annual meetings, it has been that the first duty of all of us is to protect and put out fire, and they in the Head Office would argue out responsibility and costs. That has all been changed; a new order from the Chief Forester; it is your fire. And I, Mr. Fraser said, I am not taking responsibility of your settling about the fire here; go back to Victoria; but I think  
10 if I had men available I would put them to work regardless of who was responsible, and with all these men sitting around here I think some of them should be put to work. Mr. Conway said, Oh, to hell with all that. I, Mr. Fraser, said, Do you mean to tell me you are going away from here and let this fire burn, with men available to fight it and you won't put them to work? Mr. Conway said, That is your business. So we came back to Victoria; and I got in touch with Vancouver and told them what this man wanted; I told my General Superintendent, my superior officer"—

20 Mr. Maitland: This is not proper, reading to this witness what Mr. Fraser did in connection with Vancouver, or anywhere else. Because there is no suggestion the witness was there. And my learned friend is reading now something that this witness could not have any knowledge on.

Q. You were in the office with Mr. Fraser.

The Court: That is right, Mr. Mayers; you cannot do that. You can say, did he say so and so?

30 Mr. Mayers: I will stop now, where I read, Mr. Conway said, "Oh, to Hell with all that. I said, Do you mean to tell me you are going away from here and let this fire burn, with men available to fight it, and you won't put them to work?" Now you have heard—and Mr. Conway said "That is your business. So we came back to Victoria." Now you have heard what I have read; do you deny that? A. It is pretty hard to deny that in toto, but I would say that that is a most inaccurate report of anything that passed while I was present with Conway and Fraser.

Q. What is inaccurate? A. The method of giving Fraser instructions, and the swearing, which I did not hear; and any throwing of paper.

40 Q. Did you hear Conway swear? A. I have heard him swear, but I did not hear him swear on this occasion.

Q. You did not hear him swear on this occasion? A. No. A. Well, what is wrong?

Mr. Maitland: My learned friend should show him the document.

The Court: He can check it over. But what difference does it make, we are not trying this case as to what Mr. Orchard's

Chauncey Donald Orchard, for Plaintiff—Cross Examination.

idea of Fraser is.

Mr. Mayers: I think the whole of this evidence is improper; I did not want to object to it; but I want to deal with it now that it is in.

The Court: I will give you free scope. I thought you might have objected.

Mr. Mayers: I did not want any suggestion that there is anything for us to conceal.

10 The Court: If you are going to check that all through, I don't think it is very pertinent.

Mr. Mayers: Show him question 588 (document handed witness).

The Court: You can take your time, pick out each part you do agree with, and what you don't agree with. A. This is examination of Fraser?

The Court: This is what Fraser gives as an account of what occurred. Where was this, out on the scene, was it?

Mr. Mayers? Yes, partly there and partly in Victoria.  
20 What do you say is incorrect in that part that I have read to you?  
A. Starting with question 588?

Q. Yes, and going to 589 (witness peruses).

The Court: You understand, witness, you can take that answer and read it out line by line—that is you can separate the sentences and say, I agree with this, and I disagree with that, and so on. A. Well, sir, I don't—I cannot recall these things word for word; I heard no swearing, and so on. And I saw the paper handed.

Q. Did you take a piece of paper or letter and throw it at  
30 him? A. No, absolutely; but I took out the order and handed it to Mr. Fraser. The whole trend of the thing—a Forestry officer in the Forestry Service could not help but take exception to it.

The Court: Certainly; stand up to your guns. A. I recall nothing about this argument. We gave Mr. Fraser every opportunity to show his side of the case; and in my hearing he said nothing to defend the railway.

Mr. Mayers: Would you just answer my question, pick out what you say is inaccurate? A. The trend is inaccurate.

Q. Pick out anything that you say is inaccurate. A. All  
40 right; we will start at the first, "He went over and sat down on a stick of timber, and came back and threw a piece of paper at me," this is inaccurate, nothing in it. "I said, Mr. Conway, I don't think it is in your province," and so on, I didn't hear any of this argument. "That has all been changed; a new order from the Chief Forester"—"So with the preaching and one thing and another we have heard from the Forestry officials at our annual meetings, it has been that the first duty of all of us is to protect

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and put out fire”—we do preach that—“and they in the head office would argue out responsibility and costs. That has all been changed”—

The Court: Mr. Fraser is saying that this is what you were telling. A. Yes, we do argue that. But I didn't give this argument, “That has all been changed, a new order from the Chief Forester, it is your fire.” The responsibility of the railway, that is covered by the Board of Railway Commissioners' orders; there  
10 has been no change in that for years.

Mr. Mayers: Well, is this what Mr. Conway said? A. I didn't hear him say that.

Q. You did not hear him say that? A. No.

Q. Go on and say anything else that you did not hear him say. A. This “To Hell with all that” sort of stuff, I heard no such talk.

The Court: Before that? A. “I think if I had men available” Fraser is saying, “I am not taking responsibility of your settling about the fire here; go back to Victoria; but I think if I  
20 had men available I would put them to work”—is that what Fraser is saying?

The Court: Yes.

A. “And with all these men sitting around here I think some of them should be put to work,” I did not hear him say that. And Conway, “Oh, to Hell with all that,” I didn't hear Conway say anything like that.

Q. And Fraser said, “Do you mean to tell me you are going away from here and let this fire burn, with men available to fight it and you won't put them to work? That is your business.”

30 A. I did not hear any of that. “So we came back to Victoria; and I got in touch with Vancouver and told them what this man wanted.”

Q. He is telling what he did then, you don't know anything about that? A. No.

Mr. Mayers: Only you did come back to Victoria with Fraser? A. Yes.

The Court: Go on, finish it up, “So I gave Conway a letter to that effect.” A. That was the letter I suppose which we produced.

40 Q. “At least tendered him one, and I think he threw it on the ground”; is that true? A. No, that is absolutely incorrect.

Mr. Mayers: Did you see Fraser tender a letter to Conway which Conway rejected? A. We came back in the car and stopped at the office, in Mr. Fraser's office in town here. Mr. Fraser asked us for an opportunity to take the matter up with the Vancouver office before he made a decision; which he did. After he had done so he wrote a letter, which I think his clerk brought it

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out and handed it to Conway in the car. Conway passed it to me, and I read it over, and said, That would not be sufficient. And I myself took it into the office—I am not sure about that—one of us took it back to the office, I saw it go back. And it was not thrown at them, or thrown on the floor or on the ground, or anything of the sort.

Q. There was a letter which Mr. Fraser did offer to you, which one of you rejected? A. Which we both rejected.

10 Q. Which you both rejected. Then did Mr. Fraser say to you that he had tried to get in touch with Vancouver again and had not succeeded? A. I don't recall that he did.

Q. You don't deny that he did? A. No.

Q. And did he then say, when he handed you the letter which you have put in, "This letter is given absolutely under protest"? A. I have no recollection of anything of the sort.

Q. Well, you won't deny that he said it? A. I don't deny it, no.

20 Q. And the letter that I am speaking about that he said was given absolutely under protest, is this letter that you have put in now, isn't it? A. I don't know that he gave me any letter under protest.

Q. Well, the letter that you have put in is the letter as to which you say you won't deny that he told you it was under protest? A. That is the only letter that I received.

Q. Yes. A. And carried away.

Q. Is this reasonable: "Fires are peculiar things and you cannot say without watching, what they will do"? A. Quite right.

30 Q. Naranyan Singh told you that the fire at mile 35.2 had been considered safe, didn't he? A. I don't think he made any comment on whether it was safe or not.

Q. You remember giving evidence before the Fire Marshall? A. Yes.

Q. Isn't this what you said, "According to his story, that is Naranyan, on Tuesday afternoon, the 19th, perhaps one o'clock, a heavy wind came up and drove the fire out of control. In the meantime the fire had been attended constantly and had been considered safe"? A. That is what I might have said.

40 Q. That is what Naranyan told you, isn't it? A. Yes.

Q. Fraser never accepted responsibility, did he? A. Unless this letter which he gave us is responsibility.

Q. He always told you that he did not agree to accept responsibility? A. No, that is quite right, he didn't accept responsibility.

Q. That is all.

(Witness stands aside).

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SAMUEL COWAN, a witness called on behalf of the Plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. MAITLAND:

- Q. Your full name, please? A. Samuel Cowan.
- Q. Where do you live at the present time, Mr. Cowan?
- A. At Courtenay. The upper end of the Island.
- Q. Were you a former employee of the Kapoor Lumber Company? A. Yes.
- 10 Q. What were you before that, what did you do before that?
- A. Before that I had been a lumber carrier for the Hillcrest Lumber Company.
- Q. Up to when? A. Up to December 10, 1928.
- Q. How long were you with them? A. About two months.
- Q. And before that what did you do? A. I was Superintendent of the Beban Lumber Company.
- Q. How long were you with them? A. I had been Superintendent of that Company for about twenty months. And before that I had been re-sawyer for them for about 12 months.
- 20 Q. And before that what did you do? A. I had been accountant of the Gwilt Lumber Company.
- Q. For how long? A. I was accountant for the Gwilt Lumber Company about fifteen months.
- Q. And before that what did you do? A. I was shipper of the Gwilt Lumber Company.
- Q. And before that what? A. Before that I had been on a ranch when I came back from France, I had some land and I settled on the land like a good many other returned men.
- 30 Q. Since you left your ranch I take it then that you have been identified considerably with logging companies? A. Yes, sir.
- Q. And you went into the employ of the Kapoor Company in December 1928, wasn't it? A. Yes, sir.
- Q. In what capacity did you enter the employ of the Kapoor Company? A. As accountant.
- Q. And you were still accountant of the Kapoor Company up to the time of this fire? A. Yes.
- Q. And how long after? A. For a further period of six months, or seven months, I am not sure.
- 40 Q. Now during that time did your duties increase beyond that of an accountant at all? A. In a sense, yes.
- Q. Just how? A. Out side my duties as accountant I was more or less consulted in the matters of policy; and more or less in regard to the technical end of the management.
- Q. A few things I would like to clear up that you might help

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us on. First, the insurance; did you have anything to do with the insurance? A. Yes, correspondence between the insurance agents would naturally pass through my hands.

Q. And would you handle the moneys that were paid to insurance companies by the Kapoor Company? A. Yes.

Q. Do you remember what they were and how they were made up? A. I cannot give you the definite figures, I can tell you in round figures the amount received.

10 Q. Give us that, will you? A. The amount received in cash from the insurance company in round figures was \$105,000; in addition to which there was a further amount of \$2500 paid I think for repairing two lumber carriers which had been damaged. That \$105,000 was distributed roughly \$75,000 received on account of the lumber destroyed, \$14,000 approximately—mind you I am giving round figures, I don't profess they are accurate, but approximate—\$14,000 damage to houses—houses destroyed; approximately \$11,000 on mill plant and equipment, and I think \$4500 on logging equipment.

20 Q. Now was all of the property of the Company insured at the time of the fire? A. Of the property? By that you mean the buildings—

Q. Was everything covered they owned there by insurance? A. No, not everything.

Q. Was everything burnt that was covered? A. No, sir.

30 Q. Mr. Mayers was asking some questions today of the witness Mayo Singh as to the financial condition of this Company at the time of the fire. What was the financial condition of this Company at the time of the fire. A. I consider their financial position as fairly good.

Mr. Mayers: Wouldn't that be shown by the books?

Mr. Maitland: You did not ask the last witness for books.

Mr. Mayers: He already had said that he did not know anything about the books.

Mr. Maitland: Have you got the books here that would tell you the situation?

The Court: Does he know the result? The books are available for cross-examination.

40 Mr. Maitland: How do you say the general position of the Company was? A. The general position of the Company at the time of the fire was fairly good.

Q. Some suggestion has been made that royalties, I take it, or payments under one of these agreements, to the Home Bank was always in arrear. A. That is not correct.

Q. Now can you say as to whether they were in arrears or whether they were otherwise? A. They were in arrears at the time of the fire, but they were not always in arrears.

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Q. Well, were they ever in any other shape except being in arrears and paid off? A. Yes, sir; they were always in good shape until we shut down in the winter of 1929-30. We went in arrears at that time because we had expended considerable money in putting new equipment into our plant and had paid cash for it, and we were \$30,000 ahead in our payments for timber, and considered that it would not be out of the way for the Home Bank to wait a little on their stumpage.

10 The Court: Did you meet your payrolls? A. Yes.

Q. Every month? A. Yes.

Q. Twice a month? A. Once a month.

Mr. Maitland: What do you mean by being \$30,000 ahead on your payments on the timber? A. We had made a payment of \$30,000 on the timber, and we were paying stumpage at the rate of 25 per cent. more than the actual value of the timber.

Q. Now you remember the summer of course of 1930, when this fire took place? A. Yes.

20 Q. You were living there at that time? A. I was living there at Kapoor.

Q. How about your own house, was it burnt? A. No.

Q. There has been some suggestion here today made of another fire, I think on Saturday the 16th of August, 1930. Do you remember that fire? A. I have heard about it.

Q. What do you remember about it? A. I remember that on Monday the 18th I was advised that a fire had occurred and had been put out on the morning of the 16th. On the 16th I was away from Kapoor.

30 Q. Where were you on the 17th? A. On the 17th I was at Kapoor.

Q. Do you know where this fire was on the 17th. A. On the 17th I didn't know about the fire.

The Court: You only learned about it on the 18th? A. Yes.

Mr. Maitland: I want to know if you were around there on Sunday, the 17th? A. Yes, sir.

Q. Along the right of way? A. Along the C.N.R. right of way, yes.

Q. You were where? A. From Kapoor to Leach River.

40 Q. Is that coming toward Victoria? A. It is from mile 36 to mile 34.

Q. That would be in the direction of from Kapoor to Victoria? A. That is the way I was going.

Q. You were over that right of way on Sunday? A. Yes.

Q. How many times? A. Twice. I went once down and once up.

Q. And did you see any sign of fire at all on that Sunday?  
A. No.

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Q. Were you through the rock cut? A. Yes.

Q. Did you have a view of the area down by Sooke River and Deer Creek? A. May I see the map? (Going to map). My house is on this side of the school.

Q. Your house is near the building marked School, to the left of a little beyond 36? A. Yes.

10 Q. The Victoria side of 36. A. I walked from that point down all along the railway down to mile 34, which is not shown on the map.

Q. So that you walked on the right of way which is shown on Exhibit 4? A. Yes, sir.

Q. Would you have a view during that walk, of Deer Creek as shown on the map? A. Yes.

Q. That area? A. Yes, I would see all this area.

Q. And Sooke River? A. Yes—in a sense—Sooke River shows at intervals; it depends on the contour of the country.

Q. There are trees growing on the banks of it? A. Yes.

20 Q. Going along there did you see any sign of fire at all? A. No.

Q. When was it that you first saw any fire or heard of any fire? A. Are you referring to the fire of the 16th?

Q. No, we have got past the 16th. Now you say on the 17th you saw no fire. Starting with Monday the 18th, when was it you first heard of any fire? A. About a quarter past one on Monday.

Q. What happened then? A. I was coming back from my lunch and noticed smoke some distance on the Victoria side of the mill. And that is this easterly direction looking up the railway track.

30 Q. Yes. A. I noticed smoke, and made enquiry, and I was informed that there was a fire—

Q. Wait, who informed you? A. The conductor of the C.N.R. way train.

Q. What conductor would that be? A. Conductor Miller.

Q. What did he tell you? A. That there was a fire down there.

Q. Did you say anything to him? A. Yes, I asked how he knew about it, and he said he saw a bunch of men going down to fight it.

40 Q. Now what train was Conductor Miller on? A. On the local way freight.

Q. How was that local way freight made up as it went through Kapoor? A. You mean the exact composition of the train?

Q. Yes, if you please? A. That I could not tell you; it was made up of empty box cars and flat cars and wood cars.

Q. Was there any accommodation on the way freight train

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Samuel Cowan, for Plaintiff—Direct Examination.

that was used for carrying pasengers? A. They had a very strict rule against carrying passengers.

Q. On that line? A. Yes.

Q. And then anybody on the train would be an employee?  
A. Yes, sir.

Q. What can you tell me, starting with say at the time of this fire, say a week before, during that week, the week of Monday the 9th, that would be, the 9th of August, what the train service was running through there on the C.N.R. line? A. I can give you the regular service.

Q. That is what I want. A. The regular service was a gas car up and down every day—

Q. It would carry what? A. The gas car would carry any passenger traffic and mail and light express.

Q. What time would it get into Kapoor? A. At 10:35 I think was the schedule.

Q. In the morning? A. In the morning.

Q. That is going towards Kissinger? A. That is going to  
20 wards Kissinger.

Q. And when would it pass Kapoor coming back to Victoria? A. 3:45 in the afternoon.

Q. That is all you would have to do with the gas car. Was that daily? A. Daily except Sunday.

Q. That is all you would have to do with it daily? A. Yes.

Q. The up and the down trip? A. Yes.

Q. Now what were the freight movements? A. There was a way freight three days a week. It came up on Monday Wednesday and Friday; and went down on Tuesday, Thursday and  
30 Saturday.

Q. At what hour would it arrive at Kapoor on the way to Kissinger? A. The time was indefinite, but usually somewhere between 11 o'clock and one o'clock.

Q. And what time of the day at Kapoor from Kissinger to Victoria? A. There was a wide latitude in time, it would depend on how much work they had to do.

Q. How much milk and how much wood they had? A. That is it exactly, and sawdust.

Q. Do you know what extra freight trains were run? A.  
40 That I cannot give you any definite idea of. There were extra freights run, but just when I couldn't profess to say. I know there were some.

Q. What quantity of your output would you ship over this line? A. One hundred per cent.

Q. Any idea how much freight would originate in a month at your mill? A. Yes. In ordinary times I would say between forty-five and fifty thousand dollars.

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Q. A month? A. A month.

Q. That would go over the Canadian National? A. It would originate there, and would travel part of its journey over the C.N.R.

Q. The rest of it would depend on the destination on the line shipped? A. Yes.

Q. Now when did you first see Mr. Fraser on the Monday, or did you see him on the Monday? A. Yes, sir, I saw him Monday evening.

Q. What happened there? A. He came into the office about quarter to five. He went over to the telephone, and to the best of my recollection he reported the train re-railed and pulling out for Kissinger.

Q. Now when was there a train derailed? A. It was derailed while I was absent at my lunch some time between quarter past twelve and quarter past one.

Q. And when did the crew get there to re-rail it? A. The crew would have got up some time around 4:20 in the afternoon.

Q. And they would come from Victoria, would they? A. Yes, sir.

Q. And did they pass this rock cut where the fire started on the Monday on the way to the point of derailment? A. Yes, sir, they would have to pass it. They would have to pass the scene of the fire to get up to the point of derailment.

Q. Now after the derailment did you have occasion to look at the rails at all? A. Yes, I saw the rails.

Q. Had any damage been done by the derailment? A. Yes, sir.

Q. What was it? A. There were three rails alongside the track that had been bent and twisted.

Q. Were those rails ever put in later, those three? A. No, they are still there to the best of my knowledge.

Q. Yes. Any other damage done? A. The switch points, I am told were broke. But that I cannot vouch for. I didn't see the switch until after repairs had been made.

Q. You saw the three rails, did you? A. I saw the three rails.

Q. Do you know what time that freight arrived that day? A. I can place it within a few minutes.

Q. Yes. A. It arrived approximately five minutes past twelve.

Q. Where was it coming from? A. From Victoria.

Q. Well then, before the derailment, then, the freight would pass the scene of the fire, would it?

Q. Around 12 o'clock, that minute. A. About twelve o'clock.

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Q. And before the derailment? A. Before the derailment.

\* \* \* \* \*

(Court here adjourned until 10:45 a.m. tomorrow (May 19th, 1932).)

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Thursday, May 19, 1932; at 10:45 a.m.

MR. COWAN IN THE BOX: EXAMINATION IN CHIEF:

Mr. Maitland: I will try and clear up one or two of the matters Mr. Mayers has been referring to. Can you tell us anything about the suggestion made by him as to an operating loss at the time of the fire, on the part of the Kapoor Company? A. Could I see the statement that he made the suggestion from? I think he is very, very much mistaken.

10 Q. Have you got the statement (produced and handed witness). Just look at that, will you, please; that is at the end of April, 1929.

Mr. Mayers: 31st of December, 1929.

Q. 31st of December, 1929; that would be the December before the fire? A. That was nine months before the fire.

Q. Yes. A. I think then that that statement should be described as misleading; I was referring to our position at the time of the fire.

20 Q. What was your position at the time of the fire? A. At the time of the fire we had shown a gross operating profit. The net deficit for the year 1929, according to this statement, is only \$2691.

Q. Well, you and Mr. Mayers can fight that out later—I never thought there was very much in it. Now, Mr. Cowan, you remember the morning of the fire? A. Yes, sir.

Q. Did you have any conversation with Mr. Fraser on that day? A. I recollect one conversation with him during the day.

Q. What time was that? A. Approximately two o'clock in the afternoon.

30 Q. That is on the Monday? A. No; I was thinking of the day of the fire—I always think of that as Tuesday.

Q. All right; what was the conversation on Tuesday? A. Tuesday at two o'clock?

40 Q. Yes? A. A call came into the office, a telephone call came into the office, from what point I don't know; and judging by the voice it was Mr. Fraser at the other end of the wire; and we had a conversation in regard to this fire. He told me he had been listening in on a conversation in regard to this fire between their section foreman, from our office, and their dispatcher, in which their foreman had told him that the situation was decidedly dangerous, and in which the section foreman had advised the bringing out of a tank car.

Q. Whose tank car? A. The C.N.R.'s; and the sending out of a locomotive. And in the course of our conversation Fraser asked me what I thought of the situation. I told him that it was decidedly dangerous. At that time we had either shut down our

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mill and were employing our full mill crew in fighting the fire or we were just on the point of doing it, depending on the exactitude of my sense of time. At two o'clock it has been established, to my satisfaction at any rate, we had closed down the mill.

Q. Now, did Fraser come out there? A. Fraser did come out, I understand, but I did not meet him on that afternoon.

10 Q. I see. When was the freight re-railed, do you remember? A. Fraser came into the office on the Monday afternoon about 4:30, and I heard him report the locomotive re-railed and on its way. He also reported out on the auxiliary.

Q. Did you see Dunn down there that day? A. Yes, I saw Dunn that evening.

Q. Do you remember any conversation that took place between Fraser and Dunn? A. There was no conversation took place in my presence, excepting an agreement to go down on the C.N.R. train to the scene of the fire.

Q. Had you any conversation that day? A. Yes.

20 Q. What happened, what did you say? A. There was some conversation took place, of which I cannot give the exact words, I can give you the sense of it.

Q. Yes. A. When Fraser finished reporting his trains out—

The Court: What? A. His trains out—he reported one train, my Lord, clearing for Kissinger, and one train clearing for Victoria.

Q. Over the telephone? A. Over the telephone, to the dispatcher.

30 Mr. Maitland: That is after the re-railing? A. After the re-railing. He turned around to me, and some conversation took place about the fire, in which I told him definitely, flatly, that that fire was right on the C.N.R. right of way. I did not like the tone that he adopted at the time, and the suggestion that it was our "baby" as it were. And while this conversation was taking place, Dunn, the Assistant Ranger, came in; and I cut the argument short by turning around and saying, There is Dunn, the Assistant Ranger, you two had better go down to the scene of the fire, and fight it out between yourselves.

40 Q. Did they go down together? A. They went down from the office together.

Q. Now, you saw the fire on Tuesday, at what time did you pay particular notice to the fire on Tuesday? A. About half-past one.

Q. Had you seen the previous fire at the rock cut on the Monday yourself? A. No.

Q. When did you first see it? A. I first paid particular attention, and first saw the flames at about 1:30 on Monday.

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Q. Where were they then? A. They were in a direct line—I had a position back of the office on the knoll, and I could see clear down the kind of a gully to where the flames were burning.

Q. You better come over to the map. I will change the colour to purple. Will you take a purple chalk; now mark C-1 where you first saw the fire about 1:15 on Tuesday, please. A. Where I was standing, or where the fire was?

10 Q. Well, where were you standing—mark that C-1 (witness does so)? A. Of course this is only approximate.

Q. Yes. A. But it would be somewhere around here, I imagine.

Q. That would be at 1:15 on Tuesday? A. About 1:30 on Tuesday.

Q. 1:30 on Tuesday. And what is the formation at C-1 there? A. Where I was standing is right on the edge of a projecting knoll.

Q. And where did you see the fire? A. I saw fire somewhere down in this direction here, somewhere in this area here.

20 Q. Mark that C-2, will you, please (so done)? Now did you see any fire between Deer Creek and where the houses are marked along the C.N.R. railway there? A. No; at that time there was no fire there.

Q. Did you see any fire Tuesday between Deer Creek and the C.N.R. railway? A. No, I did not see any.

Q. You saw the fire there at C-2; did you observe it then the rest of the day, as to the course it took, and what was happening? A. No, I cannot say that, sir. I observed the fire going off this way.

30 Q. Draw an arrow, please, in the direction in which the fire was going when you saw it. A. The directions of course are approximate; it approximately came along this way.

Q. Put an arrow at the head of that line. A. Yes.

Q. That is a line from C-2? A. Yes.

Q. And then what occurred, what did you notice next? A. As it was coming up that way, before it had arrived at Deer Creek the Superintendent had strung three lines of hose from the mill over this way.

40 Q. 'This way' does not mean anything; the Superintendent had what? A. Strung three lines of hose from the mill.

Q. From the mill at the point C-3? A. At C-3, yes. I don't know just which hydrant he was taking, but it was from the mill anyway.

Q. From the mill to where? A. There was one line of hose strung along this way (indicating); there was another that came over this way, and there was another, but I forget where that one came from, it came over somewhere near the mill pond.

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Q. What happened next? A. The fire came up, advancing as this line continued, approximately.

Q. This purple line from C-2? A. By this time the crew of men were working clearing a fire trail from the edge of this slope; there was a slope like that, and the men had cleared a fire trail, and hose lines were strung ready to receive the fire by the time it arrived there.

10 Q. That would be at C-4, where you had that fire trail, C-4 to C-5? A. I don't know the extent of that fire trail.

Q. Well, around there, anyway? A. Yes.

Q. What happened next? A. They managed to divert the course of the fire at this point by means of their hose lines.

Q. That is the point— A. C-4 to C-5; and although the fire was burning furiously they managed to check its further advance towards town; but it kept burning off in this direction for a certain length of time.

20 Q. That is in the direction of C-6? A. C-6. It had arrived at about this point, possibly, at a point just about opposite my house, which was located here.

Q. Your house is C-7? A. C-7. When the wind changed, and the fire came back, travelling I should judge in this direction.

Q. Make an arrow at the end of that C-8. A. C-8.

Q. What time did the wind change? A. The change occurred some time between 3:30 and four o'clock.

Q. In the afternoon. And did it continue then in that direction? A. Pardon?

Q. The direction would be east, wouldn't it? This last mark you made here, that would be east? A. East, yes.

30 Q. Did it continue that way? A. Yes; as far as my observation went.

Q. And what happened when it went on the eastern course? A. When it went on the eastern course the buildings in the town caught fire.

Q. Yes. A. And there was a great deal of excitement about that time, and my observations were necessarily then rather limited.

40 Q. Now up to that time was there any fire in the vicinity of the north-east corner of that map Exhibit 4? A. That would be up here?

Q. Yes, in that direction? A. No sign of fire at all.

Q. Now mark that, will you, please, C-9? Or anywhere in that vicinity on that side of the track? A. There was no fire on this side of the track at all.

Q. Where were the lumber piles? A. The lumber piles were in this area here.

Q. Well, was there any fire north and east of those lumber

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10 piles? A. That would be here (indicating)?

Q. Yes? A. No, there was no fire there.

Q. When you say the lumber piles are here, you better mark that C-10 to C11 to show us where they are. A. Perhaps I better enclose a rough area.

Q. Yes, and mark C-10 inside of it.

The Court: That is the area of the lumber piles, is it?

10 Mr. Maitland: Yes, my Lord. Did you see where the lumber yard caught on fire? A. No.

Q. You were there how late that night? A. I was around until ten o'clock, half-past ten.

The Court: He is describing the situation where the fire had not reached the lumber piled. He said there was no fire East and West of the lumber pile here—assuming there was no fire.

Witness: At that time, until 4 o'clock, the lumber had not caught. At that time, at 4 o'clock, the wind had changed.

20 The Court: With respect to the lumber pile, what was the direction of that fire at that time? A. At that time the fire was running North, parallel to the railway.

Mr. Maitland: The point you just gave his Lordship a moment ago was from C-6 to C-8? A. Yes.

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(Court Adjourned to 2:15 p.m.)

Thursday, May 19th, 1932; 2:15 p.m.

MR. COWAN IN THE BOX: EXAMINATION IN CHIEF

Mr. Maitland: Now the day of this fire did you hear any explosions of any kind? A. Yes, I did hear some.

30 Q. There is some suggestion of dynamite or something to blow the works up, or something of that kind. What did you hear? A. I heard two or three explosions; and my conviction at the time was that it was either gas or oil drums exploding under heat.

Q. After the fire did you find whether any gas drums or oil drums had exploded? A. Yes.

40 Q. How many? A. I found half a dozen oil drums at the freight platform that had quite evidently exploded, the ends were bulged and blown through. And over in the lumber carrier's garage there were at least over a dozen drums that were bulged in the same way from the effects of an explosion.

Q. Did you know anything yourself about dynamite around

Cowan, for Plaintiff—Direct Examination.

there? A. Around the plant?

Q. Yes? A. No. I had no personal contact with it.

Q. You saw a bucket or something produced at the Fire Marshall's enquiry with some sticks of dynamite in it? A. Yes, I saw a bucket produced at the Fire Marshall's enquiry.

Q. Supposed to be found up near the lumber yard or in the lumber yard. A. So it was said.

10 Q. Do you know anything about that at all? A. I never heard any suggestion about it until the time of the Fire Marshall's enquiry.

The Court: What is the point about it?

Mr. Maitland: I think the point is, as I understand it, they suggest that we put dynamite there to blow up our lumber pile or something. I suppose that is the suggestion.

The Court: What difference would it make, if the lumber piles were bound to burn?

20 Mr. Maitland: They have pleaded it, and I have to anticipate it. I never took it very seriously, but I understand my learned friend will go into it.

The Court: Very well.

Q. Do you know anything about any purchase of any dynamite around that time by the Kapoor Company, or anything of that kind? A. At that time we were purchasing dynamite for our requirements for logging railways, but the purchases were made in small lots and were delivered directly to the people who were using it.

30 The Court: You watched the efforts made to put the fire out? A. Yes.

Q. And where it started? A. Yes.

Q. And was it an honest attempt? A. An absolutely sincere effort, so sincere that some men were injured.

Q. Irrespective of who was to blame for the fire, as far as fighting was concerned, everything was done that was possible? A. Everything done that was possible, my Lord.

40 Q. It was not a camouflage? A. No, we were endeavouring to save our property. We were not entering into the origin of the fire at the time. We were faced with the condition, and we were not considering who was responsible, we were to save ourselves and our property.

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CROSS-EXAMINATION BY MR. ALEXANDER

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Juror: May we know what your total insurance was? A. I cannot give you the figures offhand, sir, but it was somewhere over \$230,000; of which the mill was ninety odd—of which the mill was \$93,500.

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Mr. Alexander: You told us, witness, that you were in charge of the office. A. That I was which?

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tion.

10 Q. That you were in charge of the office? A. Yes.

Q. You went there in December of 1928? A. Yes.

Q. And left there in the spring of 1931? A. That is correct.

Q. April or May, was it? A. It was at the end of April.

Q. And amongst your duties in the office was to look after all the records, and run the financing of the Company, that is to carry out the financial arrangements of the Company, and to be brought into consultation with Mayo Singh with regard to the policy of the Company? A. No, that is going a little too far.

Q. How far do you go, then? A. The policy of the Company was determined by the directors of the Company.

20 Q. Of which you were not one? A. Of which I was not one.

Q. But the actual operation of the Company was in the hands of Mayo, who in turn passed on to you a large portion of that duty? A. Yes, such as was appropriate to my position.

Q. Shortly, you were the head white man around there, weren't you? A. It amounts to that.

Q. Now before I go into this question of damages I would like to ask you a few questions with regard to the history of the fire itself. You were not in Kapoor on the Saturday, were you? A. No, not during the day; I came back in the evening.

30 Q. You went to Victoria and got back on Saturday evening?

A. Yes, that is correct.

Q. And you said that you had gone down the track on Sunday? A. Yes.

Q. On a picnic with your wife and family? A. That is correct.

Q. And there was no sign of fire when you went down the track on Sunday? A. No.

Q. What time did you get home on Sunday evening? A. between five and six.

40 Q. And at that time there was no fire? A. No fire whatsoever.

Q. Did you observe anybody walking up and down the track on that Sunday when you were going on your picnic? A. I did meet a couple of people on the track, yes.

Q. The track was used, was it not, between Leachtown and Kapoor, the track was used a good deal by people going from one

Cowan, for Plaintiff—Cross-Examination.

place to another? A. Yes, people used it.

Q. You were there on the Monday at the mill? A. I was at the office Monday, yes.

Q. But you heard nothing about a fire until lunch time, until after lunch time? A. You mean the Tuesday fire?

Q. No, I am talking about the Monday, now. A. No, I heard nothing of a fire until after one o'clock on the Monday.

10 Q. And as soon as you heard of the fire you called up the Ranger? A. As soon as I got down to the office, yes.

Q. That is a man named Campbell? A. Yes, Campbell of Victoria.

Q. Now, you remember being examined for discovery some time ago, Mr. Cowan? A. Yes, I remember.

Q. I am going to read you some of the answers you gave to the questions on your examination: "(96Q) Then what happened after that?" This is talking about the Monday, after you had seen Mr. Miller. "(A) As soon as I left Miller I walked into the office and put in a call for Ranger Campbell at Victoria.

20 (Q) And what did you say to him—did you get him? (A) Yes, he got through. I reported a fire. (Q) How did you know it was Campbell? Do you know him? (A) Well, I had spoken to Campbell previously. (Q) Over the telephone? (A) Yes. (Q) And you asked for Campbell? (A) Yes. (Q) And you got the man you supposed was Campbell? (A) That I supposed was Campbell, yes. (Q) What was your conversation? (A) I reported a fire in the vicinity of mile 35, and asked him to send over a Ranger. I believe he asked me what we were doing about it, and I told him we had sent out a crew." A. That is correct.

30 Q. When you use the word mill you mean the Kapoor Company? A. The Kapoor Company.

Q. "(Q) About what time would this be? (A) Well, it would be about 1:30. I got in the office about 1:20. I spoke for a few minutes with Smith, and then called Campbell. (Q) Smith was in the office? (A) Yes. (Q) That is Douglas Smith? (A) Yes." He was your assistant bookkeeper, wasn't he? A. He was my assistant.

40 Q. "(Q) You got a line on what? (A) I got a line on what action we were taking, before I called up Campbell." Who did you get that line from? A. From Smith.

Q. From Mr. Smith. "(Q) What action were you taking? (A) That we had sent out a crew of men to fight the fire. (Q) Who had sent those out? (A) The superintendent of the mill, presumably."

Q. That would be Bal Mukand? A. Bal Mukand.

Q. "(Q) How many men did they consist of? (A) I cannot tell you from personal observation. (Q) This is simply

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what Smith told you? (A) Yes. (Q) And you reported that to Campbell? (A) Yes." Now those answers are true? A. To the best of my knowledge and belief that is exactly what occurred.

Q. And then that would be about half-past two in the afternoon? A. No, sir, it would be about half-past one in the afternoon.

10 Q. Half-past one in the afternoon, yes; and then after that nothing happened until about quarter to five, so far as the fire is concerned? A. Yes.

Q. And then you saw Fraser? A. Fraser came into the office about a quarter to five.

Q. And shortly after he came in Dunn came in? A. Shortly after.

Q. And they left shortly after that and went down to the scene of the fire. A. Yes.

Q. And then finally Dunn came back alone? A. That is correct.

20 Q. I am going to read from the examination after that: "(119Q) And Dunn came back about what time? (A) I should say about a quarter past five. (Q) And then what happened? (A) And I asked him what conditions were down there, and he said that we had put a crew of men to work down there and had thrown a fire guard around the fire, and that he had left instructions as to what should be done, and that he would come over again the next day." Those answers are true, Mr. Cowan? A. To the best of my knowledge and belief, yes.

30 Q. And going on with the conversation, "(Q123)"—this is conversation between Dunn and yourself: "Was anything said about a pump? (A) There may have been some remark about a pump being brought over the next day. But as to that I couldn't — (Q) Don't you remember his telling you that he was bringing a pump over on the next day? (A) He might have; possibly he did so, I cannot recall clearly. I know that almost invariably when we call up a Ranger we did ask for a pump to be brought over, because they are the handiest things in the world to put out a fire." A. That is correct.

Q. You said that, and that is true? A. Yes.

40 Q. Then that was all that you knew about the fire on Monday after you had your conversation with Dunn nothing more happened? A. That is all I recollect.

Q. Then on the Tuesday morning you had a visit from Bal Mukand? A. On Tuesday morning?

Q. Yes—did you not? A. My memory is not clear on that now.

Q. I will read you what you stated in your examination: "(133Q) And what happened in the morning? (A) In the morning? (Q) The morning of the 19th of August?" That

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would be the Tuesday. (A.) That would be the Tuesday.

Q. "(A) On the morning of the 19th of August I was busy with my own duties in the office; I had ascertained through a visit by the Superintendent that he had a crew of men out there, and that he was exercising all precaution in regard to keeping the fire within bounds." A. If I said that when my memory was fresher, I expect I did.

10 Q. What do you say now? A. I cannot say I recall it, but it was probably a statement while it was fresh in my mind.

Mr. Maitland: What number was that?

Mr. Alexander: 134. Now you had no conversation with Fraser on the Tuesday morning, had you? A. None that I recall.

Q. But you did have one with him in the afternoon? A. Yes, I recollect one conversation with Fraser.

Q. You had one conversation? A. Yes.

Q. That was over the telephone, was it? A. Over the telephone.

20 Q. Now I read to you from question 237—this is what you stated was the conversation: "(Q) What did you say to him? (A) I cannot recall the exact words. But the gist of the conversation was, Mr. Fraser was anxious to know how the fire was, and I told him that she was extending her area, and that due to the change of wind she had crossed the track, and that we were closing down the mill—I forget at the time whether we had closed the mill down, or it was after my conversation with Bal Mukand; and I mentioned that we were increasing our crew to five"—that must be wrong. A. To fight the fire.

30 Q. Yes. "Mr. Fraser asked why I didn't let him know that morning. I am just giving you the gist of the conversation, not the exact words. And I told him that until 12 o'clock the fire had seemed to be practically under control. It was somewhere after twelve o'clock when the wind started to come up into a series of whirlwinds and began lifting the fire in every direction, and she immediately began to get out of control. (Q) Is this what you told Fraser? (A) I might not have mentioned about the wind, but my conversation was that the fire had increased its area and was getting more dangerous, and that we were going to shut down the mill in order to fight it. (Q) What time was this? (A) 40 I really couldn't say, but it would have been somewhere around 2:30 possibly. Mind you I took no notes of the time during that day. I don't know what time it was." Those answers are correct?

The Court: From where to where?

Mr. Alexander: From 237 to 239. A. Yes, those answers are correct to the best of my knowledge and belief.

Q. And that telephone conversation was on Tuesday afternoon? A. On Tuesday afternoon, though I will not pin myself down to a definite time.

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Q. Well, was it about the time that the mill was closed down or was closing down? A. Just about the time the mill was closed down.

Q. And when was the mill closed down? A. At two o'clock.

Q. Now, did you have any conversation with the dispatcher of the C.N.R. that day? A. None that I recall. I might have done, but I do not recall any with the dispatcher that day.

10 Q. Now I read to you questions 253 to 262: "(Q) Did you have any conversation with any dispatcher on the Tuesday? (A) None that I can recall. (Q) That is to say you may have had? (A) Possibly. (Q) Did you see Reese?"—Reese is the section foreman of the C.N.R., he was, was he not? A. Yes, Reese was their section foreman.

Q. "(Q) Did you see Reese; did you know Reese by sight on that Tuesday August the 19th? (A) Yes. (Q) Did you see him on that day? (A) Yes. (Q) Where? (A) At the office at Kapoor. (Q) Your office? (A) Yes. (Q) What time was that? (A) That would be somewhere around 2:30." A. Yes.

20 Q. "(Q) At the time you were telephoning? (A) Yes, approximately that time. (Q) Was he using your telephone? (A) Yes. (Q) To whom was he speaking? (A) I think he was speaking to Mr. Fraser." Those answers are true, witness? A. Yes.

Q. Now then later on that afternoon you were out watching the fire, were you? A. Yes.

Q. Up to what time? A. Between two and four o'clock I was in and out of the office, oh, every few minutes, one might say.

30 Q. And after four o'clock? A. After four o'clock the office building was destroyed.

Q. And before that you said you had removed your office furniture? A. Just about the time of the office having caught fire, which I can only place indefinitely as some time between 15 minutes to four and four o'clock, I took my records out of the office, as much as I was able to salvage, and took them over to a box car; and from that time on I have no clear recollection of the chronological order of events. Between four and six at any rate things are misty in my mind.

40 Q. Well, your office was burnt at four o'clock? A. Approximately four o'clock, that is what I would judge.

Q. So that from the time that you had your conversation with Reese or with Fraser, rather, when Reese was in the office, you had no communications with anybody representing the C.N.R. on Tuesday afternoon? A. None that I recall, no.

The Court: Where is your office? A. Right along the creek, my Lord. The sketch shows it.

Q. Is it on this plan? A. No, my Lord. It was destroyed.

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The office building was right here (indicating on Exhibit 25), on the other side of Deer Creek, my Lord.

Q. Over here? A. No, to the left of Deer Creek.

Q. Out there? A. Closer to the creek. It was right on the bank of the creek.

Q. How did you get across there? A. There was a walk way from the office to the C.N.R.

Q. Went down to the track, and then on, did you? A. Yes.

10 Q. I would suggest that you put on the exhibit the place where the office was, to give some idea of where your power of observation was—on the main plan.

Mr. Maitland: We will have him do that.

The Court: Just walk down and mark there where your office was.

Mr. Maitland: Put it in purple (Witness does so).

Mr. Alexander: The square with the word "office" written beside it, that shows the location of your office, does it? A. Yes (on Exhibit 4).

20 The Court: He said it is on the bank of the creek there.

Mr. Alexander: Yes, beside Deer Creek. A. Yes, beside Deer Creek.

\* \* \* \* \*

(Court adjourned until 10:45 a.m. tomorrow, May 20th)

Friday, May 20th, 1932; at 10:45 a.m.

\* \* \* \* \*

(Samuel Cowan: cross-examination concluded)

(Witness stands aside)

30 (Court adjourned to 2:15 p.m.)

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Friday, May 20th, 1932; at 2:15 p.m.

\* \* \* \* \*

ROBERT EUGENE SWANSON, a witness called on behalf of the Plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. MAITLAND:

- Q. Your full name, please? A. Robert Eugene Swanson.
- Q. What is your occupation? A. At present?
- Q. Yes? A. I am sawing for the Hillerest Lumber Com-  
 10 pany at Duncan.
- Q. Where do they operate? A. Duncan, B.C.
- Q. Where were you working at the time of this fire? A. In the Kapoor Lumber Company.
- Q. What was your position there? A. Chief engineer and fire chief in charge of all fire equipment, electrical equipment and steam equipment.
- Q. How long had you been chief engineer at Kapoor? A. About two years.
- Q. What was the first you heard of the fire on Monday, the  
 20 18th? A. My assistant came in about noon, that was on the Monday, and he says, Bob, there is a fire—
- Q. Never mind that; he reported a fire? A. He reported a fire, he saw a fire down the track.
- Q. Did you report to anybody else? A. I reported to Bal Mukand.
- Q. There has been some discussion here about the pumps, I think, particularly around the mill yard. Tell us the fire equipment. Will you just describe that? Who put that fire equipment in there? A. I supervised that work; the whole fire equipment.
- 30 Q. What about the water system? A. I supervised that too.
- Q. And therefore you would be familiar with both? A. Yes, I am.
- Q. What condition were they in on Monday, the 18th day of August? A. Very good condition.
- Q. Did you make any tests at all? A. Yes.
- Q. When? A. Monday I tested the hydrants in the yard, which showed water was flowing; and filled the fire tank every day, at least I flowed it over from the fire pump on the log pond.
- 40 Q. When was the fire whistle blown on the Tuesday? A. Approximately ten minutes to two.
- Q. What would that mean? A. It meant that every person in the mill would have to come to the fire, and come to the engine room and ask me where they were to go.

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Q. What did you do? A. I sent different crew with hoses, told them which hose to take, and directed the running of the hoses out from certain hydrants.

Q. What did you do as to the mill itself? A. I put a crew of men to water the mill down, soak it good with water.

Q. How would you do that? A. I put probably two men on the hydrant, who would connect the hose up, two and a half inch hose to the hydrant, who would open the valve, turn water on, at 55 pounds pressure, two and a half inch hose; there would be two crews at the time using two hoses. They could soak that mill; those nozzles would throw a stream of water clean over the mill if you wanted them to.

Q. Now, did you see the fire coming that day? A. After it was reported to me I seen a little smoke down that way.

Q. That was on what day? A. That was on the Tuesday. On the Monday I didn't see anything. I just was reported there was a fire. And it was my duty to report to Bal Mukand, and send men down if Bal Mukand wasn't present.

Q. Yes. A. About half-past one I looked down in that direction, and I seen the smoke was coming up quite heavily.

Q. Where? A. Down—oh, it was just down I would say in that direction.

Q. Towards the rock cut? A. Down the C.N.R. right of way below the yard, about a half mile below the yard.

Q. Do you know where the rock cut is? A. I know where it is.

Q. Where was it in connection with the rock cut? A. I wasn't down there the day of the fire.

Q. Was the fire coming that way? A. No, the fire was coming—let me get my directions—the fire seemed to be blowing in south-westerly around a westerly direction. And about two o'clock, when Bal Mukand told me to blow the fire whistle, it seemed to be sweeping upwards in that cut somewhere below the track, coming in there in quite a roll.

Q. What did you do in relation to saving the lumber piles? A. Well, I reported to Bal Mukand that I seen a blaze starting on the top of the lumber yard, on the lower end of the yard; that would be between five and six o'clock. I sent a crew of men down there, which Bal Mukand took down, and we found we couldn't do anything about saving it, that it was too much of a wind blowing there and too hot. So about eight o'clock that night we cut a portion of the platform off, opposite to the posts marked Yard Limit; I would say a portion about 50 feet of it here to stop the fire from coming through. And we connected up hoses from the yard and wet down all along the front there.

Q. Have you seen that map before? A. Yes.

Q. Mark S-1 where you first saw the fire Tuesday? A. I

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cannot mark the first location.

Q. Approximately. A. It was down here somewhere.

Q. Mark S-1 where you think it would be. A. Where I first seen the blaze was around here.

Q. Mark that S-1. And then it seemed to go where? A. That is where I first, around two o'clock, I saw it, around in here. But, mind you, I was up in here, I seen that in the distance.

Q. You were in the mill? A. I was in the mill.

10 Q. Where did you see it coming? A. It seemed to be coming this way first.

Q. Draw a line with an arrow at the end of it, please. A. Yes.

Q. From S-1. Where did it go when the wind changed? A. It seemed to sweep up right towards the mill, like that.

Q. Put an arrow beside that, and at the end of the arrow mark S-2. (Witness does so.) Where was it you saw this top of the pile burning? Where would that be? A. Down in around here.

20 Q. Mark that S-3. A. I was looking from here.

Q. Mark it S-3 (witness does so). You see that point on the map marked C-9 there in the upper left-hand corner? A. Yes.

Q. Was there any fire up there? A. That was a burnt up area.

Q. But was it burning there at this time? A. There were little patches where cinders were left.

Q. When? A. That would be towards six o'clock at night.

Q. Did you hear any explosions? A. Yes, I did.

30 Q. And you saw what they were, or do you know? A. Well, in fact I concluded at the time that I did know, that it was an oil drum blew up on the station, for the simple reason I was on top of that boiler house—

Q. You were not on top of the drum? A. No, I was on top of the boiler house at four o'clock. I got over on the boiler house that day, it being up near the cyclone, putting out that fire; I could see down on the freight platform which was burning. I heard a loud explosion, and I just saw the flame from it, and I says to the fellows there, There goes a gas drum.

Q. You heard that? A. I just saw the puff from it.

40 Q. What was the effect? A. I just saw a big cloud of smoke come up as the oil was burning on the station, on the platform.

Q. Was there any ammunition in those houses that you know of? A. I know there was a box of 32 special shells in my house, a box of 44 shells, and a box of shotgun shells. And in all the Japanese houses I know they all had ammunition. And judging from some of the sharp reports, I says, There goes some of that ammunition.

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Q. Never mind; you thought that was what it was? A. In fact I knew it was.

Q. Will you look at Exhibit 6; I understand you took these pictures? A. I did.

Q. With your own camera? A. Yes.

Q. Is that the original size, or an enlargement? A. This is an enlargement.

10 Q. Is this Exhibit 6 on the black background, is that the original you took? A. Yes, they are my pictures.

The Court: Is the enlargement put in?

Mr. Maitland: The enlargement is the Exhibit.

The Court: This is only a copy; if you put it in you will have to give it a new number. (Original put in as Exhibit 34.)

Mr. Maitland: When did you take that picture, Mr. Swanson? A. Oh, I would say it wouldn't be more than two weeks prior to the fire, and hardly may not be two weeks.

20 Q. Where were you when you took it? A. On the top of the fire tank.

Q. Where would that be? A. I will have to show you on the map.

Q. Come over to the map and show me. (Witness marks it.) S-4. Why did you take that picture? A. I just took it because I liked taking pictures, and I wanted to send a picture of the mill to the folks at home. And I mailed this copy to Nanaimo. Two weeks after, the fire, and my other copies and camera were burnt; my brother handed me these pictures.

30 The Court: You mean the smaller ones? A. The original pictures that you have got there.

The Court: These are pictures pasted together? A. Just pasted together; taken with one kodak.

Q. And that was then photographed after it was pasted together? A. I showed these pictures to Mr. Hutcheson and he asked for them.

Q. You said it was good stuff? A. I said it was good stuff. And he promised that he would give me one of these, and I gave them to him.

40 Mr. Maitland: That means we have got to make a copy like that for you? A. Oh, you bet.

\* \* \* \* \*

CROSS-EXAMINATION BY MR. MAYERS:

Q. Exhibit 34, was that taken within ten days of the fire?  
A. Yes, within ten days approximately, or two weeks.

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Q. Which would you say, was it within ten days of the fire?

A. Yes.

Q. You have put your "S-1" down near the Kapoor spur, have you not? A. Yes.

Q. You know that spur that was running along more or less parallel to the Sooke River? A. I know approximately where the spur was.

10 Q. The smoke that you saw on the Tuesday, which side of the spur do you say that was on? A. I don't know; I know it was below the C.N.R. track. I was never down at the scene of the beginning of the fire.

Q. All you can say, it was somewhere down in the valley of the Sooke River? A. It was between the Sooke River and the C.N.R.; but it was in my assumption up above that spur, the Kapoor spur.

Q. The mill side of the spur? A. Yes, it was between the Kapoor spur and the C.N.R. track; that is just judging from what I seen from half a mile off.

20 Q. I think you said you got hurt, too, on that day, did you? A. I did.

Q. Did you leave? A. Yes.

Q. The fire fighting? A. No, I stayed right with it.

Q. Your assistant reported to you on Monday, did he, at what time? A. At noon, when I came back from dinner.

Q. That would be one o'clock? A. That would be about twenty minutes to one.

Q. And your assistant's name was? A. Charlie Cotsford.

30 Q. How do you turn on and off the water distribution system in the lumber yard? A. Down by the planer mill engine.

Q. There is a valve? A. There is a six-inch valve.

Q. Just show me where the planer mill was, is this it, "Planing mill"? A. Yes.

Q. Mark that S-5 (witness does so.) There was a tank car belonging to Kapoor Lumber Company, was there? A. Yes.

Q. What was the capacity of the tank car? A. I don't know the exact capacity offhand, but there were two tanks on that car. It would be about seven by seven by four.

40 Q. Was the capacity of each tank about twenty-three hundred gallons? A. I couldn't say offhand.

The Court: Give an idea. A. They would be around that—seven by seven by four—200 cubic feet—and six and a quarter gallons in a cubic foot.

Mr. Mayers: So that it is about 2,300 gallons? A. Yes.

Q. And the total capacity of the tank car would be over 4,700 gallons, wouldn't it. A. It would be around that, yes—4,000 gallons.

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Swanson, for Plaintiff—Cross Examination.

Conway, for Plaintiff—Direct Examination.

Q. That was a very powerful pump that you had in the mill, was it? A. On the log pond, yes.

Q. And in addition to the pump you had two storage tanks, had you not? A. Yes.

Q. And either the pump or the storage tanks could supply the distribution system? A. I don't understand you.

10 Q. Well, you could force water through the distribution system by the pump, could you? A. Which distribution system do you mean; fire fighting equipment?

Q. Yes? A. Yes; that big pump supplied the fire fighting equipment.

Q. And could you draw on the tanks as well? A. You didn't draw from the tank to the pump. But the tank, the big fire tank gave you a potential head of 55 pounds—or 45, I forget which, pounds on that fire fighting system all the time. And that tank was filled every day from the big fire pump.

The Court: Was it used that day? A. Yes, it was.

20 Q. But it was not sufficient to fight the fire? A. It was sufficient to keep the fire back and save the mill. That was what saved the mill, was that pump. Turned the fire off from the yard.

Q. The system as a whole would not stop the fire? A. It would have taken a five-foot water main to stop that fire, it was so big. But we had sufficient water to save the mill and the plant.

Q. When it came to the mill you were in charge of the fire? A. Yes.

30 Q. But not down on the ground where the fire was. A. Out in the slashings, I was not in charge.

(Witness stands aside).

JOSEPH BURTON CONWAY, a witness called on behalf of the Plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. MAITLAND:

Mr. Maitland: Your full name, please? A. Joseph Burton Conway.

Q. What is your occupation? A. Forest-Supervisor.

Q. You have held that position how long? A. Approximately eight years.

40 Q. What is your district? A. About half of Vancouver Island.

Q. And what district is the Kapoor in? A. Just what do

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you mean by district?

Q. I have in mind the Forest Rangers. A. The Victoria Ranger district.

Q. And who was in charge of that particular section or division on the 18th and 19th of August, 1930? A. Richard W. N. Campbell.

Q. Now, you remember the occasion of a report coming in of that fire? A. Yes.

10 Q. When did you first hear of it? A. About 9 p.m. on the evening of August 19th.

Q. And then what did you do? A. Arranged with Ranger Campbell to meet me at Langford pole cache on Monday morning.

Q. Have you any arrangement with the C.N.R. as to fighting fires in proximity of along the right of way? A. The Forest Branch have an agreement.

Mr. Maitland: I am asking my learned friend to produce that agreement.

20 Mr. Mayers: My Lord, I am submitting that this document is entirely irrelevant. And I would ask your Lordship to look at it (handed to Court).

The Court: Gentlemen, I think the Jury better retire; I cannot comment on it in their presence very well.

(The Jury here retired.)

The Court: You agree that is the better course? It is done over and over again in criminal cases, and I think it as well here.

30 Mr. Maitland: There has been some suggestion by my learned friend as to the exact position that this man Dunn occupied. There are allegations throughout, I think, that we undertook the defence on this fire and everything else; that the Company had nothing to do with it.

The Court: We?

Mr. Maitland: We—I mean the Kapoor, the plaintiffs.

The Court: Will it be contended that a person with property in danger is absolved from the duty to protect his own property?

40 Mr. Maitland: One of the contentions advanced is that we took charge of this fire to the actual exclusion as a matter of fact of Fraser and Fraser's men. Therefore, these questions having been put to Dunn the other day, as to what his actions were, and as to what he said, and what orders he gave, it makes it quite relevant that we should know the relationship between the railway company and this man representing the Provincial Government or the Forest Branch. And if there is an arrangement between them, it is quite relevant. Otherwise I do not see how

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we can get the picture of what Dunn's powers are.

The Court: If Dunn saw fit that day to say, Well, I think it is safe enough, and the Canadian National, either represented or unrepresented, saw fit to accept that position, I would say as a matter of law that does not relieve them from liability if the fire for which they are to blame, destroyed property.

10 Mr. Maitland: That is quite true; but I do think I should have the true relationship between the Forest Branch and this railway company.

The Court: On what ground?

Mr. Maitland: Because of the argument that will be advanced by my learned friend to the effect that we undertook, along with Dunn, not only to take charge of this fire, but they even go so far as to say we did so to the exclusion of the C.N.R. Now, of course if it could be said that we to the exclusion of the C.N.R., took it over, and said, You keep away, and have nothing to do with this fire—

20 The Court: If that is developed in the defence, I will pass upon it when the time comes.

Mr. Maitland: It was developed the other day in cross-examination, they put it to Dunn in that way, that suggestion. It was just a colour, a slight suggestion.

The Court: My view of the law is, that whatever Dunn did at the time is not binding upon Kapoor, unless Kapoor voluntarily accepted his judgment, and in other words, said to the Canadian Northern, go away, don't concern yourself with this affair, you are to blame for it but we take it on ourselves to fight the fire.

30 Mr. Maitland: Your Lordship thinks this evidence cannot be put in?

The Court: I rule for the moment that it cannot go in. I cannot see the privity of the parties, that would entitle you to use the document as against them.

(The Jury here returned into Court.)

Mr. Maitland: There are just two matters, Mr. Conway, I want to ask you about.

The Court: You live in this city? A. In Nanaimo.

40 Mr. Maitland: You were brought here from Nanaimo. Do you remember a conversation with Mr. Fraser and Naranyan Singh on the 20th of August? A. Yes—I don't recall that Naranyan Singh was mixed up in that conversation.

Q. Tell us what you remember of it. A. In the previous conversations with Mr. Fraser, in attempting to show that due to the location of the fire, the starting point of this fire, it was one

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which the railway company should assume responsibility for its control, Mr. Fraser pointed out that he did not care to accept any responsibility until he had discussed the matter with section foreman Reese. And it was some time later on the track when we encountered section foreman Reese, and Mr. Fraser had his conversation with him; apparently ascertain what he wished to know. And from that time we passed on to such time as we concluded our conversation later on.

10 Q. Did you have any discussion as to where the fire started?  
A. With Section Foreman Reese?

Q. Yes? A. No.

Q. Now, later on I understand you got a letter which is already in as an exhibit, from Mr. Fraser, asking you to take charge of this fire by the C.N.R.? A. Yes.

20 Q. Will you tell us under what circumstances that was given, please? A. After inspecting the point of origin of the fire, with Mr. Fraser and the Hindu Naranyan Singh, and Kapoor Singh who was acting as interpreter, we carried on through this conversation with Section Foreman Reese; and apparently Mr. Fraser arrived at the decision then that the occurrence of the fire and so forth was as we were attempting to show him, and he could not advance any argument as to why the railway company should not assume responsibility for its control. But he pointed out that he could not take this step without consulting some officials in Vancouver. He asked us on the ground to take the fire over, and we explained to Mr. Fraser that we would take the fire over provided he gave us a written request to do so, for the Company which he represented, the Canadian National. Then  
30 Mr. Fraser advised us that he could not do this without consulting some officials in Vancouver. So we decided to drive back to Victoria, which we did, and continued to the Canadian National station. And Mr. Fraser and Mr. Wright went into the station, and so far as we know had this conversation with the Vancouver officials; and Mr. Wright came out and handed me a letter which merely asked us to take the fire over, but did not set out in any way that it was for the Canadian National or Canadian Northern Railway Company. I passed the letter to Mr. Orchard, who was my superior officer, and asked his opinion of it; and his opinion  
40 was the same as mine, that it was not the wording which we would care to accept; that is, according to how we had been instructed by our Department. Mr. Wright took the letter and went back in, and I think Mr. Orchard followed him in. And some minutes later Mr. Orchard came out with the amended letter, which we accepted.

The Court: Exhibit 23, that is the letter you refer to?

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Mr. Maitland: Exhibit 23, is this the letter that you got (handed to witness)? A. Yes.

The Court: Orchard came out with it? A. This letter Mr. Orchard I think brought out.

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CROSS-EXAMINATION BY MR. MAYERS:

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10 Q. You had power to summon the assistance of any male person between the ages of 18 and 60 to assist in putting out and extinguishing any fire, had you not? A. With some few exceptions, which you do not mention.

Q. I will read you the whole passage of the Act that I am referring to: Any employee of the Forest Branch may employ or summon the assistance of any male person between the ages of 18 and 60 except only train men, telegraphers and dispatchers on duty, doctors, and persons physically unfit, for the purpose of controlling and extinguishing any fire. A. Yes.

Q. You knew that? A. Yes.

20 Q. You in fact did order Mr. Fraser to assist in extinguishing the fire on the Wednesday, didn't you? A. August the 20th.

Q. That is right, isn't it? A. Yes.

Q. Why did you want any writing from Fraser? A. Because I am instructed by my Department I cannot take the statement without it is written.

Q. You have power to compel anyone to assist in putting out fire; what power had you to call upon anybody to give you any writing? A. That is a matter of policy that would have to be answered by higher officers in my Department. It is a definite instruction to me by my Department.

30 Q. There was no reason at all, so far as you can tell me, then, why you should have required any writing at all from Mr. Fraser, when you had already ordered him to assist in putting out the fire; is that right? A. Not unless Mr. Fraser wished us to take the fire over.

Q. There was no question of taking any fire over by anybody. You had power to put out the fire, and order anyone of the citizens I have mentioned to assist you, hadn't you? A. Certain fires.

Q. Any fire? A. Yes.

40 Q. Why then did you persecute Mr. Fraser into giving you a letter? A. The railway companies, under instructions or orders from the Board of Railway Commissioners, are called upon to control any fires occurring within three hundred feet from the centre of their right of way.

Conway, for Plaintiff—Cross Examination.

Q. You say that was what you were acting under?

Mr. Maitland: I don't think he has finished his answer yet.

Q. Is that what you were acting under?

The Court: Had you finished your answer? A. No, sir.

The Court: Finish it; don't let Counsel prevent you from fully answering any question. A. Under that order we are instructed by our Department. That, in dealing with railway fires, that is fires which occur within that liability strip, that, if the fire assumes the size which the railway company apparently don't feel like handling, they can request us to take it over, that is to assume the controlling; we are instructed by our Department that we may do so; provided we receive a written request from the Company, from some official of the company, to do so.

10

Mr. Mayers: Were you acting under that order of the Board of Railway Commissioners? A. Yes.

Q. You were. And that is why you say you got this letter from Mr. Fraser; is that it? A. Yes.

20

Q. Did Mr. Fraser tell you on that Wednesday that he resented what you said to him? A. No.

Q. Never? A. No.

Q. Did you accuse Mr. Fraser on that Wednesday of knowing nothing about the fire of that date? A. No.

Q. Either when you were up at Kapoor or when you were conversing with Mr. Fraser in Victoria? A. Not at any time on that day did I accuse Mr. Fraser of knowing nothing of the fire.

Q. Did Mr. Fraser tell you that he had been there for a good part of the night with a gang of men who had remained there the whole of the night? A. I do not recall the exact words. He said he had been at the fire.

30

Q. Did he show you on the ground the fire guards that he had built or caused to be built? A. A small fire guard, yes.

Q. One small fire guard? A. That is all that was shown me.

Q. Did Mr. Fraser strenuously throughout his conversations with you deny that the railway company was under any responsibility for the origin of that fire? A. That has been Mr. Fraser's contention ever since I have had dealings with him.

40

Q. Mr. Fraser refused to give you any writing at all at first, did he not? A. The question of writing was not mentioned in the first. We merely asked Mr. Fraser to comply with the instructions as given to his Company by the Board of Railway Commissioners.

Q. And did not Mr. Fraser at the first, on your request, refuse to give you any such writing as you were asking for? A. We didn't ask Mr. Fraser for any writing at the first of the discussion.

Q. When you did ask him, at first he refused? A. He said that he did not want to assume responsibility, and that he could

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not do so without consulting some other officials.

Q. When he eventually signed this exhibit, did he not sign it under a strong protest against being forced to give anything?

A. I wasn't present when Mr. Fraser signed that.

Q. Did you refuse to do anything in the way of fighting that fire until Mr. Fraser gave you this writing? A. I explained to Mr. Fraser that we could not.

10 Q. In fact, you did refuse, then? A. I suppose that is a refusal.

Q. And did not Mr. Fraser, when you and he were at Kapoor together, urge you to set all the men whom you could get up there, to work in fighting the fire? A. He asked us why we could not do so.

The Court: What was your answer to that? A. The same as given to him earlier, that we could procure these men provided they were taken on the railway company's payroll.

Mr. Mayers: That was it, was it; it was just a question of cost? A. Yes.

20 Q. That was what was in your mind, was it? A. Yes.

The Court: In the meantime the fire was burning? A. Yes.

Q. The great harm had been done at that time, as it turned out? A. Practically all of the damage had been done at that time.

Q. That is on the 20th?

Mr. Mayers: Well, I suggest to you that the fire was still burning on the Wednesday? A. Yes.

Q. And threatening standing timber other than that belonging to the Kapoor Lumber Company? A. Yes.

30 The Court: What was the outcome of this fire, did you go up there to stop it, or did you treat through the Company? A. The outcome was that the fire was taken charge of by the Forest Branch upon the receipt of this written request; and a crew put on to control it.

Q. Did you stay eventually? A. Yes.

Mr. Mayers: How long did it take? A. Approximately a week.

40 Q. Well now, I understand that your object was to throw the cost on the Canadian National Railway; is that it? A. My object was to comply with the instructions given me by my department.

Q. Wasn't that the real object in your mind, as you have already told me, to throw the costs on the Canadian National Railway? A. As I understood the arrangement, that fire was one under which an agreement between the two, the Forest Branch and the railway company, responsibility for control was on the railway company.

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Q. Now, cannot you answer that question; the object was to throw the cost on the Canadian National Railway? A. I don't see where I enter into the cost. The cost is between the railway company and the Forest Branch.

Q. But you have told me that what you had in mind was the cost of fighting the fire; isn't that right? A. Yes.

Q. That you wanted to throw it on the Canadian National Railway? A. Because, as I understood it, the agreement drawn  
10 between those two was that cost should be borne by the railway company.

The Court: Now, you have got the answer. He was trying to put it where he thought it ought to be; and if he is right he is right, and if he is wrong he is wrong.

Mr. Mayers: It didn't much matter whether the costs be borne by the Provincial Government or the Canadian National Railway, it eventually comes out of the taxpayers' pocket? A. That is a matter that would have to be answered by the Department. It is just a question of policy, and arrangement between  
20 the two.

Mr. Maitland: I am a little fussy about which one pays the taxes.

Mr. Mayers: Well, do you mind which Government spends your money?

Mr. Maitland: I prefer it is not my own; that is all.

(Witness stands aside.)

Mr. Maitland: I have a certified copy of the Rules of the Board of Railway Commissioners under the Railway Act, General Order 362, which I would like to put in; and also attached thereto  
30 the fire instructions under it. (Put in as Exhibit 35.)

Mr. Mayers: This is the one we produced to you on the examination for discovery?

Mr. Maitland: Possibly we can examine this copy, and put it in at the next sitting.

Mr. Maitland: I want to put in certain questions from the Discovery Examination of Fraser, Superintendent of this division or line.

Mr. Maitland read questions 1 to 10; 60 to 71; the general working instructions referred to, put in as Exhibit 36; questions  
40 93 to 102; 106 to 153; 174 to 211, and at the request of Mr. Mayers, 171 to 173; Mr. Maitland then began at 169 to 211; the map marked by Mr. Fraser is put in as Exhibit 37; 223 to 310; 336 to 342, and at Mr. Mayers' request he began at 313 to 336; 347 to 366; 436 to 478; 512 to 516, and at request of Mr. Mayers 517; 526 to 531; 536 to 557; 664; 707, beginning, "Are you familiar,"

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to 730.

Mr. Maitland: That is all of that, my Lord. I have the discovery of Jones and Miller to put in on Wednesday, and one or two other short witnesses.

Mr. Mayers: Mr. Shallcross?

Mr. Maitland: Mr. Shallcross is at Rupert.

The Court: We will adjourn until 11:30 on Wednesday. May I add a word of caution to you, Gentlemen of the Jury, in addition to what I said the other day; it is this: this case is one  
 10 of importance, not only in the amount involved, but the fact that a special jury has been called to hear it; and I would ask you particularly not to converse with anybody about the action in the meantime. Keep your minds clear—until Wednesday—do not let anybody discuss any feature of it—concerning the parties, the pleadings, or the matter. Will you observe that? (Jurymen replied Yes.)

(Court here adjourned until 11:30 on Wednesday, May 25th, 1932)

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Excerpt from Examination for Discovery of Norman S. Fraser.

EXAMINATION BY MR. MAITLAND:

- 1 Q. Mr. Fraser, you are an officer of the Canadian Northern Pacific Railway Company? A. Yes.
- 2 Q. What position do you hold? A. Assistant General Agent.
- 3 Q. For where? A. For Vancouver Island lines.
- 4 Q. Has that division got a name of its own? A. Nothing further than the Vancouver Island Lines.
- 10 5 Q. And you run the railway line out of Victoria, don't you? A. Yes.
- 6 Q. To where? A. Kissinger, and also one to Patricia Bay.
- 7 Q. Now you are familiar with the fire in question in this action? A. With the which?
- 8 Q. The fire in question; you know where it occurred, the fire that is in question in this action? A. Yes.
- 9 Q. Where was it? A. Approximately at mileage 35.2, Cowichan subdivision.
- 20 10 Q. Cowichan subdivision, that is on the Victoria and Kissinger line, is it? A. Yes; that is the name of the subdivision.

\* \* \* \* \*

60 Q. And you knew that you were to protect it for whatever distance was in the order of the Board of Railway Commissioners, at any rate?

Mr. Mayers: That is not in issue; whatever the order says will go.

30 61 Q. Well, what do you know about it? A. Only I was under the working instructions as prescribed in our working time table.

62 Q. Have you got that here? A. I have that here, yes, the general working instructions (produced).

63 Q. These are instructions that you have given to every employee? A. Yes.

40 64 Q. That is in carrying out this order it will be the duty of all officers and employees generally to take precautions 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. And then it says, to all conductors, engine men and trainmen: conductors, engine men and trainmen to discover or receive notice of the existence or 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 the same by wire to the superintendent,

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and also to the agent or person in charge at the next or nearest point where there shall be a telegraph or telephone communication, giving exact location by mileage. Now this is taken from the order of the Board of Railway Commissioners apparently 19th of April, 1922, these instructions that you have given here? A. That is on the top.

65 Q. Yes, as it says. And you say that this was given to every one of the employees? A. Yes.

10 66 Q. Would they get a copy of this personally? A. That is the working time table, yes.

67 Q. This is time table 3 they call it? A. Yes.

68 Q. Is that what you call it? A. Time table number 3.

69 Q. And this is the one that was in existence at the time of this fire in 1930? A. Yes.

70 Q. Taking effect at 24:01 Sunday, May 18, 1930? A. Yes.

20 71 Q. I think we better put the whole thing in; I am referring to this page (marked Exhibit "A"). A. That is page 13, Time Table Number 3.

\* \* \* \* \*

84 Q. Did you undertake to put out any— did you have arrangements or have men or have equipment for fighting the fire on your own right of way? A. We had.

\* \* \* \* \*

93 Q. A map of from mile 35 to 36 is marked for identification Exhibit "B"; scale one inch to one hundred feet. A. That is slightly over the inch.

30 94 Q. Well, about one hundred feet? A. About one hundred feet.

95 Q. Now you have seen this map, at least one like this before, this Exhibit "B"? A. Yes, somewhat similar.

96 Q. You were operating over this line during the month of August, 1930? A. Yes.

97 Q. Now we will take first the 16th of August; I want the traffic movements on the 16th of August. (Document produced). This is the 16th of August, 1930? A. 16th of August, 1930.

98 Q. Saturday; is that right, Mr. Mayers?

Mr. Mayers: Yes.

40 99 Q. Before you give me that—I understand you operate two kinds of trains, a passenger and a freight, on this line? A. We operate a motor coach.

100 Q. That is gas, isn't it? A. Gas.

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Mr. Mayers: Gasoline. A. Gasoline, to be accurate. And freight trains with oil-burning locomotives.

101 Q. Those are the two kinds of locomotives you have, one gasoline coach? A. Yes.

102 Q. At least the motor power, one is a gasoline coach and the other is an ordinary oil-burning engine, I presume? A. Yes.

\* \* \* \* \*

10 106 Q. On Saturday what record have you got as to traffic movement? A. Motor coach 15806 on train 391.

107 Q. 391 runs which way, Mr. Fraser? A. All odd numbered trains run west; even numbered trains run east.

108 Q. Odd numbers go west, and the number 2 and number 4 are always eastern trains? A. Always eastern trains. That is the standard railway practice.

109 Q. 391 would be going west, wouldn't it? A. Yes.

110 Q. And that would be to Kissinger from Victoria? A. Yes.

20 111 Q. Left Victoria at what time? A. Do you want the crews, the names?

112 Q. We will come to that in a minute. 391 left Victoria— A. —nine o'clock, arrive Kissinger 12:55. Left Kissinger 13:15; that is 392 eastbound.

113 Q. Yes, left Kissinger 13:15. A. Arrived Victoria 17:10.

114 Q. That is the gas car? A. Yes.

115 Q. What crew would she carry? A. Conductor Mulligan, Engineer Jones—or Engineman Jones as we call him.

30 116 Q. What is the difference between an engineer and an engine man, is there any? A. No, but in the last revision of the standard code the word engineman was substituted for engineer, just to cover a case like this, where a man is on a motor coach, or some other—

117 Q. Something beside an engine? A. Yes.

118 Q. We have Mulligan and Jones; have we anybody else on that trip? A. No, that is all.

119 Q. That was a passenger trip? A. Yes. Now, way freight—

40 120 Q. Let us clear this first up. We have the gas car leaving Victoria at nine, getting to Kissinger at 12:55, leaving at 13:15, and arriving at Victoria 17:10? A. Yes.

121 Q. And we have only two men, Mulligan and Jones? A. Yes.

122 Q. Did either of them report any fire to you that day?

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- A. No.
- 123 Q. Now we have another train, what do you call it?  
A. Number 570.
- 124 Q. 570? A. Yes, way freight.
- 125 Q. That doesn't take any passengers at all? A. No.
- 126 Q. 570, way freight— A. —left Kissinger five o'clock.
- 127 Q. Left Kissinger, that is travelling east going from  
Kissinger—left Kissinger when? A. Five o'clock. Arrived Vic-  
10 toria 13:50.
- 128 Q. Well, that is five in the morning? A. Yes.
- 129 Q. You always leave that early? A. Yes.
- 130 Q. Arrived Victoria when? A. 13:50.
- 131 Q. That is 1:50 we call it. Is that the only trip it made  
that day? A. That is all. That is all the movements of that date  
on the Cowichan subdivision.
- 132 Q. What train did you have on this way freight, how  
big a train was that? A. Well, he left Kissinger with one load  
and one empty and arrived Victoria with 19 loads and 12 empties.
- 20 133 Q. Nineteen cars loaded? A. Nineteen loaded cars  
and twelve empties.
- 134 Q. And how big a crew would he have on that train?  
A. It would be five men on that train.
- 135 Q. Who are they, have you got the names? A. Con-  
ductor Miller, Engineer Winters—that is the 16th—here is the  
train, Number 570 (indicating).
- 136 Q. Just read them out. A. Conductor Miller, Engin-  
eer Winters, Brakeman Smith and Brakeman Mainprize. The  
fireman's name is not on this register, there is no place for it; he  
30 registers in the shop.
- 137 Q. Can you give me that tonight?  
Mr. Mayers: I can give it to you now; Fireman Standish.  
A. W. J. Standish.
- 138 Q. Did any of these members of the crew of that way  
freight report any fire to you on the 16th? A. No. Not that I  
have any record of.
- 139 Q. Well, what about your memory? A. No, I have  
no—
- 40 140 Q. There was no report made then. Who is the traffic  
superintendent of this line? A. There is none.
- 141 Q. Well, you would be the man? A. I represent that  
official.
- 142 Q. Any report of that kind would come to you? A.  
Come to me, yes.
- 143 Q. What kind of an engine was that, Mr. Fraser? A.  
She is what we call an M-4, 35 per cent. oil burner.
- 144 Q. What do you mean by 35 per cent. oil burner? A.

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Well, an oil burning engine of 35 per cent. capacity.

145 Q. How is it as to type, is it a new type or old type?

A. No, it is a standard type that has been in use for a number of years.

146 Q. When was it built, this engine? A. I have no idea.

147 Q. You have no idea? A. I have not examined it for that.

10 148 Q. I don't suppose they would give you new engines for this line? A. It was in good condition.

149 Q. Was it old or new? A. Oh, I cannot give you that information without checking up.

150 Q. You have pleaded an awful lot about these engines, Mr. Mayers, do you know when this engine was built?

Mr. Mayers: No, but we could find out from somebody here.

151 Q. Will you try to get that at noon?

Mr. Mayers: Yes.

152 Q. That way freight made the whole trip right through, didn't it? A. Yes.

20 153 Q. Then we come down to Sunday the 17th, no traffic. A. No traffic on the Cowichan sub on Sunday.

\* \* \* \* \*

169 Q. The Provincial. What was the condition as to dead or dry grass or weeds, and that sort of thing, on your right of way? I don't mean your tracks necessarily, but on your right of way, between 35 and 36; say from the 15th of August until the 18th? A. Well, it would be more or less of that at all times.

170 Q. I see. Well then, would you say there was more or less of that at the time of the fire?

30 Mr. Mayers: More or less of what?

171 Q. Of weeds and dead or dry grass, and that sort of thing? A. No, there was a lot of bracken there, which is considered a good guard.

172 Q. Is it dead? A. No, not usually; the bracken at that time is not dead.

173 Q. Are you suggesting there was no dead grass? A. I didn't say there was none. It was no doubt well covered with green bracken; the undergrowth which you most generally get, with a green underneath.

40 174 Q. There was considerable dead grass, wasn't there, on that right of way; I am taking the whole right of way, one hundred feet? A. There was some, yes.

175 Q. You cannot say how much? A. No.

176 Q. And I suppose all the grass there was dry? A. Throughout the whole country there was more or less dry grass,

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burnt by the sun.

177 Q. When did you cut that right of way? You know what I mean by that, cut your weeds and your grass, and that sort of thing; have you a record of that? A. No, I haven't a report on that. We are prohibited from burning.

178 Q. I know that. But don't you cut and pile it? A. Not in the midsummer.

179 Q. When do you do that? A. In the spring and fall.

180 Q. You just let the grass dry and stay in that condition, do you? A. It is usually protected by the growth of bracken.

181 Q. Assume there is bracken there, but you just let the grass fall and stay there on your right of way, is that right? A. Yes.

182 Q. And that is what you did this summer? A. The usual practice.

183 Q. And you count on the bracken as your fireguard or protection, is that right? A. With the ordinary precautions that we use, of patrol, yes.

184 Q. What precautions were you using as to patrol, between the 15th and the 18th of August, 1930? A. Our foremen patrol the track practically daily.

185 Q. For the purpose of fire? A. To see that everything is in good condition, and what general conditions are.

186 Q. And when would he patrol this track for you, did he have special times to do it? A. No; he would use his own—

187 Q. Whose duty was it to patrol that track between mile 35 and 36 on this line? A. Foreman Reese.

188 Q. And Reese would report I suppose to you, would he? A. He would report to the Division engineer, Munro, or to me direct.

189 Q. Can you tell me whether Reese patrolled that track between mile 35 and mile 36 on Saturday the 16th? A. My recollection is that he patrolled to mile 35.4 from 43.

190 Q. Mark that on this map now; to mile 35.4; that would be from Victoria towards Kissinger? A. No, he patrolled this way, from the west along down.

191 Q. And how far did he get? Take your time, Mr. Fraser, and don't guess about this, please. A. It would come in somewhere about here.

192 Q. Mark that "C", please (witness does so). You are talking now about Saturday the 16th? A. Yes.

193 Q. Did he report any fire to you on Saturday the 16th? A. No.

194 Q. Well then, when did he next patrol it? what about Sunday the 17th? A. They don't patrol Sundays.

195 Q. There was no patrol on Sunday the 17th? A. No.

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- 196 Q. The 18th did he patrol it? A. No.
- 197 Q. Well, why? A. The report he gave was that he could not get down here on account of this engine derailed, he couldn't run his—
- 198 Q. Where was the engine derailed—mark it "D" (witness does so). Now is that derauling on the main line or the spur do you remember? A. On their spur.
- 199 Q. How would that affect getting along the main line?
- 10 A. Because he could not run in the face of the train, and not having communication he could find no—
- 200 Q. (Interrupting) You mean the relief train? A. No, this train that was derailed.
- 201 Q. How did this man Reese travel? A. By truck motor.
- 202 Q. And at what time was this train derailed? A. About 12:30.
- 203 Q. And what time was she re-railed? A. May I look at the train sheet for that date?
- 204 Q. Sure; that is what I want. A. About 16:20.
- 205 Q. That is when she was re-railed? A. Yes.
- 206 Q. All right. Did he make a patrol after she was re-railed on the 18th? A. No; by the time that train got to where he was his day's work would be over.
- 207 Q. And then you got no patrol done between 35 and 36 beyond the point "D" on this map, for Monday the 18th. A. I was there with a number of other men, and was all over that ground.
- 208 Q. What? A. I was there with two other section
- 30 gangs, and all over that ground.
- 209 Q. What time did you get there? A. Sixteen o'clock Monday the 18th.
- 210 Q. That would be four in the afternoon? A. Yes.
- 211 Q. Well, up to that time you got no report from anybody, earlier in that day, of a patrol being made between 35 and 36? A. No.

\* \* \* \* \*

- 223 Q. Now what is the first fire you came across on Monday, if you came across any when you were there? A. Monday
- 40 the 18th?
- 224 Q. Monday the 18th of August? A. Monday the 18th of August, about 12:30 Conductor J. A. Miller telephoned from Kapoor, and dispatcher on duty called me to the 'phone; Miller informed me that his engine was off the track.
- 225 Q. That is at the point "D" on the map? A. Yes;

Excerpt from Examination for Discovery of N. S. Fraser.

and he would let me know in a few minutes if he required assistance. At the same time he reported having seen a small fire east of the east lumber yard.

26 Q. Is that all the detail he gave you? A. No, I am coming to that.

227 Q. Go on. A. East of the east lumber yard, and that he had notified the mill people, and they would send men down.

10 228 Q. What? A. And they would send men down. A few minutes after, he came back on the telephone and informed me that he could not get his engine on without assistance. So I immediately ordered a train with the auxilliary, for Kapoor.

229 Q. That train would run out from Victoria, wouldn't it? A. Yes.

230 Q. And it would pass from 35 to 36 on its way to the derailment? A. The derailment was met before you get to 36.

231 Q. 35 is down here (indicating)? A. Yes.

232 Q. It would travel from 35? A. Yes, up to that point (indicating).

20 233 Q. But it would pass this point where the fire was before it would get to the point of derailment? A. Yes.

234 Q. You understand that question, Mr. Fraser, don't answer any question unless you are clear on what I am saying, you see. Are we clear on that? A. Wait until I hear what I said that raised this question.

235 Q. We will start over again. Your relief train—is that what you call it? A. Yes.

236 Q. Left Victoria for this point D on that map, which is the point of derailment? A. Yes.

30 237 Q. By the map I mean Exhibit "B". And in going to that point D, the point of derailment, you would have to pass the place where Conductor Miller told you the fire was? A. Yes.

238 Q. You mentioned a moment ago that the fire was in the east yard, is that it? A. No, east of the east lumber deck.

239 Q. And did he give you any exact particulars as to where that fire was, particularly in relation to your right of way? A. Probably said just off the right of way.

240 Q. You don't remember it? A. I don't remember.

40 241 Q. But in any event the report indicated to you that it was close enough for you to take an interest in it? A. Oh, yes.

242 Q. And what time did the relief train leave Victoria? A. 14:30.

243 Q. 14:30—2:30 in the afternoon you left Victoria? A. Yes.

244 Q. That would be how long after you got the report? A. A little less than two hours I should say.

245 Q. And how long does it take you to go from Victoria

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to point 36? A. We arrived at point 35.5 at 16 o'clock an hour and a half.

246. That is, you got there at four o'clock? A. Yes.

247 Q. In the afternoon. When did you get the message from Miller? A. Somewhere between 12:30 and 13 o'clock.

248 Q. And you left an hour and a half or two hours later? A. Yes; we had to call a crew.

10 249 Q. I appreciate that; but it was an hour and a half or two hours before you left Victoria? A. Yes.

250 Q. And how was that train which left for this point of derailment made up? A. He had four auxilliary cars and the caboose.

251 Q. What are these auxiliary cars like, Mr. Fraser? A. What you call a wrecking outfit.

252 Q. What are these cars like? a flat car? A. No; there would be a truck car, a tool car, a blocking car, and car for men to ride in.

20 253 Q. Then they are like automobile garage appliances that they send out with equipment to re-rail a car? A. Exactly. That is, the auxilliary complete consists of six or seven cars.

254 Q. And this auxilliary consisted of how many? A. Four.

255 Q. Are they all necessary for the purpose of re-railing? A. Well, we take them with us; we don't know what we may encounter—blocking and tie car and rail car; it is carried as practically a unit, so that anything that comes up you have the equipment for.

30 256 Q. I am not criticizing that. In any event on this occasion you had four auxilliary cars? A. Yes.

257 Q. And the caboose? A. Yes.

258 Q. Of course the caboose is just for the men to sit in, isn't it? A. Yes.

259 Q. So we have then what, an oil engine? A. Yes.

260 Q. Which engine? A. 427.

251 Q. Is that the one you mentioned a while ago, or another one? A. The 2116 I spoke of before.

262 Q. Is this 427 old or new? A. Well, we haven't any new ones.

40 263 Q. You had 427, and you had four auxilliary cars, and your caboose? A. Yes.

264 Q. And you had your complete equipment for re-railing in case of derailment? A. Yes.

265 Q. What other equipment did you have with that crew that left that day for this place? A. Well, I don't know as we had any other equipment, except the standard auxilliary equipment in that. But I picked up on the line Foreman Davis at Met-

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chosin, and Foreman Frederick near Milne's Landing, with their men, their fire fighting equipment, buckets, mattocks, shovels—

266 Q. We will come to that in a minute. When you left you had no fire fighting equipment at all, when you left Victoria?

A. Well, we did carry certain buckets, and shovels.

267 Q. I want that as clearly as you can give it to me. A. I would have to check what was in these cars, what tools.

268 Q. You were there. A. We had all sorts of tools.

10 269 Q. But the fire fighting equipment you had I suggest was the equipment that would have been there anyway, and was not affected by the fact that you had had any report that there was a fire? A. We had the usual equipment.

270 Q. Exactly; and you took nothing additional because of this telephone communication you had from Miller when you left Victoria? A. No. Our fire fighting tank car was beyond there. If it was necessary we would go and get that.

271 Q. We will get to that in a minute. How many men did you have when you left Victoria? A. All of the train crew.

20 272 Q. Who were they? A. McCague, and I cannot be sure of the others.

273 Q. Have you a report of it, Mr. Mayers? A. Engine man—that is all in there—these were two besides those—I think it was Feldon—

Mr. Mayers: Aren't you speaking about that auxilliary 247?  
A. These were loose men in addition to the train crew.

274 Q. I am asking you about the whole works.

Mr. Mayers: We can give you the train crew.

30 275 Q. Yes, give me the train crew. Mr. Mayers: Engineman Seward, Fireman Livingstone, Conductor J. A. Cameron, Brakeman Muckleston, Brakeman Good.

276 Q. Are these the complete crew that left Victoria, that Mr. Mayers has just read? A. That was the train crew.

277 Q. And in addition to that— A. —I had McCague, Carman, A. W. McKenzie, Locomotive maintainer, and I think Feldon.

278 Q. What was he? A. He is a carman.

279 Q. What do you mean by a carman? A. They are the men who assist in this auxilliary, they look after the cars.

40 280 Q. They are experts on re-railing, are they? A. Yes; McCague is.

281 Q. You had them quite often, I suppose? A. Not necessarily.

282 Q. Well, I have got now your complete crew leaving Victoria, which is really a crew properly equipped to re-rail this engine, is what that amounts to, isn't it? A. Yes.

283 Q. And then you told me something about picking up

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someone else on the way along? A. Foreman Davis near Metchosin, with three or four men; and Foreman Frederick near Milne's Landing.

284 Q. How far is Milne's Landing from mile 35? A. Milne's Landing is at mileage 26.5.

285 Q. I see. That is about nine miles away? A. Yes.

286 Q. You better give me the names, if you can, of this crew of men you picked up; can you do that, have you got that, Mr. Mayers? A. I can get it from the timekeeper's office; these men who were working then.

287 Q. If you please. A. On Milne's Landing and the Metchosin gang.

288 Q. What equipment did they give you? First take Metchosin, what did you get? A. Buckets, mattocks, shovels, the usual fire fighting equipment which they have.

289 Q. And then you continued? A. Yes; and picked up at Milne's Landing.

290 Q. Did you get any equipment there? A. The same.

20 291 Q. The same equipment? A. Yes.

292 Q. And then you went on your journey, and you went past this fire to the point of derailment, didn't you? A. Yes.

293 Q. You mentioned a moment ago about a tank car; where was it? A. That was located at Deerholme.

294 Q. Where is that? A. Deerholme is at mileage 58.

295 Q. That would be towards Kissinger? A. Yes.

296 Q. Was it there at this time? A. Yes.

297 Q. Now when you came up from Victoria to re-rail this engine, I understand this engine was derailed on a spur? A. Yes.

30 298 Q. There was nothing to prevent you going right through if you wanted to, to Deerholme, was there? A. No.

299 Q. There was nothing to prevent you going up if you wanted to and getting that tank car, was there? A. No.

300 Q. As a matter of fact did you have any engine at all up in the Kissinger direction? A. No.

301 Q. Will the tank car run under its own power? A. No.

302 Q. And you would have to go up and get it? A. Yes.

40 303 Q. How long would it take to go up to Deerholme from pont 35? A. Oh, about an hour.

304 Q. All right. Then you went right on to the point of derailment, this point D; and did you take the complete crew of men you had picked up in Victoria and Metchosin—and what was the other place—Milne's Landing, right up to this place of derailment? A. Yes.

305 Q. And did you all work on re-railing this engine for fifteen or twenty minutes? A. Yes.

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306 Q. How long were you re-railing it, about twenty minutes? A. About that.

307 Q. Now what is this tank car used for? A. Exclusively for fighting fires.

308 Q. That is what it is for? A. Yes.

309 Q. And you are required by the railway board to keep one, aren't you? A. Yes.

10 310 Q. What time did you get your engine re-railed; have you got a report there of that? let us get the exact time. A. I have not the exact moment; but the train left at 16:35; so that it must have been some few minutes before that.

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313 Q. Then what did you do? A. I went to the Kapoor Lumber Company's office, and informed the dispatcher the engine was re-railed and the train would proceed; and that we were then going to the fire east of there.

314 Q. And then what did you do? A. I picked up a ranger whom I afterwards learned his name was Dunn.

20 315 Q. Where? A. At the Kapoor office. And whom I had arrangement with the Forestry Department to meet. And proceeded with the train to the fire.

316 Q. Now where was the fire? Mark it E (witness does so); kindly print the E. A. You want a square letter.

317 Q. Yes. That is fine. How far back was that fire from the right of way? A. Oh, I should say 100 to 130 feet.

318 Q. Not closer. Are you talking now about the track or the right of way? A. Well, I was on the track.

30 319 Q. You say it was about 100 feet from the track? A. 150 possibly feet from the track.

320 Q. What area did it cover? A. Oh, very small, probably 20 or 25 feet, at the outside; logs piled up, but they were not all burning.

321 Q. Well, did you take your equipment you had and the fire fighting crew, and your buckets and your shovels and your mattocks down there? A. Yes.

322 Q. What did you do when you got there? A. We got off and we saw three men working here.

323 Q. That is at point E? A. Yes.

40 324 Q. Three what kind of men, Hindus? A. Yes. And we had passed a couple through this rock cut, in coming through this rock cut.

325 Q. You passed a couple working, coming through the rock cut? A. They were not working, but carrying pails.

326 Q. Just mark "rock cut" on the map there (witness

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does so). I see. A. Yes. And the forest ranger went over around here.

327 Q. By "around here" you mean a little— A. He went right down here, and over to this fire, circled there and came back here.

328 Q. Make a dotted line showing where he went.

Mr. Mayers: He walked around the fire. A. He walked around the fire.

10 329 Q. He walked around the fire; that is fine. To get warm I suppose. And then what happened? A. He came back, and asked me if these men I had were on their home section, and I told him they were not, that they came from Milne's Landing and Metchosin.

330 Q. And then what happened? A. And he said, Well, just wait a minute; and I said, Do you want them to go to work? He said, Just wait a minute, and I will go around. He went around again.

20 331 Q. You mean your own men? did he want your own men? A. My own men; they were all there.

332 Q. That is this man Dunn? A. Yes. He went around again; and when he came back he said, Take your men away out of this back home, we can finish this thing up in a few minutes.

333 Q. And away you went? A. There was nothing else to do.

334 Q. I am not asking why, but you did go, didn't you? A. Yes.

30 335 Q. And left three Hindus? A. Three there, and two in the rock cut. That is all I saw. There may have been one hundred there—

336 Q. There is no doubt about this, though, Mr. Fraser, without arguing about whose fault it was, if you had put these men that you had in your auxilliary, the men you picked up at Metchosin, and the men you picked up at Milne's Landing, to work, you would have had no difficulty putting that fire out there in that 25 foot area, would you? A. Oh, no.

337 Q. And did you talk to the Hindus at all there? A. No, not at that time.

40 338 Q. Have anything to do with them? A. No; I don't think I spoke to any of them.

339 Q. You saw two other Hindus going down there with buckets and shovels and things, didn't you? A. Yes.

340 Q. You went right back to Victoria, did you, then? A. Yes.

341 Q. With this army of re-railers and fire fighters? A. I distributed them at their home stations.

342 Q. As you went along you just put them off where they

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belonged. And when did you get back? A. We arrived Victoria at 18:45.

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347 Q. Let us try and clean Monday up, then. I want all of the traffic movements on Monday. That is Monday the 18th we are talking about. A. Monday, August the 18th Motor coach 15806, train 391 left Victoria 9 o'clock.

348 Q. Victoria to Kissinger? A. Yes. Left Victoria 10 nine o'clock, arrived Kissinger 12:55.

349 Q. Who were the crew? A. Mulligan and Jones.

350 Q. Which was each? A. Conductor Mulligan and Engineman Jones.

351 Q. So that that went right over the whole line then between 9 in the morning and 12:55? A. Yes.

352 Q. Arriving at Kissinger at 12:55; and then what happened to that train? A. She left Kissinger as train 392 at 13:15, arriving Victoria 17:35.

353 Q. Now what time would she pass Kapoor going first 20 to Kissinger, that is travelling west? Westbound what time would she pass Kapoor? A. We haven't a report on this sheet; we had no operator at Kapoor; but our time table would show the time she is due there.

Mr. Mayers: 10:40.

354 Q. 10:40—you better check that. A. She is due at Kapoor 10:24.

355 Q. And on the return she is due there at what time? A. 15:44.

356 Q. And she was apparently on time this day both 30 ways? A. She was 25 minutes late into Victoria. Number 392 delayed at Kapoor 38 minutes on account engine 2116 derailed.

357 Q. Were you there when she arrived at Kapoor on the derailment proposition—yourself I mean, Mr. Fraser? You went up with this crew of men; do you remember whether you were there or not when she arrived? A. We arrived there before she arrived.

358 Q. Well now, who were the crew on her? A. On 392?

359 Q. Oh, you told us that, Mulligan and Jones? A. Yes.

360 Q. Did either one report a fire to you that day? A. I 40 was at the scene; they would not stop and report.

361 Q. You were there in the afternoon. A. I met them there.

362 Q. They left Victoria at nine o'clock, was it? A. Yes.

363 Q. And they went straight through to Kissinger, where they got to at 12:55? A. Yes.

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364 Q. During that time did they report having seen any fire to you at all, any one of them? A. Not to my recollection.

365 Q. Well, have you any record of it? A. Not that I know of.

366 Q. And you have no recollection of them having made any report either, have you? A. No.

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10 436 Q. Now who was it suggested that you and Dunn should go down and see the fire? A. Oh well I hardly call it a suggestion, I told Dunn I was going down with my men and train to the fire and he had better come along.

437 Q. Before I forget it, I want to know if you know any of the following men as being employees at that time of yours on this line; G. A. Roberts? A. Yes.

438 Q. What does he do? A. He is train dispatcher.

439 Q. Where? A. In Victoria.

440 Q. During the month of August, 1930? A. G. A. Roberts, 1930, yes, he was working here.

20 441 Q. Frank Mineau? A. Frank Mineau was a locomotive engineer.

442 Q. What train was he on? A. Mineau was on Number 569 August the 18th.

443 Q. John A. Cameron? A. John A. Cameron, conductor on the auxilliary that date.

444 Q. J. H. Davies? A. J. H. Davies, section foreman at Metchosin.

445 Q. Norman Cann? A. Section labourer at Metchosin.

30 446 Q. Joseph Reese? A. Joseph Reese, section foreman at mile 43.

447 Q. J. A. Miller? A. J. A. Miller, Conductor on the way freight 569 August the 18th.

448 Q. And J. H. Jones? A. J. H. Jones, Engineman on motor coach that date.

449 Q. These men all were under your supervision, weren't they? A. Yes.

40 450 Q. Now, having again regard to the point E, what was the first report that you got of that fire; was it as you have already told us this morning, a report from Conductor Miller? A. The report from Conductor Miller.

451 Q. All right. What was John H. Jones doing that day? A. He was engineman on the motor coach.

452 Q. Did he report this fire to you at all? A. Not that I remember.

453 Q. And he was the man who went by there about 10:25

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that morning, wasn't he? A. Yes.

454 Q. What do you mean by 35.2? A. Thirty-five and two tenths of a mile out.

455 Q. Where was this fire at E, about, where is that 35.2? A. This is about two tenths of a mile west of the 35 mile post.

456 Q. That is the point we have in mind apparently when we talk of 35.2? A. That is the supposed point there; I don't know that it was ever stepped off.

10 457 You remember the fire enquiry being held? A. Yes.

458 And all of those employees of yours were produced to give evidence that day? A. Yes.

459 Q. And they were referring continuously to 35.2? A. Yes.

460 Q. That would be the point E, about? A. That is the point that is intended.

20 461 Q. Now did he report to you that about 10:25 in the morning passing 35.2 he noticed a smoke there—J. H. Jones? A. No, he didn't report that to me. He would not leave his car to go to a telephone to do that.

462 Q. Did he report to you that the fire was about 25 or 30 feet from the track? A. No.

463 Q. You have got that information from him since, haven't you? A. I have got information from him that he saw a smoke there that morning.

464 Q. At 10:25? A. When he went west that morning.

465 Q. And you have also got the information from him that it was only about 25 or 30 feet from the track? About that, yes.

30 466 Q. Jones stopped at Kapoor that morning with his car, didn't he? A. He stopped at Kapoor station, yes.

467 Q. Have you got any reports, any written reports made by any employees relative to this fire, Mr. Mayers?

Mr. Mayers: No.

468 Q. Do you mean by that that you are not producing them or you have not got them?

Mr. Mayers: There are none so far as I know. I understand Mr. Maitland to mean reports made with respect to the subject of the litigation; there are none.

40 469 Q. I understand the position then, that there are none, and none have been made.

Mr. Mayers: That is right; there are no reports made under threat of litigation or in anticipation of litigation. We have naturally taken statements from our employees after the litigation was threatened or anticipated, for the purpose of this action.

470 Q. You heard what Mr. Mayers says, Mr. Fraser; did you not get any written report in the course of your ordinary

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duty, from your employees about this fire? before there was any fire enquiry or lawsuit at all? A. I had no written reports from any of those men.

471 Q. And any reports then that are in existence are reports that must have come into existence after the litigation?

Mr. Mayers: After it was anticipated. A. I don't know just what you mean by those reports.

10 472 Q. Any written reports about the fire. Take the man Jones, have you got any report from Jones? A. No, I got no written report from Jones.

473 Q. How long had Jones been working for you up to the date of this fire? A. He is one of our oldest employees.

474 Q. Are these tank cars any use for fighting a fire as small as you say this one was when you first saw it? A. Which, fire fighting tank cars?

475 Q. Yes. A. Oh, yes.

20 476 Q. If you had it there when you saw those three men there, and had actually used it, would you have been able to put the fire out? A. Oh, yes. But when the forest ranger declined assistance I didn't go for the tank car.

477 Q. Well, of course, it is all right to talk about the forest ranger; you are not very much worried about us, apparently.

Mr. Mayers: He has such confidence in the Provincial officials.

478 Q. Now you have got home all right, anyway, on Monday the 18th, Mr. Fraser. Any more trouble that night about fires, any more reports come in? A. None that I remember of.

30 \* \* \* \* \*

512 Q. Now Tuesday is the 19th—we will come back to the 18th for a moment: we have got this far, then, in regard to the 18th, that the first time that this fire was noticed by any of your employees was by Jones at about 10:45 that morning? A. Yes.

513 Q. You have no knowledge of your employees having any earlier knowledge of it? A. No.

514 Q. And Jones did not report it? A. No, not at that time.

40 515 Q. When did he report it? A. Well, he did not make any official report other than he mentioned it when he saw me there in the afternoon.

516 Q. That is the conversation you have given me this morning? A. Yes. But he made no official report of the thing at the time.

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517 Q. Would Jones' engine going from Victoria to Kissinger be the first and only engine up to that time of yours that went that way, on Monday the 18th? A. Yes, Jones was the— Jones with the motor coach was the train movement by there after our motor coach passed there on the Saturday afternoon.

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526 Q. When do you say the last patrol over that particular point was, before 10:45 Monday morning? A. Reese was in that vicinity on Saturday afternoon.

527 Q. Did he go that far? A. I think he went to 35.4, that would be two-tenths of a mile from that area.

528 Q. But he would not have reached that point? A. No. At this particular time Reese was busily engaged with a fire at mileage 38, and that accounts for his—

529 Q. Between the point Reese got to and where the fire was there was a rock cut, wasn't there? A. Yes.

530 Q. Would that obscure his view at all? A. It might right at that point, but from over here he could see right down into it.

531 Q. You mean at the Kapoor mill Company's siding D? A. Yes, from the point D he could look right into it.

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536 Q. Well, then we get to Tuesday the 19th. What did you first hear that morning? A. On the morning of Tuesday the 19th I called Kapoor somewhere about 8:30 and asked them how this fire was, and was informed that it was well under control and practically out.

537 Q. Who told you that? A. It was a white man, but I cannot just recollect at the moment.

538. Q. Was it the man who answered the phone? A. Yes.

539 Q. Well, was it Cowan or Smith? A. I couldn't be certain just at the moment.

540 Q. Would you say it was one or other of them, Mr. Fraser? A. Well, I tell you I cannot remember right now just who it was.

541 Q. And who did you get the information from? A. Well, when I was told that the fire was under control and they had men there, why I figured that they would put it out.

542 Q. Didn't you get any report from your own people that morning about this fire? A. No, I did not.

543 Q. What time did you get this report that it was practically out? A. That was about 8:30.

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544 Q. When did you next hear anything about it? A. About two o'clock.

545 Q. Who from? A. I cut in on the telephone at two o'clock, and Mr. Cowan was on the phone then, and I asked him how the fire was getting along, and he said they had it fairly well under control, and men working at it.

546 Q. Any of your own people report to you in the afternoon? A. Not at that particular moment.

10 547 Q. When did they, if at all? A. In about forty minutes.

548 Q. Who called you? A. I was in on the phone myself, and got in touch with Reese, he told me that the fire was assuming dangerous proportions and they needed assistance at once.

549 Q. That was forty minutes after you had talked to these other people? A. About forty minutes after, yes.

550 Q. What did Reese tell you? A. That the fire was assuming dangerous proportions and they wanted assistance right away.

20 551 Q. Did you talk to Cowan then? A. I don't remember whether I did or not.

552 Q. You cannot remember? A. I cannot remember definitely.

553 Q. Well, you did take a train up there, didn't you, on Tuesday? A. The moment that I got this information from Reese I called the dispatcher and ordered a train from Victoria.

554 Q. And went up? A. Yes.

555 Q. And it was out of control when you got there? A. Yes.

30 556 Q. Hopeless? A. Yes; we could do nothing at that time.

557 Q. Now there are peculiar geographical conditions there that make the wind very uncertain, aren't there? A. Yes, from the gullies, and the curvature of the track, it is very hard to say just which way the wind is blowing, as you are facing a different direction as you proceed along the track.

\* \* \* \* \*

40 664 Q. Did these employees of yours, these conductors and trainmen and enginemen all understand if they saw a fire they were to report to you or to somebody? A. Yes.

\* \* \* \* \*

707 Q. Are you familiar with the order of the Board of Railway Commissioners No. 362? A. The working instructions

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tion for  
Discovery  
of N. S.  
Fraser,  
--continued.*

Excerpt from Examination for Discovery of N. S. Fraser.

put into my time table, yes.

708 Q. But you know that order, don't you? A. I know the general order, or the portions that apply to our division, the working instructions—that is the one that—

709 Q. Who is the Chief Fire Inspector under this order 362, do you know? A. I think that is intended to be Leavitt, isn't it?

710 Q. What? A. Leavitt is the man that issues—

10 Mr. Mayers: Clyde Leavitt.

711 Q. Who does he work for? A. The Dominion Railway Board, Commission.

712 Q. Did you get any instructions from him that year, did they tell you the measures necessary for establishing and maintaining your routes in a condition safe from fire as far as may be practicable?

Mr. Mayers: The rules are there.

713 Q. On Exhibit C.

Mr. Mayers: Exhibit C.

20 714 Q. "C" then are the instructions that were in force at the time of this fire.

Mr. Mayers: Yes.

715 Q. Did you have any force of fire rangers at all for patrol and fire fighting purposes between the 15th and the 20th of August in this locality? A. Not fire patrolmen; not required.

716 Q. The only instructions I take it you gave your employees, agents or contractors on the line are the ones contained in that time table put in this morning—what was the exhibit number of that? A. In the time table Exhibit A.

30 717 Q. Those are the only instructions you gave them. A. We have copies of this pinned on every board and posted up at each section house and station.

718 Q. Did everybody get a copy of this, maintenance, right of way? A. All the foremen.

719 Q. Well, would Reese be a foreman? A. Yes.

720 Q. And you don't know whether they read it or not I suppose? A. Oh, they have periodical examinations on these things, yes.

721 Q. Anything in it about fires? A. Page 184.

40 Mr. Hutcheson: Pages 125 and 184 you will find them.

722 Q. There are lots of them. Did you get any report at all from any of your men as to any brush, debris or other combustible matter on the lines adjoining the right of way that summer, that might form a fire hazard? A. They would be on file in the division engineer's office.

723 Q. Do you remember yourself? A. No; they would not come to me, they would go right into his office.

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*Examina-  
tion for  
Discovery  
of N. S.  
Fraser,  
--continued.*

Excerpt from Examination for Discovery of N. S. Fraser.

724 Q. Your foreman is supposed to report that sort of thing? A. They report that to him. They draw his attention to it possibly when he is going over the road supervising their work.

725 Q. Who would that go to? A. To St. John Munro, our Division Engineer.

726 Q. Where? A. In Victoria.

10 727 Q. Wouldn't they come to your attention? A. Not unless there is something serious. He is supposed to be looking after that branch, you see. I couldn't look after it all.

728 Q. Are you familiar with paragraph 14 of this 362-C: "When fire is discovered presumably started by the railway (reading the section)." Were you familiar with that section? A. Yes; we have general meetings with the Forestry officials practically every year, and discuss all that, and go into it thoroughly; and their instructions to our foremen direct.

20 729 Q. Were you familiar with this section E of this order of paragraph 14 of 362: "The provisions of this section shall apply to all fires occurring within three hundred feet of the railway track, unless proof shall be furnished that such fires were not caused by the railway?" A. That 300 feet is the distance from the track, yes.

730 Q. Were you familiar with that subsection E of 14? A. I cannot say that I just remembered it from there; but as I said before, I knew there was something, or heard that there was something somewhere.

\* \* \* \* \*

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tion for  
Discovery  
of N. S.  
Fraser,  
--continued.*



Samuel Cowan, for Plaintiff—Direct Examination.

Wednesday, May 25th, 1932; at 11:30 a.m. the trial was adjourned until 2 p.m.

May 25th, 1932; at 2 p.m.

\* \* \* \* \*

10 Mr. Maitland: If your Lordship pleases, I would like to recall Mr. Cowan on two points. Since Mr. Cowan was in the box, if your Lordship will recollect, the inventory kept by Dodd was produced; I want to draw that now to his attention, and ask whether he has been over it, and ask him how it compares with the figures he has given. Your Lordship will recollect he said he took the total production, and took from that the sales, to arrive at the amount on hand. Now, we have this inventory in, and I would like to draw his attention to that, and ask him what figures he arrives at after looking at the inventory. The next point I would like to examine him on—during the adjournment I sent him back to Kapoor, and I want him to give the exact location on the map of the derailment we were talking about early in the trial. Those are the only two points.

20 Mr. Mayers: We have no objection, my Lord.

MR. COWAN, recalled, testifies.

DIRECT EXAMINATION BY MR. MAITLAND:

Q. Mr. Cowan, did you see the point of derailment on that line? A. I saw the locomotive off the track, and I saw the place where the track had been repaired.

Q. And is that point still observable. A. The point is still observable.

Q. I understand you were up there during the adjournment? A. Yes, sir.

30 Q. Can you give us the point of derailment, and also tell us whether this map is correct as to the number of tracks in that particular locality? A. May I go over?

Q. Yes. A. This plan is not correct (Exhibit 4).

Q. In what respect is this plan not correct? A. It does not show the track as it actually exists.

Q. Where does the track exist? A. There is one switch that is not shown on this.

40 Q. That is at the point where? A. Approximately at this point marked D in red. There is a double track running from that point, which parallels the track down till it reaches the bridge.

Q. Just sketch that in there, will you, please (witness does

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so). Now, that is a purple mark you have made from D to the end of the bridge? A. Yes, end of the bridge.

Q. That is the way the track is double there; there is a switch at point D approximately, and a double track emerges into a single track right at the end of the bridge? A. Yes.

Q. Where was the derailment? A. The derailment was right at this switch here.

10 A. Mark, it, please; just make a heavy dot if you can, first. That is meant to represent the switch (indicating).

Q. Where was the derailment? A. The derailment was right through the switch itself; the switch points and the rails ahead of the switch were bent and twisted.

Q. Mark that point C-X, will you please. (Witness does so). What track is that on? A. That is on the Kapoor Lumber Company's track.

\* \* \* \* \*

(Witness stands aside).

20 Mr. Maitland: Now, my Lord, I would like, with your Lordship's permission to read the evidence of Jones, one of the employees of the defendant Company, an engine man, examined for discovery on the 19th of January.

The Court: How many of the defendant Company were examined?

Mr. Maitland: I examined Mr. Fraser, got certain information from him, then I examined this man Jones, and then I examined another man named Miller.

The Court: There were no conditions attached to the order?

30 Mr. Maitland: The only conditions, subject to your Lordship's ruling at the trial as to whether I read this.

The Court: Well, don't you have to comply with the rule? There is no objection being raised—I don't suppose I should raise it.

Mr. Mayers: Yes, my Lord, I think it is very oppressive to examine for discovery more than one officer of the railway company. My learned friend has indulged in indiscriminate wholesale examinations.

Mr. Maitland: My learned friend is ahead of me on that.

Mr. Mayers: I am not putting in any.

40 Mr. Maitland: My friend had the witnesses.

Mr. Mayers: I am calling this witness.

Mr. Maitland: You mean you are calling this man Jones?

Mr. Mayers: Yes.

Mr. Maitland: If my learned friend is calling Jones I won't

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press it, my Lord.

The Court: The burden is on you; you have to satisfy the Court that it is proper to put in the discovery.

Mr. Maitland: That is the case for the Plaintiff, my Lord.

Mr. Mayers opened the case for the Defendant.

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**No. 8.**

**Defendant's Evidence.**

FRANK MINEAU, a witness called on behalf of the Defendant, being first duly sworn, testified as follows:

10           DIRECT EXAMINATION BY MR. MAYERS:

F. Mineau  
Examina-  
tion.

Q. Your full name, please. A. Frank Mineau.

Q. Where do you live? A. Kamloops

Q. What is your occupation? A. Locomotive engineer.

Q. How long have you followed that profession? A. Well, I have been following that all of my life; I have been here with the C.N. for 25 years.

Q. How long experience have you had with oil burning engines or locomotives? A. About six years.

Q. And that has been on the Island? A. Yes; the most of it  
20 at the time was on the Island; with the exception since last fall I have been working out of Kamloops, on an oil burner.

Q. In the summer of 1930 you were working on the Kissinger branch, were you? A. Yes, part of the time.

Q. On the 18th of August, 1930, you were driving Engine 2116, were you? A. Yes, sir.

Q. You remember what time you started from Victoria? A. Starting out of Victoria?

Q. Yes. A. Oh, somewhere around nine o'clock; I don't remember exactly what time; it was somewhere around there.

Q. By the way, what fuel was Engine 2116 burning?  
30 Fuel oil. A.

Q. You would arrive at Kapoor about what time on that morning trip, leaving Victoria at nine? A. Well, around 12:05 it was; somewhere there, around 12 and 12:05.

Q. Around 12 o'clock noon? A. Yes.

Q. Is there any railway indication at mile 35? A. Well, the Yard Limit board.

Q. On that Monday morning did you do anything in consequence of passing the Yard Limit board? A. Well, I shut off,  
40 shut off the throttle to a drifting throttle.

Q. You proceeded under a drifting throttle, did you? A. Yes.

Q. Tell me what exactly is that operation? A. Well, you

Frank Mineau, for Defendant—Direct Examination.

shut off the steam from the cylinder almost, there is just enough to take up the slack, and form a cushion against the piston; but there is—when that steam comes out from the exhaust nozzle, the exhaust nozzle the opening is large enough that there is no pressure left then, you see.

Q. That is, there is no steam blowing up the smoke stack?

A. No.

Q. That is what you mean by the exhaust, is it? A. Yes, sir.

10 Q. In ordinary circumstances the steam blows up through the exhaust into the smoke stack? A. Yes, sir.

Q. And that is what you cut off, is it? A. Yes, sir.

Q. When you are going under a drifting throttle? A. Yes, sir.

Q. How is the engine travelling? A. Well, I was drifting there, you see, on account of the Yard Limit board, and the curvature at mileage 35, just about level there, and it is only a short distance from there, you see, where the Kapoor Lumber Company were using the C.N. main line; and on account of the curve, so I shut off, in order so I would not hit anybody.

20 Q. But was the engine exerting any tractive power? A. No, not at all.

Q. Now, when you shut off the steam does the fireman do anything? A. Well, he cuts down on the supply of oil, to cut down his fire.

Q. How long experience have you had in driving oil burning engines? A. About six years on oil burners.

Q. Have you known of any occasions of oil burning engines to cause combustion or set fire to anything? A. No, sir.

30 Q. Did you on that Monday sand the engine? A. Yes, sir.

Q. Where did you perform that operation? A. Well, we generally sand them out of Victoria.

Mr. Maitland: Generally sand them out of Victoria? A. Yes, always, always. And the next place where we sanded was after we passed Bridge 27.1, between that and 27.4.

Mr. Mayers: That would be eight miles from mile 35? A. Very nearly.

Q. That would be eight miles nearer Victoria than mile 35? A. Well, seven and a half.

40 Q. Between seven and eight? A. Yes.

Q. What is the nature of the ground there; what is the profile? A. It is up hill.

Mr. Maitland: Where he sanded?

Mr. Mayers: Where you begin to sand; you begin to sand as you are starting to go up hill? A. Yes; the engine being worked hard.

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Q. Yes; and that is the reason you clear the tubes, is it?

A. Yes, sir.

Q. Did you sand on this Monday the 18th of August, 1930, between mile 27.1 and mile 27.4? A. On the 18th?

Q. Yes? A. Yes, sir.

Q. The result of the sand would be what on the tubes? Clean up the tubes.

10 Q. What do you say as to the possibility of any spark being emitted when the engine is travelling under drifting throttle? A.

There is absolutely no spark can be thrown out because you are not working the engine. There is no force.

Q. After you had passed mile 35 did you observe anything in the surrounding country? A. Well, mileage 35, do you mean?

Q. After you had passed mile 35? A. After I passed mile 35, yes, there was a little fire, smoke.

Q. What exactly did you observe, smoke or fire? A. A smoke.

20 Q. And about where was that? A. Well, it was about mileage 35.2.

Q. I am going to prove this picture; it is an enlargement (shown to witness and Jury). Get this oriented first. Mark on there as exactly as you can the point where you saw the smoke. (Witness does so). I will write "Min" against that.

The Court: Get him to tell the jury what the flame consisted of that morning.

Mr. Mayers: Yes, thank you, your Lordship. The cross against the letters "Min" represents where you saw the smoke?

A. Yes, sir. (Photo put in as Exhibit 44).

30 Q. Do you recall what the smoke was rising from? A. Where I found it?

Q. Yes. A. That is where the smoke was rising from.

Q. What was burning? A. Oh, a piece of log there and stump.

Q. How far would you say that was from the train? A. Well, at the time I said it was close to the track, but I was back there again since that, and I pointed out to Mr. Edison—

Mr. Maitland: That is not evidence.

Mr. Mayers: Oh yes; you pointed it out to Mr. Edison. A. Measured it—I seen the measurement, it measured 119 feet from

40 the rail.

Q. You have visited the scene since and pointed out this spot to the Company's surveyor? A. Yes.

Q. When was that? A. I forget just what date it was.

The Court: Last month? A. No, just a few days ago.

Mr. Mayers: Have you travelled on the prairie very much?

A. On the prairie, yes.

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Q. Do they fence on the prairie? A. Yes.

Q. Did you get accustomed to the approximate distance of the edge of the right of way. A. Oh, yes.

Q. Could you tell on that Monday, before you ever measured at all, whether the smoke that you saw was on or off the right of way, as you visualized it? A. I could tell.

Q. Which was it? A. It was off the right of way.

10 Q. I think you said that you got to Kapoor at 12:05 that day? A. Yes, sir.

Q. It would be a few minutes before you got to Kapoor, of course, that you were passing mile 35.2? A. Yes.

Q. What was your engine pulling that day? A. A freight train.

Q. How many cars? A. Well, I cannot remember just exactly how many cars we had.

Q. The conductor would know that? A. The conductor would know what cars we had.

20 The Court: And where were you when you noticed this smoke? A. I was on the engine.

Q. After you passed or at the time? A. Just as I was going by.

Mr. Mayers: What happened when you reached Kapoor? A. Well, at Kapoor we had a little bit of switching to do; and in doing that switching, setting out, the last move was to set out an oil car on that Kapoor oil siding; and we got off the track; a rail kind of spread, and we dropped off the track there.

30 Q. I will prove this plan; here is the C.N.R., here is the mill. Now, how do those spurs go off from the C.N.R., and how many are there, do you know? A. Yes. This is the main line of the C.N.R. Over here is a switch, and they have got a long siding here, goes all the way along here. There is a switch here. This switch—one line is I presume they would call that their main line of the Kapoor Lumber Company, goes all the way around.

Q. Is that called the main logging spur? A. The main logging spur; and this oil tank that the Kapoor has got is on another siding here, a short siding.

Q. That runs off the main logging spur? A. Yes; a switch at both ends.

40 Q. You can see over here, Gentlemen, there is this main logging spur which runs off the C.N.R. and goes up here, up the hill. and then there is this that they call the run around, the run around track, which goes off the same main logging spur, and goes past the oil tank and comes back on to the main logging spur. A. Yes. Well, we backed in here. When we backed in here, we have got to back in here a little ways, far enough to get this car clear,

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because the log cars are loaded wide, and to get clear you have to push it down here. After we got in the engine was on this side of the frog, right on the curve here.

Q. Towards the oil tank? A. Towards the oil tank. And the rail turned over — raised partly, and we dropped on the ground. The rail kind of spread, you see; the drivers laid one side, three drivers on the width of the rail.

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Juror: We understand the switch was clear at the time? A. Yes; I was away from the frog.

Q. Was there anything to prevent anything coming down on this outside here—you were on the inside one? A. On the inside one.

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tion,  
continued.

Q. Anything to prevent anything coming down on the outside? A. While we were there they could not pass on that line; because it was a little bit close clearings.

Mr. Mayers: What the Foreman wants to know, you have not quite explained to him: Suppose your engine had been taken off altogether, could anything have gone down the main logging spur? A. Oh, yes. There is no interference whatever with that frog. And the switch, everything was in perfect condition. Absolutely no interference whatever.

Q. Just explain why while you were there, there was any difficulty in getting down the main logging spur—while your engine was there? A. While we were off the track here they would not have been able to come down right then. But we were re-railled, we got assistance and got on the track, and after we got on the track there was nothing to bother to get down that main logging spur and come right down here; because the track here was in good condition.

Juror: You mean your engine and the oil car—had you any other car here?

A. Just the oil car. We left that on their siding.

Q. Nothing else? A. No.

Mr. Mayers: Just the locomotive and the oil car? A. Yes.

Q. Show where you left the other car. A. The other car we left it on here—I think two cars.

Q. The mill spur? A. The mill side track.

Q. The Kapoor siding? A. Yes.

Juror: Off of the main road? A. Yes.

Mr. Mayers: You had taken in the route along your main Canadian National Railway, and then you had shunted your other cars on the Kapoor siding leading up to the mill. A. Yes.

Q. And backed your oil car on the side track? A. Yes. Our train was there; and there was no interference.

Q. You had got to this point, after backing in the oil car

Frank Mineau, for Defendant—Direct Examination.

into this run around track, your engine had turned over a rail. Now, just go on and tell us what happened from there. By the way, the rail that was turned over— A. —was the rail on this side?

Q. On the run around track? A. On the run around track. The other track was independent. It is perfectly clear. There was no damage done to it.

Q. That is the main logging spur? A. Yes.

10 Mr. Maitland: Will you mark the line?

Mr. Mayers: It is marked here run around track.

Mr. Maitland: Where he was de-railed.

Mr. Mayers: You can do that, but it is so small. A. Pretty hard to mark.

Q. But a dot where you think the rail was overturned. A. I can do that—as far as this map—

Q. You don't know the scale? A. I don't know the scale so far as that goes.

20 Q. Put it approximately, with reference to its distance from the oil tank.

Juror: How far between the oil tank and the switch was it, half-way or two-thirds of the way between the oil tank and the switch. A. It was nearer the oil tank than the switch. Because the front of the engine—it is pretty hard to show it right on the map.

Q. Put a dot nearer the tank, then. A. Yes.

30 Mr. Mayers: I think you may go back to the box. (Blueprint referred to marked Exhibit 45); (the enlarged photograph being Exhibit 44). What happened after that; did you get re-railed? A. Yes; we sent to Victoria for assistance.

Q. And eventually your engine was re-railed? A. Yes.

Q. What did you do about the overturned rail? A. Well, I didn't have anything to do with the overturned rail. We got out of town. The section man looked after that.

The Court: What time did you get it re-railed? A. Oh, it was around four o'clock, it might have been after.

Mr. Mayers: And after you were re-railed how did the engine proceed, when it did go? A. Well, I don't quite get you, how did the engine proceed, how?

40 Q. You were re-railed on the siding, were you not? A. Yes.

Q. On the run around track? A. Yes.

Q. Where did the engine go from there? A. We went back on to the main line and coupled on to our train.

The Court: You backed up, did you? A. No, we pulled ahead; ran forward up to the main line, and then coupled on to our train. I had to back up a car length from the switch to our train.

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Mr. Mayers: Yes, you backed the oil car into the run around track, did you not? A. In the first place, yes.

Q. And when your engine was re-railed you came forward?

A. Yes.

Q. And down the main logging spur? A. Yes.

Q. Actually down that spur? A. Yes, sure.

Q. And got on to the C.N.R. main line? A. Yes.

Q. And you did that? A. Yes.

10 Q. You got out, and went to Kissinger? A. Yes.

Q. The oil car, did you subsequently pick that up? A. Picked it up the next morning and took it to Victoria; picked it up off the siding.

Q. The siding would be the siding that runs to the mill? A. Yes, that long side track.

Q. On this plan Exhibit 45 that is marked Kapoor Siding, that is the one you mean? A. Yes, sir.

20 Q. About what time was that, do you remember? A. Well, we arrived Kapoor about 9:55, somewhere around there, and we picked it up shortly afterwards.

Q. Then you proceeded from Kapoor to Victoria on the Tuesday morning, the 19th of August, 1930? A. Yes, well, that is the date.

Q. Did you notice the fire, or did you notice anything in the neighbourhood of 35.2? A. Yes, sir.

Q. What did you see there? A. Well, there was a little bit more fire than on Monday.

Q. Did you see flame or smoke? A. Well, mostly smoke; a little bit of flame.

30 Q. Did you notice in which direction it was travelling? A. Yes; well, I couldn't tell exactly the direction, I could tell you the railway direction, the railway direction is east and west, you know. Of course there is a lot of curve around there. But there was a fire guard there or fire trail that the man had made, raised from the time I passed on Monday until I came back on Tuesday I noticed there was something new. And the fire had jumped over that fire guard, just around, just a little over.

40 Q. Was the fire moving towards or away from the railway, or towards or away from Kapoor? A. Well, away from Kapoor travelling the same direction as the railway like, it looked to me And had spread out, that the area was bigger on the Tuesday than it was on Monday.

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CROSS-EXAMINATION BY MR. MAITLAND:

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- Q. There is rather a grade coming up by 35.2, isn't there?  
A. A grade, yes, at 35.2, yes, just starting a grade there.  
Q. From Victoria toward 35.2 there is a grade just as you approach 35.2? A. Well, it starts to go up there just about—  
Q. I don't mean it starts at Victoria but going from Victoria to Kissinger, as you approach this 35.2 there is a grade? A. Going up a grade at 35.2, but before you get there it is level.  
10 Q. But going up there it is a grade? A. Yes.  
Q. Can you drift on a grade? A. When the momentum of the train is fast enough you will.  
Q. You have got to depend on the momentum? A. It all depends on how far you want to drift.  
Q. How far were you drifting on this morning of the 18th of August. A. I would drift by about the other side of 35.2.  
Q. Do you mean by that the Kapoor side or the Victoria side? A. I mean the Kapoor side.  
20 Q. The Kapoor side? A. Yes.  
Q. You would drift past? A. Yes.  
Q. You would have to get up a fair power to do that? A. Pretty fair speed.  
Q. Puff up a bit? A. No.  
Q. No? A. I wouldn't have to, coming inside the yard limit.  
Q. You were going up grade, anyway? A. At that point, 35.2, yes, there was a grade.  
Q. And you saw this fire, I think you said that morning, apparently? A. I did.  
30 Q. Did you ever report at all as to having seen this fire? A. Written report.  
Q. Yes? A. I have no written report, but I talked it over with the conductor.  
Q. When? A. Right then, as soon as I got to Kapoor.  
Q. What? A. As soon as we got to Kapoor.  
Q. Did you talk it over with your Superintendent. A. I was not talking to him. The conductor does that work.  
Q. You did not think it is part of your duty? A. Not on the trains, no; no talks of that kind.  
40 Q. You were the engine man, were you? A. Yes, sir.  
Q. You did not make any report anyway to anyone? A. To anyone, did you say?  
Q. Yes. A. Yes, I did.  
Q. To whom? A. I reported to the conductor.  
Q. What, did you tell him you saw a fire? A. Yes; and he

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told me that he seen it.

Q. So you had both seen it? A. Yes.

Q. The two of you saw it? A. And he reported it.

Q. And when did the conductor tell you he had seen it? A. After I seen him there at Kapoor.

Q. After you were derailed? A. Yes, after we were derailed.

10 Q. In any event you went right on to Kapoor, didn't you?  
A. Sure.

Q. From the scene of this fire? A. Yes, we went to Kapoor, it is only a short distance.

Q. And your conductor's name was Miller, was it? A. Miller.

Q. And he was having lunch when you were derailed—didn't he? A. I don't know what he was doing.

Q. You don't know whether he reported at all? A. It would be pretty hard for me to say what he is doing when he is back there.

20 Q. Were you present at the fire inquiry? A. At the fire inquiry?

Q. Yes; into this fire? A. Well, I was called in there one time, yes.

Q. You remember Miller was there? A. I don't know whether he was there that morning or not.

Q. Miller was your conductor, in any event? A. Yes.

Q. And then there was another man, Jones; do you know Jones? A. Yes.

Q. He was an engine man of yours? A. Yes.

30 Q. Now, have you discussed this fire with Miller and Jones within the last six months? A. Well, Miller is working—Jones is working here out of Victoria, and I am working out of Kamloops.

The Court: He wants you to tell him whether you have discussed it or not. A. I have not discussed it with Mr. Jones, no.

Mr. Maitland: Well, have you with Miller? A. No.

Q. You have not discussed your evidence on this trial with Miller? A. No.

40 Q. Have you discussed Miller's evidence with anybody? A. Not that I know of.

Q. Did you know that Miller said it was 25 or 30 feet from the track, the fire? A. I don't know, I don't know whether he said that or not.

Q. You would be surprised if he did? A. Well, I don't know.

Q. Did you ever hear that Jones said it was about 30 feet

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from the track? A. I don't know what Jones said.

Q. Now, you were at the fire enquiry, were you? A. I was in the Provincial Police Court, yes, I was there.

Q. And you saw Jones there? A. I don't remember seeing Jones.

Q. Well, did you see Miller there? A. I don't remember seeing Miller.

10 Q. Do I take it that you attended that Fire Enquiry as one of this crew of this train, and never discussed the distance that fire was from the track with either Miller or Jones at that time? A. Well, to tell the truth about it, I have been down to Kamloops ever since last fall, and I have never seen Mr. Jones again until I got back here.

Q. A moment ago I think you told his Lordship this afternoon that you said at the time that it was quite close to the track?

A. Yes.

Q. And you have now changed your mind; is that correct?

20 A. I have not made any statement that I have changed my mind, no.

Q. Well, did you say it was close to the track? A. I said it was quite close to the track.

Q. Yes. How close did you think it was to the track before you went there with the surveyor? A. Well, I figured it would be around 50 or 60 feet; there is a lot of time we say from the track—but I really meant outside the right of way.

Q. What did you mean a little earlier this afternoon when you said it was pretty close to the track you thought before? A. What did I mean?

30 Q. Yes, did you mean fifty or sixty feet? A. Well, fifty or sixty feet outside the right of way, yes.

Q. What suggested in your mind that you ought to go out there, and you might be wrong in the distance that this fire was from the track? A. What suggested it in my mind?

Q. Yes? A. I thought I would have another look to see how it looks.

Q. Your name is Mineau? A. Yes.

Q. And you did give evidence yourself at the Fire Enquiry? A. Yes.

40 Q. I want to read what you said there. You remember Mr. Wheatley, the C.N.R. policeman? A. Yes, sir.

Q. He was examining you, do you remember that? A. Yes.

Q. "(Q.) Did it look like a previous fire or something? (A.) It was an old burning, and it was small; a little bit of smoke there coming out, and after we went up to our switch and load our way freight, after the engine got derailed, and I went back and noticed, and there was quite a bit more smoke later and then

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the smoke was coming up in a body." You remember saying that?  
A. Something like that.

Q. And Mr. Walker says this: "And this is on the Monday now? (A.) Yes." Is that correct? A. That it was on Monday?

The Court: What does he mean that they went back and noticed?

Mr. Maitland: After the engine got derailed. A. I looked back.

10 The Court: You looked back? A. Yes.

Q. You did not go back? A. No, I did not go back.

Q. You mean, to locate the spot by looking back from where that rail was? A. I could tell where the smoke was coming.

Q. You could tell the direction sufficiently to take the surveyor there afterward.

Mr. Maitland: It was through the rock cut, wasn't it? A. It was the other side of the rock cut.

Q. Now, Mr. Walker says, "And this is on the Monday now? (A.) Yes. (Q.) Were you up there on the Saturday?  
20 (A.) No." and then Mr. Maitland, "What time was it you noticed this first? (A.) In the morning when I came up there; it was around noon. (Q.) It was on your way from Victoria to Kissinger, wasn't it? (A.) Yes. (Q.) Your first one up that morning? (A.) Yes. (Q.) How close was it to the tracks? (A.) Well, I couldn't say; I never measured it; but it was only a short distance. (Q.) It was fairly close to the tracks and quite obvious to you? (A.) Yes." Now, are those answers correct? A. Well, it is fairly close to the track, it was fifty or sixty feet outside the right of way.

30 Q. That is what you meant by that answer? A. That is what I meant by that answer, I mean then.

Q. And you never heard Miller tell us at that Fire Enquiry it was 25 or 30 feet? A. I wasn't there—I didn't hear Miller's evidence.

Q. And you never heard Jones tell us at the Fire Enquiry it was 25 or 30 feet? A. I was called to go on duty, and as soon as I got home after I left I went to work.

Q. Did you make any report to tell anybody that this fire was fifty or sixty feet from the track?

40 The Court: The right of way.

Mr. Maitland: The right of way.

The Court: Does he know what the distance of the right of way is? A. Well, the right of way is one hundred feet.

The Court: Then that would be 150 to 160 feet away?

Mr. Mayers: My Lord, the right of way is fifty feet on each side.

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The Court: Fifty, and fifty more, that would be one hundred or one hundred and ten? A. Yes; that would be 100 to 110.

Mr. Maitland: Now, what time does the train crew take lunch? A. Well, whenever they have the opportunity.

Q. Did you lunch this day before you were de-railed? A. If I had a lunch the day I was derailed? Yes.

Q. Before you were derailed? A. No; afterwards.

10 Q. Do you know what the conductor was doing at that time when you were de-railed? A. Well, he was down there; and after we couldn't do anything we had to send to Victoria for assistance to come.

Q. How many cars did you have on your train? A. Well, I don't remember how many cars.

Q. Roughly? A. Well, that is quite a while ago, and it is pretty hard.

Q. Imagine your memory is as good as it is on this location, and tell us now how many cars you had on that train? A. I don't remember just how many cars we had on that train.

20 Q. Do you remember what crew you had? A. Five men in a crew.

Q. And that is all you had on that train, five? A. The engineer which was myself, the fireman, conductor and two brakemen.

Q. And how long did you have to wait for the train to come out to re-rail you, from Victoria? A. Well, I am not positive, but they got there somewhere around four or a little after; I don't remember just exactly what time.

30 Q. During that time did you or any of your crew to your knowledge do anything to put that fire out, or take any steps to go down and look at it and put it out? A. I didn't go there; I was busy around the engine.

Q. Well, you were not busy when you decided you had to have help to re-rail it, were you? A. Yes, I was.

Q. Were you? A. Yes.

Q. What were the rest of the members of your crew doing? A. They were helping.

40 Q. The conductor was having his lunch part of the time? A. I didn't know. I didn't see him eat. I couldn't tell anything about when he ate.

Q. When was it the surveyor took you out to measure this distance? A. The other day.

Q. Two or three days ago? A. The other day.

Q. Who suggested that? A. Well, I don't know who suggested it.

Q. Mr. Fraser? A. I kind of wanted to have a look at the

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place myself to see what it was like, because I didn't know whether—what the place, looking back, I had been away for quite a while—but everything seemed clear to me.

Q. Who suggested you going out there, was it Mr. Fraser?

A. Well, I don't know; I believe it was; I wouldn't say for sure.

The Court: Had you seen the place you selected with the surveyor, before? How did you come to pick on this particular place? A. Your Lordship, there is a little ravine comes down

10 there, where I presume in high water where the water had been running, and then I knew where they built that fire trail, which is at right angles to the track. Because after the report of that fire I kind of took particular notice of that; so that it was an easy matter when I went back there, to pick out the spot, because I knew where it was.

Q. When you went back there on the following morning, that is the 19th, did you get off the train at all and go down? A. No. I didn't go down, but I was going by very slow.

Q. But you were still at the throttle? A. Yes.

20 Q. And the same as you were the day before, when you noticed the fire? A. Well, it was a little bit larger.

Q. But it was in the same position? A. Yes; it had spread a little, you see.

Q. And when the surveyor was out and you were locating the spot, you simply pointed to the spot that you selected, and then you measured the distance? A. Yes, my Lord.

Mr. Maitland: What did that wrecking train do to your engine? A. All they done, they cut off their engine off the wrecking train and came down on to the siding and coupled on to us, and

30 backed over the switch and everything; and coupled on to us and gave us one pull and we went right on.

Q. They were on the same track you were on? A. Yes.

Q. Did you hurt the switch at all? A. No.

Q. Or the frog? A. No. The derailment was on the other side of the frog on the curve, as I pointed out on the map.

Q. Did you break any ties? A. I don't think so.

Q. Would you be surprised to know that some were broken?

A. Well, I would be surprised to know, yes, I would. Although there might be after the section men examined them they might

40 have detected something, they might have changed some, I don't know.

Q. Did you get a copy of this time table No. 3? A. Yes.

Q. You all got it. You have read it, I suppose? A. Yes.

Q. Exhibit 36; you are familiar with it? A. The time table?

Q. The instructions on it? A. Well, I don't know if I remember all the instructions, I may not be able to repeat it word

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for word.

Q. But you have read them? A. Yes.

Q. I want to read this first one to you: To all Conductors, Engine men and Train men"—now, you are an engine man? A. Engine man.

10 Q. Conductors, engine men or train men who discover or receive notice of the existence or location of 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 can be telegraph or telephone communication, giving exact location of mileage. You were familiar with that, were you? A. Yes, sir.

Q. Where was the nearest point from mile 35.2 where you could telephone to the Superintendent or headquarters, advising them that there was a fire? Where was the nearest point from mile 35.2 that you could report to headquarters or to the Superintendent that there was a fire? A. Kapoor.

Q. Kapoor? A. Yes, sir.

Q. I think Kapoor was about a third of a mile away? A. Yes, some short distance.

Q. A very simple matter, wasn't it? A. Yes, sir. Conductor Miller informed me that he reported.

The Court: From that place? A. From Kapoor, yes, my Lord.

Q. That would be by wire? A. By wire or telephone.

(Witness stands aside).

30 WILLIAM J. STANDISH, a witness called on behalf of the Defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. MAYERS:

Q. Your full name, please? A. William J. Standish.

Q. Where do you live? A. Victoria.

Q. What is your occupation? A. Locomotive engineer.

Q. How long have you followed that? A. Since 1909.

Q. And you have been with the C.N.R. for how long? A. With the operating department since July, 1911.

40 Q. How many years' experience with oil burning engines have you had? A. About six years, seven years.

Q. That is on the Island? A. Yes.

Q. On this Kissinger line? A. Yes.

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Q. You were the fireman on Engine 2116 on the morning of Monday the 18th of August, 1930, were you not? A. Yes.

Q. By the way, who conducts the operation of sanding?  
A. The fireman—I did.

Q. That is you? A. Yes.

Q. On that Monday morning what was the point nearest to mile 35 where you had last sanded? A. Right from Bridge 27.1, a very heavy grade there, and that is where we sand them out generally at that point.

10 Q. Is that where you sanded on that Monday morning? A. Yes.

Q. What is the result of sanding the engine? A. It cleans out all the flues with the carbon on.

Q. You saw the Yard Limit board mile 35? A. Yes.

Q. You are familiar with that? A. Yes.

Q. What did you do? A. Well, that is the yard limit board, you are supposed to kind of ease up along there. And I worked with the engineer, in conjunction with the engineer, when the engineer opens the throttle up I give a little more oil, if he eases the throttle down I ease off the oil.

20 Q. Tell us what you did on the Monday morning when you passed mile 35. A. I eased the oil down.

Q. What does that leave in the fire box? A. Just a very small flame; just a very small flame, what we call a pilot light.

Q. In your experience with oil burners have you ever known them to emit anything that has set fire to objects? A. No, not in my experience, no.

Q. What do you say as to the possibility of their throwing out sparks or any combustible material when the engine is under a drifting throttle? A. I don't think they do at all. I don't see how they could.

30 Q. Did you observe anything on passing mile 35? A. No.

Q. Which side of the engine were you on? A. I was on the left hand side; I couldn't see over there anyway.

Q. You were on the left hand side looking towards Kapoor, were you? A. Yes.

Q. Then you became derailed? A. Yes, we were derailed up in the oil track, Kapoor oil track.

40 Q. Do you remember what length of rail was displaced or overturned? A. If I can remember correctly it was just about the length of a rail turned over there.

Q. And was that on the run around track or on the main logging spur? A. That was on the Kapoor oil track, the run around track we call it.

Q. That was eventually repaired? A. Yes.

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Q. And your engine passed out on the main logging spur?  
A. Yes.

Q. Once your engine had got out of the way, was there anything to prevent traffic on the main logging spur? A. No.

Q. On the Tuesday you came back from Kissinger and stopped at Kapoor, and then proceeded to Victoria in the morning, did you not? A. Yes.

10 Q. Did you notice anything at mile 35.2 then? A. I noticed some smoke from stumps and pieces of logs and stuff smoking.

Q. Can you tell whether—did you see any flame at all? A. No, I did not see any flame, just smoke.

Q. Can you tell whether the smoke there was on or off the right of way? A. It looked to be on the outside of the right of way as far as I could tell, without measuring it.

Q. Would you look at this plan; come over here for a moment, will you. Point out on Exhibit 44 where it was that on the Tuesday morning you saw the fire or the smoke. A. On this  
20 stump here.

Q. Just mark it. A. Right in here (Marking).

Juror: Between the mark you have made and the fill was it burning at all? A. No, no.

Mr. Mayers: I will put "St" (doing so). You have been out to the same place and identified the spot again, have you? A. Yes.

Q. When was that? A. A few days ago. It was I believe Saturday I think it was.

Q. On Saturday; and you pointed out the place to Mr. Edison?  
30 son? A. Yes.

Q. And he measured it, did he? A. He measured it.

Juror: How far away was that?

Mr. Mayers: We shall prove that by Mr. Edison.

#### CROSS-EXAMINATION BY MR. MAITLAND:

Q. Well, who was in this party last Saturday? A. We were out making marks as to distance.

Q. You were there? A. I was there, yes, sir.

Q. And was the last witness what is his name? A. Mineau.

Q. Was he there? A. Yes.

40 Q. Now, who else was there? A. Quite a few out there I guess.

Q. Quite a party. Was Jones there? A. No, I didn't see Jones.

Q. Was Miller there, the conductor? A. Yes, I guess they

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were all out there as far as I know.

Q. He was the conductor on your train, you know him pretty well? A. Yes.

Q. Was he there? A. Yes, they were there.

Q. Now, Mineau was there.

The Court: You don't know about Jones? A. I am not sure about Jones.

Mr. Maitland: And Miller was there, and Mineau was there?

10 A. Yes.

Q. And how did you go out? A. Went out in the gas car.

Q. Was Fraser there? A. Yes, he was there.

Q. And did you talk about the fire on the way out? A. We went out there for the purpose of measuring where we had seen the fire; and that is what we did.

Q. Did you talk about it on the way out? A. Well, I don't know. I didn't. To be frank with you, I didn't.

Q. You were running the car? A. No, I was sitting right in the back all by myself. I had a back seat all to myself.

20 Q. Alone? A. Alone absolutely, yes.

The Court: What was the matter with you, why didn't they talk to you? A. I didn't feel like talking to them, I wasn't feeling very good.

Mr. Maitland: This is their side of the case, anyway? A. It is their side, yes.

Q. Who was the first man to go back into the woods and mark the place where the fire was supposed to have been seen? A. I didn't check up on it.

Q. You were there? A. I was there.

30 Q. And you saw some man go back from the track and mark where he thought the fire was? A. I went back and measured where I saw the fire. But I wasn't told where.

Q. Did you understand my question? A. Not quite, no.

Q. You saw some man go back from the track and mark where he thought the fire was? A. Yes.

Q. Who was the first man who went back and did that? A. Let me see well now, I don't know, I didn't pay a great deal of attention to who went.

40 Q. Did Fraser himself go back? A. He may have, I couldn't tell whether he did or not.

Q. Several of them went back anyway before you did? A. Yes there was.

Q. And did you see Mr. Mineau mark the fire as being— A. Well, I saw him go there about where he marked it; I couldn't point it out to you right now.

Q. Did you go to about the same place? A. No, I did not.

Q. Your distance was nearer the track? A. My distance

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was nearer the track, and coming from a different direction.

Q. And coming from a different direction? A. Yes.

Q. Now did he tell you on Monday, did he say there is a fire as you went by this place on Monday? A. No.

Q. Never told you anything about it? A. No.

Q. Never mentioned to you on Monday that there was a fire?  
A. No.

10 Q. But you did look, yourself, on Tuesday? A. Yes; I couldn't help but see it.

Q. And did you see men working there? A. No, I didn't see anybody come right at the fire, no; not right at the fire.

Q. By the way, Deerholme, is that the junction point from Cowichan to the main line? A. Deerholme, you go down to what we call tidewater; a spur about six miles long.

Q. You go down to Cowichan Bay? A. Yes.

Q. And that is where you keep your tank car? A. That is where it generally is kept, yes.

20 Q. You are one man who would know where it is? A. Well, it can be moved around.

Q. Well, it was there at this time anyway? A. It probably was.

Q. Have you ever used that tank car? A. Oh, yes.

Q. What is its capacity? A. I don't know what its capacity is, I am sure.

Q. Roughly? A. Roughly I would say around about 3500 gallons.

Q. Is that as high as you will go? A. I am just making a very conservative estimate.

30 Q. Only a guess? A. That is all it is.

Q. Have you used it? A. No, I never used it personally.

Q. Never worked on it personally? A. Never worked on it personally; we have had it on the engine and fought fires with it.

Q. Have you ever seen it worked? A. Yes.

Q. How does it work? A. Fine.

Q. How far would it throw water? A. It gets to throw water a couple of hundred feet.

40 Q. There would be no difficulty in getting it on Monday and bringing it down to Kapoor, that you know of? A. The only difficulty was if it could be had, that is all. Our train was on the main line; anyone coming from Victoria could not very well get by our train until we were re-railed.

Q. Couldn't anybody bring that from Deerholme down to the scene of the fire? A. They would have to get past us.

Q. Was your train on the main line? A. Our train was on the main line.

Q. Actually on the main line? A. Yes.

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Q. And that was blocked? A. Yes.

Q. And you had that re-railed about what time? A. Around four o'clock somewhere.

Q. Was part of your train that was derailed on that main or way line? A. The engine and tender were derailed on the Kapoor run around track, the oil line.

10 Q. And if the water tank car had been brought down, it could have been connected with the cars that were on the main line all right, and you could have got through, couldn't you; what was to prevent you? A. I don't quite understand that question.

Mr. Mayers: The tank car does not move under its own power.

The Court: You mean with another engine. A. If there had been another engine up there, yes. But there wasn't another engine.

Mr. Maitland: What time did you see the fire Tuesday? A. It would be around 10:30 or 10:45.

Q. Did you do anything about it? A. No.

20 Q. Make any report? A. No.

Q. No report at all? A. No.

Q. Didn't you know your instructions to report a fire either on or near the right of way? A. My conductor, the conductor on the train, is the man that always made the report. If you report to him then he is the man that is supposed to turn in those reports; he does all the clerical work on the train.

Q. You reported this fire to him? A. Told him about it.

Q. Where did you tell him about it? A. At Milne's Land-  
ing.

30 Q. Where is that? A. It is about eight miles away, when we stopped.

Q. You did not tell him until you got there? A. No.

The Court: When was that? A. That was about twenty minutes afterwards.

Q. After what? A. After we passed 35.2.

Mr. Maitland: On Tuesday? A. On Tuesday, coming back.

Q. You were coming back towards Victoria? A. Yes; that fire had been there the day before; it was hardly necessary to report it.

40 Q. You did not report it anyway except to him? A. No.

The Court: He told you he saw the fire? A. Yes, he knew the fire was there. It was no news to him.

Mr. Maitland: Did he say it was no news to him? A. Well, I don't suppose it was—unless he was blind.

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Standish,  
Cross-  
examina-  
tion,  
*continued.*

(Witness stands aside).



(Court here adjourned until tomorrow at 10 a.m. (May 26, 1932).)

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Thursday, 26th May, 1932, at 10 o'clock a.m.

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Mr. Mayers: I want to put in the Order of the Board of Railway Commissioners No. 362 of the 19th April, 1922, which I think was given an Exhibit Number in Mr. Maitland's case.

The Court: It is not in already?

Mr. Mayers: If it was not put in, it was discussed. I think Mr. Maitland did put it in.

Mr. Maitland: My Lord, my friend has something additional in that certificate, and that is why we held it over before.

10 The Registrar: Certified copy of the Order of the Board of Railway Commissioners—Fire patrol—Exhibit 35.

Mr. Mayers: Well give this a new number, as the Order is attached. (Exhibit 46.)

I want to put in the order of Mr. Clyde Levitt, made under order 362, this Exhibit which I am putting in being dated 1st March, 1930. (Exhibit 47.)

The Court: I thought you said this Order was dated 19th April, 1932?

20 Mr. Mayers: 1922—the order of 19th April, 1922. I would like to read a little of this to the Jury, because it bears on what we are going to prove. I don't know whether my learned friend agrees with me that the Order 362 prescribes no fire protection devices for oil burning engines. That appears in Order, paragraph 2 of Order 362 (Reads)—and all the subsequent enumerated rules for fire protection relate exclusively to coal burning engines. That is the Board of Railway Commissioners prescribe no fire protecting devices for oil burning locomotives. There are one or two other conditions I want to read—Paragraph 10—

30 gives the Chief Fire Inspector power to order the construction and maintenance of fire guards. This particular line of railway is Cowichan subdivision, and I have a certificate to this effect: (Reads)—So that we were under no obligation either with regard to any fire protection on locomotives, nor were we under any obligation to construct or maintain fire guards on this Cowichan subdivision. Then paragraph 13, sub-paragraph (d)—

Mr. Maitland: I want to be perfectly fair—if he is going to make a reference of that kind, he should read what is required.

Mr. Mayers: I will read: "In case the section man or other employees available . . . regular duties."

40 Then Mr. Levitt's order deals with this, namely "patrols for the purpose of such subdivision," etc.—second paragraph, under the heading "Patrols."

The Foreman: When you say fire "guards" is not required, what do you mean by that?

Mr. Mayers: Fire Trails— I have read what the rules said— Now dealing with patrols, I ask your attention to the words which I read—Where you get the words "working in-

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structions” patrols are not required, and there is a heading “Cowichan subdivision and Kissinger . . . etc. The same regulation is under the heading “Inspection” (Reads).

I have prepared a schedule of the train movements on Monday and Tuesday, so that we need not burden our minds, if your Lordship will permit me to give your Lordship one, and the Jury one each.

10 Mr. Maitland: Is this the Schedule, or is this what they did?

Mr. Mayers: This is the actual time.

Mr. Maitland: Quite a difference.

Mr. Mayers: Well, there was delays on that day.

JOHN ALBERT MAINPRIZE, a witness called on behalf of the Defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. MAYERS:

- Q. You live in Victoria? A. Yes.
- Q. What is your occupation? A. Brakeman.
- Q. You work for the C.N.R.? A. Yes.
- 20 Q. On Monday, 18th August, 1930, what train were you on?  
A. I was on the West way freight, going from Victoria to Kissinger.
- Q. You got to Mile 35 some time around noon, did you? A. Yes, around noon.
- Q. And you went up to Kapoor, and you had a derailment?  
A. Yes.
- Q. Can you tell me when the engine was re-railed. A. About somewhere around 16 o'clock—about 4 o'clock that afternoon.
- 30 Q. You reckon time right round from 12 to 12? A. Yes.
- Q. By the way, where was the derailment, do you remember, on which line? A. It was on the leg and spurs run around.
- Q. The run-around track was it. A. Yes.
- Q. Leading up to the oil tank? A. Yes.
- Q. Did you see the state of the rail after the engine had been re-railed? A. Not after it had actually been re-railed. I seen it after it was off.
- Q. You did not see the condition after? A. No.
- Q. You proceeded to Kissinger that morning? A. Yes.
- Q. Came back on Tuesday morning? A. Yes.
- 40 Q. Got to Kapoor about what time? A. Somewhere around 10 o'clock.
- Q. What did you do? A. We switched the mill for a few minutes and then I went out to flag the gas car.
- Q. How did you go? A. Through the rock cut.
- Q. To what point? A. I went past the fill this side of the

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rock cut.

Q. You passed the fill. Did you see any sign of burning that morning? A. Yes.

Q. Whereabouts? A. Well, I could not tell you exactly.

Q. Approximately where did you see the burning? A. It was off on the right hand side going to Kapoor.

Mr. Maitland: What time was this you say you saw that.  
10 What time is he speaking of?

Mr. Mayers: Some time after 10 o'clock, Tuesday morning. Come over here and see if you can identify it. (Over to Jury.) This is the fill, the embankment is down here. Can you tell me approximately where you saw the burning? A. I saw it in here. (Indicating.)

Q. That is on the rock cut? A. On the slope leading to the rock cut.

Q. Just make a mark approximately where you saw the burning on that morning. (Witness marks with a cross.)

20 Q. Yes. Put M.P. for Mainprize. What was it you saw, fire or smoke on the slope by the fill? A. Mostly smoke.

Q. What was actually smoking? A. It would be logs and stumps.

Q. In which direction was the smoke moving, did you notice that? A. No, I did not.

Q. Did you see any men working there, or did you see any men there? A. Yes, I saw three or four.

Q. What race were they? A. Hindus.

30 Q. What were they doing? A. They were sitting up on top of the rock cut, in the shade.

Q. Were they working at all? A. No.

Q. Then you flagged the gas car, did you? A. Yes.

Q. And came out on the way freight after? A. Yes.

Q. Did you notice the car as you came past on the way freight? A. Yes, it was still there.

Q. Did you see any men working along there? A. No.

CROSS-EXAMINATION BY MR. MAITLAND:

Q. What is your work, again? A. Brakeman.

40 Q. How long have you been on this line as a brakeman? A. Six years.

Q. Were you here yesterday when the expert gave evidence? A. Yes.

Q. Are you prepared to swear there is no such thing as red hot sand that comes out from the funnel of these engines during

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operation? A. Yes.

Q. You have never seen anything at all come out from the smoke stack of this oil-burning engine during the time you have been connected with it?

The Court: He has seen smoke come out. Any sparks? A. Never seen any sparks come out.

Mr. Maitland: Ever seen anything at all except smoke? A. No.

10 Q. Nothing on the track or right of way of any kind? A. No.

Q. Did you ever have one of those engines of yours inspected to see if it was all right as far as throwing anything out was concerned? A. No, that is another department altogether.

Q. You did not know anything about it? A. No.

Q. You have marked this photograph I believe where you think the fire was? A. Yes.

Q. When was this drawn to your attention as to where it was? A. When I flagged the gas car, went round up there.

20 Q. When was that brought to your attention—that you were to give evidence as to the location of the fire? A. Well, I was notified about two weeks ago.

Q. You did not give evidence at the Fire Enquiry at all, did you? A. No.

Q. Did you go out on the measuring party? A. Yes.

Q. You were one there, but were you out with the first one to go out and measure the distance? A. I was not.

Q. Your memory is blank up to that? A. I did not pay any attention.

30 Q. You heard the last witness yesterday in the box? A. Yes.

Q. Do you think I could find anybody who knows who first went back and measured the distance on that track. Can you help me? A. I cannot.

Q. You cannot? You were all there together. A. We were all there, but scattered around.

Q. You were there for one purpose? A. Yes.

Q. And someone must have led the way. Who was the crusader who first left the track and said: Here it is? A. I don't know who it was.

40 Q. How many were in the party? A. I don't know that either.

The Court: What date was that? A. Well, we went out on a Saturday—I think it was a week last Saturday, the 19th.

Q. Now when Mr. Mayers was questioning you about the location of the fire, I have this written down, as you answer—I could not say exactly where the fire was—That is what you told

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him? A. Not the exact distance, no.

Q. The reason for that, it was so long ago and you were not concerned with the location at the time? A. Well, it was quite a while, but we could not see how far it was.

Q. How big was the fire you saw? A. It would be approximately 100 feet square.

Q. 100 feet square at what time? A. Just after 10 on Tuesday.

10 Q. In the morning? A. Tuesday morning, yes.

Q. Tuesday morning it was 100 feet square just after 10 o'clock? A. Yes.

Q. You were going where at that time? A. Going to Victoria.

Q. That was not the day you were derailed though, was it? A. No.

The Court: Mr. Maitland, the Jury may want to know at what point. Did he see the fire on Tuesday or Monday. A. Tuesday.

20 Mr. Maitland: You did not see it on Monday at all? A. No.

Q. You went by on the way freight? A. Yes.

Q. And did not see any fire there. What time was it? A. Around noon.

Q. On Monday nobody mentioned it? A. No,—I heard about it afterwards.

Q. You were the fireman? A. No, brakeman.

Q. Who was your fireman? A. Standish.

Q. And Engineer? A. Mineau.

Q. Both gave evidence in court yesterday? A. Yes.

30 Q. Neither mentioned it to you? A. No.

The Foreman: Might we understand: you made a mark on that—that was Tuesday? A. Yes.

Q. Was the ground between, the ground of the fill, all burnt? A. Well, it had been burnt over some time or other.

Q. Was it smouldering? A. No.

Q. Not burnt from that fire? A. No.

Q. On Tuesday? A. No.

Mr. Maitland: Might I follow that for a moment, my Lord?

The Court: Yes.

40 Mr. Maitland: Now the evidence was quite clear that this fire was seen by everybody at least at 1 o'clock on Monday.

The Court: Those that did see it, saw it about 1 o'clock.

Mr. Mayers: Noon.

Mr. Maitland: No, it was 1 o'clock before we saw it—12:30—So that was pretty nearly 24 hours before you saw it on the Tuesday? A. Yes.

Q. What had been burnt over between the time it started

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on Monday and when you saw it on the Tuesday? A. I don't know, I did not see it was going on.

Q. Well, you have told the Foreman there was no sign of it being burnt on Monday? A. Not as far as I could see.

Q. Will you swear there had been no burning between the track and where you saw the actual fire on Tuesday—Had been no burning there between Monday and Tuesday? A. I cannot swear to that, no.

(Witness stands aside.)

LESLIE SMITH, a witness called on behalf of the Defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. MAYERS:

Q. You live in Victoria? A. Not now.

Q. Where do you live? A. Vancouver.

Q. What is your occupation? A. Train man.

Q. On the Monday and Tuesday, August 18th and 19th, 1930, you were on the way freight, were you, going to Kissinger?  
20 A. Yes.

Q. What was your occupation on the way freight? A. Rear end brakeman.

Q. On the Tuesday you left Kapoor about what time? A. On the arrival of the gas car.

Q. When would that be? A. About 10:30-10:35.

Q. Then you came on the way freight towards Victoria, did you? A. Yes.

Q. You know that rock cut, do you? A. Yes.

Q. And the fill on the Victoria side of the rock cut? A. Yes.  
30 Q. Did you see any sign of burning near the fill on the Tuesday? A. Yes.

Q. What did you see, exactly? A. A little smoke and odd blazes.

Q. Do you remember approximately the places where you saw them? A. I cannot tell that. (Witness at photograph.)

Q. Get your bearing on here, remembering that there is a fill under the rail. A. Yes—that is the fill (indicates).

Q. The fill is under the rail? A. This is the rock cut.

Mr. Maitland: Pointing to the left hand upper corner of the picture of the rock cut.  
40

Witness: And this is where I seen a fire up at this corner on Tuesday.

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Mr. Mayers: Put a cross where you saw the fire.

The Foreman: May I ask the approximate distance in this photograph?

Mr. Mayers: I will get that for you.—You are L. Smith—I will put L.S. (photograph marked). Do you remember about what area that covered? A. I should judge around 75 feet square—100 feet.

10 Q. Did you see anyone at that fire, or at the point of burning? A. Not when I was going by.

Q. You have been out there since, have you? A. Yes, sir.

Q. You located the spot where you approximately placed the fire? A. Yes.

Q. And pointed it out to Mr. Addison? A. Yes, sir.

CROSS-EXAMINATION BY MR. MAITLAND:

Q. Looking at this picture from the left-hand corner to the right-hand corner, the top corners both, what distance would you say was between those two points? A. I could not say.

20 Q. Give us some idea? A. I cannot tell from the distance at all. I can tell from the ravine there—The ravine there, and here is the rock cut (indicating).

Q. How far is the ravine this side of the closest stump you saw on that picture? A. I don't know.

Q. Can you tell me how much of the rail is in that picture? A. There is one side of the rail.

Q. Is there a whole rail? A. One half.

Q. In length? A. I don't know, I don't see any joints there.

30 Q. When this picture was taken, the camera at the end closest to you did not take the rail length into consideration? A. I don't know.

Q. What is the length of the standard rail? A. Standard length, 39 feet.

Q. The first time you saw the fire was Tuesday? A. Yes.

Q. You came up on Monday? A. Yes.

Q. What time? A. Generally about noon going to Kissinger.

Q. Going West? A. Yes.

40 Q. You saw no fire on Monday? A. I was not in the caboose.

Q. I see—At any rate you saw no fire? A. No.

Q. Who was your brakeman? A. Mainprize.

Q. And conductor? A. Miller.

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Q. Did any of your men on Monday tell you they had seen a fire there when this train passed? A. The engineer and head brakeman and the fireman was on the engine and I was at the rear end. I was not where they were.

Q. On Monday you were going to Kissinger, were you not? A. Yes.

Q. Did any of them tell you that they saw a fire at Kapoor when they went by on Monday? A. I did not see any fire on 10 Monday.

The Court: He is asking did anybody tell you? A. Not after we were going past Kapoor. After we were derailed I seen the smoke, on Monday—did not go down, I was working on the engine.

Q. You saw the smoke on Monday? A. Yes, and it was reported by conductor, Miller. I was on the tail of the caboose when he seen the smoke and said he was going to report it.

The Foreman: When you saw this fire on Tuesday, was the ground between the spot you have marked on that map and the 20 railroad burnt? A. I could not say.

The Court: What do you mean by the spot? A. That was where I seen the fire, on that little knoll, heading towards Victoria.

Q. What size was it? A. Around 75 feet square.

Mr. Maitland: You were in court were you when the other witnesses gave the same description, as 100 feet? A. Yes.

The Foreman: You cannot tell us where it was in relation to the railway? A. No.

The Court: Which way was the wind blowing? A. Same 30 way as the train was going—towards Victoria.

Q. Would it be parallel or across the track? A. Going up the hill from the railway—a knoll there.

Q. Would it be across the track? A. No, it was going up the hill, headed towards Victoria.

Mr. Mayers: I think your Lordship can see by the photograph.

The Court: I don't want to confuse the jury. I don't like photographs. I want to get the direction. Photographs only reach the vision.

40 Mr. Mayers: They represent the nature of the ground.

The Court: Not the distance.

Mr. Mayers: You could tell the place. That is all I am concerned with, to prove the distance.

Mr. Maitland: This is re-examination, not cross-examination.

The Court: It should be by permission of the Court.

Mr. Mayers: I beg your Lordship's pardon, I was just re-

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examining.

The Court: I was not finished—You say on the map—can you give the area about on the map, that is on that plan? A. The only difference is there—the rock cut ravine, and you will notice, that is I noticed, there was that small knoll.

Q. Which way did the fire appear to be going? A. Towards Victoria.

Q. Not towards the sawmill? A. No.

10 Q. Parallel with the track? A. No, away from the track. There is a big curve, you go around the curve there, and it was going up over the knoll.

Q. Now did you see it later on, that fire at all? A. After Tuesday—

Q. You only saw it once on Tuesday? A. Yes.

Mr. Mayers: And you remember the ravine you mention? A. There is a fill here—

Mr. Maitland: Just a moment. I am objecting to that. I asked him that and he said he could not tell.

20 The Court: The witness is called to designate some place, now the re-examination is to fix that point.

Mr. Mayers: I was going to ask the witness to identify the position.

Mr. Maitland: I must ask for the stenographic notes to be read—the answer.

Mr. Mayers: I am content.

(Question and answer with reference to this point were read by stenographer.)

30 Mr. Mayers: That is a different thing, to identify the ravine. I am asking him to identify the ravine on that picture.

The Court: Did you take particular attention that day as to where the ravine was? A. I did, yes.

Q. Why? A. Because they were all talking about the fire.

Q. Why, did the blame rest on the railway company? A. Well, no, not in the territory.

Mr. Mayers: Can you see on this photograph where the ravine is which you mention? A. Well, the ravine goes down here, this way.

40 Mr. Maitland: Now take the red pencil and mark that both ways where the ravine is now. A. There is a small knoll here and a small knoll there, and by this rock.

Mr. Mayers: Can you just indicate roughly by a line where the knoll rose and where the rock cut rises? A. I could not say where it rises, but there is a small knoll here.

Q. Draw a line in ink around in here somewhere and put in there a small knoll. A. And rock cut, and the rock cut looks as if there is a kind of a drain down here and comes up here.

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Mr. Mayers: That indicates the direction of the knoll does it? A. Yes.

Q. And now just draw roughly the indication of the knoll.  
A. There is a creek, which looks as if there is drainage of water off this hill.

Q. Indicate the rock cut. A. Comes up here, this knoll here towards the rock cut, this spur. This is a very small knoll.

Q. That is the indication of the rock cut, is it? A. Yes.

10 Q. We put towards the rock cut in between the two lines as shown.

Witness: There is a little creek bed, the water runs down here.

The Foreman: My Lord, it would help us quite a lot if we might have the witness make a ring enclosing the area he saw burning on Tuesday, not the spot, but where he saw it burn. A. Well the spot I mark it is the bottom of the knoll.

The Court: He could not show an area on the picture, because he is looking at it. He could show it on a plan.

20 Witness: Well, the fire was at this knoll.

The Foreman: I want to see how close it is coming to the railway.

Mr. Mayers: Do you know these two trees? A. Yes.

Q. Was there any fire the railway side of these trees? A. No, when I seen the fire it was on this small knoll here, and I was sitting in the caboose coming up around this curve.

The Court: Did you see the fire trail that day, do you remember? A. No, I don't remember.

30 Q. Did your observation go as far as to consider whether there was a fire trail to stop the spreading? A. No, all I looked at was where the fire was.

Q. What were the men doing there? A. I did not see any men at all. There could have been men at the back of the hill.

Q. What time was this? A. This was about ten thirty or ten forty-five on Tuesday.

Q. No men at the fire? A. Not when I seen—you see when I was going east I would not be looking the other way, I was going ahead around this curve, and I did not see anybody around.

40 Q. You saw sufficient to come before a judge and jury and tell where the area of the fire was, and now you say there were no men there. A. No, there was no men there. I did not see any.

(Witness stands aside).

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JAMES AUSTIN MILLER, a witness called on behalf of the Defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. MAYERS:

- Q. Where do you live? A. Victoria.  
 Q. How long have you been railroading? A. 25 years.  
 Q. And how long have you been conductor? A. 23 years.  
 Q. In the service of the Canadian National Railway? A. Yes.
- 10 Q. You were conductor on the way freight, were you not, which was going up to Kapoor on Monday, 18th August, 1930?  
 A. Yes.
- Q. Where were you when you were approaching the fill before the rock cut, after Mile 35—in what part of the train? A. At the rear of the caboose.
- Q. Did you see anything after you had passed Mile 35?  
 A. Yes.
- Q. What did you see? A. I seen smoke.  
 Q. Whereabouts was that? A. At approximately Mile 35.2.
- 20 Q. That was when you were passing the fill? A. When I was passing it on a moving train.

(Witness goes over to jury).

- Q. Will you mark on this photograph where you saw the smoke, on Monday? A. It was burning right in here—I think it was that log here that was smoking.
- Q. Just mark a cross, will you, and I will put “Mil” over this. You recall that tree, do you? A. I recall that cedar tree.
- Q. And this cedar tree? A. Well, this is east of that there, that is east, this is west.
- 30 Q. You recall this cedar tree, it is near the point you have marked X. Can you remember from what the smoke was rising on the part that you think was burning? A. On a burnt log or burning stumps.
- Q. You have been to the place since, have you? A. Yes.  
 Q. And located the place you have marked? A. Yes.  
 Q. And you showed it to Mr. Addison, did you? A. Yes.  
 Q. Then you went on to Kapoor? A. Yes.
- Q. What happened Monday at Kapoor? A. I went through the usual procedure, pulled into Kapoor with my train, stayed on  
 40 the caboose for the purpose of having lunch. The head brakeman was starting off, making the stop to the oil car and the oil tank, and the engine became derailed.
- Q. Do you remember how many cars made up that train?

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A. No, not right now.

Q. You remember the oil car? A. Yes.

Q. You had an oil car? A. Yes.

Q. What did you do with the other cars? A. Left them on the main line.

Q. Go on and tell me what happened after the derailment.

A. The brakeman, Mainprize or Smith, I have forgotten which, came back and told me the engine was off the track. I went up and examined the lay-out, and thought I could possibly re-rail her without assistance, so I said we would have lunch. We went to lunch in the caboose, which Smith was preparing, and ate lunch. We then went back and started to re-rail the engine—I cannot explain the procedure necessary on that.

Q. No, that does not matter. A. I took one pull with what power I had, and I seen I could not do it, I was going to damage the track, and I said we will have to have help. I went to the telephone, I called Victoria and told Mr. Fraser I was derailed, and I would require the auxiliary. I then told him that there was a fire back behind us and that the fire apparently was gaining considerable volume, as the smoke was rising, getting bigger.

Q. You noticed that? A. Yes, I noticed that when I was going back from the caboose. And he said, all right, I will get out as soon as I can. I went back down to the caboose. This was at that time approximately 13 o'clock—12:55 or 13 o'clock. I noticed some Hindu men going east towards that smoke with pails and shovels, apparently for the purpose of combatting the fire. I did not do anything more, only some clerical work that was required by me in course of my daily duties, until Mr. Fraser arrived with the auxiliary, at approximately 16 o'clock.

Q. And then you were eventually re-railed? A. I got his engine in front of my engine, gave him one pull, a matter of ten minutes, or possibly a few seconds more, and we were re-railed. I immediately put that engine on my train and proceeded to Kissinger.

Q. You returned on Tuesday morning? A. Yes.

Q. At Kapoor did you pick up anything? A. Yes, an empty oil car and number of loads, I have forgotten how many.

Q. Was that the oil car you had taken up full on the previous day? A. Yes.

Q. And then you came back to Victoria? A. Victoria.

Q. Did you notice anything at the scene of the fire? A. No, I was in the body of the caboose, doing my clerical work, at that particular point.

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CROSS-EXAMINATION BY MR. MAITLAND:

- Q. You were on what train, Mr. Miller? A. 569 number, way freight between Victoria and Kissinger.
- Q. How many cars did you have? A. Don't recollect the number of cars.
- Q. Give me an idea? A. Approximately twenty.
- Q. How big a crew? A. Five men, including myself.
- Q. Any of them smoke? A. Yes, I smoke.
- 10 Q. How many of them smoked cigarettes? A. Smith smokes cigarettes, others I don't remember.
- Q. Don't lay it on Smith. A. He is the only one I have associated with me.
- Q. You don't smoke cigarettes? A. Yes, I do—I did at that time—I think they all smoked.
- Q. Have not all sworn off since that fire? A. No—I don't smoke cigarettes now, smoke a pipe.
- Q. You were conductor on this train? A. Yes, going west from Victoria to Kissinger.
- 20 Q. Left Victoria about nine that morning? A. Yes.
- Q. Got to Kapoor at what time? A. 12:05.
- Q. Before you got to Kapoor you passed Mile 35.2? A. Yes.
- Q. That is a third of a mile from Kapoor? A. Yes.
- Q. You have 'phone facilities and everything of that kind at Kapoor? A. Yes.
- Q. As you were passing Mile 35.2 you saw fire? A. I saw smoke.
- Q. You thought that was about 30 feet back from the track? A. At that time from my own observation I did.
- 30 Q. All right. At that time, from your own observation, it was 25 or 30 feet from the track? A. Yes.
- Q. Therefore you thought it was on your own right-of-way or your own property? A. No.
- Q. How far did you think that went? A. I know, 50 feet from the centre. I have since discovered I made a mistake.
- Mr. Maitland: Never mind, everybody on your side seems to have discovered they have made that mistake.
- Mr. Mayers: I submit that that is not a proper observation. I am not aware that anybody yet has suggested they made a mistake.
- 40 The Court: No, that is a suggestion for the jury, later, it is not proper here.
- Mr. Maitland: At that time you did think it was on your right-of-way? A. No, I thought it was 25 or 50 feet from the track on my previous examination.
- Mr. Maitland: (Reads question 32 of Examination for Dis-

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covery). (Q) And you saw smoke, I understand, on the right-hand side of your train, do you remember that? (A) Yes. (Q) How far from the track? (A) Oh, approximately anything between twenty-five and thirty feet.—That is what you told me on discovery, do you remember that? A. Yes.

Q. You gave evidence at the fire enquiry, did you? A. Yes.

10 Q. Here is what you said—Now you told us at the fire enquiry which was held on the 4th November, 1930, that it was not more than 30 feet. You told me on discovery when you were examined in the Registry Office here on the 19th January, that it was approximately between 25 and 50 feet. Are these answers right or wrong? A. They were from my eye observation at that time, and as far as my vision went, as far as my recollection went, they were correct at that time.

Q. All right, at that time— A. Since that I have been marking a map or a photograph, and I have been on that ground, and I located the spot where I seen that smoke, and it was more than 25 or 30 feet from the track.

20 Q. You did that two years after? A. Yes.

Q. At that time, on the 18th day of August, 1930, you thought that fire was on your right-of-way? A. I thought it was there.

Q. On your right of way? A. I won't say it was on the right-of-way, I say I made a mistake at that time.

The Court: Don't get excited. What did you think then? A. I thought it was 25 or 50 feet from the track, which would naturally be on the right-of-way.

30 Mr. Maitland: What did you do after you passed that fire? which you then thought was on your right-of-way, what did you do? A. Went to Kapoor for the purpose of switch, and proceeded to prepare lunch.

Q. And while you were having lunch, the engine was derailed? A. Yes.

Q. What did you do then? A. I examined the derailment.

Q. Then what did you do? A. 'Phoned Victoria.

The Court: You sought for assistance from the Railway? A. Yes.

40 Mr. Maitland: Q. How much time elapsed after you left Mile 35.2 and 'phoned Victoria about the derailment? A. About forty minutes.

43 Q. Are you familiar with instructions in this time-table? A. Yes, special instructions.

Q. You were conductor on that train? A. Yes.

Q. Why did you not immediately after you got to Kapoor telephone your superintendent and tell them there was a fire on that right-of-way? A. The requirements of that special rule

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require me to make a report of all fires within my region, but that I will do it at the first open office. Kapoor is not an open office. The nearest open office was Deerholm. I had to use the 'phone at Kapoor on account of the derailment, and reported it then.

Q. If you had a fire on the right-of-way not near your own 'phone you would not report it? A. If the weather was dangerous, I knew the fire was of a very minor nature, when I seen it.

10 Q. And in the surrounding conditions? A. I knew the conditions.

Q. Just let me read this to you (Reads exhibit 36): "Conductors or railway trainmen . . . shall report same . . . to the superintendent, giving exact location by mileage." Now there was telephone communication at Kapoor, was there not? A. Yes.

Q. In any event you did not do it on this occasion? A. I did do it, I did not do it immediately,—I made my full report.

Q. You did not intend to do it? A. I did intend to do it, had every intention to do it, but intended to do it at Deerholm, where there is an operator.

20 Q. An hour later? A. Yes, but I did not consider the fire of immediate danger.

Q. How long did you expect to be at Kapoor? A. Thirty-five minutes.

Q. At least an hour and a half before you got to Deerholm? A. Yes.

Q. You made no attempt to put this fire out? A. No.

Q. Although you thought it was in the beginning? A. I knew it was not in the beginning. It looked like an original burn—just smoke.

30 Q. You did not examine? A. No, did not stop.

The Court: Had you been up before. What was the last trip before? A. Saturday.

Q. Nothing visible? A. No, nothing visible, no.

Mr. Maitland: You were having your lunch, were you, when this derailment took place? A. Yes.

Q. Do you know how many ties were broken by the derailment? A. No ties were completely broken, the track was spread, and the wing rail partly turned over.

40 Q. Was that all? A. That is all the damage that was done to the track.

Q. Are you sure of that? A. Positive.

Q. When did you examine it? A. Immediately the engine was railed I looked it over.

Q. When was it that you saw that the smoke was gaining considerably? A. After I had examined my derailment.

Q. You saw the fire was getting more serious? A. More volume of smoke.

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Q. You noticed that? A. Yes.

Q. And then 'phoned for help to Victoria? and had to wait for help? A. Yes.

Q. By that time did you go down and look at that fire, which was looking more serious? A. No.

Q. Neither did you send your crew? A. In regard to the fire, no, we made preparation to re-rail the engine.

10 Q. Now I want you to listen to this answer you gave me on discovery: Question 93: "As a matter of fact at one o'clock it looked like a pretty serious fire? (A) No, there was no big flame of fire. (Q) The Hindus were going down with buckets and shovels? (A) Yes, but it was no very large fire, it hadn't then crossed the railroad."—Do you remember telling me that? A. I told you what was a fact, it had not.

Q. Did you expect it to cross the railroad? A. No.

Q. Was it in such a way that if it became at all serious it would cross the railroad? A. It did cross the railroad.

20 Q. What did you have in mind when you gave me this answer: "(Q) The Hindus were going down with buckets and shovels? (A) Yes, but it was no very large fire, it hadn't then crossed the railroad." What did you have in mind when you told me that? A. I don't just know, it is vague to me. I cannot recall why I told you that.

Q. All right, here is another: (Answer to question 85): "I noticed a bunch of Hindu men going towards in that direction with pails and shovels, evidently for the purpose of fighting the fire."—How many were there in the bunch of Hindu men, would you think? A. Did not count them.

30 Q. Would it be quite a few? A. They were straggling along coming from the mill, and straggling along there.

Q. I think we have evidence from Mr. Dunn that there were twenty-five or twenty-six. Would you say you saw them? A. I have never seen so many as that around Kapoor in two years. They were straggling along one behind the other, coming from the mill with pails and shovels, and some besides might have had mattocks, I don't recall.

Q. After you were re-railed, you went on your way? A. Yes.

40 Q. Did not go back to the fire with your men, or anything of that kind? A. No, I could not go back to the fire.

Q. This was the first you saw of that fire, was it not? A. Yes.

Q. On Monday, August the 18th? A. Yes.

Q. Did you tell any of the members of the crew on the train that you had seen it? A. We talked—possibly talked about it, yes.

Q. When? A. At that particular time, when we got up to Kapoor.

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Q. Did you tell the Kapoor people about it? A. I think I talked in the office.

Q. What did you say? A. I said that smoke is gaining considerable volume, those were my identical words.

Q. When did you say that the smoke was gaining, after your re-railment? A. No, when I seen the smoke rising from behind my train, that was probably I would say 12:50, I cannot recall the actual time.

Q. Now the actual time that you saw this fire is when? A. About 12:2 or 12:3.

Q. And the actual time when you saw someone in Kapoor about it, was what? A. I don't just recall, possibly 12:30 or 12:35.

Q. Before or after you 'phoned? A. At the time I went into the office to 'phone, I don't know whether it was before or after.

20 Q. After your derailment? A. Yes.

RE-EXAMINATION BY MR. MAYERS:

Q. You have been back to the fire since to see the spot? A. Yes.

Q. And pointed it out to Mr. Addison? A. Yes.

The Court: "Spot" confuses me—was there a spot you marked at that fire? A. Not perhaps that particular spot, but the area would probably be quite near the spot where there was a log burnt—no log burning, but it was smoking, I would say an original fire.

30 The Court: No smoke coming from the brush? A. No.

Juror: Some evidence has been given as to the distance of the track. Does that mean from the position of the fill? A. I meant the rails at the time.

RE-CROSS-EXAMINATION BY MR. MAITLAND:

Q. Something I overlooked, your Lordship: You kept on working on that line, did you? A. Yes.

Q. For how long? A. Right after the fire I was off for a few days, and then I left there in September, 1931.

40 Q. Well, the fire was on the 18th and 19th of August, was it not? A. 18th.

Q. And between the 18th and 19th August and the time you

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gave your evidence at the fire inquiry of the 4th November, you were continually up and down that line? A. Yes.

Q. And from that evidence to the 19th January, your examination for discovery? A. No, I came from Kamloops for the discovery examination. I stopped working on that line in September, 1931.

10 Q. For a year after that fire you were continuously up and down? A. Yes.

Q. And you had this spot to go by continuously, after the fire? A. I never thought about it.

Q. You went by this spot continuously after the fire? A. Yes, six times a week.

Q. Before you gave this evidence, and many times after? A. Yes.

The Court: When did you know there was going to be an action? A. In January, 1932, I was called for discovery.

20 Q. And the fire court, when? A. November.

Q. Until you were actually summonsed to give evidence for discovery was the first time you knew there was an action to be brought? A. That was the first time.

Q. And between all the time you had been up and down the line you never gave a thought to it? A. No.

Mr. Maitland: May I ask a question as to that?

The Court: I allow it because it strikes me as peculiar.

30 Mr. Maitland: Did you not know that an action was to be brought? A. I did see it in the Vancouver papers that Mr. Maitland had made an application to the Court for the purpose of an extension of time for the action between the Kapoor Lumber Company and the C.N.R.

Q. Did you see that in the Colonist, the Victoria papers? A. Yes, I very seldom see the Times.

(Witness stands aside).

FRANCIS HUGH MULLIGAN, a witness called on behalf of the Defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. MAYERS:

40 Q. Where do you live? A. Edmonton.

Q. And your occupation is what? A. Conductor.

Q. How long have you been conductor? A. 30 years this Fall in the C.N.R.

Q. Always with the C.N.R.? A. Yes.

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- Q. You were conductor on the gas car running from Victoria to Kissinger in the summer of 1930? A. Yes.
- Q. You left Victoria every morning about when? A. 9 o'clock.
- Q. Got to Kapoor about when? A. 10:25.
- Q. On Monday morning, August 18th, 1930, you were taking the gas car on that morning, were you? A. Yes.
- 10 Q. You remember Mile 35 and the fill of the rock cut? A. Yes.
- Q. Did you observe anything as you passed Mile 35? A. I saw smoke on the right-hand side.
- Q. After passing Mile 35? A. Yes.
- Q. Where was that in reference to the fill? A. Well, the ground there is in the shape of a bowl. (Witness at plan.)
- Q. Will you mark this. Just orient yourself on that map, and remember that the fill is obscured by that rail (indicating). Mark it "M.L.G."—Did you observe what it was which was smoking? A. Logs and stumps.
- 20 Q. And about what area did they cover, do you think? A. It did not cover very much. I just noticed as I was passing through.
- Q. Then you went and stopped at Kapoor and went on to Kissinger? A. Yes.
- Q. And you came back in the afternoon? A. Yes.
- Q. Reached Kapoor at what time in the afternoon? A. About 3:44.
- Q. And you were delayed on that afternoon, were you? A. Yes.
- 30 Q. You had to wait for the way freight to get out of the way? A. Yes.
- Q. When you left Kapoor and came to Victoria did you observe anything at the smoky place? A. Well, I was in the body of the car, I did not see anything.
- Q. In the morning when you saw the smoke, in what part of the car were you? A. I would be in the front end of the car.
- Q. Then on Tuesday you went from Victoria to Kissinger, arrived in the neighbourhood of Mile 35.2 about 10:15 or 10:20? A. Yes.
- 40 Q. Did you notice anything at the scene of the smoke? A. Yes, I could see smoke the same place, it had worked back from the track.
- Q. Had the area increased or diminished? A. It had increased.
- Q. Did you see any men working at the time? A. Yes, I saw some Hindus working there.
- Q. About how many? A. About 5 or 6, I don't know, I

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did not count them.

Q. During that summer, before the fire, had you seen any people walking on the track? A. Yes.

Q. How often? A. Well, quite often, I could not tell you—quite often, they were walking up and down to Leechtown from Kapoor.

Q. That is the Victoria side of Kapoor? A. Yes.

Q. They were walking up and down the track? A. Yes.

10 Q. Did you see them doing anything? A. Saw them smoking, both men and women.

Q. There is no road laid there, is there? A. No, no road.

Q. So to get there you go in to Kapoor and then walk. A. Then walk, yes.

Q. Is there a Post Office at Kapoor? A. At Kapoor, yes.

Q. Had you seen any fires in that neighbourhood prior to Monday, August 18th? A. Yes, saw smoke fires—smoke on the opposite side, right up to the time of the big fire, for probably three weeks before that, coming from the post office up to the school.

20 Q. That would be around Mile 36 would it? A. Just about it.

Q. How long had you seen smoke before the fire? A. I seen smoke every day there, it never went out, it was smouldering logs and stumps there.

Q. Come and look at exhibit 5, and show me approximately where you had seen the smoke at points other than Mile 35.2? A. Around here (indicates).

Mr. Maitland: Mark that—mark in brown.

30 Mr. Mayers: Just indicate—just a rough outline. (Witness marks.)

The Foreman: Where is that outline—semi-circle?

Mr. Mayers: Do you know whether it was an enclosed area or did it seem to go back to the old fire? A. The old fire ran up the centre to the school near the track up here.

Q. It had crossed the track? A. No, not that fire.

Q. On the side of the track away from the school? A. Yes.

Q. Right opposite? A. Yes. Right opposite, here, house some place.

40 Q. Your yellow line is intended to show the outside edge of the fire, is it? A. Yes.

Mr. Mayers: I mark that “M.G. 1 to 2.”

(Witness returns to box.)

Q. Did you see what it was that was smoking in the neighbourhood of M.G. 1 to 2? A. Old logs and stumps, that was

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smoking there.

Q. Approximately for what period before the fire had you noticed this? A. I noticed every trip going up there, it was smoking right along.

Q. Do you remember when the big fire occurred that you mentioned? A. Well, I don't remember the date, it was about three weeks.

10 Q. Before Monday, the 18th August? A. Yes.

Q. And the smoke had been continuous up to Monday, August 18th? A. Yes.

CROSS-EXAMINATION BY MR. MAITLAND:

Q. How far is M.G. 1 from the right-hand track, going from Kissinger to Victoria? From the centre track? A. Coming to Victoria?

Q. Yes? A. Well, I don't know.

Q. Well, approximately how far? A. It is hard to tell how far it is.

20 Q. Well, give me some idea, you made the mark. A. I could not tell you.

Q. How far is M.G. 1 from the nearest track in any direction? A. I could not tell.

Q. How close is there a house to the point M.G., or was there at that time? A. There is a house right standing there yet, at the foot of the hill. The fire burnt up to it.

Q. There was a house right down in that locality? A. Right near, not far from our right-of-way.

Q. Was it 100 yards from the track? A. I could not say.

30 Q. Was it 200 yards? A. I could not tell you.

Q. You saw this fire at the 35.2 Mile. That is the one the other side of the rock cut? A. I did not see any fire, I saw smoke.

Q. You knew there was a fire? A. No, I did not know whether there was from that.

Q. Did you not tell his Lordship you thought there were stumps burning? A. Smoking.

Q. Did not that indicate a fire? A. Well—

Q. This was the 18th of August? A. Yes.

40 Q. You had been on that run all that summer, and it was a dry season, and you knew there had been fires around, did you not know fires were dangerous at that time? A. There was a fire there three weeks before that.

Q. Was this the first one to burn on the right-of-way? A. I

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did not see it on the right-of-way.

Q. You did not? A. No.

Q. You did see the same fire as the others told us of—as Jones told us of? A. I don't know what you mean.

Q. Jones was your engine man? A. Yes.

Q. And he placed it 25 feet from the track? A. I don't know where he said it was.

Q. You know where it was? A. Yes.

10 Q. How many feet? A. Approximately 75 feet from the outside rail.

Q. And you cannot tell me how many feet it was from your track to M.G. 1, is that correct? A. No, I cannot tell you that.

Q. Now you were at the fire inquiry, were you not? A. Where?

Q. At the fire inquiry? A. Not to give evidence.

Q. Were you there? A. I was there.

Q. Were you asked to give evidence at all? A. No.

20 Q. By the policeman, Wheatley? A. Just at the C.N.R. down here, a statement, that is all.

Q. You were not asked to give evidence at the fire department? A. I was there.

Q. You did not give evidence? A. No.

Q. Nobody asked you to? A. Nobody asked me to.

Q. Where is the nearest section man from the point where you saw this fire? A. Joe Reese, I don't know how far that is up.

Q. You don't know how far his section was? A. Section 43, I think.

Q. He was on that line? A. Yes.

30 Q. You were the conductor in charge of this car? A. Yes.

Q. You know timetable 3, you have read the instructions, and handled it? A. Yes.

Q. "Conductors, engine men or train men, who discover or receive notice . . . shall report same by wire to the superintendent . . . etc., giving exact location or mileage"—did you do that? A. There was no operator there, so therefore I could not report it.

Q. Did you do that? A. No, I could not report it.

Q. Take the notice—you had the engine man or train man with you, and his name was Jones? A. Yes.

40 Q. Let us read some other instructions: "Conductors, engine men and train men, etc."—did you never use that Kapoor 'phone at all? A. I don't think I did.

Q. Did it not occur to you that you could go to Kapoor and 'phone? A. Well, I could not leave the car on the main line without protection. I had no brakeman except my engineer, he had to watch the Government mail there where he was sitting.

Q. Will you listen to this: (Reads further instructions)

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“Engine men shall on discovery . . . stop and notify the first employee . . . that action shall be taken.” Were you familiar with those instructions? A. Yes.

Q. Those are instructions by the Board of Railway Commissioners? A. Yes.

Q. You knew it was in existence, you had your engineer man there, Jones? A. Yes.

10 Q. You did see fire? A. I saw smoke.

Q. Smoke would indicate it was even smaller than a small fire. Why did you not have your engine man or crew put that fire out right away? A. There have been so many fires around there I figured they had everything under control. They all knew there was fire around there for weeks before that.

Q. You did not report it? A. No.

Q. And did not report it when you got to your section man, Reese? A. No.

Q. Did you report? A. No.

20 Q. Did you talk of it to an inspection man that morning?  
A. No.

Q. Did you report to the Kapoor people? A. No.

Mr. Mayers: Have you been advised of the location of the fire since? A. Yes.

Q. And you have pointed it out to Mr. Addison? A. Yes.

(Witness stands aside).

JOHN HUGHES JONES, a witness called on behalf of the Defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. MAYERS:

30 Q. Where do you live? A. Victoria.

Q. What is your occupation? A. Locomotive engineer.

Q. How long have you followed the railway? A. About  
45 years.

Q. And you were in the employ of the C.N.R. in 1930? A.  
Yes.

Q. You were the engineer on the gas car that ran up from Victoria to Kissinger in the summer? A. Yes.

Q. On Monday, August 18th, 1930, you were driving that gas car and got to Mile 35, did you? A. Yes.

40 Q. And know the fill and rock cut following that? A. Yes.

Q. Did you observe anything after you had passed Mile 35?  
A. At Mile 35.2 I noticed a little smoke.

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Mulligan,  
Cross-  
examina-  
tion,  
*continued.*

J. H. Jones,  
Examina-  
tion,

Jones, for Defendant—Direct Examination.

Jones, for Defendant—Cross-Examination.

Q. Did you see what was smoking? A. It seemed to be very close to a stump.

Q. Can you come over here and mark the stump where you saw the fire burning, on Exhibit 4. Just get yourself fixed on the map, remembering the fill under the rail, and then pick out your stump. (Marked.) Mark that J.

The Court: Is it in the same place?

10 Mr. Mayers: No.

Q. You have been back since, have you, to that place?

A. Yes.

Q. And you located your stump, did you? A. Yes.

Q. And pointed it out to Mr. Addison? A. I did.

Q. And you went from Kapoor to Kissinger on that date?

A. Yes, on the day of the fire.

Q. And came back in the afternoon, did you? A. Yes.

Q. And left Kapoor about 4:25—You were delayed by the derailment? A. Delayed a little, yes.

20 Q. Coming back from Kapoor to Victoria on Monday afternoon, did you observe anything at Mile 35.2? A. I noticed some men there.

Q. About how many did you see? A. Well, it occurred to me there was about a dozen there.

Q. And was there smoke there then? A. Yes, there was smoke gathered around.

30 Q. Was the area—How would the area compare to the area you had seen in the morning? A. Well, it seemed to be a little bit more. The men were scattered around and I took it for granted there was smoke round where they were.

Q. Did you see what they were doing? A. Putting out the fire, I think.

Q. In what way? A. With shovels.

Q. And on the Tuesday morning, when you went up, did you observe anything at Mile 35.2? A. On Tuesday?

Q. Yes? A. No, I don't remember.

Q. And in the afternoon, of course when you came back, what was the condition? A. There was a regular fire round there.

Q. You were the engine man on this gas train? A. Yes.

40 CROSS-EXAMINATION BY MR. MAITLAND:

Q. You were the engine man on this gas train?—on this gas car? A. Yes sir.

Q. And you say that you saw this fire about twenty-five or thirty feet from the track? You said that at the Fire Inquiry.

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tion,

Jones, for Defendant—Cross-Examination.

A. Yes.

Q And you went further and said that you thought that this fire from the distance where you saw it was a fire that you thought had been started by a track walker dropping a lighted cigarette? A. No I didn't.

Q Here is what you said at the Fire Inquiry. You were asked this question: "Was it close enough to have been originated by a track walker or tourist do you think?" and your answer: 10 "Well, undoubtedly; it would run out to where it was. It was only about twenty-five or thirty feet from the track." Do you remember giving that evidence? A. Oh yes, but I didn't say it was started by that.

Q I am not saying you did; but didn't you say that it could have been started by a track walker? A. Well that is open so far as that is concerned; that is an open question.

Q I am looking at my discovery brief instead of the other. The Court: You did not originate that idea whoever was asking the question? A. Why no; I thought it was an open 20 question; it could have been started by anybody that started the fire.

Mr. Maitland: Q. Well now, apparently Mr. Wheatley — you remember him at the Fire Inquiry? A. Yes.

Q. Now Mr. Wheatley asked you this: "Have you noticed track walkers on your various trips, that is trespass people walking the track? (A) "Yes." (Q) "Frequently?" (A) "Quite frequently; hunters and tourists up around there." Then he goes on to deal with that; and then I examined you at page 72: 30 "Mr. Maitland: (Q) That is the fire you saw at 35.2. Do you think that was something that could have been started by a track walker or tourist? (A) "Well that was smoking; it was some old fire starting up again." (Q) "Was it close enough to have been originated by a track walker or tourist, do you think?" (A) "Well, undoubtedly; it would run out to where it was. It was only twenty-five feet or thirty feet from the track." (Q) "Not from the right-of-way, actually from the track, twenty-five or thirty feet, you are clear on that? (A) "Yes." (Q) "Was that where you first saw the smoke?" (A) "Yes." (Q) "At 10:25 in the morning?" (A) "Yes."

40 Q. Now do you want to change that, or accept that as being your evidence? A. Well that is not the proper distance. I made a mistake in the distance.

Q. You did not tell me that at your examination for discovery; you did not tell me that you had made a mistake in the distance? A. I didn't know what distance it was.

Q. Did you go out with the measuring party? A. I was running the gas work car on my own from the depot.

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Jones, for Defendant—Cross-Examination.

Q. And you found out then that you were wrong, did you?  
A. I saw the measurements.

Q. Now you were under the impression at the Fire Inquiry that this could have been started by a cigarette, weren't you?

A. Well I don't know whether I was competent to Judge; I think no one would be competent to judge that off-hand.

10 Q. Would you think the fire warden who walked around the fire guards; he was there and saw these men, and talked to the men actually fighting the fire, would you think that he would be competent to tell the distance? A. I don't know.

Q. More than yourself? A. I don't know.

Q. Would a man right there be more competent than yourself to tell that distance? A. He should be, yes.

The Court: Did you get off? A. No; I went by there at thirty miles an hour, and just had a passing glance.

Mr. Maitland: You went by there— A. —and I photographed it in my mind.

Q. You went by there at thirty miles an hour? A. Yes.

20 Q. And you saw a fire that you thought at the Fire Inquiry was twenty-five or thirty feet from your track? A. I saw a little smoke.

Q. But you thought it was twenty-five or thirty feet from your track you said at the fire inquiry?

Mr. Mayers: Let him finish his answer.

The Witness: Are you through?

Mr. Maitland: No, I am not through. Go ahead and answer.

A. I don't know where to start in to answer. Please repeat the question.

30 Q. I say you were going at thirty miles an hour and you saw a fire, or what you thought was a fire, anyway, and you thought it was twenty-five or thirty feet from your track, didn't you? A. Yes, at that time.

Q. Is that right? A. That is right.

Q. And two years afterwards you went out with a party and actually picked up a stump that you saw when you were going past there at thirty miles an hour? A. Yes.

40 Q. Did you report this fire that day when you first saw it. Did you make a report that day that you had seen this fire at 10:30 in the morning? A. No.

Q. Did you report it to your section man, Reece? A. No.

Q. Or to any of the section men at all? A. No.

Q. Did you make any attempt to put the fire out or anything of that kind as required by these instructions? A. No.

Q. You did nothing at all? A. I kept on going.

Q. And so did the fire, didn't it?

(Witness stands aside).

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O'Malley, for Defendant—Direct Examination.

MERLIN MARTIN O'MALLEY, a witness called on behalf of the Defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. MAYERS:

- Q. Where do you live? A. Victoria.
- Q. And what is your occupation? A. Conductor on the logging train.
- Q. You were in the service of the Kapoor Lumber Company in the summer of 1930, were you not? A. Yes.
- 10 Q. And I think you lived in one of these houses down near the school? A. I did, yes. No, on the hill.
- Q. Pardon? A. I lived on the hill.
- Q. Well you know where the school is? A. Yes. I lived in one of the five houses.
- Q. Just come over here for a moment and identify the location on the map? A. I lived right there.
- Q. Four houses marked there. There should be five? A. Yes.
- Q. And yours is the little one? A. Yes, mine is the little
- 20 one.
- Q. Before you go back, your work took you out where? A. It took me all along the line.
- Q. Well, which line? A. From Kapoor right down to the C.N.R. switch.
- Q. You were working out on the Kapoor main logging spur, were you? A. Yes.
- Q. And that goes away up to the woods? A. Yes.
- Q. You remember Monday the 18th August, 1930, do you?
- A. I do, yes.
- 30 Q. And that was the day before the fire which burned the building? A. Yes.
- Q. What time did you go to work that day? A. I went to work at a quarter to seven.
- Q. What work did you go to? A. I went and got the locomotive and dumped two loads of logs, and then I went to the woods.
- Q. You went up that main logging spur at the top of the map? A. Yes.
- Q. And did you observe anything as you were going? A.
- 40 Yes, I saw smoke.
- Q. About where? A. I couldn't tell you exactly where from where I was at, but it was down along the C.N.R. track.
- Q. Just come over and mark for me whereabouts you were when you saw the smoke? A. I was right there.
- Q. Put an "X" at the approximate place.

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The Court: What is that?

Mr. Mayers: The position where he was when he observed the smoke. I will put in "O'Malley"—"M 1." Now where, approximately did you observe the smoke? By the way, you know the rock cut on the C.N.R. do you? A. Yes.

Q. Approximately where was the smoke that you saw there at point "O.M.1"? A. Well I just saw it opposite where I was; it would be down here some place; I couldn't tell you exactly the spot where it was at.

Q. I understand it was there approximately? A. It was down here where I saw it first.

Q. And that would be "O.M.2"? A. Yes.

Q. And that would be about what time? A. It would be between seven and eight o'clock

Q. Between seven and eight o'clock in the morning of Monday the 18th August, 1930? A. Yes, sir.

Q. You went on up to the woods, and did you report that to anyone? A. I reported it to the woods boss, yes.

Q. And who was that? A. Ardyn Singh.

Q. And then coming back, what time did you come back from the woods? By the way, did Ardyn Singh say anything when you reported to him? A. Yes, when I reported the fire he said that the men down at the mill would look after the fire.

Q. What time did you get back? A. I got down there about twelve o'clock; I think around noon sometime.

Q. And then did you notice anything on your way back? A. Yes.

Q. Coming down? A. Yes.

Q. What did you see? A. I saw smoke over there still.

Q. In the same place? A. Yes.

Q. And you went back to the woods after lunch? A. Yes.

Q. And what time did you go home finally? A. I came home about five o'clock; about that time.

Q. Now where was the—was there a tank car belonging to the Kapoor Lumber Company? A. Yes they had a tank water car—a fire car.

Q. Where did that sit or live when it was in use? A. It generally stood on the little spur opposite the planing mill.

Q. Just come over here and show us on the map? A. That is the spur up in here. It does not show on the map.

Q. Just mark the approximate position, just about where it was? A. It was just about there I imagine.

Q. That would be "O.M.3."? A. Yes.

Q. Now on the morning when you came home from the woods about twelve o'clock did you observe where the C.N.R. engine had been derailed? A. Yes I did.

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Q. Where was that? A. Dwn at the oil tank.

Mr. Mayers: Give me that blue print please.

Q. Just come over to the Jury will you. Looking at Exhibit 45 which is a blue print of the spurs of the Kapoor Logging Company Limited. You had better acquaint yourself with the map. This is the main logging spur is it? A. Yes.

Q. Where is the run-around track as you call it? A. It comes off the bridge.

10 Mr. Maitland: That will be on the car track going east.

Mr. Mayers: Q. The run-around track. A. The run-around track is where I used to take the logs.

Q. The run-around track has two junctions on the main logging spur? A. Yes.

Q. Whereabouts was the point—whereabouts had been the place of derailment? A. About there.

Q. Put a red dot where you say it was. A. (Witness marks place).

20 Q. By the way, you saw the result of the derailment did you? A. Yes, I was down there at noon and helped to put the locomotive back on the track; but I couldnt get around; they had this blocked at that time, and there was no stumps there to get my block and line on, and they had to send to Victoria.

Q. After the engine had been re-railed and got away did you see the place? A. Yes.

Q. And what had happened? A. Well the main line was clear and it was all right; that is this line here on the right.

Q. The main logging spur was clear? A. Yes.

30 Q. There was nothing to prevent traffic on the main logging spur? A. No.

Q. What had happened on the siding? A. Well this track here had turned over.

Q. That is the rail had turned over? A. Yes; and after I came down at night coming home the rail was up again.

Q. Did you go out on the main logging spur on the Monday with your locomotive? A. On the Monday? Do you mean down here?

Q. Yes. A. No.

Q. Did you on the Tuesday? A. Yes.

40 Q. Tell me what you did on the Tuesday? A. I came out and dumped out the oil car.

Q. And what did you do with the oil car? A. I sent it.

Q. You actually brought the oil car out from where it was on the run-around? A. I went down and brought it down.

Q. You brought it down? A. I brought it down the two switches.

Q. And put it on the mill switch? A. Yes.

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O'Malley, for Defendant—Direct Examination.

Q. You are clear are you that on the Monday, once the engine had got away from the point of derailment there was nothing to prevent the traffic on the main logging spur? A. I couldn't say after about 5:30 because I wasn't down there.

Q. But at night when you were there? A. No.

Q. Was there any result by reason of the derailment on the main logging spur at all? A. No, not on the main line, no.

10 Q. What time did you take hold of the oil car on Tuesday morning? A. Seven o'clock.

Q. Did you use the tank car on that Tuesday at all? A. Yes, sir.

Q. What time was that? A. I took the tank car about one o'clock.

Q. And what use did you make of it? A. I was fighting fire with it.

Q. Whereabouts? A. Pardon?

20 Q. Whereabouts? A. I was on the C.N.R. with the water car, and I went up to Mr. Cowan's house and filled up, and I stayed there until the gas car came in; and I sent the brakeman to brake the gas car, and I was out there then fighting the fire with the water car.

30 Q. And after you had filled up at Mr. Cowan's house did you continue to make use of the tank car? A. Yes, I was opposite to the five houses on the C.N.R. track; and Mr. Sullivan lived down there and Mr. Webber, and we were fighting his place there, and at about half-past one, one of these Chinese houses caught on fire, and the mill was still running. There was just a handful of men down at the scene at that time. The mill was still going. In fact they didn't blow the mill whistle until two o'clock in the afternoon, and then the fire was reaching all round there previous to that.

Q. And after that did you continue to use the tank car? A. I did, yes; I used it until I had to come in and pull some box cars that they had their stuff packed in. I had to pull them out, and then I couldn't do anything more with the locomotive.

Q. That is the locomotive was cut off? A. It was around the C.N.R. by Mr. Cowan's house.

40 Q. Did you observe whether there was water in the lumber yard at any time shortly before the fire? A. Well I know there wasn't water in the lumber yards three days before the fire, I am positive of that.

Q. Pardon? A. I am positive there was not.

Q. How do you know that? A. Well they built a tank for one of the donkeys out in the woods about a month before this, and they had it setting on the gasoline house there on the platform, and the woods boss came down to me and wanted me to fill this

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up with the locomotive, with the injector on the locomotive, and I asked him then I said, why don't you fill it up on the stand opposite to that, and he said there was no water in there.

10 Mr. Maitland: Who was it said that? A. The woods foreman Arjan Singh. It was two days before that I was up there and Arjan Singh was sitting on the cars with me and the water was running out of this pipe. Whether it was broken or not, I don't know; and I mentioned the fact to him when he got off, and two days after he wanted me to fill this tank up.

Q. And the pipe you are referring to was where? A. Just opposite the oil house it would be; it would be the lumber carrier's garage.

Q. Did you have a derailment anywhere near Mile 35 at any time? A. Yes, I did.

Q. About when was that? A. That would be about—I couldn't tell you exactly, but it was about the middle of June—the first part of June.

20 Q. Where was it? A. Do you mean on the C.N.R. track?

Q. Yes? A. Yes.

Q. Where was it? At the rock cut? A. At the rock cut near Victoria.

Q. You had been using the Miller spur? A. Yes, when they were logging down there.

30 Q. And what happened there? A. Well I had a car off the track, and put it back on again just before the gas car in the afternoon, and it was trying to beat the gas car up to the mill switch in order to get in the clear; and we started to go away again and the car jumped again, and the rail was spread, and we cut the ties with this car that jumped off the track, and I blew for the Kapoor section crew, and they came down and they fixed the track, and I had to take the car back in the clearing below and dumped the load there. I couldn't get it over the main track.

Q. And the Kapoor section crew gang fixed the track? A. Yes.

40 Q. And what did you do with the ties? A. I couldn't tell you, I know they took them out and put in new ones, but I couldn't tell you what they did with them. They threw them off the side I guess.

CROSS EXAMINATION BY MR. MAITLAND:

Q. Have you been drinking this morning? A. No, sir.

Q. Not at all? A. Oh, I had two or three beers, yes.

Q. You got into a little trouble about a year and a half ago

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in relation to some money matters? A. I might have.

Q. Well you ought to know. You were arrested weren't you? A. No, I absolutely was not, no.

Q. Wasn't there some money found in your possession and given to some one else? A. I wasn't arrested, no.

Q. Wasn't there some money found in your possession and given back to some one else? A. Yes, there was, yes.

10 Q. Now the man you spoke to about this fire you say was Arjan Singh? A. Yes.

Q. And the man you spoke to about the water was Arjan Singh? A. Yes.

Q. And Arjan Singh is dead? A. Yes, he is dead, I think. I heard he was.

(Witness stands aside).

STEPHEN GILLIS, a witness called on behalf of the Defendant, being first duly sworn, testified as follows

DIRECT EXAMINATION BY MR. MAYERS:

20 Q. Where do you live? A. Victoria, sir.

Q. And what is your occupation? A. Logger.

Q. You were living up at Kapoor in the summer of 1930 were you not? A. Yes.

Q. You were living with Mr. O'Malley the last witness? A. Yes.

Q. In that house that he pointed out, the little one of the five? A. Yes, sir.

Q. You remember Monday the 18th of August, 1930, the day before the fire? A. Yes, sir.

30 Q. What time did you get up that morning? A. I got up about 5:30.

Q. And did you see anything that morning at all that attracted your attention? A. About half past nine I saw smoke coming down there by the rock cut, about 35.2.

Q. What volume of smoke did you see there? A. Oh just a small flume of smoke.

Q. You were there? Just come over here and show me on this plan where you were.

Mr. Maitland: When was this?

40 Mr. Mayers: Monday morning at half past nine.

Q. Show me on there, Exhibit 4, here is the school. A. About there. (Indicating position).

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Q. I will put "S.G.-Fig. 1". Whereabouts approximately was it that you saw the smoke? A. Here. (Indicates position). There.

Q. And "there" is the end of the rock cut. The rock cut extending from there to there. A. Here.

Q. Draw a line in the near vicinity. A. (Indicates position with line).

10 Q. I will put two arrows. Mark that "S.G.-2". (Witness indicates position accordingly).

Q. Did you continue to see smoke there that day? A. Yes, during the day I noticed it several times.

The Court: That was the only smoke you noticed that morning, was it? A. Yes, sir.

Mr. Mayers: Then on the Tuesday, did you see anything then? A. Yes, about 6:30 in the morning there was still smoke there when I went out on the verandah and Mr. O'Malley was going to work.

20 Q. You were not working at the time, were you? A. No, sir.

Q. When did the smoke begin to increase on the Tuesday? A. I would say about half past eleven or twelve o'clock.

Q. Passing through that, did you see the point of derailment where the engine went off the rails on the Monday? A. Yes, I was down there.

Q. Did you see any repair work going on? A. By the Kapoor people?

30 Q. By anybody. By anybody. A. I saw the locomotive out on the track.

Q. And after that did you see anything? A. I went up to the house and cooked supper for Mr. O'Malley.

Q. You didn't see what happened? Thank you.

#### CROSS-EXAMINATION BY MR. MAITLAND:

Q. You were let out by the Kapoor people, weren't you? A. I quit there on my own account.

Q. I am instructed you were let out; which is it? A. No, I quit there on my own account.

40 1930. Q. When? A. I couldn't say exactly; either June or July,

Q. You were living with O'Malley in that house? A. Yes, I was.

Q. And when was the next time—the next job you got after that? A. The next job after that, I went from there; I am not

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Gillis, for Defendant—Cross-Examination.

quite sure.

Q. Are you staying with O'Malley now? During this trial?

A. Sometimes I stay home, if he has got friends. I stay down at the hotel.

Q. What is the name of the hotel? A. It is the Montrose Rooms now. I was up at the St. James for two nights, and I left there.

Q. You know the man who runs the St. James? A. I do.

10 Q. His name is George Hardy? A. Yes.

Q. Did you tell him you were going to get something out of this case? A. No I never.

Q. More than your expenses? A. No I never.

Q. Did you tell him you were going to get a piece of money or a job, one or the other? A. No. Any conversation with him—I had no conversation with him of that kind at all; but the other night he came up to me and he says, "Oh, all you will get out of this is a job," and he said, you might be offered a job, and you may not even get that; and I said I know I won't be offered a job,  
20 because there are too many C.N.R. men out of a job now for me to get one.

Q. And you did not tell him that is what you were going to get? A. No, I didn't.

Q. Did you tell him that you would be really well paid?

A. No, I didn't tell him that.

Q. Did he tell you to go and get an order from Mr. Fraser for your hotel? A. No, he gave me a slip of paper for me to write my name on it, and I did that.

(Whereupon the Court adjourned at 12:30 p.m., to 2 p.m.)

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Davies, for Defendant—Direct Examination.

Thursday, May 26, 1932; at 2 p.m.

JOHN HERBERT DAVIES, a witness called on behalf of the Defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. MAYERS:

- Q. Your full name, please? A. John Herbert Davies.
- Q. Where do you live? A. Metchosin.
- Q. What is your occupation? A. Section Foreman, C.N.R.
- 10 Q. How long have you been railroading? A. Since March, 1920.
- Q. In 1930 you were stationed at Metchosin, were you? A. Yes.
- Q. You remember Monday, the 18th of August, 1930, the day before the fire, do you? A. Yes.
- Q. What happened on that afternoon; you were at Metchosin, were you? A. We were coming home to Metchosin from working on the far end of the section; the train stopped and picked us up, and told us to get our tools and pile aboard that there was an engine off at Kapoor.
- 20 Q. That is a train that was coming up from Victoria. A. Coming from Victoria to Kapoor.
- Q. Met you on the track, I suppose? A. Yes.
- Q. And your section men were with you, were they? A. Yes.
- Q. How many were they? A. Three.
- Q. And you went aboard this train, did you, with your section men? A. Yes.
- Q. And you took what materials with you? A. We took our usual tools for working on the track, repairing the track; 30 which we always carried fire equipment always during the fire season, fire fighting equipment, shovels, water buckets, mattocks, as required.
- Q. Anything else? A. No, we just have our ordinary section tools to use to repair the track.
- Q. Any extinguishers? A. We have no extinguishers; we have fire pails—canvass buckets, water buckets.
- Q. And then you went on to Kapoor, did you? A. Yes.
- Q. Mr. Fraser of course was on that train? A. Yes.
- Q. That is what you call the auxilliary, is it? A. Yes.
- 40 Q. What I call a work train; that is right, is it? A. Yes.
- Q. When you came past mile 35 did you observe anything? A. Yes, I was looking out of the door of the bunk car, in which we were travelling with the section men, and I saw smoke on the side of the track.

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Q. What time would that be, about? A. Well, I really cannot give you the exact time; but it was when we went up on the train.

Q. The train reached Kapoor at four o'clock; so that it would be slightly before four o'clock. Come over here and show me on this photograph where it was you observed the smoke.

Mr. Maitland: When was this?

Mr. Mayers: Monday afternoon, on the work train. A. Yes; 10 there is a culvert here; that is a gully that drains, this depression in here, and here is a culvert.

Q. A culvert under that rail? A. Under the track. We were standing in the door of the bunk car on which we ride to the derailments, and I was looking out, and I saw smoke just right in here.

Q. Just make a circle indicating the approximate position where you saw the smoke. A. It seemed to me to be just here; just in behind this stump and in between that log.

Q. Between the stump and the log. I will put "JHD". 20 You may go back to the box.

Mr. Maitland: What time would that be?

Mr. Mayers: Somewhere after four o'clock. Have you returned to the scene and located that place since? A. Yes.

Q. The place where you saw the smoke? A. Yes.

Q. And you pointed it out to Edison, did you? A. Yes.

Q. And then you went to Kapoor; and what did you do there? A. Well, we got our tools out of the car, took them over to where the engine was derailed, got some hardwood blocks out of the tool car and took them over there in case they would be re- 30 quired. By that time the engine had uncoupled from the work train and hooked on to the derailed engine.

Q. And you re-railed the engine? A. Well, I had no actual part in it.

Q. The engine was re-railed? A. The engine was re-railed.

Q. And then what did you do? A. When they took the engine out of there I told my gang we would fix up this track. So I got a bar. And the rail was just turned over; I squeezed the rail into our proper guage, and one of the gang, one of the men called Trestain and another man Bishop, they got their hammers 40 and spiked it in. And I held it into the proper guage with the bar.

Q. So that you replaced the rail and spiked it immediately after the engine was re-railed? A. Yes; the track was put back in good shape, in its full standard guage.

Q. And then you went where after that? A. Well, I told another of the men, Mr. Cann—

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Q. Don't tell us what you said to anybody; where did you go? A. We gathered up our tools and went across back to the work car, the bunk car.

Q. Did you see Mr. Dunn on that occasion, the Forest Ranger? A. The first time I saw Mr. Dunn was coming out of the office, accompanied by Mr. Fraser.

10 Q. You did not know then that his name was Dunn? A. I didn't know, but I knew he was a Forest Ranger; I had seen him before.

Q. And what did Dunn and Fraser do? A. They got in the caboose.

Q. And your train went back where? A. Back down to where we seen the smoke as we were coming up.

Q. What did you do when you got there—by the way, the train stopped, did it? A. The train stopped.

Q. And what did you do? A. I got off the car, and followed Mr. Fraser and Mr. Dunn to a place on the track right opposite the fire.

20 Q. Did you hear anyone address Mr. Dunn? A. Yes, I heard Mr. Fraser speak to him.

Q. By name? A. By name.

30 Q. And then what did either of those two do? A. Mr. Dunn walked around the fire guard, and he came back up on the track where Mr. Fraser and I was standing and I don't exactly recall the conversation that went on between Mr. Fraser and Mr. Dunn, but Mr. Dunn went around the fire again. And when he came back Mr. Fraser asked him if he wanted any men, and he says, I have got ten or twelve men here, and he says, Now is the time, if you can get them. Well, Mr. Dunn—I don't know whether I should say the exact conversation, it might be contempt of court.

Q. Oh, no, you will be excused. What did Mr. Dunn say? A. Mr. Dunn says, Hell, no, we will have it out in an hour.

Q. And then what happened? A. Well, I think—

Q. By the way, while you were at the scene—when you were near mile 35.2, the engine and train waiting on the track, did you see anything else? A. Yes; I saw quite a column of smoke rising out of the top of green alder trees down in the course of the Sooke River, that would be west of 35.2.

40 Q. Just come over to this map and show me approximately where you saw the column of smoke—on Exhibit 4. Just get yourself oriented on here. Here is the rock cut end, and here is the fill; there is mile 35. I think you will have purple for this.

Mr. Maitland: Scarlet.

Mr. Mayers: Scarlet. Show approximately where you saw it. A. Standing here, I could see the smoke coming up.

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Q. Mark where the smoke was, first, where you saw that (witness does so). I will mark this "JHD-1." And you were standing on the track? A. I was standing on the track looking at that smoke there, happened to look around, and I saw this column of smoke coming out of the alders here. Q. You may go back to the witness box. Then you went home, did you, or went to Metchosin? A. Yes.

10 Q. Now, on Tuesday what happened, Tuesday, the 19th of August, 1930? A. We were working at mile 22.3 when the train come along and told us to get our fire fighting equipment and climb aboard.

Q. That would be some time in the afternoon, would it? A. Some time around four o'clock, I think; somewhere around there.

Q. And you went on to Kapoor, you and your three section men? A. Yes.

Q. And others, of course? A. Yes.

20 Q. When you passed mile 35 did you observe anything on that Tuesday afternoon? A. Well, there was just smoke there, that was all.

Q. At mile— A. 35.2.

Q. How was that smoke blowing, did you notice that? A. It seemed to be blowing from the C.N. grade up towards the Kapoor logging grade.

Q. Yes; up to the Kapoor logging grade. A. Yes; it seemed to be blowing, from the Sooke River across our track and up towards the Kapoor logging tracks.

Q. Just come over here and show me which logging tracks you mean? A. Here (indicating).

30 Q. That one, number 1? A. That is the smoke was blowing out here, this way.

Q. Just draw a red line indicating roughly the direction of the smoke, and put an arrow (witness does so) marking the line which I will mark "JHD-2," was the direction of the wind on that Tuesday afternoon? A. Yes.

Q. So that the smoke was blowing from the Sooke River across the C.N.R. grades? A. Yes.

Q. What did you do then? I suppose you arrived at Kapoor and got off the work train? A. Yes.

40 Q. And then what did you do? A. I got off the train; Mr. Fraser says, Take your gang and see if we can save any of the bridge. So we walked up past the train up to where the bridge is, and found that we could not; we could not do anything with it, it was too badly burnt.

Q. That was the bridge over what? A. The C.N.R. bridge over Deer Creek.

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Q. And then where did you go? A. Well, we couldn't do anything to that, we came back. I told the fellows to get on top of the cars, to see that no sparks that blew on top would ignite the top of the cars.

Q. You had some cars up there, had you? A. The siding was full.

Q. On the siding? A. Yes.

10 Q. And after that where did you go? A. Well, after the train pulled out we had no—I had no definite orders what to do, so I thought I would do what I could around the mill there, for to stop the fire spreading. So I told the man Bishop to go up the gangway and try the standpipes.

Q. The standpipes where? A. Around the gangway leading down to the loading platform.

Q. Don't tell us what anybody said; did you try them or see them tried? A. I just told the—

20 Q. Don't tell what you told anybody, but tell us what you did yourself and saw for yourself? A. I saw the two men open three of those fire hydrants; and they kept on going—the main gangway is on a curve, well, they went on up out of sight. I thought it peculiar there was no water; so I went and tried it myself after them; and I tried five. I got up to the top main gangway, and there was no water in any of them.

Q. Come over here and show me the gangway that you are speaking about. A. The main gangway is on a curve, right here, along the loading platform here; and this main gangway runs on a curve up that way.

30 Q. This is the gangway where we put "JHD" at the beginning is it? A. That is it.

Q. How many standpipes did you try there? A. There were five.

Q. And could you get water from any of them? A. No, sir.

Q. Did you try any other standpipes in the lumber yard? A. No, I didn't go any further than that.

40 Q. What object had you in trying to turn the hydrants? A. Well, that evening the wind was blowing from the west—our track direction anyway from the west, and blowing towards Victoria, so I figured by turning on the hydrants there I would flood that main gangway and it would cause a fire break.

Q. When you say the wind was blowing from the west, do not use train directions, which are indefinite; the wind was blowing toward Victoria, you say, from what point? A. Well, I really couldn't tell you the exact direction of the track at that particular point.

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Q. Can you indicate on this map the direction? A. Oh, yes.

Q. All right; do that. This was when you were in the lumber yard; just draw a line roughly indicating the direction of the wind in the neighbourhood of the lumber yard (witness does so); I see. So that it was blowing towards the lumber yard from the direction of the mill? A. Yes.

10 Q. I will mark it "JHD-4"; all right. Go back in the box. The broken line with the arrow there. And then what did you do after you tried the fire hydrants where did you go, and what did you do? A. I came back on to the loading platform alongside of the track.

Q. And from there? A. I stood there until I saw somebody with authority for to tell me what to do. I had no definite instructions.

Q. And then after that? A. While I was standing there Mr. Cann and Mr. Bishop came down on to the platform.

20 Q. Those were two of your section hands? A. Yes.

Q. And what happened then? A. Well, Cann, he showed me a pail with dynamite and caps and fuse in it, that he had got in a pile of lumber—he had found in a pile of lumber.

Q. You have that pail with you still and the dynamite and the cap and fuses? A. I have them.

Q. Mr. Cann will bring them along. And what did you do? A. I took charge of the powder and the pail.

Q. Don't call it powder, because it was dynamite. What did you do?

30 Mr. Maitland: Who is giving the evidence?

A. I just took charge of it; and I walked down the track. And while I was walking down the track I met Mr. Fraser and showed him it.

Q. He told you to do something, and what did you do? A. He told me to cache it. Well, I did.

Q. Where did you cache it—that is hide it—where did you hide it? A. It was just east of the Kapoor spur, that runs below the track, between the C.N. track and the Sooke River.

Q. Close to mile 35? A. Pretty close to 35.

40 The Court: On whose property did you find it? A. In the Kapoor Lumber Company's.

Q. Why look for it? A. Had the fire got in amongst that stuff—

Q. Did you put it away? A. I took it and kept it safe.

Q. What did you do with it afterwards? A. I just left it there.

Q. Why did you take it? It belonged to somebody else. All

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right.

Mr. Mayers: We have got it in Court, my Lord. We can restore it at any time they ask for it. And you walked down the track from the lumber yard to mile 35? A. Yes.

Q. Now, tell me what you observed when you were walking down the track? You first of all got to the rock cut, did you not? A. Yes.

Q. Then you got to the fill? A. Yes.

10 Q. Did you see any signs of burning on the right of way when you were going down from the lumber yard to mile 35? A. No, sir. There was positively none.

Q. Then where did you go after that? A. Mr. Fraser told me to get the gang and put in a fire guard.

Q. You started in on the fire guard, where? A. On the east end of the east side, the Victoria side of the fire that we saw on Monday.

Q. Yes; that would be down near Mile 35, would it? A. Yes, closer towards 35 than where the fire is marked.

20 Q. And what happened; in what direction had the fire got? A. From our track to the Kapoor Logging track.

Q. That is the upper logging track? A. Yes.

Q. And you worked at that for how long? A. We completed it about 1:30 or two o'clock on Wednesday morning.

Q. What time was it when you began the fire trail, do you think? A. I cannot tell you the exact time, but it was—we had done about 150 feet when it got dusk.

Q. From the fire trail that you were constructing had you a view of the lumber yard? A. A clear view.

30 Q. Did you see or hear anything happening in the lumber yard? A. I did.

Q. What was that? A. Well, during the course of making that trail there I heard and I saw five distinct explosions; right in the lumber piles.

Q. When you say you saw the explosion, what exactly did you see? A. Three piles distinctly; I couldn't tell you whether it was two by four or two by six, or it might have been four by six, but you see the lumber lifted off the top of the pile and scattered.

40 Q. Now, what period of time did the explosions cover. A. Well, they were most noticeable from dusk until midnight.

Q. After you had finished that first fireguard what did you do? A. After the first one I started a second one, between our track and the Sooke River.

Q. And you got that finished about when? A. Just breaking daylight.

Q. And did you do anything after that? A. Yes; we all

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went up to Deer Creek bridge, the main line bridge, and took out the burnt rails that were hanging, where the bridge was burnt out and the rails were just hanging, just cut them loose, to enable the bridge gang to start making the new bridge the next morning.

Q. Did you build any more fire trails? A. I did. When I just completed that job of cutting loose the rails over the creek, I looked back and I saw quite a lot of smoke down by the Sooke River; so I told the foreman in charge of that section, Mr. Reese—suggested to him, rather, we should go down, and see if the fire had jumped the fire guard; which we found it had done.

Q. It was burning towards what direction? A. Victoria.

Q. Yes; and then what did you do? A. We went back to the green timber, and chopped a good fire guard about five or six feet wide, and then started a back fire.

Q. That would be on which side? A. That would be on the Kapoor side of the fire guard; between the C.N. grade and the Sooke River.

Q. So that your first fire guard was on the right side of the C.N.R. grade going towards Kapoor, and the other two fire guards were on the left side of the grade going to Kapoor; is that right?

A. That is right.

Q. Your second and third fire guards, which was nearer Kapoor? A. That would be the second one.

Q. Your third fire guard was on the Victoria side? A. Was on the Victoria side.

Q. Of the second fire guard? A. Yes.

30 CROSS-EXAMINATION BY MR. MAITLAND:

Q. What time did you arrive there Tuesday? A. I couldn't tell you the exact time that we had arrived there; we were picked up about four o'clock from where we were working; around between five and six, I think.

Q. And at that time there were sparks all over the place, weren't there? A. No, it was on the low side of the track—on the Sooke River side of the track.

Q. There were sparks all around where your train was, weren't there? A. They were blown across the track.

40 Q. On the top of your train? A. There may have been; that is why I took precautions.

Q. Just try and remember; weren't there sparks flying all over on top of the cars and everything else when you got there? A. No, I couldn't say that the sparks were flying on top of the

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car.

Q. I will read what you said at the Fire Enquiry. You remember what you said at the Fire Enquiry? A. Down in the Parliament Buildings?

Q. Yes. “(Q.) On your arrival at Kapoor, what did you see? (A.) I know everything was all terrible up over there, and the smoke was all over the place. We stopped the train I believe at the first switch, but I wouldn’t be certain of that. (Q.) 10 Just tell me what you know. (A.) What do you want? About the fire or the train? (Q.) What did you do? (A.) We piled out of the cars, and there was a string of box cars in the first siding, and so there was sparks flying all over the place, and we got on top of our car. There was sparks on top of our car.” A. No, I didn’t know—I didn’t know of any sparks being on top of our cars, but the sparks were flying around there.

Q. What you stated in November, then, at the Fire Enquiry, is not true?

The Court: You didn’t hear what he read? A. I did, I 20 heard what he said; but I cannot say definitely that there were sparks flying on top of our cars. The sparks were flying around there, but I cannot tell you absolutely definitely whether they were on top of the car or not.

Q. Do you think you were wrong then? A. Well, I don’t remember now, your Lordship, at all.

Mr. Maitland: That is that. Now, this fire that you saw on Monday, you say that that was coming out from among some green alders down by the Sooke River? A. Which one?

Q. A column of smoke. A. There was a column of smoke 30 coming out of the top of green alders on Monday.

Q. Down towards Sooke River? A. Yes.

Q. Why didn’t you tell us that at the Fire Enquiry? A. I was never asked.

Q. Did you report it to anybody? A. Just told the gang that.

Q. When did you tell the gang that? A. Right at the time.

Q. Did you see the men fighting this fire at 35.2 on Monday? A. On the right side of the track.

Q. The Kapoor people on Monday fighting this fire at 35.2 40 when Mr. Dunn was there? A. Yes.

Q. How many men were fighting that fire? A. I distinctly remember five.

Q. And you say that reference was made to this other fire, and nothing was being done about it down there by the Sooke River? you drew to their attention there was another fire down Sooke River? A. Whose attention?

Q. Anybody. A. No, I did not.

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The Court: What was the fire enquiry for? A. I don't know, your Honour.

Q. What does the word "enquiry" mean? to find out about the fire, isn't it, the origin of it? A. Yes, sir.

Q. Didn't it occur to you, a pretty intelligent man, that it was your business to tell all you knew about it, and where the origin was? A. Well, sir, from what I can recollect, I was asked questions, and I answered the questions asked.

10 Q. But you would tell them, Here, they are all wrong about this, according to my idea of it, it did not originate at 35.2 at all, it was some other place? A. Well, the only thing that I was asked about, your Lordship, was this fire at 35.2.

Q. As being what caused the damage. It is a question of whether anybody suffered from the fire, isn't it? A. Yes, I presume so.

Q. This Enquiry from your standpoint must have been a fire enquiry, they were trying to find out if this loss was due to a fire which took place at 35.2; but you had some other theory of it  
20 —all right.

Mr. Maitland: Would you come over to the map, please; now you see this green D; green D is the point past the rock cut. You have been in the court all week, haven't you, you have been listening to all the witnesses? A. Yes.

Q. You heard the plaintiff's witnesses give evidence that the fire started on the right-hand side of that track, and that on Tuesday about noon it jumped that track to the other side; you heard them give that evidence, didn't you? A. No, I didn't, I wasn't in Court all the time.

30 Q. Are you saying now in Court here that that fire never jumped the track on Tuesday at all? A. Yes, sir, to the best of my knowledge that fire did not jump that track.

Q. Go back in the box. Did you listen to all the evidence being given at the Fire Enquiry? A. No, I did not.

Q. You did not give evidence at the Fire Enquiry that it never jumped the track, did you? A. I don't remember.

Q. No. Now I think you said on Monday when you were picked up you told that they were going to re-rail an engine; is that what you were told? A. Re-rail an engine, and I believe  
40 there was something mentioned about a fire; anyway we took our stuff along with us.

Q. I was just taking down what you told Mr. Mayers; you told him that you were to go to re-rail an engine. Do you state now you were told about the fire also? A. I seem to remember something about fire; but we always carry them along with us, always; always have them with us.

Q. What is your work; you are section man, are you? A.

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Foreman, yes.

Q. What did they do; how did they re-rail this engine? A. The equipment they used?

Q. I want to know what they did. They had an engine—what was the weight of it, have you any idea? A. No, I am not a mechanic on that.

Q. Anyway it was off the track, it was off the rail? A. Yes.

Q. How many wheels off the track?

10 Mr. Mayers: It was not off the track, I submit.

A. I couldn't tell you exactly how many.

Mr. Maitland: He has just said it was.

Mr. Mayers: You put the words in his mouth.

Mr. Maitland: I prefer the witness to give the evidence. Was it off the track or wasn't it?

The Court: Off the rails—derailed, it was off? A. Sometimes, your Lordship—this rail was just turned over, and the the drivers were setting on the base of the rails; they were not right hard on the ties.

20 Mr. Maitland: Have you been back there since? A. Many times.

Q. Have you not seen, lying alongside that place of derailment, even to the present time, the bent rail that was taken out? A. No.

Q. You have not? A. There is no rail there.

Q. Don't say that. You have not seen it? You don't want to go any farther than that? A. Well, there is no rail there.

30 Q. Witness, I don't want to put you in an awkward position; I didn't ask you to swear there was no rail. Are you prepared to swear there is no bent rail? A. I am prepared to swear there is no bent rail at the place that engine went off.

The Court: A rail on the righthand side of that spur? A. Not on that spur, I didn't see one, your Honour. It must be pretty near 150 feet towards the C.N. main line from where the engine was off.

Q. The place that was marked the first day of the trial, where is that, the original map? There is a rail there, but you think it is not on the spur I am referring to? A. No, sir, it is not on that spur.

40 Mr. Maitland: Did you hear any gasoline tanks explode? A. No, I cannot recollect gasoline. I don't know whether they make any different explosions to any other thing.

Q. Well, if any did explode while you were there, that would be some of the noises you heard, wouldn't it, if they made a noise?

A. Well, I didn't see any gasoline tanks in the lumber.

Q. Now, you know in the month of August the weather is exceedingly dry, don't you? A. Yes.

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Q. And that fire is dangerous along there? A. Dangerous everywhere.

Q. You have, I suppose, certain instructions from the Company? A. I have.

Q. What would you do if you found a fire on your right of way? A. Proceed to extinguish it immediately.

Q. Yes. Do you patrol your section during this time of the year? A. I do.

10 Q. Every day? A. Every day.

Q. Sundays included? A. Not Sundays.

Q. Now, you see there is a reason; just think before you answer. Every day but Sunday did you patrol? A. Every working day.

Q. Well are there working days every day but Sunday? A. Every day but Sunday.

Q. Six days of the week you patrol that track? A. Yes.

Q. And what do you do if you find any sign of fire on your section? A. I proceed to put it out.

20 Q. Do you report it? A. I report it if it is too large for me to handle.

Q. If it is too big you report it? A. Report it, yes.

Q. There has been some reference to fuse, caps and dynamite; they were all in the one pail, were they? A. In the one pail.

Q. And you cached these, I think you said? A. I did.

30 Q. And your idea was, I think—, let us bring it out and put the light on it—that this dynamite was put in the lumber in order to blow the lumber pile up; that is your idea, isn't it? A. I have no ideas on it.

Q. You must have had some idea when you cached it. What was your idea when you cached it? A. I cached it on instructions from Mr. Fraser.

Q. Was it your idea that there was to be a fire started at mile 32, and then coaxed in one direction, and then another direction, and then finally it would light on the lumber pile, and the lumber pile would blow up; is that your idea? A. I think you are trying to put ideas in my head.

Q. It was in there all the time?

40 The Court: What was in your mind at the time it was cached? A. It seemed very peculiar.

Q. You were taking somebody else's property, and putting it away; what was the idea? A. It was brought out of the lumber piles, and I took charge of it and told Mr. Fraser.

Q. We know that; but was it because it was suggested that the railway company was to blame, and you wanted this as evidence for the railway company? A. No, sir, I hadn't the least

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Davies, for Defendant—Re-Examination.

Cann, for Defendant—Direct Examination.

idea what it was for.

Q. You just followed orders? A. I just followed orders, did as I was told.

Q. Pure railway discipline? A. Superior officers there, you obey orders.

10 Mr. Maitland: But you found this bucket before there was any explosion?

The Court: This one did not explode.

Mr. Maitland: No; if it had he would not be here. Did you hear any explosions before you cached it? A. No, I did not.

#### RE-EXAMINATION BY MR. MAYERS:

Mr. Mayers: There is a question I should have asked in chief, that I would like to ask now.

The Court: All right.

20 Q. At the time when you were trying the standpipes in the lumber yard was there any fire in the lumber yard? A. Just in the corner nearest the mill; that was the only place.

The Court: Was the wind blowing at the time? A. Yes, sir, from the Sooke River up the hill.

Q. There was wind blowing? A. Well, I don't know whether the fire created its common draught.

Q. Do you know that locality well enough to know if the wind has any settled movement in one direction? A. It is not like as in an open position; sometimes it comes down and there are cross-gulleys there, and cross-gulleys from the mountains.

30 Q. It is controlled by the cross-gulleys from the ravines and the mountains? A. Yes.

(Witness stands aside).

NORMAN HAROLD CANN, a witness called on behalf of the Defendant, being first duly sworn, testified as follows:

#### DIRECT EXAMINATION BY MR. MAYERS:

Q. Your full name, please? A. Norman Harold Cann.

Q. Where do you live? A. Rocky Point.

Q. Your occupation is what? A. Section hand.

Q. And in 1930 you were stationed at Metchosin, were you?  
A. Yes.

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Q. Mr. Davies was your section foreman? A. Yes.

Q. You remember going up in the work train on the Monday, August the 18th, 1930? A. Yes.

Q. Did you take any part in the re-railing? A. Yes, I did.

Q. What did you do? A. Well, I packed a few blocks, hardwood blocks.

Q. And after the engine was re-railed what did you do? A. I helped to fix up the track.

10 Q. Tell me exactly what you did? A. I got a bar and helped to prie on the rail, and there wasn't—it didn't take very long, about ten minutes, to fix the track up. We just did it temporary, we didn't make a number one job of it.

Q. You put the rail back in place? A. Yes.

Q. And spiked it? A. Yes; amongst the gang we just made a temporary job of it so that it was safe.

Q. Then you went back, and your train stopped there near the fire? A. Yes.

Q. The fire of 35.2? A. Yes.

20 Q. What did you see when you were there; did you get off the train, by the way? A. No, I was on the auxilliary car at the time, and we were directly in the cut—we were about the middle of the train; and me and the rest of the gang, our gang including the other gang, we were talking to an old Hindu there with one arm, and generally just one of the chaps was talking a little Hindustanee, and we chatted to him.

30 Q. Don't tell us what was said, but what you saw. A. Well, I saw—I noticed Mr. Fraser and Mr. Davies and the Fire Ranger on the dump, you know, monkeying around, and quite a little time occurred, between about five or ten minutes, and then as the train moved on, I naturally went to see what the discussion was about, at the point. I could see a little bit of the fire trail there, with two or three Hindus there. And that was all including that day. That was Monday.

Q. Did you see where the fire trail began? A. You could see where they had made a little bit of a trail, it was nothing very much.

Q. On which side of the railway was that going towards Kapoor? A. At the right-hand side.

40 Q. Could you tell how far the beginning of the fire trail was from the edge of the dump? A. Well, from what I could see of the thing they didn't make a very big effort to make a fire trail. The dump—it was just a matter of two or three people walking down there, they probably made a trail, as far as I could see, it was pretty well—there wasn't a big affair, but it was pretty well—the most of the affair was pretty well away from the track; and the trail they had made, it was a very crude affair; although it was a

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very small fire, probably that was ample to hold the fire.

Q. Do you remember those two cedars there? Come over and look at this photograph, will you? Do you recognize the photograph? The dump comes under the rail. A. Yes

Q. And this is looking west of the railway. Do you remember these two cedars? A. I recognize the spot.

Q. Whereabouts do you say the fire trail began? A. Well, you could—

10 The Court: The place put upon the plan would be better than on the picture.

Mr. Mayers: But he recognizes the features on the ground; and there are no features on the plan.

The Court: He recognizes the picture.

Mr. Mayers: Yes. There is no use asking him to mark it on the plan; you have to be something of a skilled plan-reader, to find out what distance you are marking on the plan. You can visualize it in your mind when you have the natural features appear that you have in your mind, you can orient yourself by the  
20 natural features. Where do you think the fire trail began with reference to those cedars? A. You can see the cedars along here, and along up here; and I believe it curved around here; I didn't go there myself.

Mr. Maitland: Just what he knows, please.

Q. Just mark the beginning of where you think the fire trail began. A. Where it actually began?

Q. Yes. A. The main part of the fire was burning in around here, and in here. There were no efforts made in this direction to stop the fire. It was blowing away from the mill  
30 towards Victoria, the general direction. There was no fire guard put on the other side.

Q. That is by the rock cut? A. Yes.

Q. Mark if you can the place where the fire trail that you did see, began. A. It just came down this little gulley here, you see.

Q. Which side of the gulley? A. Right in the centre here.

Q. Mark the beginning if you can, or the point nearest the dump. A. Somewhere around here; just down here.

Q. Mark that C. A. That is where the strongest part of  
40 the fire was.

Q. We will mark that C. C was the strongest part of the fire? A. Yes. It was kind of going this way. It wasn't a big fire by any means.

Q. And it was blowing, the fire was moving? A. Working this way.

Q. From C towards the right of the picture? A. Yes.

Q. Did you see anything on the other side of the railway?

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A. I noticed while at Kapoor there was a fire away down in the green timber. That was down towards the river.

Q. The Sooke River? A. Yes.

Q. You noticed that when? A. We noticed that in the meantime while we were re-railing the engine, or after we had re-railed it and loading the tools, or something of that kind, I noticed particularly this smoke hanging in the green timber, just behind the village.

10 Q. Behind the townsite? A. Yes.

Q. When you were on the track, or on the train that was on the track, at mile 35.2, did you see anything on the side away from where you have marked the fire guard? A. I didn't quite get that.

Q. You were down at mile 35.2 in your car standing on the track? A. Yes.

Q. When you were going back from Kapoor? A. Yes.

Q. And on the right-hand side looking towards Kapoor was the place where the fire trail was? A. Yes.

20 Q. Did you see anything on the other side of the trail? A. No, I didn't notice nothing. The Hindu was on the other side, and as a matter of fact we were talking to him as he stood in the ditch there.

Q. Then on the Tuesday you went up to Kapoor again, I think, on the work train? A. Yes.

Q. And you got there some time in the afternoon? A. Yes.

30 Q. Or late in the afternoon. What did you do when you got to Kapoor on the Tuesday? A. We got off the train there with the rest of the gang, and we was going up towards the mill on the track. Well, we met Mr. Fraser, who told us to go up to the bridge and see what we could do to save it, and to be careful that we didn't get hemmed in by the fire. We proceeded up to the bridge, and it was very hot there, and we went right up to the bridge, but it was too hot there, we couldn't do nothing, we couldn't save the bridge or do anything.

Q. And after that you went to look after cars, did you? A. Yes, we came back from there and we were sent up on the cars to see that—just to see if they was, probably the roofs might be burning or something.

40 Q. And after that you went where? A. And after that we climbed on to the platform, the main platform, and we went up the main gangway, trying the hydrants, the water hydrants.

Q. The gangway of what? A. I should imagine it was the main one; it went up the hill. A kind of a curve that went up the hill and kind of swung right into the mill.

Q. That was in the lumber yard? A. Yes.

Q. The lumber piles were on both sides? A. Yes.

Q. What did you do while you were on that? A. We tried

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the hydrants all the way up.

Q. How many? A. I presume right there three or four.

Q. And what was the result? A. There was just—there was no water—well, there was just water that was laying in the pipe, that was all, there was no water behind it.

Q. What did you do after that? A. After that—

Q. You tried the standpipes on that curved gangway? A. Yes.

10 Q. Did you try them anywhere else? A. Yes, we came back and I went, I think me and Mr. Bishop, we went towards Victoria on the gangways like, and then we went straight back up again in the far corner of the lumber yard that way; and we tried the hydrants as we were going up.

Q. That is on the side of the lumber yard nearer Victoria? A. Yes.

Q. What was the result of trying those hydrants? A. There was no water.

20 Q. What do you mean by trying hydrants, what exactly did you do? A. We opened them. We twisted the handle to the left.

Q. What did you do after that? A. Well, we was coming back, and Mr. Bishop—we was coming back together, and he had a different idea of coming back than I did, I suppose, and he went around one pile and I went around the other; and while doing that I squeezed my way through a lumber pile and my attention was drawn to a big cavity under this lumber pile, and I noticed a fire bucket, and I saw a sack on it, and I thought it was funny, and I naturally went to lift it up to see what was there; and I found this powder and the fuse and that there.

30 Q. You found the dynamite and the fuse? A. Yes.

Q. And what else was in the bucket? A. There was just this dynamite and the fuse and the caps.

Q. Yes. And you gave the dynamite to Mr. Davies? A. Yes.

Q. Now, that was where in relation to the lumber pile? A. That was underneath it.

Q. What? A. Underneath the lumber pile.

40 Q. The lumber pile was raised off the ground, was it, on poles? A. Yes, at the back end it was I should imagine about three feet off the ground.

Q. Yes. Then did you go down, did you accompany Davies down the track from the lumber yard to mile 35? A. I didn't quite get that.

Q. Did you go with Davies down the track from the lumber yard to mile 35? A. No, I didn't go down with him when he cached the powder, no.

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Q. Did you go afterwards? A. I went down there, but I wasn't there when he met Mr. Fraser or anything like that.

Q. You did go down? A. I must have been behind him or probably went ahead of him.

Q. Anyhow, you did go down? A. Yes.

Q. When you were going down did you see any sign of burning on the right of way at all? A. No.

10 Q. And you got down to mile 35 and went to building fire guard, did you? A. Yes.

Q. You were on the fire guard which ran off from the C.N.R. grade to the upper Kapoor spur, were you? A. Yes.

Q. Did you hear or see anything while you were working there? A. Well, I heard explosions, but I didn't—I didn't see them, I might have just missed them, but I heard the explosions.

Q. About how many did you hear? A. Well, I should imagine there were three or four.

20 A. Yes. Q. And you worked on the other two fire guards, did you?

CROSS-EXAMINATION BY MR. MAITLAND:

Q. Do you recognize Exhibit 7?

Mr. Mayers: Is this taken from the air?

Q. Yes, from the air.

A. I think I could recognize it, but I wouldn't swear to it.

Q. Put it down there so that we can all see it. I take it this is the Sooke River, is it, there—or is it? A. Well, I thought that was the track.

30 Q. That is the track (indicating) and is this the Sooke River here? A. Yes, I guess that is the river.

Q. Now, just look at it and get it in your mind clearly. A. Yes, I think I have got it.

Q. As good as you can get it? A. Yes.

Q. I give you a red pencil; now just mark that little spot there where you say you saw this smoke hovering over the top of green trees. A. It didn't actually hover, it was just laying there about three or four feet from the top of the trees.

40 Q. Hanging, that is the word you used, hanging over the tops of the trees? A. Yes, it was just hanging there. There was no breeze or nothing.

Q. Could you mark about where it was? A. Mind you, I am just taking a guess at this.

Q. That is all you can do, two years afterwards. A. I could show you better if I was up there.

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Cann, for Defendant—Cross-Examination.

Bishop, for Defendant—Direct Examination.

Q. I am not going up there again with you. Wet it and mark it. A. This is the river here—you said wet it?

Q. Wet the picture and put it on there. A. To the best of my belief I should imagine it was about in here.

Q. Make a cross there. A. Yes. That might be burnt out there, you know, but when I saw it, it was in the green timber right in there.

10 Q. Make a cross there. That is a cross on Exhibit 7 that this witness has made. Now, where were you standing when you saw this smoke hanging over the tops of these trees? A. Well, you can get a clear view in the two positions.

Q. I don't want to know where you can get a clear view; but where were you standing? A. I was—I cannot exactly recollect if I saw it when we were at the derailment or when we was—when the train pulled us down to Kapoor, just a few feet from where the derailment was, I was in the car, and you can see it from there in them two positions.

20 Q. Can you tell me how many feet from the point where you made the cross there is a house in this green timber? A. Well, to my estimation, that distance, there was that old burnt logged off land that had been burnt off a year or two before, and the green timber line came, and the fire was just inside of it. It might have run thirty or forty or fifty feet.

Q. Are there any houses in that green timber? A. No, no houses.

Q. Did you go in there? A. Oh, I don't know, there might have been a house in there, I didn't see any house.

30 Q. You don't know, do you? A. No.

(Witness stands aside).

ROBERT BORDEN BISHOP, a witness called on behalf of the Defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. MAYERS:

Q. Your full name, please? A. Robert Borden Bishop.

Q. Where do you live? A. At West Lang.

Q. And in the summer of 1930 you were a section hand at Metchosin, were you? A. Yes.

40 Q. You were working under Mr. Davies who was section foreman? A. Yes.

Q. On the Monday you went up on that afternoon on the work train to Kapoor, August the 18th, 1930; is that right? A.

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Yes.

Q. Did you take any part in re-railing the engine? A. Yes.

Q. And after the engine was re-railed what did you do? A. I helped spike it up.

Q. Spike what up? A. The rail.

Q. The rail was put back in place, was it? A. Yes.

Q. And you helped to spike it? A. Yes.

Q. And when you finished it was the track passable? A. Yes, it was passable.

Q. By the way, the place where you mended the rail, was that on the run around or on the main logging spur? A. It was on the run around.

Q. Then you came back to mile 35.2, did you not, and the train stopped there? A. Yes.

Q. Did you get out? A. I just came out and stood by the door, I didn't get down right all the way down.

Q. What did you see at mile 35.2? A. Well, I didn't see much of the fire, I just saw the smoke there. I wasn't in the good view.

Q. On which side of the line was it looking towards Kapoor?

A. Right-hand side.

Q. Did you see anything on the other side? A. No.

Q. You saw the men working there, did you? A. Yes, I saw two or three.

Q. How long did you stay at mile 35.2? A. Was this on Monday?

Q. Yes. A. Oh, I should imagine about 15 minutes.

Q. Have you told me everything you observed there? A. All I can think of at that time.

Q. Then on Tuesday you went up again, did you? A. Yes.

Q. And you were with Mr. Cann going through the lumber yard examining the standpipes, were you? A. Yes.

Q. And what happened then? A. You mean while we were in the lumber yards?

Q. Yes? A. We went up these gangways and tried the pipes; and then he went one way and I went the other, to try some others that were away from the main gangway.

Q. How many standpipes did you try? A. I tried three or four, I think; I just forget how many.

Q. With what result? A. I got no water at all.

Q. Then after that you walked down the grade to 35, did you? A. Yes.

Q. When you were going down the grade to 35 did you see any signs of fire on the right of way? A. No, none at all.

Q. And then you took a hand in building the fire guard from the C.N.R. to the upper Kapoor spur? A. Yes.

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- Q. Did you see or hear anything when you were doing that?  
 A. While we were just on top of the knoll about half-way across the fire guard, you can get a clear view into the lumber piles. And I heard quite a few explosions, three or four, I think. And there were a couple of times I went out from the top, and it looked like the top layers of the pile going up, you could see the timbers flying in the air.
- 10 Q. Do you remember the direction of the wind when you were building that fire guard, the first fire guard? A. Over the top?
- Q. Yes? A. It was blowing towards Victoria.
- Q. When you were in the lumber yard trying the standpipes was there any fire in the lumber yard? A. No. Only towards the mill like.

CROSS-EXAMINATION BY MR. MAITLAND:

- Q. Well, there was fire towards the mill then, wasn't there?  
 A. Yes.
- 20 Q. Was it an absolute lack of water or lack of pressure you were suffering from, or what was it? A. You mean when we were on the lumber pile trying to get water?
- Q. Yes; was there an absolute lack of water or lack of pressure? Did you get some water? A. We just got a drop that was just left when it drains from the pipe.
- Q. You say it was absolutely shut off? A. Yes, absolutely.
- Q. And there was a fire at the other end towards the mill? A. Yes.
- 30 Q. How many hoses were working? A. At the mill?
- Q. Yes? A. I couldn't say.
- Q. How many hoses were run down in the stretch in front of the mill, in that slashing? A. I couldn't say.
- Q. Did you see any at all? A. I think I saw one or two.
- Q. Try and think how many did you see? A. I couldn't tell you just how many.
- Q. Were they wetting down the mill at this time? A. Well, there was so much smoke at that time I couldn't say what they were doing.
- Q. Did you go to the Superintendent of the mill or anybody,  
 40 and say, Here, we cannot get any water here? A. No.
- Q. Did anybody do anything of that kind that you heard or saw? A. No, not that I know of.

(Witness stands aside).

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FREDERICK JOHN TRESTAIN, a witness called on behalf of the Defendant, being first duly sworn, testified as follows:

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- Q. Your full name, please? A. Frederick John Trestain.
- Q. Where do you live? A. I live at McMurphy.
- Q. And in the summer of 1930 you were stationed at Metchosin? A. Yes.
- 10 Q. And you were on the section with Mr. Davies? A. I was a section man, yes.
- Q. On Monday the work train picked you up, on Monday the 18th of August, 1930, and you went up on it to Kapoor? A. Yes.
- Q. Do you remember the equipment you were carrying, by the way? A. Just the regular equipment we take on these jobs, we have so many of them, we just put on a few shovels, picks, crowbars, hammers, etc., what we think we will need.
- Q. When you went back to 35.2 did you notice anything? A. 35.2?
- 20 Q. That is the fill. A. Yes; on the right side of the track I noticed smoke; but I never got a clear view of it until I came back when we stopped.
- Q. You took part in the re-railment, did you? A. Not exactly in the re-railment, my part came in after the re-railment fixing the track. It was not very much of a job, just getting the rail replaced, and it didn't require the section men an awfully long time on that job.
- Q. What did you do in the matter of replacing the rail? A. I generally do the spiking on the section—in the section at that time; and Bishop and I spiked while one man and the section foreman was holding the rail in with a bar.
- 30 Q. By the way, the overturned rail, was that on the run around or on the main logging spur? A. I don't know the names of the different tracks there, but I know we got the main line, and we walked over one track, and the next track was the one the engine was off. I don't know the different names of the tracks, because I have only been up there on about three occasions.
- Q. Then when you left was the track on which the rail had been overturned, passable for traffic? A. That track was perfectly safe. I am positive on that. Because I saw the gauge put on it, and I spiked in to the gauge myself; so that I am absolutely certain the track was safe. It was not a number one job, we didn't trim the track off or anything like that; but it was spiked safe.
- 40 Q. Then you went back and stopped at the fire opposite

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the fill? A. We didn't stop exactly where the fire guard was; there were two or three cars ahead of us, and we stopped just at the end of that cut, because I was talking to a Hindu in the cut.

Q. Did you get off the train? A. No, I never got off the train, I stayed on.

Q. Did you see where the smoke was rising. A. Yes, I saw where the smoke was rising.

10 Q. Just come over and identify on the photograph, will you?  
Mr. Maitland: When was this?

Mr. Mayers: On Monday afternoon. A. The fill goes down like that, and then you start climbing a little. I was up here looking from this angle and it looked to be somewhere about here.

Q. Just mark a cross (witness does so). I will put T against that. Did you observe anything else while you were there?

20 A. Well, when we was coming back I observed some Hindus there. But you see there was a tool car we were in, and it has got two doors, and I never paid an awful lot of attention, everybody was crowding to the door, and I looked out the other side, and there was a Hindu out there, there was a pail in his hand. That is about all I remember at the time.

Q. Did you see anything on the side of the track away from where you have marked the fire? A. Yes, I saw the smoke that has been alluded to by Mr. Davies. But I don't quite agree with him, it wasn't a column of smoke, it seemed—it seemed to be hanging over those green timbers; it was not a column rising up. A column would be rising up. Just seemed to be hanging over the top.

30 Q. Where was that approximately? A. I saw it in two places, I saw it down by where we re-railed, and up where we were you could get a view of it.

Q. You saw it from two places, you mean? A. Yes.

Q. Where did you see it, at what point, at what locality did you see it? A. Well, it is some bare ground, and at the back of that bare ground there seems to be timber, green small stuff, not very big; not timber that you would cut, I don't think.

Q. Whereabouts was it? A. Where would it be from the Sooke River?

40 Q. Yes; where would it be in reference to the Sooke River?  
A. The Sooke River makes a kind of curve there. It would be in that curve, I think.

Q. Come to this Exhibit 4 and see if you can give an idea of where you saw it. There is the mill, there is mile 35.2; here is towards Victoria; here is the track, and the mill; and this way it goes down to Kissinger. You were first of all up here when you were re-railing (indicating)? A. Yes. It was around about this way, some place about here.

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Q. Indicate roughly by a circle the area in which you think the smoke came from? A. I just seen that smoke hovering—if I put a mark there I couldn't swear it was right there; it was somewhere around here like that.

Q. That is as near as you can get? A. Yes.

Q. We will put T inside that circle. Then on Tuesday you went up again on the work train, did you not? A. Yes.

10 Q. And you were one of the section hands who tried the standpipes in the lumber yard? A. Myself I tried no more than three, I just followed Mr. Cann, and I just tried them after him. And I didn't go even to the lumber piles, but I just waited on the yard platform until they came back. But the standpipes I tried there was nothing came out of them.

Q. Then after that you went down from the lumber yard to mile 35, did you not, to build the fire guard? A. We went back after a while, yes, we went back to mile 35, yes, it would be about 35 there.

20 Q. Going down the track from the lumber yard to the mile 35 did you see any sign of burning on the right of way? A. No, I did not. I didn't seen any burning at all.

Q. Do you know approximately what time that was? A. Oh, I don't know, I never had a watch on me. I know I felt hungry.

Q. Then you worked on the fire guard from the C.N.R. to the upper spur, did you? A. Yes.

30 Q. Did you see or hear anything when you were working there? A. I can remember one distinct explosion, but I couldn't tell you what time, but I saw the tops of the lumber pile go up, you know, as if it would be something that forced it up.

Q. By the way, what were the directions the wind was blowing when you were working on the fireguard? A. When we were working on the fire guard, well, the fire guard tells you it was going towards Victoria; that is the reason we were digging the fire guard across there, it was blowing towards here.

#### CROSS-EXAMINATION BY MR. MAITLAND:

Q. Would you mind coming around to map again, please. Do you see the Kapoor Lumber spur here? A. Yes.

40 Mr. Mayers: Which one is that? A. The one that comes from 35, I believe.

Q. Yes, coming from 35. Now, isn't that space between the rock cut and the Sooke here pretty well all logged over and slashed? A. Yes, it is, up to a certain—you mean on this side

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of the track?

Q. Yes? A. Well, it is logged over, but there is some green stuff back here.

Q. I want you to tell me now is this Sooke River to the left of the circle with T? A. I don't know; I am not very well acquainted with the country. I should think so by the size of it on that map.

10 Q. Can you describe the green timbers around beyond to the left of T on this map, and beyond the river again? Are there any green timbers down there? A. Yes, I think so.

Q. Now, are you positive that you are right when you put that circle T as the place where you saw the smoke hovering around the top? A. I told you I wasn't positive; I saw the green timber back there.

Q. And it was somewhere over to those green timbers? A. Somewhere hovering over those green timbers.

20 Q. You arrived at what time Tuesday? A. I couldn't say; I never carried a watch.

Q. Well, did you tell Mr. Mayers that you saw some smoke on the right-hand side as you came in on Tuesday? A. On Tuesday, no, he never questioned me about that.

Q. When was it you saw the smoke on the right-hand side? A. Monday.

Q. And none on the left? A. On the left-hand side of the track?

Q. Yes. A. The only smoke I saw on the left as far as I can remember is what I have described now.

30 Q. As hovering over the green timbers? A. Yes.

Q. But at the rock cut on the left you saw none on the Monday? A. I cannot remember seeing any, no.

RE-EXAMINATION BY MR. MAYERS:

Q. Wait a minute, I don't know that you quite got that. A. If he made it plain I would have seen it; I have got the ordinary intelligence.

Q. You were on the train stopping opposite mile 35.2 on Monday afternoon? A. On Monday afternoon, yes; on the way back from the re-railing, yes.

40 Q. Yes. When you had been up at the re-railing you saw this smoke hovering over the trees near the Sooke River? A. Yes.

Q. Did you see that again when you were on the train near the point 35.2 when the train was stopped? A. I was looking out of the side, but I couldn't see the green timber then. I could see the smoke, that is all.

(Witness stands aside).

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WILLIAM McCAGUE, a witness called on behalf of the Defendant being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. MAYERS:

- Q. Your full name, please? A. William McCague.  
 Q. Where do you live? A. Victoria.  
 Q. What was your occupation in 1930? A. Car inspector.  
 10 Q. On Monday the 18th of August, 1930, did you go up to Kapoor? A. Yes.  
 Q. You went up on the work train, did you? A. Yes.  
 Q. What did you do when you got there? A. We helped to re-rail the engine.  
 Q. Did you take any part in the replacement of the rail? A. No; we were loading our tools when the section men were replacing the rails.  
 Q. Then you came down on the train towards Victoria and stopped opposite or upon the fill, did you? A. Yes.  
 20 Q. And did you see anything there? A. I saw smoke back off of the track.  
 Q. That would be, you were standing on the fill, were you? A. Yes.  
 Q. Did you get off the train? A. No stood in the doorway of the cook car.  
 Q. Just show me if you can on this photograph where you saw the smoke at mile 35.2. A. My car stood about here; I looked across this way, the smoke was in here.  
 30 Q. Just mark it approximately (Witness does so). Thank you; I will put McC. By the way did you see the rail after the engine had been re-railed? A. Yes.  
 Q. What was its condition? A. It was a little bit bent, but it was passable.  
 Q. Was it spiked? A. The section men were spiking it then.  
 Q. Did you see any men at the scene of the fire where you have marked the cross, when you were waiting on the track? A. Yes.  
 Q. How many? A. There would be five or six.  
 40 Q. What were they doing? A. They had shovels in their hands; all had shovels.  
 Q. Were they doing anything with them? A. No, they were standing looking at the train while we were there.

CROSS-EXAMINATION BY MR. MAITLAND:

- Q. Did you relay a bent rail? A. We did not touch the

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rail.

Q. What? A. We did not move the rail out at all; we didn't change it.

Q. You just bent it, didn't you — your engine did? A. When the wheels turned the rail very naturally it bent it a little.

Q. And you just left the rail in that position? A. The section man straightened it back and spiked it.

10 Q. What did you mean by telling Mr. Mayers it was a little bit bent? A. Naturally if you turn a rail over and you fasten it at both ends, it is liable to be bent.

Q. I think so. There is no doubt this one was bent at both ends. A. It was bent where the wheels were.

Q. That is where the wheels of the engine were? A. Where the wheels turned the rails over when the engine was derailed.

Q. What do you mean by the wheels turning the rail over, did they turn it right over? A. This was on a curve leading into this track.

20 Q. Did it turn right over? A. Partly over; because as soon as the flange of the wheel would strike the bottom of the rail it would keep it from turning over that way.

Q. Then part of it remained nailed in the original position on the ties, is that right? A. Possibly further up.

Q. The same rail, mark you, you follow me, do you? A. Yes.

Q. Part of it would be in its natural position on the ties, is that right? A. Yes.

30 Q. And part of it would be bent over by the weight of this engine? A. Just so as the wheel, the flange of the wheel would touch the bottom.

Q. Just so what? A. Just so the flange of the wheel would touch the bottom, the web in the rail at the bottom.

Q. What was the engine actually resting on? A. On the bottom part of the rail.

Q. On the bottom part of the rail? A. Yes.

Q. That is the lower part that supports the T., is it? A. Yes.

40 Q. And what part was it that was bent over? A. The whole rail all the way through would be turned over with the weight of the engine on it.

Q. Not the part that was nailed down, that was not affected? A. That might be the next rail.

Q. Is this a guessing contest, or do you know? A. I know.

Q. You know. You were telling me a little while ago that part of that rail would remain in its shape on the ties.

The Court: The rail spread, you know.

Mr. Maitland: Am I right in that, that part of the rail

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stayed in its natural position? A. The rail that was away from the engine, the next rail that it was fastened to; the next rail.

(Witness stands aside).

CONNOR FELDON, a witness called on behalf of the Defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. MAYERS:

- 10 Q. Your full name, please? A. Connor Feldon.  
 Q. Where do you live? A. In Victoria.  
 Q. In 1930 you were working for the C.N.R.? A. Yes.  
 Q. Where do you live? A. In Victoria.  
 Q. In 1930 you were working for the C.N.R.? A. Yes.  
 Q. What as? A. Car man.  
 Q. You went up on the work train on Monday to Kapoor?  
 A. Yes, sir.  
 Q. And you took part in re-railing the engine? A. Yes, sir.  
 Q. Did you see what was done to the rail afterwards? A.  
 20 It was turned over a little bit by a spread in the rail.  
 Q. And what was done to it, after the engine? A. After the engine the trackmen came along and spiked the rail, sufficient for any car to go over.  
 Q. And then you came down with the train to mile 35.2 and stopped opposite where there was some smoke, did you? A. Yes, sir.  
 Q. Did you see approximately where the smoke was rising from? A. Down in the hollow, I cannot tell you exactly what, how far.  
 30 Q. It was down in the hollow somewhere? A. Yes.  
 Q. And approximately what area did it cover? A. Oh, probably one hundred or a hundred and fifty feet.  
 Q. Yes, all right.  
 Mr. Maitland: That is at 35.2.  
 Mr. Mayers: Yes. That is all.  
 The Court: When are you speaking of? A. Monday afternoon.

(Witness stands aside).

(Court here adjourned until 10 a.m. tomorrow (May 27, 40 1932).)

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Friday, May 27, 1932; at 10 a.m.

WILLIAM WALSH BAKER, a witness called on behalf of Defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. MAYERS:

- Q. Your full name, please? A. William Walsh Baker.
- Q. Where do you live? A. Milne's Landing.
- Q. How long have you been railroading? A. Ten years.
- 10 Q. In the summer of 1930 you were one of the Milne's Land-  
ing section gang, were you? A. Yes.
- Q. You remember Monday, the 18th of August, 1930, the day before the fire, do you? A. Yes.
- Q. Where did you go on the Monday? A. Went up to work on the section at mile 33.5.
- Q. You were picked up by the work train, were you? A. Yes.
- Q. And you went up to Kapoor? A. Yes.
- Q. Do you remember about the time you arrived? A. No, I could not.
- 20 Q. Some time in the afternoon? A. Oh yes, some time in the afternoon.
- Q. What did you do at Kapoor? A. Worked on the derailment.
- Q. What did you actually do? A. I spiked the rail—after we got the engine on I spiked the rail.
- Q. There were other men working there, were there? A. Yes.
- Q. Did you get the rail into position? A. Certainly.
- Q. And was it suitable for traffic? A. Certainly.
- 30 Q. Then you went on aboard the train and came back towards Victoria, did you? A. Yes.
- Q. And you stopped on that fill, on the Victoria side of the rock cut, did you? A. Yes.
- Q. What did you see there? A. A little smoke.
- Q. On which side, looking towards Kapoor?
- The Court: When was this?
- Mr. Mayers: Monday afternoon, coming back from Kapoor. The work train stopped on the fill. Did you get off the train? A. No, I did not.
- 40 Q. You were looking from the train? A. Yes.
- Q. And you saw smoke on which side looking towards Kapoor? A. On the right-hand side.
- Q. Down in that hollow, was it? A. Yes.
- Q. Do you recall the general features of the ground? A.

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Yes.

Q. Just come over here and look at this photograph. Do you remember these two cedars? A. Yes.

Q. Whereabouts was the smoke that you saw? A. About there.

Q. Just make a cross where you saw the smoke, will you? (Witness does so). I will put B. Did you notice what it was that was smoking? A. It looked like a log, you know, from where I was on the train.

Q. Did you see anything on the other side of the grade. A. Yes.

Q. What did you see? A. Smoke.

Q. Whereabouts? A. Well, on the left-hand side down towards Sooke River.

Q. Down by the Sooke River, was it? A. Yes. The left-hand side of the track. It laid down in that direction.

Q. In the direction of Sooke River, was it? A. Yes.

Q. What exactly was it you saw there? A. Smoke; just smoke.

Q. Then on the Tuesday you went again to Kapoor. On the Monday you came back to Milne's Landing? A. Yes.

Q. And on the Tuesday you went up to Kapoor again? A. Yes.

Q. How did you come to go up on Tuesday? A. Went up on the hand car.

Q. Who was with you? A. Mr. Frederick, Mr. Cummings and Mr. LeBarge.

Q. And you got there about what time, do you remember?  
A. Oh, it will be somewhere around about 20 minutes past four, I should judge. I cannot keep track of time on a thing like that.

Q. How far did you go on the hand car? A. We went up and we put the hand car off on the logging spur of the Kapoor Lumber Company.

Q. That would be around about mile 35, would it? A. A little beyond.

Q. A little this side? A. A little the other side, closer to Kapoor. On the left-hand side.

Q. Then you walked, did you? A. Yes, we walked.

Q. Along the grade? A. Certainly.

Q. And what did you observe going along the grade from  
35? A. There was no fire there that I saw.

Q. No fire where? A. Along the track.

Q. On which side? A. On either side.

Mr. Maitland: This is on Tuesday, is it?

Mr. Mayers: Yes.

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The Court: At four-thirty?

Mr. Mayers: 4:20 or somewhere around there. You saw no fire on either side of the grade; did you see any smoke on either side of the grade? A. As we were walking along you could see the smoke from the Kapoor, you know, but there was no smoke where we was walking.

Q. The smoke was up towards Kapoor, was it? A. Certainly.

10 ly. Q. Now, walking from mile 35 to Kapoor was there any thing burning on the right of way? A. No.

Q. Was there anything that had been burnt on the right of way? A. No.

Q. Then when you got to Kapoor what did you do? A. I was put to patrol the track.

Q. You patrolled the track. And how long were you doing that? A. I was there until the auxilliary came.

Q. And after that? A. I was put further back.

20 Q. While you were patrolling the track what part of it were you on? A. Well, I was on the—being between the first and the second rock cut.

Q. Yes. A. That would be east of the Kapoor.

Q. The Victoria side of the Kapoor? A. Yes.

Q. And while you were patrolling was there any fire on the right of way? A. No.

Q. Any burning on the right of way? A. No.

Q. How long did you patrol in that way? A. Oh, I have no idea of the time.

30 Q. You eventually went down the track again, did you? A. I beg your pardon?

Q. Did you go down the track again towards mile 35? A. Yes; I was taken down there.

Q. You were taken down there? A. Yes.

Q. To do what? A. To fight fire.

Q. Were you on the fire guard? A. Yes.

Q. You were helping to build the fire guard? A. Yes.

Q. How many fire guards did you work on? A. Three.

Q. Whose orders were you under? who was over you? A.

Mr. Frederick.

40 Mr. Mayers: Did you see any occurrence in the lumber yard at any time? A. Well, I see the lumber caught fire.

Q. Where were you then? A. I was down in between the first and second rock cut. That was previous to being moved down to the Kapoor spur; where the fire guard was.

Q. Where the fire guard was. What exactly did you see in the lumber yard? A. Well, while the fire was on the wind was blowing across the track, taking it right over the Kapoor mill;

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and after a while the wind changed and blew back across towards Sooke River. And then up behind one of the lumber piles there was a big black cloud of smoke, no flames come up; beyond one of the lumber piles on the far side, but no flames.

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Q. Just a burst of smoke? A. Just a burst of smoke.

Q. That side of the lumber pile was towards the track or away from the track? A. Away from the track.

10 Q. During any of the time that you were patrolling the grade, or while you were walking down the grade to the fire guard, did you see any burning on the right of way at all? A. No, sir.

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Q. Or anything burnt on the right of way? A. No, sir.

The Court: Were there sparks in the air in that afternoon at all, caused by the wind? A. Well, they was going over the mill; but where I was patrolling there was no—

--continued.

Q. But generally through that district were there sparks in the air, through the fire? A. Oh, yes, sparks.

Q. And wind blowing? A. Yes, the wind was blowing.

20 CROSS-EXAMINATION BY MR. MAITLAND:

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tion.

Q. Where are you stationed? A. Milne's Landing section.

Q. Is that between Victoria and Kapoor? A. Yes, sir.

Q. So you would come from Victoria direction to Kapoor to get there on the Tuesday afternoon? A. Yes.

Q. And on Tuesday afternoon you got there about 4:30, did you say? A. I should judge somewhere around there.

Q. You know this 35.2? A. Yes.

30 Q. That is the rock cut, isn't it? A. Somewhere there, yes.

Q. Well, you know what I mean when I speak of it as 35.2, that is the rock cut? A. Yes.

Q. And you understood that that was what Mr. Mayers was talking about when he referred to mile 35, didn't you?

Mr. Mayers: I referred to the fill.

Mr. Maitland: You know the fill? A. Yes.

Q. The fill is at 35.2, isn't it? A. Yes.

The Court: There is a mark 35, the 35 mile point is marked on the ground? A. That is marked on the telephone pole.

Q. Is that in the fill or the cut? A. That is away back.

40 Mr. Maitland: That will be closer to Victoria, two-tenths of a mile.

The Court: This is two-tenths of a mile further on? A. Yes.

Mr. Maitland: Yes. And you came from there on Monday,

Baker, for Defendant—Cross-Examination.

- and you saw fire on the right-hand side of the rock cut? A. Yes  
—smoke, not fire.
- Q. Smoke? A. On Monday.
- Q. On Monday? A. Yes.
- Q. You were picked up for what purpose on Monday? A.  
To go to the derailment of an engine.
- Q. And that was all? A. That was all.
- Q. You were not very much interested in the fire then on  
10 Monday? A. Well, I wasn't much interested in the fire, no.
- Q. No. And then you came back on Tuesday at 4:30 to  
fight fire? A. Yes.
- Q. And I think you have told Mr. Mayers that when you  
came through the rock cut, that is 35.2, there was no fire on either  
side; is that right? A. Yes.
- Q. Do you mean that the fire had been put out that was  
there the day before? A. I don't know whether it was put out or  
not, there was no fire then.
- Q. It was gone, anyway? A. Yes.
- 20 Q. Then you noticed some smoke down in the green timbers,  
did you? A. Yes.
- Q. No, I don't want to put these questions too quickly; you  
understand what I am saying, do you; you noticed some smoke  
down in the green timbers? A. Yes.
- Q. You understand that? A. Yes.
- Q. That is down by the Sooke River? A. In that direction.
- Q. Yes. Were you in court yesterday? A. No.
- Q. One of the witnesses said yesterday that what he saw  
was smoke hanging over the tops of trees; is that what you saw?  
30 A. Yes.
- Q. Down below? A. Yes.
- Q. How many houses were there in these green timbers down  
there, that you know of? A. How many what?
- Q. How many houses were there in these green timbers?  
A. I don't know.
- Q. You don't know? A. No.
- Q. Do you know whether there were any or not? A. No, I  
don't.
- Q. Now, you went up on the Monday for the purpose of re-  
40 raiing this engine? A. Yes.
- Q. What is your work? A. Section man, section labourer.
- Q. Then you are pretty familiar with engines being de-  
railed on this line, I take it? A. Not with engines.
- Q. Well, something? A. Oh, yes.
- Q. It is quite a habit having things derailed? A. No, not  
very often.
- Q. Anyway, this engine had been derailed? A. Yes.

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Q. And I think the suggestion was made that before they sent for help they tried to get the engine back on the track; do you know whether they did or not? A. I don't know.

Q. When you got there, because there would be some sign of their trying to get her back? A. Very possibly they did.

Q. Do you know what that engine weighs? A. No, I don't.

10 Q. A pretty heavy thing. What was the condition of the wheels when you got there? A. The hind wheels was off.

Q. Where was the hind wheel? A. In between the track, in between the steel.

Q. In between the steel on the ties? A. Yes.

Q. And would it be the hind wheel that turned around when they tried to put the engine on by her own power? A. I suppose they naturally would.

Q. Yes. So that that hind wheel would be turning around on these ties? A. I don't know whether they tried to get it on or not.

20 Q. Assuming they did, the hind wheel would be the one that would turn around, wouldn't it? A. Well, I don't know, I am not versed in the engineering part of it.

Q. Come, now, you knew a moment ago; have you forgotten, or don't you want to tell me? A. I am telling you.

Q. Surely you have seen engines derailed before? A. When the engine is stopped the wheels would be going around.

Q. Exactly. And they would be going around on those ties? A. If they would start to move it.

30 Q. Exactly. Do you know whether or not when the engine was derailed there it was standing on the switch ties? A. No, I don't know.

Q. You don't remember that? A. No.

(Witness stands aside).

JOHN FREDERICK, a witness called on behalf of the Defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. MAYERS:

Q. Your full name, please? A. John Frederick.

Q. Where do you live? A. Milne's Landing.

40 Q. And you are the section foreman at Milne's Landing, are you? A. Yes.

Q. And you were the section foreman at Milne's Landing in 1930? A. Yes.

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Frederick,  
Examina-  
tion.

Frederick, for Defendant—Direct Examination.

- Q. You remember Monday, the 18th of August, 1930, the day before the fire at Kapoor, do you? A. Yes.
- Q. You went up to Kapoor on that day on the work train, did you? A. On the Monday.
- Q. On the Monday? A. On the Monday.
- Q. What did you do at Kapoor? A. Fixing the track to put the engine on.
- Q. What is that? A. Repairing the track.
- 10 Q. What did you personally do? A. Spiking it.
- Q. Spiking? A. Yes.
- Q. Was the track repaired when you finished? A. Yes.
- Q. That was where the engine had been derailed, was it? A. Yes.
- Q. And when you had finished, you and your men and the other men, was the track suitable for traffic? A. It was.
- Q. Then you came down on the train towards Victoria and stopped on the fill beyond the rock cut, near mile 35, did you? A. Yes.
- 20 Q. Did you see anything there? A. I see fire on the right-hand side.
- Q. Looking towards Kapoor? A. Yes.
- Q. Do you remember about where it was? A. Well, it was on the right-hand side.
- Q. In that hollow? A. In that hollow.
- Q. Did you see fire or smoke? A. Oh, just the smoke.
- Q. And then you were up there on Tuesday, were you not? A. Yes.
- 30 Q. You went up on your hand-car? A. On the hand-car.
- Q. With Baker and Cummings? A. Cummings and LeBarge.
- Q. LeBarge, yes; what were you doing up there on Tuesday? A. I went straight to the mill. I left the hand car off on the spur.
- Q. You left the hand car at the spur near mile 35, did you? A. 35.2.
- Q. Did you patrol the track on that day? A. Yes.
- Q. Whereabouts did you patrol? A. I was on top of the cars.
- 40 Q. What is that? A. On top of the box cars.
- Q. Up by the box cars? A. Yes.
- Q. And did you come down from the mill near which the box cars are, to mile 35 at any time? A. Yes, we came down through there to get to the mill.
- Q. You went up from 35 to the mill? A. To the mill.
- Q. You walked up? A. Yes.
- Q. Did you see any burning on the right of way when you

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Frederick, for Defendant—Cross-Examination.

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walked up? A. No.

Q. Was there anything that had been burnt on the right of way when you walked up? A. No, not any fire.

Q. Then when you had finished patrolling did you go back to mile 35? A. We came back to the fire guard.

Q. Where did you work; on the fire guard? A. Yes.

10 Q. When you came down the track from the mill to mile 35 did you see anything burning on the right of way? A. No, sir.

Q. Or anything that had been burnt on the right of way then? A. No.

The Court: Where was the fire then? A. The big fire was near the mill.

Q. Between the mill and the lumber pile, along that district? A. Yes.

20 Q. Then that was far away from the point that you saw on Monday, where the smoke was on the Monday? A. No, that was in the same location where the fire was smoking, in to the mill, on the bridge or outside.

Q. On the same side? A. On the same side.

Q. Quite a distance away, though? A. Yes.

Q. Well, could you tell, did you observe, that that fire got from the point you saw it on Monday to the point you saw it on Tuesday? A. The same point was burnt down.

Q. Speak up. A. The same point was covered by fire.

Mr. Maitland: That is what? A. The same point was covered by fire and smoke.

30 Q. The same point was covered by fire and smoke? A. Yes.

The Court: There was smoke and fire over the whole area, then; it catches on the stumps, and it would not go right out; they will catch very easily, won't they? A. Yes.

Q. You know what I mean? A. Yes.

Q. There was no green timber in that locality? A. No.

CROSS-EXAMINATION BY MR. MAITLAND:

Q. What time did you arrive on Tuesday, Mr. Frederick? A. Some time after four—4:20—some time after four o'clock.

40 Q. You said something about being on top of the box cars. What were you doing on top of the box cars? A. Protecting them from sparks.

Q. Were there many? A. No, but that is all we could do there.

Q. I cannot hear you. A. In case there were any sparks.

Q. There were sparks blowing around there? A. Blowing

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all around, smoke and sparks.

Q. Weren't you playing hoses on the box cars? A. There was no hose.

Q. At any time? A. No.

Q. What do you mean by the right of way you speak of the right of way, what do you mean by that? A. The right of way.

10 Q. You mean the tracks and the roadbed, do you? A. The tracks and the roadbed.

(Witness stands aside).

ANDREW WARK MACKENZIE, a witness re-called on behalf of the Defendant, being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. MAYERS:

Q. I want you to give me particulars about the tank car of the Canadian National. Can you refresh your memory from that document? A. Yes; this is a letter I wrote to Mr. Johnson, Fire Inspector, Ottawa—Federal Fire Inspector.

20 Q. That is a copy of your letter? A. This is a copy of my letter.

Q. Having refreshed your memory, just give me the particulars of the tank car, will you? A. A wooden tank car built on a flat car—wooden tank built on a flat car. I may quote the figures in the letter?

Q. Yes. A. Having a capacity of 5217 Imperial gallons; equipped with one Worthington steam pump six by four by six. The equipment is as stated.

30 Q. You may as well state all the particulars in this letter relating to the tank car. A. Fire fighting tank car C.N. 52214, has a wooden tank 26 feet 6 inches by 7 feet by 4 feet six, making a capacity of 5217 Imperial gallons. It has a Worthington Duplex steam pump six by four by six—that is a six-inch steam cylinder and a four-inch water cylinder with six-inch stroke. The equipment carried is the following: 800 feet of one and a half inch hose, with three-quarter nozzle; six round-mouth shovels, six track shovels, six mattocks, twelve canvas water buckets. That is all that pertains to the car.

The Court: How do you move the tank car from point to point? A. By the locomotive. Just simply an ordinary flat car.

40 Q. And in case of necessity the locomotive gets the car and takes it out? A. To any point of the fire. It is equipped for steam.

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Q. Could it have been brought on Tuesday to the point 35.2? A. I am not aware of where the tank car was located. That is outside of my province.

CROSS-EXAMINATION BY MR. MAITLAND:

Q. You were aware that under the Railway Board Regulations they had to keep a tank car, in view of patrol duty? A. I am aware it is necessary.

10 Q. And it was in view in this report here, I suppose, that you wanted to show that that was in first class condition? A. Every spring I overhaul the car; see that it is in working order, that the equipment is correct; and after that I am through with it.

Q. So I take it from this report that on the 19th day of August, 1930, you had at Deerholme, which is an hour away from the scene of this fire, a perfectly equipped fire fighting apparatus? A. As far as I know; it was up the line somewhere, but where I don't know anything, that was outside of my province.

20 Q. Wherever it was, it was a perfectly equipped fire fighting apparatus? A. Yes.

Q. With 800 feet of hose? A. Yes.

Q. With fire buckets and shovels? A. Yes.

Q. With everything that was necessary to put out a fire, if they wanted to go for it? A. That is the equipment as stated.

Q. Well that is what it was for, fighting fires? A. Fighting fires.

The Court: Was it presumed to carry this amount of water at all times? A. It was; it was kept filled.

30 Q. And I suppose the gravity—outside of the pump there is gravity attached there that will carry that water, or is there? A. No, no gravity; just two or three feet of a head. The pump takes it from the tank.

Mr. Maitland: You don't count on gravity, you count on the pump? A. No, the gravity would only be two or three feet.

The Court: It would not have any force, you mean? A. None at all.

40 Mr. Maitland: I want to direct your attention to the examination of Mr. Fraser, in which he refers to certain instructions that he gave to you. "(636) Did you inspect the engines after the fire, as to preventive appliances? (A.) I asked the mechanical department to look to see that they were in good condition, yes. (Q.) Did you get a report? (A.) He would report to Mr. Quantic in Vancouver. (Q.) Wouldn't you inform yourself as to that report? (A.) I informed myself as to this engine on Monday.

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(Q.) What did you find? (A.) When I was there I asked both Mackenzie and Mineau the engineer, and they said the engine was in good condition." That would be you, that Mackenzie, wouldn't it? A. Yes.

10 Q. "(Q.) And that is the way freight? (A.) Yes. (Q.) The oil engine? (A.) The oil burner 2116. (Q.) In good condition, in what respect? (A.) In regard to all her appliances, and to no possibility of her throwing fire." Now, did he ask you to inspect the engine as to their being no possibility of it throwing fire? A. The exact words I cannot say at this stage. I can only say that in connection with oil burners we have the precedent of many years to go upon, in which coal burners did throw fire; it was assumed the oil burner being locomotives, operate in something the same way. But they do not.

20 Q. Are you prepared to go so far as to say that there is no such thing as a fire from the sanding, or anything else, being started from an oil burner? A. In my opinion it is quite impossible for anything which escapes from the locomotive smoke stack to set fire. That is my opinion.

The Court: You are speaking of oil burners? A. I am speaking of oil burners, yes, sir.

Mr. Maitland: And I take it that would apply to any kind of an oil burner? A. That is my opinion.

30 Q. What was the idea, then, of Mr. Fraser, your Superintendent, asking you to find out as to no possibility of it throwing fire? Why would he do that if it was an impossibility? A. As I stated before, locomotives have been credited with setting fires, and I would say in the case of the coal burners, we have the precedent of that to go upon.

Q. You didn't have any coal burner precedent in this case, this was an oil burner, wasn't it? A. Nevertheless, when the engine is reported to have been on the scene of the fire, the logical thing is to make some examination. I did so.

(Witness stands aside).

WELLINGTON MCALPINE, a witness called on behalf of the Defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. MAYERS:

40 Q. Your full name, please? A. Wellington McAlpine.

Q. Where do you live? A. In the Municipality of Saanich, on Cordova Bay.

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Q. In 1930 what was your occupation? A. I was Forest Patrol Officer with the E. & N. Land Department.

Q. Of the Esquimalt and Nanaimo Railway Company?  
A. Of the Esquimalt and Nanaimo Railway Company.

Q. How long have you filled that office? A. Two years.

Q. Two years. That was in 1930? A. 1930.

Q. And you have filled the office since? A. Yes; still filling it.

10 Q. And you are patrolling this year, are you? A. Yes.

Q. Where were you stationed in 1930? A. My headquarters were at Leachtown.

Q. That is on the Victoria side of Kapoor, is it? A. Yes, about mile 34 there.

Q. How often—by the way, has the Esquimalt and Nanaimo Railway Company any timber in that vicinity? A. Oh, yes, a large area.

20 Q. And your duties would include what, exactly? A. Well, just guarding against any fire outbreaks, reporting the same if necessary; looking over the country for danger spots, making note of them, and reporting them.

Q. During that summer had you occasion to patrol the track of the C.N.R.? A. Yes, regularly.

Q. Regularly; how often a week? A. Oh, at least twice a week I would be up and down the track.

Q. You would be from Leachtown how far up the track?  
A. Usually as far as Sooke Lake.

Q. That is beyond Kapoor? A. That is beyond Kapoor; as far as the Sooke Lake Watershed—I don't go in there at all.

30 Q. And did you continue that bi-weekly patrol up until the fire of the 19th of August, 1930? A. Yes.

Q. What was the condition of the right of way of the Canadian National Railway that you saw during your patrol? A. I consider it in good condition.

Q. You were on the lookout for fire hazards, were you?  
A. Yes.

Q. Did you find any fire hazard on the right of way of the Canadian National? A. Not at any time.

40 Q. Not at any time. It would have been your duty to report that, of course? A. Yes.

Q. Did you notice pedestrians along that right of way?  
A. Oh, yes; they were coming and going quite often.

Q. Would that be a rare occasion? A. Oh, quite regularly at that season of the year.

Q. What have you to say as to the danger of growing green bracken on the right of way, or anywhere else? A. I consider

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growing green bracken a protection against any fire outbreak. It retains moisture in the ground; keeps down any chance of fire, of the fire running to any extent.

The Court: What is that? A. Keeps the moisture in the ground, prevents fire that should come from any cause, from running along the ground.

10 Mr. Mayers: In regard to the slash, in the sense of tops and limbs, did you see any slash on the Canadian National right of way at any time? A. No.

CROSS-EXAMINATION BY MR. MAITLAND:

Q. What was your district? A. Well, it was rather large, the Leach River district—we speak of it as the Leach River district.

Q. Where did you run from? A. The boundaries were rather indefinite; it was Leach River itself, and over as far as the Goldstream Watershed boundaries.

20 Q. Goldstream was the east boundary, what was the west boundary? A. The west boundary was indefinite, I take it to include all of the Leach Watershed.

Q. How far did you go along the track toward Kissinger? A. Oh, I went as far as the Sooke Lake Watershed, at the foot of Sooke Lake.

The Court: You know Kissinger? A. I know where Kissinger is, on Cowichan Lake; I believe it is at the far end of the C.N.R.

Mr. Maitland: You go beyond Kissinger? A. No.

30 The Court: What company are you employed by? A. The Esquimalt and Nanaimo Railway Company.

Q. You are not a C.N.R. man? A. No.

Mr. Maitland: What did you have to do with our line? A. Nothing whatever.

Q. Not ours, but the C.N.R. line? A. I understand what you mean.

Q. You had nothing to do with the C.N.R.? A. No.

40 Q. How often would you go over it between say Kapoor and Deerholme? A. I was never beyond Sooke Lake; I was never on official duty at any time on the C.N.R. not more than a mile north of Kapoor.

The Court: Is Sooke Lake as far as Kapoor? A. Just a half a mile or so beyond Kapoor.

Q. Beyond Kapoor? A. Yes.

Mr. Maitland: Do you know where mile 35 is approximate-

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ly? A. Yes.

Q. And mile 36? A. Yes.

Q. What did you have to do with the track between mile 35 and mile 36 on the C.N.R.? A. Well, it was not part of my range of patrol but it was an open ground, it was a place where I could see and get good distant views from, to see if there were any outbreaks of fire at any place.

10 A. No. Q. And was it your duty to inspect the C.N.R. right of way?

Q. Did you ever make an inspection of the C.N.R. right of way between sections 35 and 36 on the right of way? A. No; not specially; except I looked over the ground, as I did any place else.

Q. Did you find rotten ties covered with blackberry vines on the left of the right of way as you went along? A. I didn't examine to see whether they were rotten or not, I saw discarded ties there, yes.

Q. Discarded ties? A. Yes; that had been used.

20 Q. Let us assume when they were discarded they were rotten. Will you say that was or was not a fire hazard? A. Oh, I couldn't say, unless—if they were damp they would not be a fire hazard.

Q. If they were dry? A. If they were dry under certain circumstances they might be.

Q. The evidence given by Dunn, the Forest Ranger, is that they are very much of a fire hazard. A. I have not heard of any fires starting from them.

Q. You have not? A. No.

30 Q. You don't think when they are dry and powdery, and any fire starts on them, with the powdery part collapsed and the wind comes up, that they are a very bad fire hazard, those ties, don't you think that is so? A. I never paid enough attention to decide that matter.

Q. You have been along the C.P.R. quite often, I suppose you have, too, the main line? A. No.

Q. You have not? A. No.

Q. Have you been along any railway where you saw at certain seasons of the year all of the old ties being burnt? A. Yes.

40 Q. And on a railway that is well run, I take it, when ties are discarded they are piled together for the purpose of burning, aren't they? A. Yes.

Q. Herded together, not left lying along the track, are they? A. Not as a rule, no.

Q. And in a certain season of the year they are consumed generally, apparently? A. Yes.

Q. Is that what you saw on the E. & N.? A. I couldn't say; I am not connected with that.

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Q. You are a Fire Ranger; can you tell me whether or not that is what they do on the E. & N.? A. I don't know; I have not been on the E. & N., I don't know what their custom is.

The Court: Aren't you one of the officials referred to in the fire protection part of the Railway Act? You are appointed to protect your Company, and I suppose the public incidentally.

10 A. I am appointed by the season, sir, in a certain district, and the only district I have been in is the Leach River district.

Mr. Maitland: Do you walk the tracks quite a bit in this district? A. Quite a bit, yes.

Q. As a matter of fact haven't you in your patrol often found fires in the ties on the right of way and on the railway itself? A. No.

Q. Have you ever found one? A. No.

Q. You never put fires out on the tracks? A. I put one little fire out, yes—not on the track, off the track—I didn't put it out, but I was there when it was put out.

20 Q. Where was it, how far from the track? A. I couldn't say, perhaps twenty feet or so.

Q. Had a train passed by before that fire? A. Yes.

Q. Oil burning train? A. Oil burning, yes.

The Court: Have you read the fire protection provisions of the order of regulations issued under the Railway Act? A. No, sir.

Mr. Mayers: May I ask a question, my Lord?

The Court: Yes.

RE-EXAMINATION BY MR. MAYERS:

30 Q. You were not the Fire Ranger on the Esquimalt and Nanaimo Railway track, were you? A. No.

Q. You were the Fire Ranger for the Leachtown district? A. I was appointed by the Land Department; employed for the Land Department in their timbered areas. I had nothing to do with the railway itself, the right of way.

Q. The Esquimalt & Nanaimo Railway track does not run through your district at all? A. No, sir.

Q. The C.N.R. track does run through your district? A. Yes.

40 The Court: It was the Land Department protecting their property? A. Yes, sir.

The Court: Apparently it was not under the Railway Act at all that they were operating.

Mr. Mayers: No. It was for other purposes.

(Witness stands aside).

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Reece, for Defendant—Direct Examination.

JOSEPH REECE, a witness called on behalf of the Defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. MAYERS:

- Q. Your full name, please? A. Joseph Reece.  
 Q. Where do you live? A. Mile 43.  
 Q. On the C.N.R.? A. Yes.  
 Q. You are the section foreman at Lake End, are you?  
 A. Yes.  
 10 Q. And your section is from Mile 43 to Mile 45, is it?  
 A. 34 to 44.  
 Q. 34 to 44. You were the section foreman of that section in 1930, were you? A. Yes.  
 Q. What did you do in the spring with regard to cleaning the right of way? A. Burnt all old ties and any dry bracken that we could, before the fire season came into effect.  
 Q. That would be before the 1st of May? A. First of May.  
 Q. Did you clean off all the section from 44 to 34? A. All we could before the 1st of May.  
 20 Q. You recall burning the ties in that year, do you? A. Yes.  
 Q. What is the nature of the ground round about 35, the fill and the rock cut, do you remember that? A. Rock and gravel.  
 Q. Is there much vegetation there, or was there much vegetation there in the spring of 1930? A. Not very much.  
 Q. What did you do with regard to any small stuff that would burn? A. What would burn we tried to burn it.  
 Q. What was the condition of the right of way on the 1st of May, 1930? A. It wasn't very bad; it was about the same as any other place along the right of way.  
 30 Q. Between 44 and 34? A. Yes.  
 Q. Had you cleaned off everything that could be cleaned off? A. What we could.  
 Q. Did you notice the fire that the Kapoor had in the autumn of 1929 on the right of way looking towards Kapoor, up on their logging spur, where they had logged? A. Yes.  
 Q. What had happened up there? A. The whole side of the hill burnt.  
 Q. And how far did that burning extend? A. It would be in what way?  
 40 Q. Towards the right of way? A. Some of it came right to the right of way, and some I suppose did not.  
 Q. That is, by the fill and the rock cut, how about that?  
 A. Yes, along about 35.  
 Q. Did the fire come right on to the right of way, the Kapoor burnings? A. Some of it did.

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Reece, for Defendant—Direct Examination.

Q. Did that consume anything consumable on the right of way down by 35? A. Yes; it came on there.

Q. What is that? A. The fire came down to the right of way at 35, above 35.

Q. Did it come on the right of way? A. Some of it did.

Mr. Maitland: You mean some of the fire or some of the right of way?

The Court: It came down to the right of way.

10 Mr. Mayers: The fire that the Kapoor had started on that hillside, you know what I mean? A. In 1929?

Q. Yes. A. Some of that fire came down to the right of way. But there were places it did not burn on the right of way; but places it did.

Q. Did it burn anything that would burn on the right of way? A. Yes.

Mr. Maitland: That is a leading question.

The Court: Not very leading, I think.

Q. Did you patrol that section daily? A. Not every day.

20 Q. How often did you patrol it? A. About three, sometimes four times a week. That is the whole of it. But every day most of it—where we were going to work.

Q. On the Saturday before the fire, did you patrol? A. To 35.4

Q. You came down as far as 35.4 from 43, did you? A. Yes.

Q. And how did you patrol, did you walk? A. On the speeder.

Q. Had you any other fire on your hands at that time?

A. Mile 38.

30 Q. Mile 38, yes. You came down as far as 35.4, and of course you would come from 36, along that horseshoe bend? A. Yes.

Q. Did you see any fire or smoke on the Saturday? A. No.

Q. At mile 35.2? A. No, I never seen no smoke.

Q. Then on the Monday what happened? A. I was at the other end of the section.

Q. Did you patrol on Monday? A. No.

Q. Why was that? A. On account of the—didn't know where the way freight was, after it was derailed.

40 Q. Would you patrol if the way freight had passed, that section, as a rule would you? A. Yes.

Q. And the way freight did not pass your section that day? A. No.

Q. And you could not meet her on the track, I suppose? A. No, I wouldn't run the risk of head on.

Q. Then on the Tuesday did you go down to Kapoor? A. I went down at 1:20 or 1:30 in the afternoon.

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Q. You got down to Kapoor about 1:20 or 1:30 in the afternoon? A. Yes.

Q. When you were at mile 36 what did you see? A. I seen a lot of smoke down on the right-hand side of the track, in the slashing.

Q. That would be where, in relation to the Kapoor Logging spur? A. Well, about close to the—about around the Kapoor Logging spur.

10 Q. That is the lower logging spur by the Sooke River? A. Yes.

Q. Then you proceeded where after mile 36 on that Tuesday? A. To the end of the rock cut, the Victoria side of the rock cut.

Q. What did you see there? A. Just seen this heavy smoke on the right-hand side.

Q. On your right-hand side going to Victoria; that would be down by the Sooke River? A. Yes.

20 The Court: What time would this be? A. About half-past one, I would say about that.

Mr. Mayers: That would be on your right going to Victoria, would it? A. Yes.

Q. When you came down you say you came through the rock cut, did you? A. Yes.

Q. How near to 35 did you get? A. Oh, I was a little from 35.2 west.

Q. Did you see anything on your left hand at 35.2? A. I never noticed anything on my left hand side going down.

30 Q. Did you see any burning on the right of way at that time? A. No.

Q. Or anything that had burnt on the right of way? A. No.

Q. After that you did what? A. I went right back up to Kapoor.

Q. And what did you do then? A. Phoned Victoria.

Q. You spoke to whom? A. To the dispatcher.

Q. And after that? A. Then I came out and put my speeder in the spur at Kapoor mill platform.

Q. And after that? A. Then I walked down towards the rock cut.

40 Q. Had there been any change in the situation then? A. No. Smoke on the right-hand side in the slashing, it seemed to be getting worse there, the fire.

Q. Yes. Do you remember any screen of small trees on the right of way near the rock cut? A. Yes.

Q. That was there then, was it? A. That was there.

Q. That was on which side? A. The right-hand side going to Victoria.

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Q. Were any of those small trees burning, or had they been burnt? A. Not then.

Q. And after that you did what? A. I went back and phoned again to Victoria.

Q. That would be about what time, do you remember? A. Well, I cannot just say the time.

10 Q. Eventually Mr. Fraser came, did he? A. Someone told me Mr. Fraser wanted me on the phone, and I went in and answered the phone again.

Q. But Mr. Fraser came to Kapoor on the work train that afternoon? A. Yes.

Q. Did you go with him anywhere? A. We went up the hill when the lumber was on fire.

Q. By the hill where exactly do you mean? A. At the Victoria side of the lumber pile.

Q. The Victoria side of the lumber yard? A. Yes.

20 Q. Do you remember about what time that would be? A. Oh, I cannot say; something around nine o'clock at night I would say it may be—I couldn't just exactly say the time, it was about that time I think.

Q. When you were up on the hill you could look over the lumber yard, could you? A. Yes.

Q. Was there fire in the lumber yard then? A. Yes.

Q. Did you hear or see anything in the lumber yard at that time. A. I heard an explosion.

Q. Where was that? A. Looking towards the mill from where I was standing, to the planer.

Q. It was between you and the mill, was it? A. Yes.

30 Q. Where was it in relation to the lumber yard? A. It was I would say more to the right a little bit, of the main pile. I cannot just—

Q. To the right of the main pile in the lumber yard? A. Yes, right from where I was standing, right in toward the planing mill.

Q. In a line between you and the planing mill? A. Yes.

Q. Where was it? A. In the lumber, I cannot say to the exact spot.

40 Q. Did you see where it was in relation to any of the piles of lumber? A. No, I couldn't say that.

Q. Now, on occasions before the 18th of August had you seen any fires in that neighbourhood near Kapoor? A. In July.

Q. Just come over here to this plan and mark for me where the fires were that you could see. Begin at the earliest date, and show me on the plan the first fire that you recall say in July. Just get your mind focused on the places. Here is 36, and the track goes right around—35. A. A fire here some place.

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Q. We will mark these separately. A. I cannot give you the exact spot, but it is in there somewhere.

Q. I don't expect you to pick out the exact piece of ground, but the locality. Just make a cross, will you? (Witness does so). That will be R-1. You remember the approximate date of that?

A. I cannot say the exact date.

Q. That would be in what month? A. In July. It would be a few days, I cannot tell how many days, before the 21st of July; but it was before the 21st of July; that week I would say.

Q. The week of the 21st of July? A. Yes.

Q. And the next one? A. Up here, 36.1, you see.

Q. That will be R-2. A. On the left-hand side of the track going to Kissinger.

Juror: That was on the track? A. Close to the track.

Q. Was it on the right of way? A. Yes.

Mr. Mayers: Going to Kissinger, on the left-hand side?

A. Yes.

Q. Well, that would not be the left-hand side going to Kissinger? A. That is not the right place, then.

Q. Mark the right place; this is towards Kissinger (witness marks it). That will be R-3. And that would be about when?

A. The 21st of July.

Q. And the next one? A. Just below.

Q. Below that again. Just mark it (Witness does so); that will be R-4. And about when did you see R-4? A. Monday afternoon, the 22nd.

Q. And the next one (witness marks); that will be R-5. About when did you see that? A. The 23rd.

Q. And the next one? A. About in here.

Q. R-6; and when did you see that one? A. The 24th.

The Court: This is all in July? A. July.

Mr. Mayers: The last one was the 24th of July you said?

A. Yes, the last one.

The Court: How many have you got down?

Mr. Mayers: Five.

The Court: Five different fires? A. Four of them.

Mr. Mayers: No, five.

The Court: Five fires before the fire in discussion.

Q. Mr. Mayers: Yes. Is that the last one you saw? A. I seen one on the 25th.

Q. Where was that? A. Down there by the Sooke River.

Q. Down here—there is the Sooke River? A. It was opposite 35.3—I cannot tell where that is there.

Q. This is 35. 35.3 would be somewhere here in the rock cut, I should think. A. It was opposite the rock cut, down in here, alongside of the Kapoor spur.

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Q. Just mark it; there is the Kapoor spur. A. That is opposite 35.3.

Q. 35.3 would be just around here. A. This is the spur—about here, just this side of the spur, I would say.

Q. 25th of July; that will be R-7. A. That was in the slash.

Q. Any more? A. That is all I seen.

10 Q. Now, R-1, what happened to that one? A. That was known as the Kapoor fire. I wasn't there; they fought that themselves and put it out.

Q. R-1? A. That happened on a Sunday.

Mr. Maitland: Surely he should not give evidence on things he does not know about.

Mr. Mayers: I asked him what he knew about R-1, and he said it was a Kapoor fire. R-3, this one here? A. Yes; R-3 was on Monday afternoon.

Q. What happened to that? A. That was burning down in the bottom of the dump, away down in the bush.

20 Q. What happened to it? A. We carried water and dirt and put it out. I left two men there.

Q. And R-4? A. That was on Tuesday, there was a stump took fire away from our track, east of our track, in a tree standing there at the edge of the Kapoor fire, next to the Kapoor fire.

Q. What did you do with that? A. Put that out.

Mr. Maitland: On the Tuesday was that?

Mr. Mayers: Tuesday of what week? A. July 24,—no, 23rd, rather.

30 Q. Yes. And R-5 and R-6 and R-7, do you know what happened to those? A. R-5, that was the stump started burning there.

Q. And what happened to that? A. I sent a man over to put it out.

Q. Was it put out? A. Yes.

The Court: Where was that?

Mr. Mayers: R-5 is not far from the Sooke River.

The Court: How far from the track?

Mr. Mayers: A long way from the track. A. One fire from the track is a half a mile and the other about a quarter of a mile,  
40 I should say.

Q. R-6, this one? A. That is the one I mean, R-6.

Q. R-5 is this side and R-6 the other side? A. I am a day ahead on that.

Q. What do you say happened to R-5? A. That is the one three of us went there to put it out.

Q. R-6? A. That is the one I sent one of the men.

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Q. And that was put out, was it? A. Yes.

Q. And what happened about R-7? A. I reported that at the store, Kapoor store, and they went down and put that out themselves. That was in their slashing.

Q. Did you ever see that put out, actually put out, R-7? A. Well, I cannot say; I understood it was put out. I was working up close to the mill; and as far as I could see there was no

10 more smoke.

The Court: This is to show that fires do happen in that locality?

Mr. Mayers: To show that fires were continually starting up in the neighbourhood of the fire they had, in July.

The Court: Starting up by some means or other. Were there any lightning storms? A. No.

Q. There is not much lightning in this country? A. No.

Mr. Mayers: The fire creeps along the ground, and breaks out over and over again.

20 Q. Did you ever see pedestrians on that track? A. Which?

Q. People walking up and down the track? A. Yes; lots of people walking up and down.

#### CROSS-EXAMINATION BY MR. MAITLAND:

Q. Mr. Reese, you did give evidence at the Fire Enquiry, did you not? A. Which?

Q. You did give evidence at the Fire Enquiry? A. That was over in the Drill Hall, was it?

Q. Yes? A. Yes.

30 Q. You understood what it was for, did you not? A. I suppose I did, yes.

Q. And you are the one section man who was in charge of this section? A. Yes.

Q. And the patrol man that is in charge of this patrol? A. We don't patrol over it.

Q. You are the man responsible? A. Yes.

Q. When were you up there last? A. Where, at Kapoor?

Q. Over between 35 and 36—last from now? A. The last time I was over there, you mean, this year?

Q. Yes? A. Yesterday.

40 Q. And before that? A. The day before.

Q. Then you have been over that section between 34 and 35 quite a number of times since the 17th May, when this trial opened, have you not? A. Yes.

Q. That was the time, you remember, when a view was taken

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up there on the 17th May—You were not there? A. Which—I don't remember.

Q. Anyway you have been over that particular section quite a few times since the 17th May? A. Yes.

Q. Are you prepared to say that between mile 35 and mile 36 there are no discarded ties lying all along the right of way, and some of them covered with blackberry vines. A. There are old ties there yet there.

10 Q. Now Mr. Dunn, Fire Warden, gave evidence, and he said in this gulch—you know the gulch at 35.2? A. Yes.

Q. He said at the time of the fire this gulch was very dirty and there were ties and debris there. Do you say this is not so? A. There may have been, I could not say.

Q. Did you patrol—

The Court: What kind of ties? A. Old ties at that time.

Mr. Maitland: You never put new ties in the gulch? A. They rolled down when they were distributed.

20 Q. As a matter of fact, looking back two years, you cannot say with any degree of positiveness what was the condition at that time? A. It is pretty hard to say.

Q. And this fire, once started, is an insidious thing, and you never know where it will stop? A. No.

Q. It creeps down and in? A. Yes, I guess.

Q. And inserts itself away down to the roots of the trees? A. Yes, in dry weather.

Q. And no man can tell how far it is going to go, once it gets away.—That is true? A. I guess true enough.

30 Q. Once you get a little breeze on a fire line, you never know how far a spark is going to go, carried by the wind? A. No, cannot tell.

Q. Sometimes they go an extraordinary distance? A. Yes.

Q. I suggest it is quite a common thing for a spark to be carried a quarter of a mile, would you dispute that? A. It depends where the fire is.

Q. It would have to be on the high land, going to the low, it would happen then, would it not? A. Yes, up on a hill.

Q. You remember Mr. Orchard, don't you? A. Well, I cannot say I do.

40 Q. Well, Mr. Orchard and Mr. Conway and two gentlemen did meet Mr. Fraser, I think, on the 20th August, and discussed the origin of this fire on the scene of the fire, do you remember that? A. I believe they did, up towards the mill.

Q. And Naghera Singh was called in?—

The Court: A Hindu was called in? A. Yes.

Mr. Maitland: And the Hindu gave a description of the

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origin of this fire and you did not dispute what he said. That is the evidence we have, is that correct? A. Dispute what?

Q. That that fire was started at Mile 35.2? A. I would not say that.

Q. I say you were called in and this Hindu Naghera Singh, told his story in your presence, and you did not dispute it? A. I could not say, because I did not know there was a fire at 35.2 at the time.

10 Q. Did you not know that on the Monday? A. No.

Q. When did you first hear that there was this fire? A. I might have heard that night or next morning.

The Court: Did you not go up and down the track that day? A. Not that Monday.

Q. Where were you? A. 44, East.

Mr. Maitland: Were you not at Kapoor at 4 o'clock on Monday? A. No.

Q. Not at all? A. No.

Q. Not at the derailment? A. No.

20 Q. Why did you not make a patrol on Monday? A. Because I would not run against that railway way freight.

Q. Did you not go that far? A. No.

Q. How far did you go? A. Did not go at all.

Q. Not that far on Monday? A. No.

The Court: He was not there at all.

Witness: I did not know anything about the fire at all, at Mile 35.2 that night, or it might have been the next day, morning.

The Court: It was only on the Tuesday that you went to Kapoor to phone Victoria? A. Yes.

30 Q. Did you see the fire at all? A. Yes, in the slashing.

Q. At 35.2? A. No.

Mr. Maitland: When was it you got to the scene of this fire first?

The Court: Call it 35.2. A. Tuesday, it was 1:30, about that.

Mr. Maitland: And before 1:30 what was the latest you had been to Kapoor? A. Saturday.

The Court: When you saw the smoke on the lower landing spur and proceeded at 1:30 did you notice anything on the left hand side? A. No.

40 Q. Did you notice some Hindus working there, trying to fight the fire? A. I saw some Hindus on the track.

Q. Men of the Kapoor Company? A. Yes.

Q. What were they doing? A. Looking after the fire in the slashing.

Q. On the left hand side was there not a body of men fighting the fire? A. Did not see anybody.

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Mr. Maitland: I want to read what Mr. Orchard said at the Fire Inquiry.—“Mr. Reece said he arrived at the fire at 1 o'clock”—that is correct? A. No, I did not leave the camp at one—Somewhere in the neighbourhood of 1:20 or 1:30.

10 Mr. Maitland. “I am not sure of that date, but it was around noon on Tuesday the 19th just after the fire had broken away from control and crossed the railway. He stated that he had watched the progress of the fire on the 19th and had observed the fire fighting activities of the Kapoor crew and he said that the fire in his opinion, he had no doubt that the fire which burned the Kapoor mill and the Kapoor Lumber Company yard, burned the bridges and done other damage, was the fire that originated at mile 35.2”—Did you tell that to him? A. No, I could not say that, I would swear to that, because I did not know there was a fire there.

Q. You did not know there was a fire at 35.2? A. No.

Q. Why did you go down there on Tuesday, were you sent for? A. No, went on my own.

20 Q. Were you not told there was a fire on Tuesday by somebody? A. Tuesday—no.

The Court: You have already said you heard about the fire on Monday, somebody told you about it? A. On the Monday night?—Tuesday night.

The Court: You said you may have heard on Monday night—did you say that? A. If I did, I meant Tuesday night.

Mr. Maitland: Now you did give evidence at the Fire Enquiry, did you not? A. Yes.

30 Q. And you did not suggest at the Fire Enquiry that this fire was started anywhere else but at 35.2? A. I don't remember.

Q. You won't say you did? A. I would not say I said there was a fire there at 35.2.

The Court: Did you suggest any other place other than 35.2 as the place of origin of the fire?

Mr. Mayers: I submit this is not a fair cross-examination, When the witness is called by the Fire Warden or here, he is asked questions and answers questions, he does not volunteer information.

40 The Court: If he is a fire-man and called, I should think he would be able to give assistance at an enquiry.

Mr. Mayers: If he is asked. — I submit a witness should never volunteer information. He is always rebuked by the Court if he does.

The Court: Not at an enquiry.

Mr. Mayers: If it is an official enquiry.

The Court: I take it it was an official enquiry, to see where the blame originated.

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Mr. Mayers: A great deal was said at that Enquiry.

The Court: You understand that some fires cause a lot of damage? A. Yes.

Q. And I suppose you knew that some blame was trying to be attached to the railway company? A. Yes.

Q. Did you have counsel for you? Who was acting for the railway company? A. I did not know anybody that was there but Mr. Fraser.

10 Q. Well, he is a pretty competent man. Was he there to protect the railway company's interest? A. Yes.

Q. Did he ask you questions? A. No, nobody.

Mr. Maitland: Was not your old policeman, Mr. Wheatley, there? A. No, I did not know anybody there.

Q. I was there? A. Well, I did not know you then.

Q. Let me get this clearly. — You did arrive about 1 o'clock on Tuesday? A. 1:30, about.

Mr. Mayers: He has told you three times he did not arrive at 1 o'clock.

20 Mr. Maitland: Last time you said 1:20 and a moment ago 1:30, and Mr. Mayers interrupts—I think I am competent to conduct this cross-examination—Now I understand you to say that you worked there on Tuesday, that you saw no fire at 35.2, or did not notice any? A. I did not notice any.

Q. You are quite clear when you arrived there on the Tuesday after lunch you did not notice any fire at 35.2? A. I did not notice any.

Q. And you mean by 35.2, at the rock cut? A. Before you come to the rock cut.

30 Q. At the Victoria side—Now I want to read what you said at the Fire Enquiry: “(A.) I arrived there at about twenty minutes after one, I think it was. (Q.) Arrived where? (A.) At Kapoor; and the fire was—there was quite a bit of smoke on the left hand side of the track, about 35.2; you might say a little further.”—Do you remember saying that at the Fire Enquiry? A. There was smoke all over—

Q. Let me read this to you again, and I would like you to listen to it:— “At Kapoor; and the fire was—there was quite a bit of smoke on the left hand side of the track, about 35.2”—Is that right or wrong? A. Yes, there was smoke all along.

40 Q. Did you give that evidence at the Fire Enquiry? A. I cannot remember if I gave that evidence.

Q. Was it right or wrong? A. There was smoke.

The Court: Then my notes are wrong — Nothing in the nature of fire? A. Not fire, I did not see any fire.

The Court: In the nature of fire—Smoke is generally caused

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from fire? A. Yes.

Q. Do you remember saying that, or are my notes wrong?

A. I cannot remember saying that at the enquiry.

Q. This morning, did you say it? A. Yes, I remember that.

Q. That is you did refer to the fact that there was heavy smoke on the right hand side, but nothing on the left—Did you say that this morning? A. Yes.

10 Q. That is your present recollection? A. Well, there was some smoke on the right of way, on the track.

Q. When you speak of the track, you have the right side and the left side. Was there smoke that afternoon on the left hand side, as well as the right? A. Yes, there was.

Mr. Maitland: Let me put that to you again. This is the question: "Where did you phone from?" A. Kapoor.

20 Q. That is the answer you gave at the Enquiry. I am going to give you question and answer: "(Q.) Where did you phone from? (A.) Kapoor. (Q.) That was on Tuesday? (A.) Tuesday. (Q.) At 1:20? (A.) At 1:20. (Q.) And you were travelling which way when you saw the fire? (A.) East. (Q.) You were travelling east? (A.) Yes. (Q.) And was the fire on the right, or left hand side? (A.) There was fire on both sides. (Q.) There were fires on both sides? (A.) Yes, the fire was on both sides at 35.2, and a little this way."—Do you remember giving that evidence? A. No, I could not say I said fire on both sides. I know I did not see any on the left hand side going down.

Q. Where was the head of the slash, would that be at 35.2, near there? A. It would be away down, 35.

Q. It would be in the vicinity of 35.2? A. No.

30 The Court: This Enquiry, it is not an Exhibit, do you have to prove it?

Mr. Maitland: Mr. Mayers and I had an understanding we will accept this.

The Court: Without calling the stenographer?

Mr. Maitland: Yes, that is correct.

Mr. Maitland: Yes.

Mr. Maitland: Come over to this map—Where is the head of the slash?

40 Mr. Mayers: By head, do you mean the beginning?

Witness: Towards Victoria, to the mill.

Mr. Maitland: If you use the expression "head of the slashing," what would you mean? Here you would refer to 35?

A. Across the way from 35.

Q. Where on the map? A. Towards Victoria.

Q. If you say the fire at 35.2 and said it had gone through the head of the slashing, where would you mean? A. By saying the head of the slashing I did not mean what spot.

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Q. As a matter of fact what you mean would be from 35.2 towards the mill, would you not? A. Yes.

Q. All right, thank you—

Q. Now did you put all those fires out in July? A. Not all.

Q. Well, if you had been notified, at say 10 or 10:30 on Monday morning by your engine man or conductor that there was a fire on your right of way at 35.2, you would have gone to put it out? A. Yes.

Q. There is no doubt about that? A. No.

Q. And are you not supposed to receive from your conductors and engine men a report of any fires there are? A. Yes.

Q. And you immediately take steps to put it out? A. Yes, go right away.

Q. And you got no report from any of your people that there was a fire at 35.2? A. No.

Q. And if you had done, you would have gone and put it out, as it was a small fire—that is correct? A. Yes.

Q. You are satisfied that these July fires were put out? A. Well, I can say what I did put out there did not seem to be any smoke left.

Q. Early in August you did not report the fires still burning? A. No.

Q. And did not have any report of them? A. No.

#### RE-EXAMINATION BY MR. MAYERS:

Q. When you were going, at 1:20 or 1:30, out towards Mile 35, you remember you told me you saw something on your right hand side down towards the Sooke River? A. Do you mean 19th August?

Q. Yes, Tuesday? A. Yes, I seen the smoke on the right hand side.

Q. Was that smoke moving?—

Mr. Maitland: I did not cross-examine on this—My friend took charge of the proceedings.

The Court: You must ask if it is permitted. It is a very leading question.

Mr. Mayers: I was asking questions in continuation of the cross-examination. He was said to have said that there was smoke on both sides of the right of way. I want him to explain it.

The Court: Well, you want to show what kind of smoke. You might put the question this way. If there was a smoke, describe it.

Mr. Mayers: Tell me what there was of smoke on the right

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hand side? A. Just looked to me that there was a fire there and an awful volume of smoke in the slash.

Q. Was it moving? A. No, seemed to go in all directions, towards the track and up towards the mill.

Q. How far towards the track did the smoke on the right go? A. Well, the smoke around the track was not as heavy as what was in the slashing. It was light smoke; enough to make  
10 me very careful in travelling through the cut on my speeder. I did not want to run into anybody.

Q. When you were coming out of the rock cut and on to the fill, you told Mr. Maitland you saw smoke on both sides. Is that right?

The Court: He said this morning he only saw it one side, but is not denying he did say it on the Enquiry.

Mr. Mayers: You told Mr. Maitland you saw smoke on the right hand side, is that right? A. Going to Victoria—on the right hand side going to Victoria.

Q. You saw no smoke on the left hand side going towards  
20 Victoria? A. Not on the track.

Q. Did you see any smoke on the left hand side? A. Not that I remember seeing.

Q. Did you see any Hindus there fighting fire? A. They were on the track, but did not seem to be doing anything.

(Witness stands aside).

ST. JOHN MUNROE, a witness called on behalf of the Defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. MAYERS:

30 Q. Where do you live? A. Victoria.

Q. What is your occupation? A. Division Engineer on the Island Line.

Q. On the C.N.R. line? A. Yes.

Q. On the Cowichan subdivision to Kissinger? A. On the Cowichan subdivision and Patricia Bay subdivision.

Q. You held that position in 1930? A. Yes.

Q. What were your duties in connection with the right of way in 1930? A. In charge of maintaining the tracks.

40 36? Q. Had you occasion to go along the subdivision to 35 and A. Yes.

Q. How often would you traverse that section in the summer of 1930? A. Oh, once or twice a week, probably.

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Q. And did that continue up through the month of July?  
A. Yes.

Q. And August? A. Until the 11th of August.

Q. What was the condition of the right of way that summer in the months of July and August? A. Very good.

Q. Was there any fire hazard on the right of way that you saw? A. Not that I considered a fire hazard.

10 Q. Was it your duty to inspect the condition of the right of way? A. Yes.

Q. Were you satisfied with its condition? A. Yes.

Q. What is the nature of the ground round about Mile 35?

The Court: Well, Mr. Maitland is not objecting to your putting these leading questions, but they will not help me very much. Tell what occurred, and let the Jury form their opinion.

Mr. Mayers: What was the condition of the ground between Mile 31 on to Mile 35.3 say—That is over the fill and the rock cut?

A. It is a sandy rocky country, not very much vegetation.

20 Q. Did you observe the condition of the dump of the fill at mile 35.2? A. Yes.

Q. What was the condition of that? A. The fill is a dirt fill, no vegetation at all on the slopes of the fill, naturally in that country.

Q. Do you know anything about the operations conducted on the right of way in the spring of 1930? A. The right of way was generally cleaned up until the 1st May, the 1st April is the end of the fire season, after which time we are not allowed to burn any brush except under special order.

30 Q. Prior to that, did anything happen in 1930 with regard to the right of way? A. The right of way was cleaned up in the spring.

CROSS-EXAMINATION BY MR. MAITLAND:

Q. Is there any difference between the condition of the right of way in 1930 and the condition of the same right of way on the 17th May, 1932? A. Quite a considerable difference.

Q. Is it worse now? A. I did not say—what do you mean, is the condition worse?

40 Q. I mean as to being kept clean? A. There is a certain amount of slashing has been done on the right of way during the last year. Owing to the very wet season this year we have not been able to burn that slash, but previous—there has been no slashing done during 1932.

Q. We have evidence here from other witnesses, all of whom

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depose to discarded ties lying on the right of way? A. What should I say?

Q. Well, what is correct, is that right or wrong? A. There are always a certain amount of ties on the right of way.

Q. Discarded ones? A. Yes, how are you going to get rid of your ties, on the 1st of May you cannot burn them.

10 Q. I suggest to you, if you make an examination of that line tomorrow you would find discarded ties covered over with blackberry vines? A. Possible to find them, in certain portions there are, and others there are not.

Q. In and around 35.2? A. 35.2, I was over the other day. I saw one blackened spot where ties had been burnt this year.

Q. Did you not see any that were not burnt yet? A. There may be a few ties.

(Witness stands aside).

20 GEORGE ALEXANDER ROBERTS, a witness called on behalf of the Defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. MAYERS:

Q. You live in Victoria? A. Yes.

Q. What is your occupation? A. Train dispatcher.

Q. And you were train dispatcher to the Canadian National Railway in August, 1930? A. Yes.

Q. Have you your despatch sheets with you? A. They are here, I believe (Produced).

30 Q. Can you give me the train movements on Monday, 18th August, and Tuesday, 19th August, 1930? A. Yes, sir—Do you want Monday, 18th, first?

Q. Yes—just half a minute—Yes, Monday 18th? A. The gas car, 391, left Victoria at 9 o'clock, and passed Kapoor on time.

Q. That would be what? A. 10:24.

Q. Yes, when would that leave Kapoor? A. It would leave there at the same time, would not stop more than a minute.

Q. Continue that gas car. That returned home same day? A. Same day, arrived Victoria 17:25.

Q. And passed Kapoor? A. 16:20.

Q. That is 4:20? A. Yes.

40 The Foreman: What time did it reach Kapoor?

Mr. Mayers: You have 4:20, leaving Kapoor? A. Yes, 4:30, I have here.

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The Foreman: 3:44, I have got. A. 3:44 is the time; it was delayed. It was delayed a little.

The Foreman: It would arrive at Kapoor at 3:44? A. Yes, and on the Monday it was delayed.

Mr. Mayers: That completes the gas car. A. The next movement was the way freight, No. 569, engine 2116, leaving Victoria at 9:40.

10 Q. Arriving Kapoor? A. 12:05.

Q. Have you a note when it left Kapoor, A. Yes, 16:35.

Q. That is 4:35, that is right—And the work train, or the auxiliary? A. That was the day the engine was derailed there—The next movement was the auxiliary, out of Victoria at 14:30.

Q. That is 2:30? A. Yes.

Q. And arrived at Kapoor when? A. 16 o'clock.

Q. 4 o'clock. You know when it left Kapoor? A. Yes, 17 o'clock.

Q. Arrived back at Victoria? A. At 18:45.

20 Q. Are these all the movements on Monday? A. All the train movements on the Monday.

Q. And on the Tuesday—Gas car? A. Tuesday the gas car No. 391 left Victoria on time.

Q. Arriving Kapoor? A. On time.

Q. That would be when? A. 10:24.

Q. It would leave within a few minutes, I suppose? A. Yes, would not stop there more than a minute.

Q. And the way freight? A. The way freight east bound.

Q. Let us finish with the gas car.—In the afternoon what time would that reach Kapoor? A. At 15:44—15:50.

30 Q. And it would leave within a few minutes? A. Left at 15:50.

Q. The way freight? A. Way freight eastbound arrived at Kapoor at 9:55.

Q. And left Kapoor? A. At 10:45.

Q. And then do you know the movements of the work train on the Tuesday, the auxiliary. A. Yes, the work train, extra 424, left Victoria at 15:50.

Q. And arrived at Kapoor? A. 17:30.

Q. And left Kapoor? A. At 23 o'clock.

40 Q. 17:50 is 5:30? A. 17:30.

Q. And left at 11 o'clock at night, is that right? A. Yes.

Q. On that Tuesday had you any telephone conversation with any one at Kapoor? A. Yes.

Q. About when was that? A. About 1:30—13:30.

Q. To whom were you talking? A. To the section foreman, Reece.

Q. And anybody else? A. Mr. Cowan.

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Q. First of all you had a conversation with Reece on the telephone? A. Yes.

Q. Then a conversation with Mr. Cowan on the telephone?  
A. Yes.

Q. Tell me what was said by Mr. Cowan, or you and Mr. Cowan? A. Mr. Cowan came to the phone immediately after Mr. Reece went off, saying he did not think there was any danger from the fire it was practically under control.

Q. What time did you say that was? A. 13:30.

Q. Is that all the conversation? A. That was the extent of the conversation at that time.

Q. You had another one? A. No, that was not the extent of the conversation. At that time I asked him if there was danger if he would use the Kapoor locomotive to pull our cars away from the mill in case of the danger which he said he would do.

Q. Had you any further conversation? A. Later on, forty-five minutes or an hour after.

Q. What was that? A. Mr. Reece called me again—

Q. Yes—never mind what Mr. Reece said, what did Mr. Cowan say? A. He followed Mr. Reece, said the fire was under control, and did not think assistance was necessary, and again I asked him if he would use his locomotive to pull our cars away to a safe place if there was danger, which he said he would do. And at this time Mr. Fraser came on the phone, and I hung up. I did not hear the conversation, cannot hear it if there are too many conversations going.

#### CROSS-EXAMINATION BY MR. MAITLAND:

Q. Did you make a note of this conversation at the time?  
A. If I did it would be on the train sheet. No particular note about the time of the conversation, but the other notes in connection with the handling of the crews, which I had to do.

Q. You sent your crews out from Victoria? A. I had one crew working in the yard at the time. It was going to Patricia Bay, and to get the crew to go up the Island I had to take part of this crew.

Q. What time did you send this crew? A. That left at 15:50.

Q. What is 15:50? A. Ten minutes to four.

Q. It was ten minutes to four when you sent your men out?  
A. That is the time the train left.

Q. How long were you gathering your crew together? A. It did not take very long. It was about 2:30 when Mr. Fraser

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finally ordered me to start the train going and I had to get men.

Q. Mr. Fraser was taking quite a keen interest in that fire that day? A. I don't know, I did not talk to Mr. Fraser again that day.

Q. Do you know the different times he called to Kapoor about it? A. I don't know, I don't come on until 13 o'clock.

Q. You have the movement of all the trains in Cowichan Division? A. Yes.

10 Q. Have you got the sheet for Sunday? A. No, I have not got it here. I have Monday and Tuesday's sheets here.

Q. I would like Sunday's? A. I don't think there were any movements on Sunday I don't remember, would have to get the sheets.

Q. Let me bring this to your attention—Did you have a phone put in at Kapoor for your convenience? A. A phone had been installed at Kapoor office for their convenience as well as ours.

Q. When was that put in? A. Had been there for years.

20 Q. And it was a simple thing for any of your men to use that as a matter of right, it was a joint phone. A. Oh, yes.

Q. And no man would have to go down to—to wait till he got to Deerholme to phone you if he was at Kapoor. A. No, he could phone from Kapoor.

Q. Or to get to Milne's Landing either? A. It depends on where he was.

Q. At Kapoor? A. Well, he could phone from Kapoor.

Q. Now you had a line running, I understand, from Deerholme to Tidewater? A. Yes, sir, we have a line running there.

30 Q. And did not—was not that engine—you have no shop up at that end of the line? A. No.

Q. Were you running that engine at Deerholme and Tidewater, at this time, do you remember—in August of 1930? A. The train sheets would show any movements that we made there.

Q. Try and use your memory for a moment? A. I cannot remember if we ran a train at a certain date or not.

40 Q. Was that engine brought in at week-ends to be repaired in Victoria? A. I don't remember, I think we had an engine up there. I would have to look at the records.—There is nothing there on that Tidewater subdivision on these dates.

Q. There is your Tidewater subdivision, the bottom one what is that there? A. They are run down as far as mileage work on that subdivision. The way freight was to go out there two miles to switch, and that is merely on that list.

Q. Did you have any other engine? A. That is the way freight engine. He did not go down that day, and that is after

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the engine got off the track.

Q. What does E X A mean? A. Extra.

Q. E X A 2116? A. Extra 2116.

Q. What was X A No. 246? A. Number of the engine.

Q. Another engine? A. Another engine.

10 Q. What are these records from Tidewater to Deerholme on the 18th, after that X. A. It was the intention to make a run on that date to Deerholm. This mileage was cancelled on that date.

Q. Can you find out for me during the luncheon adjournment whether you were using the engine between Deerholme and Tidewater in August, 1930. There were certain logging operations going on at Tidewater, and you used the engine to run down to Tidewater? A. Yes.

Q. And that engine was brought back on Saturday or Sunday night to Victoria to get repaired and fixed up? A. Yes.

Q. Will you find out whether anything of that kind took place during August, 1930? A. Yes.

20 Mr. Maitland: My Lord, I ask that this witness be recalled, for that information.

Witness: I will have to get the train sheets for that date.

The Court: He can come back. Mr. Roberts, you could go now and be back at a quarter past two? A. I go on duty at one o'clock.

The Court: Well, go down and get it now. Won't take you more than fifteen minutes. A. Take me half an hour to get it and back.

(Witness stands aside).

30 NORMAN S. FRASER, a witness called on behalf of the Defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. MAYERS:

Mr. Mayers: You live in Victoria? A. Yes.

Q. And you are Assistant General Agent to the Canadian National Railway? A. Yes.

Q. And were such in 1930—were you? A. Yes.

40 Q. Just begin on the Monday, August 18th, 1930, and tell me what you did on that date in reference to matters at Kapoor. By the way, before you start that, had you communications with the Forest Ranger Campbell on Monday, August 18th. A. Yes.

Q. You had telephonic communications? A. Yes.

Q. Tell me what he said to you and you to him?

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Mr. Maitland: I must take formal objection to that.

The Court: It is put pretty broadly. You are producing evidence to show anything Campbell said detrimental to this case?

Mr. Mayers: This witness is under the direction of the Forest Officers. Mr. Conway is the chief inspector of this district, Mr. Campbell is his immediate sub-ordinate. I submit that this witness can say anything that was told to him by the person whose directions he is bound to obey.

10 The Court: Is that fair to the Plaintiff, who would allege that the property was damaged by the Defendant Company doing certain things.

Mr. Mayers: I submit this evidence is admissible.

The Court: For the moment I would rule against it.

Mr. Mayers: That is the ground on which I was calling this evidence.

20 The Court: Upon what basis can you allege conversation taking place on behalf of a company with a representative of the Government? Assume that the statement of fact would be binding on him with the Company. You had better let that rest, at present I rule against it.

Mr. Mayers: You had a conversation with the Forest Ranger, Campbell? A. I did.

Q. What time? A. Some time after one o'clock.

Q. Then what did you do? A. I was then preparing to leave for Kapoor with a relief train when I heard from him.

Q. Did you leave for Kapoor? A. Oh yes.

Q. About what time? A. I think it was about 2:30.

30 Q. What was the nature of the train you took up? A. It consisted of a locomotive, I think four auxiliary cars and a caboose.

Q. Did you pick up anything on the way? A. Cars—No, we did not stop to pick up any cars.

Q. Did you pick up any individuals on the way up? A. Yes, I cannot tell you the exact mileage we picked up Foreman Davies of the Metchosin Section, and Foreman Frederick of the Milne's Landing section, and their men, and informed them to bring all their tools and all their fire fighting apparatus.

Q. Did they do it? A. They did.

40 Q. You arrived at Kapoor what time? A. About four o'clock.

Q. What did you do there? A. We pulled up the main line slowly in order to clear the train, the way freight which was standing on the main line blocking it, and took that out of the way, so that we could let the motor coach by, which is referred to here as the gas car. When she got by we put Miller's train out of the way and went in to re-rail the engine.

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Q. Where was the engine derailed? A. At Kapoor run-around spur, I think they call it, just up on their tracks anyway.

Q. You know these tracks, do you? The main logging spur at Kapoor, and the run-around track to the oil tank? A. I have knowledge of them.

Q. Where was the derailment? A. On what is commonly known as the run-around. It was only a matter of ten or fifteen minutes' job.

10 Q. Did you observe what happened in regard to the overturned rail? A. No, I did not.

Q. Then what happened after that? A. After looking over the derailed engine I went to Kapoor office and asked if Ranger Dunn had arrived—I would not say Ranger Dunn because I don't know whether I knew his name at that time. I asked if the Fire Ranger had arrived, and was informed he had not.

Q. And then what happened? A. I had slight conversation with Mr. Cowan I think. Yes, and also telephoned to Victoria shortly.

20 Q. What was your conversation with Mr. Cowan? A. In regard to the origin of this fire.

Q. You had seen the fire, had you? Or seen some sign of it as you came up the line? A. Yes, on our way west I instructed the crew to slow up there and we would decide then what we would do.

Q. That is on your way to Kapoor? A. On our way to Kapoor.

Q. You saw the fire from the fill, I suppose? A. From the train as we were crossing the fill, yes.

30 Q. What did you do then as nearly as you can remember? A. As nearly as I can recollect it was a very small fire, more smoke, a smudge in some logs, anywhere from one hundred to one hundred and fifty feet from the track, and there was Hindus there working, or standing with shovels, and we passed a couple of Hindus with buckets in the rock cut.

40 Q. You were speaking of the time when you were in Mr. Cowan's office at Kapoor. What happened after that? A. I met this ranger who Mr. Cowan stated was Ranger Dunn. I told him I was expecting to meet a ranger at Kapoor and he would probably be the man, and that I was going almost immediately to the scene of where this fire was reported and wished he would accompany me.

Q. And then what happened? A. He got on our train and we came down to what is known as mileage 35.2.

Q. Just before you go on there, I omitted to ask you had the fire been reported to you previously on that day; the fire at mile 35.2? A. Yes, about 12:30.

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Q. By whom? A. Conductor Miller, he reported it to me at the same time as he reported his engine derailed.

Q. And then you went down on the train to mile 35.2, and stopped the train there. A. Yes, we stopped the train there.

Q. And then what happened? A. I might say that the train was backing up, caboose first. I got off the caboose with Dunn, and we looked the situation over, and there had been practically no change since the time I had seen it coming up, probably  
10 thirty or forty minutes before, and as near as I can recollect  
Dunn went round the fire and I went through the cut to see what was there. It did not interest me and I came back to meet Dunn on the track. I said—what do you think of it now? His reply was, I will take another look. So we waited there till he went around and came back in a very few minutes, and he said: Oh, there is nothing to this, we will have this out in a few minutes. On one of these trips he asked me if these men were on their home section; and I said, one gang belong to Metchosin and the other gang to Milne's Landing, the home section. And he instructed  
20 me he would not want them, take them home, and I said I had my men out, do you want that lot? He said, no.

Q. Come and tell me what you saw at the time you were referring to at mile 35 with regard to the fire? A. It is about here, it was right in this log.

Q. Just mark the place from which the smoke was rising. (Marked).

Q. I will mark that F. About what area did that cover? A. Oh, I should think not over 20 or 25 feet square, it might have been a little larger.

30 Q. You recall these two cedars? A. Yes, I recollect them quite well.

Q. Was there any sign of active burning, such as smoke or anything, between these cedars and the toe of the dump. A. Not in here, I did not notice anything in here, or away up here, down to our dump, the fill down to the dump is not shown. There was nothing here showed any signs of the burning to the dump.

Q. That is there was nothing between this stump marked J and the toe of the dump showed any signs of any burning, is that right? A. Yes.

40 Q. Did you see any fire trail, or fire guard, as they call it? A. Yes, what I took to be one.

Mr. Maitland: When did he see it? A. On this particular day we are speaking of, Monday.

Mr. Mayers: When the train was stationed on the track—Just draw a line indicating the fire guard. (Line drawn). Now put "fire guard" against these two lines.

The Court: That is still on the picture, is it?

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Mr. Mayers: Yes, my Lord.

The Court: How can he designate the fire guard on the picture?

Mr. Mayers: He knows where the fire guard ran.

The Court: It is shown on the map.—I call the attention of the Jury to that again. How can you tell from a picture?

Mr. Mayers: I should have no difficulty if I knew the approximate distance of this stump and that stump, I should  
10 know where the fire guard ran from one natural feature to another.

The Court: All right.

Mr. Mayers: Did you observe where the fire guard started near this toe of the dump and this stump marked J? A. It started somewhere in that vicinity, but I want to correct that, I did not understand that these marks were to scale.

Q. I want the approximate point on the ground, the natural features, where the fire guard stopped. A. It would have to go down here.

20 Mr. Maitland: There is not room on the picture between the track and the line. A. It would come down here.

The Court: It is quite apparent from where that picture is taken, in the front. You see the track rail, and between that and the next object you see may be 15 or 20 feet.

Mr. Mayers: Well, we shall prove what distance there is.—Commencing by this fire guard, can you approximately say how far it was from the toe of the dump? A. Yes, it was well over 50 feet from the toe of the dump—where it begins.

A Juror: Does the toe of the dump mean the rail?

30 Mr. Mayers: No, bottom of the fill.—Is that fire guard visible on the line now? A. Remnants of the original fire guard; that I saw at that time.

Q. Has there been any change in the locality since? A. There is a sort of a path running down here, which has been made by various people using it to patrol around there, but that was not the fire guard I saw at the time; that is a path made by people viewing this scene.

40 Q. You are now speaking of the fire guard as you saw it on the Monday afternoon, the 18th August? A. Yes, and I can trace it as I saw it through these two stumps.

Q. How long experience have you had on railways? A. Something over 40 years.

Q. During that time have you seen forest fires and other fires? A. Yes, pretty nearly all kinds of fires.

Q. Frequently? A. Not very frequently along the railways; I have fought them at a distance from the railways.

Q. You have actually fought fires, have you? A. Yes, big

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fires up at Jasper Park.

Q. From what you observed on that Monday afternoon of August 18th, did you consider that there was any danger from the fire that you saw? A. None whatever.

Q. How long, in your opinion, would it have taken to put that fire out? A. With the number of men they had working there, if they worked, I should say thirty minutes would be a long time.

10 Q. What would have been the method of putting that fire out? A. Well, there was enough gravel available and there was also some water pails—drums—in the rock cut. Whether they were filled with water, I do not know. But there was a sort of a seep in there towards Kapoor, at the West end of the rock cut.

Q. Towards Kapoor, what was there? A. A small seep of water draining from the hills; and there was the Sooke River not a great distance away.

Q. What methods could have been adopted then? A. Water and the use of earth.

20 Q. Then after Dunn had spoke to you, what did you do? A. Not having anything else to do, I returned my men to their respective stations and brought the train to Victoria.

Q. On the Tuesday tell me what happened, beginning as early as anything did happen with regard to Kapoor. A. On arrival at the office that morning I called Kapoor and asked them what was the condition of this fire.

Mr. Maitland: Who was he speaking to? A. I could not swear positively to whom I was speaking, but it was Kapoor, and they stated the fire was practically out—

30 Mr. Maitland: My Lord, how can I meet evidence of that kind? He says, I called Kapoor, and I said who were you talking to, and he answers: I don't know.

The Court: You can meet that as well as the evidence given by Reece. What Mr. Fraser is trying to show is that he wanted to be on the safe side.

Witness: I wished to get a report of the fire being out, my Lord.

Mr. Mayers: What time in the morning was that? A. Somewhere about 8:30.

40 Q. When you spoke to Kapoor, could you tell whether it was a Hindu or a white man who answered? A. I am certain it was a white man.

The Court: Can you say it was Mr. Cowan? A. Well, they had a young man of the name of Smith, and I would not swear to the recollection of a voice two years ago.

Mr. Mayers: Did you know Mr. Cowan's voice at that time? A. Oh, yes.

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Q. And Douglas Smith's voice at that time? A. Oh, yes.

Q. Was it one or the other? A. I am certain it was one or the other, because those were practically the only two white men, outside of our own employees, we ever conversed with.

The Court: Mr. Maitland, you did not object—

Mr. Maitland: I do object to this evidence—

The Court: Then you must show it.

10 Mr. Maitland: I thought your Lordship ruled against me.

The Court: I wanted to find out the circumstances. Now we find it may have been a man named Smith. I am not allowing evidence of that kind—I don't know what you are going to say yet.

Mr. Mayers: Both of them are employees of the Company. I don't know whether the evidence was given. I think my learned friend will agree Mr. Cowan was there.

The Court: Well, Mr. Cowan is here. If there was any point to contradict, Mr. Cowan can contradict, but if the man is not available—

20 Mr. Mayers: I don't know whether he is not available, my Lord. Well, did your Lordship allow the question?

The Court: No, because he is not sure whether it was Mr. Cowan or Smith.

Mr. Mayers: Anyhow, you did telephone to Kapoor on Tuesday? A. Yes.

Q. And in consequence, did you do anything? A. The report I received was of such nature it convinced me everything was safe, and I went off to other work.

The Court: Now you see, Mr. Fraser, you are over-reaching the ruling of the Court. A. I am sorry, my Lord.

30 Mr. Mayers: What happened? A. I went to another location on the rail, to look after work, in the vicinity of mileage 31, I think it was.

Q. Then what happened after that? A. Somewhere about two o'clock, I should say, it was just after I had had my lunch, I called in at a temporary phone that is in that location to get in touch with Victoria, and I asked them about the fire.

Mr. Mayers: Don't tell us what Victoria told you. A. Well, while I phoned there I had Mr. Cowan at Kapoor, and he told me that the fire was a little worse, but they had it fairly well controlled and quite a number of men there.

40 Q. Had you been speaking to Reece before that? A. No, I spoke to Cowan the first time.

Q. Just tell me everything you recall that Cowan said to you? A. That was about all he said: that that fire had made some headway, but they had it well under control. So I proceeded with my work on down the track, and at mile 29, I think it was, I cut in again on the telephone. That was probably forty minutes

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after, and there was a sound of two or three people talking at that time.

10 Q. Who were talking? A. I could not make out. I recognized Mr. Cowan's voice, and I think he was talking to Victoria, I don't know, but in any event I jumped right in on the conversation and asked Mr. Cowan if there was any of our men there, and he said Reece, and I asked him to get Reece for me, and asked how the fire was, and he said it was getting larger, much worse, and I said I would immediately get the train out of Victoria.

Q. That was Reece said it? A. That was after I got Reece's report, and I ordered the train out of Victoria.—I am a little ahead. I asked Mr. Cowan to take a note to the contractors and they are to have Foreman Frederick proceed at once to Kapoor on his hand car and pick me up at mileage 29 and go on East till I overtook the fire-fighting crew.

20 Q. Then what happened after that?—and witness, do speak up.—What happened after that? A. I got on the motor coach and came East where we met the train which had been dispatched from Victoria at a place near Metchosin. We picked up Davies and his gang and went on right through to Kapoor.

Q. What time did you reach Kapoor? A. I think it was about 5:30.

Q. And you had with you the men we have heard about, the Metchosin section gang and Milne's Landing? A. The Milne's Landing men were already there—yes.

30 Q. What was the condition at Kapoor?—Starting from mile 35, what did you see as you were going along in the train, first of all? A. There was some smoke, that is going West there was some smoke on our right hand side, a considerable volume of smoke on our left hand side, from mileage 35, we went right through with the train. We did not encounter any fire until we came out. I stopped the train at the loading platform at Kapoor mill, clear of that, and told them to remain there until I went further up to see what the condition was. Our bridge was in flames, there was absolutely nothing we could do there, they could not get across. I went behind the boiler house of the mill, to see what conditions were, and if it was safe to start pulling these cars on the track, on the siding out. Eight of our cars were burnt up  
40 right there.

Q. Where exactly was the fire when you arrived? Come over and show me on Exhibit 4? A. Do you want me to trace it?

Q. Just generally, yes? A. There was still more smoke there.

Q. On the right, going to Kapoor? A. Yes, 35.2—going up in here.

Q. Over the spur, is that? A. You could not tell—going up

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over the spur here.

Q. Trace where you saw anything, beginning at the place where it should begin? A. This middle area was still smouldering on the right of the right of way, going towards Kapoor, Mile 35.2.

Q. About what area? A. It had not increased much from the previous night. The main fire was all in here. This had burnt—right up this way. (Indicating).

10 Q. Now what were you saying about the line you drew and I thickened. What did that line represent? A. That represented the direction this fire was burning, had burnt right up through here at that time. I don't know how far this extended—I could only see from here.

Mr. Mayers: I will put F 1 at the beginning of the line you drew and F 2 at the end of the line you drew,—and that represents the general direction? A. Up towards this bridge I could not see.

20 Q. And I think you said you could not see what was happening beyond the Sooke River? I could not see anything. I have no knowledge of anything beyond that line.

Q. And when you got up towards the mill, you said the bridge was on fire, the Deer Creek bridge? A. Yes.

Q. Whereabouts was the general front of the fire? A. The continuation of this line. Had gone through there and it was going up the hill, I could not say how far, I could not see.

The Foreman: Had it burnt the townsite? A. That seemed to be all gone practically; my line of vision with the smoke prevented my seeing.

30 Mr. Mayers: Is not this right: F 1 to F 2 represents your general view as you were going up the track on the train? A. That is what it seemed to be.

Q. And when you were up at the mill you could see the bridge burning? A. Yes.

Q. Had the fire gone beyond the bridge? A. Yes, it had gone.

40 Q. Towards the conveyor? A. Yes. I could not tell you what was beyond. There is the boiler house, there is the mill spur. I came in behind here (indicating). The cars were burnt on the Kapoor lumber track.

The Court: Had the fire reached the river? A. No, not that I know of.

Mr. Mayers: Was there any fire on the side of the Deer Creek Bridge, towards Victoria? A. Very slight, just these cars and burning in the saw-dust.

Q. Mark the place of the cars, put an X—You mark the conveyor. A. Here is the conveyor, the wood conveyor from the

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mill to our track.

Q. This is the place, is it?—These cars are represented on the plan, are they? A. Yes.

Q. Eight cars—These 8 cars shown on the plan at the place where I will mark F 3, were the ones you were looking after? A. No, I could not get near these; these cars were burning. The only one I saw was the first one.

10 Q. Was there any fire on the Victoria side of these cars? A. No, I walked in here, in to the conveyor and towards the end of the track to the boiler house.

Q. You are speaking of the conveyor on the Victoria side of the boiler house? A. Yes.

Q. F 4—Was there any Fire there? A. I could see fire over in here; I could not tell what extent.

Q. Was there any fire on the Victoria side? A. Oh, no.

Q. That would consume what time from 5:30? A. It would be probably 30 minutes any way.

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20 (Witness stands aside for Mr. Roberts).

GEORGE ALEXANDER ROBERTS, a witness re-called on behalf of the Defendant, being first duly sworn, testified as follows:

G. A.  
Roberts,  
(Recalled),  
Cross-  
examina-  
--continued.

#### CROSS-EXAMINATION BY MR. MAITLAND:

Q. Were you able to find out about the engine that was used between Tidewater and Deerholm? A. Yes—no such movement in the month of August. We were not logging.

Q. Your records are clear on that? A. Yes, sir.

Mr. Maitland: Thank you, that is all I want.

30 (Witness stands aside).

NORMAN S. FRASER, a witness called on behalf of the Defendant.

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DIRECT EXAMINATION BY MR. MAYERS (Continued):

Mr. Mayers: Now I was asking you what point of time that probably was up to? A. I should say 30 minutes.

Q. After that what did you do? A. We had a number of cars on this track, which, after examination, I had found were safe to go after. I came down to this switch for a crew to get



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ready to pull these cars out in safety away from the fire, in case it did go there. There was one hose in operation carrying water over the top of our cars, that is the hose was over the top of these cars which had been placed there for loading, and in order to save them shutting off their water, I secured a number of their men to go on top of the cars. The men held the hose up while we pulled the cars slowly through, in order to save any interruption to their water supply.

10 Q. And then? A. When that was all arranged we pulled this first lot of cars and stopped in here.

Q. You pulled the cars from where? A. From what we call the mill spur.

Q. Marked X 3—to where? A. Down to this next spur.

Q. I will mark this from F. 5 to F 6—You supervised that operation, did you? A. I did.

Q. That would take you up to what time? A. It would take me probably 20 to 25 minutes.

Q. And that brings us up to 6:30? A. About 30 minutes.

20 Q. During all that time you were in and around the track at the head of the horse-shoe, were you not? A. I was in here the whole time.

Q. Up to this time, 6:30, was there any fire on the right hand side of the track to the head of the horse-shoe, any fire? A. Going to Kapoor that would be on my left hand?

Q. Well, you were on this portion of the track, between F 3 and F 6.—Was there any fire on your right hand side going to Victoria? A. Nothing, except this was creeping over.

30 Q. That is the fire that had burnt the bridge was creeping over towards the railway? A. Yes.

Q. Then 6:30, what did you do? A. I was up on top of these cars taking them out, and I looked in over the mill platform, and I did not see any fire around in this vicinity whatever. There were one or two Hindus wetting down the platforms.

Q. That is the platforms marked on Exhibit 4. A. Near the planing mill.

Q. What were you saying about that? A. There was a Hindu with one hose wetting down these platforms. I did not see any fire in that vicinity whatever.

40 Q. When you were on the platform what was the nearest fire to you? A. The only fire I could see was behind me, in the direction of Deer Creek.

Q. Then after you had got your cars down to F 6, what happened? A. I instructed the conductor to remain right there until he received further instructions from me. He backed in on this, so that his cars would all be off the line, and ready to pull out, should occasion require.

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Q. What did you do? A. I took a general survey of the whole proposition and disposed my men in various directions to look after things and instructed foreman Davies immediately I came upon him to go up and see if he could do anything with his fire outfit in the lumber yard.

Q. That would be about what time? A. Somewhere about 6:45.

10 Q. What did you do then, or what did you see? A. I was then watching—I came down the track here.

Q. You came down the track to what point? A. I could not just say—somewhere about the rock cut.

Q. What did you observe on the way down? A. This fire was creeping to our direction.

The Foreman: The wind was blowing towards the lumber yard? A. Up the hill and across the track. I disposed some men and asked them to bring the hydrant and turn the hydrant on and see if it was any use at all.

20 Mr. Mayers: It was after that you came to the rock cut? A. After that I came down here to see conditions, how close to us.

Q. Did you go through the rock cut? A. I would not be certain whether I had gone all the way through or not.

Q. What were the conditions on the right of way when you came down from F 6 through or up to the rock cut? A. It seemed all right then, the locomotives and stuff was standing just west of the rock cut, locomotive and three cars.

Q. When you use the word West, you mean towards Kapoor, and East towards Victoria? A. That is right.

30 Q. The conditions on the right of way were what? A. It was quite clear; there was not any fire whatever. We were walking up and down all the evening.

Q. After that what did you do? A. After I returned to the chief loading platform the lower loading platform, I met Foreman Davies.

Q. What happened? A. He said, Look what I found,—

Q. Don't tell us what he said, just what happened? A. He had in his hand a pail covered with a sack, and I lifted the sack and saw a number of sticks of dynamite and two caps.

40 Q. Yes? A. And it was reported to me he could not get any water in the hydrant.

Q. Don't tell what anyone said—what did you do? A. I instructed Davies to take the dynamite—

Mr. Maitland: He instructed—

Mr. Mayers: You gave Davies instructions, and what did you do yourself? A. I got hold of Foreman Reece and took him to a point on a knoll, over-looking the East lumber yard.

Q. Just show me where that happened? (Indicated) That

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would be F 7.—What did you observe up there.—Tell me about what time that would be? A. That would be some time after 7 o'clock.

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Q. What was the condition of the fire in the lumber yard when you were on that knoll, F 7? A. At that time it was burning well down from this corner.

10 Q. This corner being F 8.—Just mark it where you mean. What direction was the wind at that time? A. The wind was still going this way, across our track.

Q. The wind was blowing from the Sooke River across your track, is that it? A. Yes.

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tion,  
--continued.

Q. What direction was the fire burning at F 8? A. Towards the track—In other words, in opposite direction to the wind.

Q. What did you see?—Describe as fully as you can? A. Well, I was looking over to the lumber yard, and noticed a heavy explosion, a burst of smoke and sound of explosion.

20 Q. Whereabouts would that be on the map? A. (Indicates) About there.

Q. That is F 9—You heard the explosion. Did you observe anything? A. A certain uplifting of lumber and so forth.

Q. And then what did you do? A. I continued my observation around in this direction, where I could see over here; on the other side I could not see anything, and I returned down to the track, and instructed this train to move away down here to a place of safety near mileage 35.

(The Court adjourned (to 2 p.m.))

30

Friday, May 27, 1932; at 2 p.m.

MR. FRASER, in the witness box.

Mr. Mayers: You were on the hill at F-7 when we left off. What happened after that? A. I took a general survey around through the back here; I saw there was nothing I could do at that time; so I came down the hill with Reece; and on down through the tracks where the train was standing, down in the direction of 35 here.

40 Q. That would be about what time? A. Well, by the time I would get from F-7 down to this place would probably take me twenty minutes anyway.

Q. That would be about eight o'clock then? A. Somewhere in that neighbourhood.

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Q. When you came down the track from F-7 to there did you go through the rock cut? A. Yes.

Q. How far from the rock cut did you go? A. The train was standing just by the Kapoor spur, that is the logging spur.

Q. The lower one? A. Yes.

Q. Did you notice any sign of burning on the right of way then? A. Not at that time, no, it had not got up to the right of way.

10 Q. Was there any sign of anything having been burnt on the right of way? A. Not that I noticed.

Q. The wind, the last time you spoke about it, was blowing over the mill? A. Was blowing up this way, yes.

Q. That is over the mill? A. Over the tracks and the mill, from Sooke River.

Q. Did it change after that? A. The next time I came up into through here, the wind was carrying this fire, that was the face of the fire.

20 Q. F-1 to F-2? A. Yes; and then had swung around and was coming up towards our tracks. All through here, this whole thing caught fire about that time.

Q. That is between the line F-1 to F-2 and your track, it was burning towards the track? A. It was burning towards the track.

Q. So that the wind was then changed, and it was blowing towards the track? A. Yes.

Q. And after that in what direction did the wind blow? A. It kept on coming up towards our tracks; and it veered—

30 Q. The wind veered? A. The fire was coming along here. It never reached our tracks, as I recollect it, there. It was over that part later on. It came down this way.

Q. Came down towards Victoria? A. Came down this horseshoe bend here, and over to our tracks.

Q. And then? A. It continued on down here, wherever these fires were here, it started toward Victoria, in the Victoria direction.

Q. So that the sequence of events was that first of all the wind was blowing over the mill from Sooke River? A. Where I saw it, yes.

40 Q. Then the wind changed, and from line F-1 to F-2 the fire spread towards your tracks? A. Yes.

Q. And after that again the wind veered and carried the fire in the direction of Victoria, is that it? A. That is the idea exactly. It came right down this way.

Q. Now, at any time that you were on the track did you see fire or any signs of burning on the right of way? A. About 9:30 it had got up to our right of way down in here.

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Q. Just mark that. A. Say in there, this point is.  
Q. That will be F-8. And that you say was about 9:30? A. About 9:30, yes: I saw the fire coming up into a bunch of small trees and attacking the telephone poles, and I went to work and got men to put that out.

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Q. That would be before or after you had come down towards the spur? A. Oh, I had been down here and gone back again. When I saw that, I came back, and got some of these men.  
10 Q. That would be then about what time? A. Well, it was about 9:30 that I got these men.

Q. And what did they do? A. They came and put out this fire which was in this point.

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Q. At F-8? A. F-8.

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Q. And after that what did you do? A. I went back to the caboose, in which we had telephone communication; and arranged with our Victoria office to procure an engineer from Vancouver; and likewise ordered what timbers and things were necessary to replace the bridge.

20 Q. And after that? A. When I finished that work I had previously—when I moved the train I had previously sent them to Milne's Landing to get some food for the men. They had come back, and we had eaten a little lunch; and I made a complete trip right up as far as I had been practically at any time—I didn't go up in there, I went up by this first lumber yard in there. It was burning very fiercely there.

Q. You went from what point? A. From the spur.

Q. The lower spur, and how far from F-5? A. I did not go that far.

30 Q. You did not go as far as that. Did you get to the point that Mr. Cowan marked G—you see the G here? A. No, I wouldn't say I went that far. I went to about there.

Q. That was after you had had supper. I will mark that F-7. A. Excuse me, may I change that, I forgot that that was the last trip I made—the trip I made before that was with—I took Reece, who had reported to me the fire at mileage 38 was in very bad shape, that had been burning for some three months, I should say, or three weeks, on the Government property, and was endangering our bridge number 38, quite a large concern—he had left his men there. And I came back here and attempted to get Reece down in from here, that is after the fire had got cleared away enough over there.

40 And I eventually, about ten o'clock or half-past ten got Reece across Deer Creek—and I understand he was burnt somewhat in the undertaking—so that he could get back to Bridge 38 and see what the conditions were, and then he would have to walk to Shawnigan Lake to make a report to Victoria.

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Q. And was it at a later time you went up? A. Yes.

Q. You went back after Reece? A. I went back for Reece. And I came back to the train, and at that time the fire was down in this corner.

Q. That is in the corner of the lumber yard? A. Down here where the standpipe is, down there.

Q. I will mark that F-9, then. The fire was burning in there? A. It was, yes.

10 Q. Was it burning toward or away from the track? A. It was still coming down here, about all the lumber piles were gone at that time.

Q. Was the fire burning away from the track or towards the track? A. It was going down this way, to this corner; it had got down to this corner.

Q. It was burning parallel to the track? A. No, this had burnt here.

Q. All the lumber yard? A. It was coming down in this direction, it was burning right here.

20 Q. It followed the direction down towards F-9? A. Yes.

Q. That is, coming from F-8? A. Yes.

Q. And then after that what did you do? A. I came back and instructed the train to move on to Victoria, stopping at various places to make arrangements for men, and so forth.

30 Q. Tell us a little about the fire guards; what did you do about those? A. I had, when I saw this—that is after the finding of the dynamite in the lumber yard I had it removed to a safe distance, so that it would not stampede the other men, by seeing it lying around there— or I couldn't have got anyone to work at all. Not wishing to leave the men in any danger whatever I moved them, moved the whole proposition; the only other thing to do was to try to arrest this fire which was moving towards a stand of timber on this end.

Q. On the Victoria side of 25? A. Yes. There is where they ran that first fire guard up the hill.

Q. And you left about eleven? A. Somewhere, I don't remember just what hour.

40 Q. You may go back in the box, will you. Then on the Wednesday you had interviews with Mr. Conway and Mr. Orchard, had you not? A. Yes, some time after lunch.

Q. That would be Wednesday the 20th of August, 1930? A. Yes.

Q. Tell me what happened with them? A. I was in my office at Point Ellice, somewhere after one o'clock Conway and Orchard, both of whom I knew as Forestry officers, came into the office, in a very boisterous manner, using all sort of bad language; asked me if I knew that there was a fire at Kapoor, Orchard stat-

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- ing that the Kapoor mill and the whole country was burning; Conway told me that the whole country was gone, not a C.N.R. man around there, and wanted to know if I had heard yet that there was a fire. So after a little discussion, in which I tried to explain to him that we had already had a report of that fire 24 hours previously, and I had stayed there as long as I could and returned to Victoria for timber, dispatched the train with the timber, and the men had already gone up on gas cars, I had a conference at
- 10 the Parliament Buildings with one of the Ministers, I was representing Col. Hiam that morning, and delayed until one o'clock, but immediately that was over I was back at Point Ellice, and this is when these men came in. So I stated to Mr. Conway and Mr. Orchard, that from the conversation they had we apparently didn't know where that fire was or had never been to Kapoor; but, I said, we will not leave that matter in doubt, you are going to Kapoor now and you are going with me. So I said There are two cars, yours, meaning Conway's, and mine, now get into whichever one you like, but we are going to Kapoor. We went to Kapoor;
- 20 and I saw a burning up the hill there at the arrival, there was some fire up on top of the hill, at Deer Creek; I didn't notice any men working on it then; and I asked him why there were no men working on it; he had already stated several times that it was our fire, and he wasn't looking after it. So I said I understood that your Forest Ranger took this fire over the other day, whatever it was, if this is the same fire, or whatever fire it is, if you have some Forest Rangers and men here why not put some on the work? Oh, this is your baby, not mine. I said, You are pretty high-
- 30 handed to constitute yourself judge, jury and witnesses and everything else, we at least should be allowed the privilege of expressing a thought. I will show you, they said. So I kept as quiet as I could, and went down to the tracks. He produced a Hindu there, who afterwards went and got—this Hindu I did not know, but he went and got Kapoor Singh, and they took me down to the point, that 35—near 35.2, and this Hindu, through Kapoor Singh as Interpreter, told rather a fantastic story of the fire jumping over there and away. Well, I said, you do not expect me to accept responsibility for this fire on statements like that, when I was here last night? It is your fire, and you look after it.
- 40 Q. That is what Conway said, was it? A. Yes. Well, I said, you also stated that we didn't know anything about this fire, that there were not any C.N.R. men here; I will bring you down and show you three fire guards which were put in by our men; and they worked all night, and were still working—he could see them from the track—they were still working, protecting the fire from going into the stand of timber east towards Victoria and over on the Goldstream Watershed—that was my main consider-

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ation after the other thing had gone, was to try and save what I could out of the rest. However, we walked up the track—I am a little ahead. I said, We will see if we cannot find Reece, who says he knows something about it. And went back and got Reece, who was working on the bridge. I said, Do you know anything about this, Joe? And he said, No, I didn't know anything about the fire at all until I came down on the Tuesday afternoon. I said, What about this story that the Hindu tells? He said, I don't know anything about that, except what he says. So Conway went over and sat down on a piece of timber that was there, and pulled out a notebook, and wrote a note on it. I turned it in, I don't know who has it or anything about it—ordering me to take charge of the fire. I said, This is rather a high-handed proposition, the understanding is, as I know it, that we work together to protect this fire, that I have all the men that we have available in this country at work now, and there are probably a hundred and fifty men sitting on the rail there, why not put them to work? That is your baby, you look after it. So I stood there, and I refused to sign—at least he wanted a letter in writing from me that I would take over the fire, and I told him I declined to do that. Before we left there I suggested to him again that he had better take over the fire rather than argue a case of legal points which we would not settle, and which in any event, bills or anything else would be settled by our superiors, and not by us. And that was about all I could get out of him, It is your baby, look after it. We got to the top of the hill, Conway was driving, and I stopped, I said, Conway, do you mean to tell me that you are going to drive to Victoria and leave this fire to run, while we waste time going in there arguing? He said, As I told you before, she is yours, you can do what you like with it. So the only other alternative was to come to Victoria, which I did. I called up our General Superintendent in Vancouver, fortunately got him, and told—

Q. Don't tell us what you said to him. A. No.

Q. As a result of that what happened? A. I wrote a letter to Mr. Conway, or Mr. Orchard, I forget to whom I addressed it, I think it was Conway, telling him that I would be glad if they would take over the fire for the Canadian National Railways, and the costs and so forth would be settled afterwards when the responsibility was determined.

Q. Is that the letter, Exhibit 23 (handed to witness)? A. No.

Q. It is not. A. I gave him one letter before that.

Mr. Maitland: He is talking about one that was not accepted. A. I am speaking of the one that Conway refused.

The Court: You would have a copy there? A. I haven't

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got anything, my Lord.

Q. You have a copy of the letter you wrote in the first place?

A. No, I sent it in before the Fire Marshall's discovery; I haven't seen any of the other papers since.

Q. But your copy, you wrote, have you got a manifold copy? A. I sent all those papers to the Legal Department, Vancouver, months ago. I haven't any of those. But they must have it somewhere.

10 Mr. Mayers: Is this the one, or a copy of the one (handed to witness)? A. Yes—marked Refused, by Orchard and Conway.

Q. That reads, Victoria, August 20, 1930 (reading letter marked Exhibit 48). What did you do with the original of that?

A. I handed it to Mr. Conway or Mr. Orchard, I couldn't be certain which. They were both there.

Q. What happened when you gave that letter to Conway?

A. He either threw it at me—he refused it, in any event.

20 Q. And then what happened? A. I went back into the office and attempted to get Vancouver again, and I couldn't get Vancouver; so things were at a standstill; I went over to my own private office. I had previously been conducting business from another office. I went over into my own private office and pondered the thing a while, leaving our Inspector Wright and Orchard discussing the matter in the other office.

Q. And after that? A. After a period of discussion with them over there, they brought this letter to me, this one you have just shown me.

30 Q. Who did? A. Mr. Wright. I went over to the office in which they were, but Mr. Wright came and got me; and they asked me to sign this. They both agreed that this letter was satisfactory to them; they put no responsibility on the Canadian National Railway until the matter had been fully investigated and reported. And if you can understand the sort of agony in a man's mind, to see the vast destruction up there, and been up there twenty-six hours, glad to get help up there, I signed this letter, handed it to Conway and at the same time telling him that it was handed to him absolutely under protest, but with the sole purpose of getting someone to work on the fire which they refused to  
40 handle.

Q. This is Exhibit 23 (shown to witness)? A. That is my signature on this letter.

Q. Now, I want to ask you one or two questions about the Fire Marshall's Enquiry. You remember the order in which the witnesses were examined? A. Fraser, Roberts, Mineau,—I cannot remember beyond that, there were several others, practically the rest of the crew.

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Q. The first there were Fraser, Roberts, Mineau? A. Yes.

Q. And the Enquiry started at what time, do you remember?

A. I was instructed to have my men there at 10 o'clock.

Q. Did it start at ten? A. Oh, I couldn't say the exact moment it did start, but they had a morning session.

Q. You had a morning session; did you adjourn? A. We adjourned at lunch time.

10 Q. And did you resume? A. I think it was lunch time we adjourned, somewhere about there, for lunch, and I suggested that there were two other men, one was Conductor Miller, and the other Engineer Jones, that would like to—that if they wanted our witnesses, I was putting forth all the witnesses that we had that were available on such short notice, and I would like them to hear them. I was asked by Counsel if they could give me any fresh information—or I give them any fresh information; and I said, No, it would probably be but corroborative; but at your disposal.

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20 Q. And they were eventually examined, were they? A. Yes. Somewhere about five o'clock—It was after five in the afternoon when the trains arrived.

Q. What happened to Mineau? A. I haven't the sheets with me here, but I am certain he would be called to go out on his train somewhere about noon; he would be out of town.

Q. Who was acting for the railway company at that Enquiry? A. Well, they sent a policeman over from Vancouver.

Q. Any lawyer there for the Company? A. None whatever.

30 Q. And Mr. Maitland was there, was he? A. Mr. Maitland, yes.

Q. And were you all stricken by Mr. Maitland's presence? A. Well, I didn't fall dead.

The Court: No, you wouldn't—I know you a long time.

Q. Have you got that way bill for that oil car? A. No. I was not able to procure one. I am afraid our records are incomplete in that matter.

40 Q. By the way, when were you advised of the Fire Marshall's Enquiry? A. I think I received the telegram the previous evening to appear at ten o'clock in the morning and produce all my witnesses—some of whom were spread all over the country.

The Court: What date was the first day of the Enquiry?

Mr. Maitland: The 4th of November was the first.

The Court: There was plenty of time in the meantime for you to consider the situation. You were apparently well aware that as far as Conway and Orchard were concerned, they were placing the responsibility on your shoulders, that is your Company the railway. A. Yes—to avoid costs.

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Q. Between that time and the time the investigation was held, you would have time to think the matter over. I thought for the moment you were rushed into it without any preparation.

A. I had no idea there ever was to be a Fire Mashall's Enquiry; I had never heard anything about it; or there was to be anything.

Q. Very generally done, isn't it? A. I don't know. I have never attended one in my life before.

10 Q. Even if a building burns down they hold one? A. I have never been concerned in one of those.

Q. You might look up the Statutes. A. When I finish rail-roading, I will.

#### CROSS-EXAMINATION BY MR. MAITLAND:

Q. Mr. Fraser, do you say that you were taken by surprise on this Fire Marshall's Enquiry? A. I was.

Q. Do you remember a very elaborate map with all kinds of marks and things, made by your own engineer, that you produced to help everybody that morning? A. I had a map, yes.

20 Q. Will my friend produce that map that was made use of by the Fire Marshall? I have a copy here. I show you a copy that you were kind enough to supply us with on that occasion. A. That is quite all right.

Q. Is that it? A. That looks like it.

Q. And that plan was produced by you at the Fire Enquiry? A. I don't think that I took that plan in.

Q. That was produced there I say at the Fire Enquiry? A. Yes.

Q. Made by your engineer? A. In Vancouver.

30 Q. Where did they get their instructions from? A. Not from me.

Q. Didn't you know anything about it? A. I knew they were making this plan, yes, but I didn't know what they were making it for or anything about it.

Q. A pretty elaborate plan.

The Court: What is the legend on it? (Read by Mr. Maitland).

Mr. Alexander: After the Enquiry you got that map.

Mr. Mayers: You have pasted something over it.

40 Mr. Maitland: No. You remember I insisted at the Enquiry it would be better if you would cut that out, because it was a memo of the evidence your witnesses were going to give; do you remember that? A. Oh, yes.

Q. And we cut it off. A. Yes.

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Q. And when Mr. Mayers suggests I am going around with a pot of paste in my pocket, and pasted it, he is wrong. A. I didn't hear him make that suggestion.

Q. If he did he would be wrong? A. I don't know whether you have a pot of paste, I don't know whether you had paste in your pocket or not.

Q. Now, Mr. Fraser, do you notice this mark here, "Burnt"; did you see that? A. Yes.

10 Q. That is at about 35.2, isn't it? A. Take a rule and prove it.

Q. Well, prove it. A. I am not much of an engineer.

The Court: That has no exhibit number.

Mr. Maitland: No, it has not been put in at this trial. I will ask your Lordship to let me put it in now that I have produced it (marked Exhibit 49). A. Have you got a rule?

Q. Cannot you tell me approximately? A. Well, we can get some figures off here.

20 Q. Where is the rock cut? A. I don't use those ordinarily in public, I am trying to keep young.

Q. Here is 35.15, is that what that says? A. That is right, 35.15. This is 35.1 plus.

Q. That is 35.1 plus, is it? A. Yes. There is a place put that is supposed to be the origin of the fire.

Q. Then you have a burnt over area right across the track? A. What do you mean?

Q. Here to the left, isn't that burnt over? A. No. Here is our right of way here.

30 Q. Yes, but isn't this area all in here burnt over to the left of your right of way, according to that plan? A. Yes, but the whole thing is burnt over. I don't know what these red marks are. I didn't have anything to do with the making of this map, except accompanying the men up there in order to—

Q. What was the matter with all this preparedness for the Fire Enquiry?

The Court: He said he had nothing to do with the making of the map except accompanying the men.

Mr. Maitland: Where did they get the information for making that map for your Company? A. What do you mean?

40 Q. You are in charge of this Division, didn't you give them any? A. I went up there and showed them certain points—which you have eliminated from the map.

Q. When was that? A. Oh, I couldn't tell you.

Q. Before the Fire Enquiry? A. I couldn't swear to what date.

Q. Then you do remember, don't you, that the Fire En-

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quiry was held not only on the 4th but on the 7th of November?  
A. No, I don't.

Q. Don't you know it was adjourned to Vancouver? A. I cannot be held responsible for Vancouver; when it finished here I was finished with it.

Q. And that is all the interest you had in it- A. Not all the interest I had in it; we have people over there to handle that matter.

10 Q. Then the people over there knew it was going to be resumed on the 7th of November, didn't they? A. Our legal Department were handling the whole thing; I am not the Legal Department.

Q. Did you tell them it was going to be resumed on the 7th of November in Vancouver? A. I did not.

Q. Now, Mr. Fraser, this Exhibit 48, do I understand that you drew that yourself (handed to witness)? A. How do you mean, I drew it myself?

Q. Yes? A. Yes, I wrote it out on a slip of paper.

20 Q. Were you alone when you did that? A. I couldn't say whether I was alone or not; but I am responsible for the whole wording.

Q. And it is all your idea, isn't it? A. That is my own idea.

Q. And this was on the 20th of August? A. On the 20th of August, yes.

30 Q. The day after, of course, we had been wiped out, that is the Kapoor people? A. Well, I don't know about your own business, you have not been wiped out, there is quite a lot of stuff up there.

Q. We were badly damaged. And I want to draw your attention now to your own letter, your own memo, which you say was your own idea. Your memo date regarding fire at mileage 35.2 Cowichan Subdivision. Did you designate this fire the day after the great fire as far as Kapoor was concerned, as the fire at mileage 35.2 Cowichan Division? A. No, I did at the—

Q. (Interrupting) There is your letter. A. If you will wait until I finish you will probably learn something.

40 Q. Yes. A. I stepped that off on the Tuesday evening, at least as closely as I could, and it being no marks between there and the next siding where I looked on the blueprint, the closest figure I could give was about 32.2. And I don't know how the measurements come since then, but it has always been referred to as 35.2, and I put that name on on the Tuesday night. Not when Mr. Conway was there.

Q. 35.2 is the other side of the rock cut? A. What do you

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mean?

Q. On the Victoria side of the rock cut? A. It is on the Victoria side of the rock cut.

Q. And that is the designation you put in your letter? A. To Mr. Conway, yes.

Q. Now, you remember when Mr. Orchard was down there? A. Down where?

Q. On the 20th? A. Yes.

10 The Court: Where is the memo referred to, the memo of date? A. There was a memo handed to me by Conway.

Q. What do you mean by that? A. I have been deprived of everything—well, I have got a few dollars, and a lot of hope.

Q. There was a memo, you have a recollection of a memo? A. Oh, quite positively, torn out of his notebook.

Q. A written memo? A. Yes, a page of the notebook.

Mr. Maitland: I thought Orchard produced something the other day, was that it?

The Court: No, not a memo.

20 Mr. Maitland: In any event, when they were there they brought this Hindu, whatever his name was, and he described the fire as having jumped the track? A. Through an interpreter, yes.

Q. And you said that you couldn't refute that, didn't you? A. I made no attempt to refute it. I told them plump and plain that I wouldn't take that as any proof whatever that the fire had jumped the track, one lone Hindu through the interpreter, telling you this course of the fire, I positively refused to accept that as evidence or anything else.

30 Q. Didn't you say, I cannot refute that? A. No, I did not.

Q. Now, I am going to read what you told me on discovery, question 586—I better go back, so that you will get the full significance of what I am reading you, to 584. You say, "Somewhere in about here, H, I, J and down here—it is pretty hard to judge just where—probably K, down to the river. I showed him this work that we had been doing. And he started arguing about responsibility. Well, I said, I don't think we can go into all that stuff right at this moment, the fire is burning away in the woods here, why not get some men to work to control the fire up on the hill? Lots of men sitting around here doing nothing. But he got a Hindu, he came down and showed me where the fire was supposed to have jumped the track here. (Q.) That is at E, is it? (A.) From E over to here. (Q.) E to the end of F? (A.) Yes. And I said that I couldn't refute that but that our foreman Reece was somewhere in the vicinity, we would locate Reece." Now is that correct? A. Well, did he expect me to stop all my men and come up there with a lot of evidence to refute that the fire did

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cross there? I couldn't swear to the man right there that it had not, I wasn't taking time to refute stuff that they were putting up about responsibility or anything else, I was going to investigate that when I got back to Victoria.

The Court: Did you use a map there?

Mr. Maitland: Yes, a copy of Exhibit 4. And lower down,—  
 “I asked Reece if he had heard anything of the fire—another fire  
 down there at the time, and he said not right at that time.” Was  
 10 that correct? A. Well, I don't know whether Reece understood  
 what fire I was referring to.

Q. I see. Now you did I think describe to me, didn't you, the course of the fire on the map, in your examination for discovery? A. I don't know whether I did or not. Where is the map?

Q. Well, you say, at question 566—this has already been put in in this case as Exhibit 37, that I am now referring to. You remember an exhibit being produced on your examination for discovery, don't you? A. Yes.

20 Q. I will read what you said: “(564 Q.) Well, you saw the burnt over area as soon as it was out, didn't you? may be I can help you. Where is Deer Creek here? (A.) Here is Deer Creek. If I knew what you wanted I might give an idea. But I didn't see this fire here until the fire was up here (indicating). Of course there was some smoke of burning up in here, but what time it went and where it went to I cannot tell you. (Q.) You have been over it since that? (A.) Yes, I have been over it. (Q.) And the burnt over area did continue from E right out to the burning up of these buildings, didn't it?” Now, I want you to follow me. There is the point E that you were referring to on the  
 30 map. A. Point E, yes.

Q. To the burnt up buildings. Do you follow that?

The Court. What is E?

Mr. Maitland: E is a mark on this Exhibit I will show you in a moment that was made at the time of the examination.

The Court: Approximately where is it?

Mr. Maitland: 35.2. “And the burnt over area did continue from E right out to the burning up of these buildings, didn't it?  
 40 (A.) So far as I can trace by appearances, the fire, from what I have learned since, that the fire apparently came down from here. (Q.) Just mark that, trace it with the red pencil, just give me the course. (A.) Somewhere down in this way (indicating). And then how it came up here I don't know. (Q.) How it got up in the direction of the buildings you don't know? (A.) Up here where these buildings were, I don't know. It was burning up here when I arrived. (Q.) In the buildings? (A.) Yes.

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(Mr. Mayers): Better mark that in some way; mark that first red line F. (Q.) F is the line you do know about? (A.) I am guessing at this, what I saw afterwards. (Q.) I think you told me that you followed that F. Now mark this G (witness does so). Now, I understood you to say you didn't know how the fire got up to G.' Now, I would like to show the jury that plan, from E to F. Here is E (indicating). A. Yes.

Q. There is the line F. A. Yes.

10 Q. And here is G up here. A. Yes. I explained to them at the same time that I was guessing at this letter F; I was guessing at it.

Q. I read that. A. It was up here when I got there. These buildings were burnt.

Q. Well, your guess rather agrees with my case; that is what I want to show. A. That is all right.

Q. What I have just read, here is the point E, 35.2, and the direction that he says he is only guessing at, is to reach this line F; that line F was made by Fraser; what he says is that he doesn't  
20 know how the fire got up to G. That is what I have just been reading, and this is the exhibit I have been referring to, Exhibit 37 (showing jury). Now, Mr. Fraser, I think you told me that you couldn't tell very much about the wind there; didn't you tell me that several times, because of the gulleys and the valleys and the things? A. I may have made that remark. I am not certain, but I did tell you that on account of the curvature there, that as a man walked around a curvature he was turning himself around, and liable to face the wind in every direction. As you walk around the wind catches you in different directions.

30 Q. Yes. Now you heard Reece give his evidence this morning, didn't you? A. I didn't hear the latter part of it, no, I was out.

Q. Reece, in any event was the section foreman who did any patrolling that was done on this section? A. Yes, unless the relief foreman happened to be sent in, Reece was the man responsible for the section.

Q. Exactly. And Reece told us here that if he had got a report in the morning at 10:20 or shortly after that, from the train crew that saw this fire, that he would have gone down and  
40 put it out. Is that in keeping with your general instructions to your men on the line? A. That is more or less in keeping with the general instructions, and provided for in the working time table.

Q. On this Cowichan Division I believe you are the highest official they have here on the Island? A. I don't know, I am sure, I report to Vancouver what I assume.

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Q. In the local business you are the highest officer? A. In the operating department.

Q. And you speak on the Island with the highest authority?  
A. Yes, only subject to my superior's permission.

Q. Were you surprised when you found out that these two men had gone by on this train at 10:20 that morning and had seen that fire, and had not reported it to anybody? A. Well, I don't know why they failed to observe the instructions; that is all.

10 Q. You were surprised, weren't you? A. Well, I was to a certain extent, after I heard this.

Q. They were both employees of yours? A. They were both employees of ours.

Q. They both knew that was part of their duty, didn't they?  
A. Yes.

Q. And they both knew they should have reported, didn't they? A. Quite likely they did; but there was no place between there and the end of the line, no operators.

Q. They were going from Victoria to Kapoor when they saw that fire first? A. Yes.

20 Q. And they could stop at Kapoor? A. Yes.

Q. And there is a phone put in at Kapoor for the general convenience of yourself and the Kapoor people, isn't there?  
A. Yes.

Q. Why couldn't they have gone up to the phone at Kapoor and made a report? A. He would be busy handling passengers.

Q. Why? A. Only two men on the car; one man is busy handling his mail on and off and his light express; the other man is busy watching his passengers getting in and out.

30 Q. These men thought that that fire was only 25 feet from your track at that time, he told us yesterday. Would you say the reason he has given me is a reason why he should not have reported a fire right on the right of way? A. I cannot tell you why he did not report it; that is a violation of the rule.

Q. You know in the Forestry Act in British Columbia it says if there was a fire on your property you should take immediate steps to put it out? A. I believe it is provided for in the Act.

40 Q. And you know in the Railway Act you are supposed to keep your right of way clean from debris, dry ferns and weeds and things? A. Subject to certain conditions provided for.

Q. And you tell us in this conversation with Dunn that Dunn told you that you could take your men away? A. He told me to take them home, certainly.

Q. Didn't he tell you that you could take them away?  
A. He didn't order me to take them home, he told me that he didn't want them, to take them away, what would I do with them?

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Q. Now, let us get the true position: you have an understanding, haven't you, with the Forestry Department, on any fire along your right of way, that your men are to be relieved as soon as possible if their place can be taken by other men; is that right or wrong? A. That is right.

Q. And the object that Dunn had was to carry out the arrangement between your Company and the Forest Department, to relieve you from using your section men on that fire wasn't it? A. That I think he had in mind.

Q. Exactly. I think you told me that on discovery. It was not a question of Dunn walking in and ordering you out of there, he was trying to accommodate you? A. Not necessarily an accommodation, he said he would have it out in a few minutes, and to take my men home.

Q. Do you know that one of your witnesses, or two of them said here,—I may be wrong in saying two, at least one, that what Conway said was it would take an hour? A. I have no responsibility for what the other witnesses said; nor do I know what they heard.

Q. You quarrel with that statement of the witness, anyway? A. I am telling you only what I heard.

Q. Now, Mr. Fraser, you know that our witnesses gave evidence that that train that came out there that day brought some trackage for us? A. Brought some what?

Q. Some tracks, rails—which do you call it? A. Rails.

Q. All right, rails? A. I don't know. I have not, until you asked for the papers last night, I have never seen them, I might say, in my life.

Q. What I asked for last night was your way bill showing whether or not you did take a tenth car up that day; were you able to find out? A. We have not been able to find the way bill. The records are apparently incomplete or inaccurate.

The Court: Does not every train have a sort of manifest on? A. Oh, yes.

Q. Did you find that? A. I can produce it.

Q. That would show what was in the train? A. Yes; I brought that with me. That is not the way bill.

Q. Every train has a manifest? A. Yes. But I don't handle them in the office. Some of the clerks do. I brought it down here, if they want to see it.

Q. That ought to show what the whole train was? A. Yes.

Mr. Maitland: You thought apparently when you left that afternoon, that that fire was going to be put out in a few minutes? A. I did.

Q. If it was anything like what it was at that same fire at 10:20 in the morning it could have been put out with very little

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difficulty? A. It could at any time when I saw it.

Q. Confine yourself to my question. At 10:20 in the morning, if you are right, that fire could be put out with very little difficulty? A. It could—well, I qualify that, I didn't see it at 10:25 in the morning.

10 Q. But you have had quite a bit of experience with fires, wouldn't that be the deduction you would make? A. I would have to ask you the question of what area you suggest the fire was at that time.

The Court: No use taking it on that; the Jury will suppose the fire could be put out easily at the inception.

Mr. Maitland: You had your tank car at Deerholme? A. It was at Deerholme at that time, yes.

Q. And it was in perfect condition, perfect shape, and available? A. We kept it that way so far as possible.

Q. All your men were supplied with these rules, the Board of Railway Commissioners' Rules, weren't they? A. Which ones are they?

20 Q. The ones that you have printed on number 3 sheet, No. 3 Timetable? A. No. 3 is issued to all those who are connected with the handling of trains, and the section foreman, not the section men; the foreman holds it for the men.

Q. Now this afternoon of the fire you never left the track, did you, on Monday? A. I couldn't swear positively that I went down off the tracks, I may have or I may not.

Q. What? A. You mean on Monday?

Q. On Monday? A. I may or may not have, I couldn't swear to that.

30 Q. I think you said on discovery that you did not; do you want to change that? A. Well, the only change I would make is that I couldn't state positively whether I went down or not; the chances are that I did go down, but whether I could remember a detail like that—

Q. The chances are that you did leave the track? A. Oh, I was down the dump a little way, I know that. I was down the dump a little, I couldn't say how far. I thought you meant over—

Q. I better read you what you said in discovery. A. Yes, that would be quite all right.

40 Q. Question 400: "(Q) You stood on the right of way, and the blaze, such blaze and smoke as you saw anyway was one hundred to a hundred and forty feet back there from the track? (A) From the track. (Q) And from where you were standing you could see between the track and where this blaze was, there was some burned over area? (A) Surrounding the same little fire at the point E."

399 is what I want: "Did you leave the track and go up to

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the fire? (A) No, I stood right here on our track, on the right of way."

A. That was probably when I was making those qualifications—the first question refers to the right of way and the second question refers to the track.

Q. By right of way you apparently refer to the track?

A. No, you asked me what our right of way is, and I told you one hundred feet, a short time ago.

10 Q. You said "I stood right here on our track, on the right of way." A. The first question you asked me referred to our right of way.

Q. Yes. A. And the next question—

Q. (Interrupting) When you were up there on Tuesday did you say none of your right of way had been burnt? A. I don't know what I said on Tuesday.

Q. Let me ask you that now. You say that on Tuesday at 335.2 none of your right of way had been burnt? A. Not at 335.2.

Q. 35.2? A. 35.2 it would be.

20 Q. When you got there. A. Not any that I had seen.

Q. From point E to F on the map I showed you a little while ago? A. No, I would say none of that was burnt.

Q. None of that was burnt? A. No.

Q. Do you know what E to F meant when you marked it on that map? It meant it was burnt, didn't it, that the fire had taken that course? A. No, E I took from your reports as where this fire was, that was on Monday. And F, you asked me where this fire ran here, and I told you I was giving after the fire had burnt over, only what I could see after the fire had burnt over.

30 Two entirely different days.

Q. When did you take this picture that has been used here—when was that taken? A. I did not take it.

Q. Well, do you know when it was taken? A. No, I couldn't swear to it.

Q. Did you see it taken? A. No, I couldn't swear to seeing it taken, even.

Q. Were you there with the body of men that went up there to look at this; the crowd that were taken up? A. What crowd?

40 Q. To find out where the fire started; you remember a party was sent up the other day to find out where the fire started; were you one of these parties? A. I don't get the question, what do you mean?

Q. We have had evidence here of men who say they went up on a C.N.R. train to look and see—

The Court: At the time the surveyor and those men were fixing the point.

Mr. Maitland: The surveyor was with them, and they looked

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along and saw where the fire was two years ago; you remember that? A. You have referred to it under so many different names that I wanted to make certain which trip you meant.

Q. You give me the name yourself. A. Well, we will agree on it.

Q. What do you call it? A. I don't know, you already have called it several names.

10 Q. Measuring party? A. The measuring party, it is not that.

The Court: You can answer that? A. The measuring party?

Q. You know what we are talking about? A. The measuring party, well, I took that party to Kapoor.

Mr. Maitland: When? A. On May 14th.

Q. And when did you first see this photograph that has been produced here? A. About a week after.

The Court: You mean May 14th? A. This May, just this May.

20 Q. The photographer was out there with you? A. One of our Engineering Department had a camera with him; but I was down another way. I instructed them to take them and make the measurements.

Q. It was done to prepare for this trial? A. Yes.

Mr. Maitland: Now, Mr. Fraser, you were quite interested on Tuesday morning how this fire was getting along, weren't you, for one thing? A. I try to keep interested on everything that is going on on the railway.

30 Q. And you phoned about it at 8:30 in the morning? A. Somewhere that time.

Q. What time do you get to the office in the morning? A. Usually between six and eight.

Q. You don't know what time you got there that morning? A. I couldn't tell you.

Q. And you phoned again later, at two o'clock? A. I always keep in touch with my office when I am out on the line, from whatever point I can get contact.

40 Q. About this fire, that is what I am interested in. You wanted to know at 8:30 in the morning, you say, and you wanted to know at two in the afternoon, how it was? A. I called my office at two o'clock in the afternoon to find out how things were progressing on the railway, nothing to do about the fire when I called him.

Q. You cut in at two o'clock to ask Reece how the fire was? A. Not to ask how the fire was, to ask Victoria—and you objected to the question, I think this morning.

Q. Well, it was to ask somebody how the fire was; is that

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correct? A. No, that is not correct.

Q. All right. “(544Q) When did you next hear anything about it? (A) About two o’clock. (Q) Who from? (A) I cut in on the telephone at two o’clock, and Mr. Cowan was on the phone then, and I asked him how the fire was getting along, and he said they had it fairly well under control, and men working at it.” Is that correct? A. Yes, that is perfectly correct. But it must be qualified with the fact that because I cut in on the tele-  
10 phone when our man is talking, that I cut in there for the express purpose, not of calling him up about the fire; I naturally asked him about the fire when I cut in there.

Q. You had called at 8:30 in the morning to ask about the fire, hadn’t you? A. I called them and asked about the fire and probably a dozen other things at the same time. Every man on the line reports at eight o’clock in the morning, that we can get in contact with.

Q. “On the morning of Tuesday the 19th I called Kapoor somewhere about 8:30 and asked them how this fire was, and was  
20 informed that it was well under control and practically out.” Did you call them to find out how the fire was, or not? A. Well, I called them to find out how the fire was and probably other business.

Q. Now, you heard the evidence this morning of one of your men that this telephone was for the mutual benefit of both you and the Kapoor Lumber Company at Kapoor? A. We put it in for their accommodation.

Q. And your own? A. And our own, naturally. We are the only outlet they had to the wide, wide world.

Q. And you could use it at any time you liked? A. If it was in working order, yes.

Q. Where was this phone? A. In the Kapoor office.

Q. How far away from the railway tracks? A. It was outside of our right of way; I never measured it.

Q. It was a hundred feet? A. It wouldn’t be that.

Q. It wouldn’t be that much? A. I don’t think so.

Q. I thought we had a B. C. telephone in there? A. They have now.

Q. They did not have then? A. Not when we installed it.

Q. Now, you did instruct these two men of your Company to examine these engines and see how they were, as to throwing fire, after this fire, didn’t you? A. I told them to make a thorough examination of the engine in every way.

Q. I know, but did you particularly ask them in regard to throwing fire? A. I may have specified that as well.

Q. Well, did you have in mind that it was possible that that sort of thing might happen? A. No. I have never had a report

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of an oil burner throwing fire.

Q. Why did you ask it at the time? A. The first question that is asked here on our report is, What is the condition of your equipment; and we have to fill in their question on it. It is their business to furnish the information to the head of their department, for anyone getting that.

Q. You are slashing on your right of way more or less all the time, aren't you? A. Not usually in the summertime, no.

10 Q. I am afraid I will have to refer you to question 652: "Do you remember if you slashed in the spring of 1930 or not? (A) I couldn't say whether they slashed just at that particular point; they are slashing more or less on part of the railway all the time." That was your answer that I was referring to; is that right or wrong? A. They are not slashing all the time. What I meant by all the time was not the fire seasons.

Q. "(651Q) When would you do your slashing? (A) Usually in the fall or early spring."

A. Yes.

20 Q. "(Q) Do you remember if you slashed in the spring of 1930 or not? (A) I couldn't say whether they slashed just at that particular point; they are slashing more or less on part of the railway all the time." You say now that that means all the time in the spring or fall? A. In the spring or fall, as provided by the Act; the Act tells us when we can do that.

Mr. Mayers: I think that is shown by 649, isn't it?

Mr. Maitland: "We slash at certain seasons and burn when the season authorizes," is that what you mean?

Mr. Mayers: Yes.

30 Mr. Maitland: Is that correct? A. I think that is in season.

Q. The burning is authorized, and there is no date for the slashing, apparently. Was that derailment on our tracks or yours? A. Yours.

Q. There is no question about that, is there, Mr. Fraser? A. No question whatever.

Q. Do you know whether the derailment was on switch ties or not? A. I couldn't say whether it was switch ties in their track there, or had staggered ties.

40 Q. I don't know the difference between those. A. A staggered tie would be this way; the switch tie would be a full tie running through covering both tracks.

Q. The ordinary tie that you use, that we see piled up on the railway? A. No, a switch tie is a longer tie, that goes through and catches both tracks.

Q. That is what? A. The switch tie. When they will not reach through then we stagger the ties this way, through between them, to catch the rails on both.

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Cummings, for Defendant—Direct Examination.

Q. I see. A. So I don't know whether they were switch ties or staggered ties in there.

Q. This derailment was right at the switch, wasn't it?  
A. Well, I didn't pay very much attention to the exact location, I had the men there to look after that; I couldn't tell you the point to an inch or two.

10 Q. As a matter of fact, Mr. Fraser, when you saw this fire on the Monday you did see logs actually burning, didn't you?  
A. There may have been a little blaze.

(Witness stands aside).

JOHN CUMMINGS, a witness called on behalf of the Defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. MAYERS:

Q. Your full name, please? A. John Cummings.

Q. You live at Milne's Landing, do you? A. Yes.

Q. And in 1930 you were a section hand under Frederick, were you? A. Yes.

20 Q. On the Monday, the 18th of August, 1930, you went up with Frederick to re-rail an engine, did you? A. Yes.

Q. What did you do after the engine was re-railed? A. Well, after she was—when she was derailed?

Q. Re-railed. A. Well, we rode on board the auxiliary.

Q. And you re-railed the engine? A. Yes.

Q. And what did you do to the track after the re-railment of the engine? A. We fixed it up.

Q. What did you do yourself? A. I was assisting.

30 Q. What part of the work did you do? A. I was bringing along ties.

Q. After you had finished was the track suitable for traffic?  
A. Sure.

Q. Then on the Tuesday you went up on the hand car?  
A. Yes.

Q. And you left the hand car down by the spur? A. We left it at the spur belonging to the Kapoor Lumber Company.

Q. And then what did you do after that? A. Well, we went up towards the bridge to see if we could do anything, but we could do absolutely nothing; the smoke chased us back. And  
40 then the foreman ordered us to patrol the track.

Q. And where did you patrol? A. We patrolled it down a mile.

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Cummings, for Defendant—Direct Examination.

Cummings, for Defendant—Cross-Examination.

Q. That would be back to 35? A. Very nearly, yes.

Q. That was on Tuesday afternoon, was it? A. Yes, Tuesday afternoon.

Q. While you were patrolling did you see any burning on the right of way? A. None whatever.

Q. Did you see anything that had been burnt on the right of way? A. No, there was absolutely no evidence to show that there had ever been any fire on the railroad.

Q. Or on the right of way? A. On the right of way.

Q. How near to 35 did you patrol? A. Well, I guess it would be to within about a pole length.

CROSS-EXAMINATION BY MR. MAITLAND:

Q. Do you know the point 35.2? A. Yes.

Q. While you were there on the Tuesday—we were there on the Tuesday, yes, I was there.

Q. What do you mean by right of way; what does that cover? A. Well, the right of way comprises the property of the railroad company. If you measure the distance on either side of the track I guess you will arrive at what is called the right of way.

Q. Well, what is the distance here on either side of the track? A. We run out forty feet.

Q. You reckon it forty feet? A. Yes; we were told to cut that much when we were cutting brush.

Q. And you say there had been no fire on either side of this right of way on Tuesday at 35.2? A. We saw none.

Q. How far back was it from 35.2 that you saw where there had been any fire? A. How far back?

Q. Yes? A. Which way do you mean how far back?

Q. To the left? A. To the left?

Q. Yes. A. Down on the ditch away in the gully.

Q. Which way were you going? A. We were coming down towards Victoria.

Q. Towards Victoria? A. Yes, we were patrolling down that way; when we saw the fire of course was going away to the left.

Q. You were going toward Victoria? A. Patrolling toward Victoria.

Q. Was there any sign of any fire on the left-hand side of point 35.2? A. Not a sign whatever.

Q. But there was a sign on your right-hand side, was there? A. None whatever.

The Court: There was no fire there at all? A. There was a

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Cummings, for Defendant—Re-Examination.

Ferguson, for Defendant—Direct Examination.

fire all right, it was burning in the Logging Company's ground, but not in the right of way.

RE-EXAMINATION BY MR. MAYERS:

10 Q. That is what you were referring to when you answered Mr. Maitland, that there was no fire, you were referring to the right of way, not the Logging Company's ground? A. There was no fire whatever on the right of way.

Q. Where was it? A. It was on the Logging Company's ground we saw the fire.

(Witness Stands aside).

ROBERT FERGUSON, a witness called on behalf of the Defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. MAYERS:

Q. Your full name? A. Robert Ferguson.

Q. Where do you live? A. Mile 43.

20 Q. In 1930 you were a section hand under Reece, were you not? A. Yes.

Q. What did you do with regard to the right of way in the early part of 1930, before May the 1st? A. Well, I guess we were burning a little brush, some old ties; cleaned up the right of way.

Q. That would be between what miles? A. Between Mile 43 and 34.

Q. From 43 to 34. What did you do with the brush and the ties that you mention? A. We burned them up.

Q. You burnt them up, and that was all before the 1st of May, was it? A. Yes.

30 Q. You know that you cannot burn after the 1st of May, I suppose? A. Yes.

Q. What was the condition of the right of way then? A. The condition was quite good.

Q. Was it you who patrolled with Reece on the Saturday, August 16th, 1930? A. Yes.

Q. And you got as far as what point? A. Mile 35.4.

Q. Mile 35.4. What was the condition of the right of way when you were coming down from 43 to 35.4 on that day? A. It was quite good.

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CROSS-EXAMINATION BY MR. MAITLAND:

Q. Were you in Court this morning? A. Yes.

Q. Did you hear Reece cross-examined as to the condition of this right of way? A. I did.

Q. Did you hear your Divisional Engineer cross-examined this morning as to the condition of the right of way? A. Yes.

10 Q. Did you hear me suggesting that there were ties covered with blackberry vines around 35.2? A. Well, I don't know. I don't think so; I don't remember.

Q. You wouldn't swear there were not? A. No, I wouldn't.

(Witness stands aside).

HUGH McINTYRE, a witness called on behalf of the Defendant, being first duly sworn, testified as follows:

H.  
McIntyre,  
Examination,

DIRECT EXAMINATION BY MR. MAYERS:

Q. Your full name, please? A. Hugh McIntyre.

Q. Where do you live? A. Mile 43.

20 Q. In 1930 you were one of the section hands under Reece, were you not? A. I was, yes.

Q. What is the extent of your section, from 43 to where? A. 43 to 34.

Q. And that was your section in 1930? A. Yes.

Q. Did you do anything in regard to the right of way in the early part of 1930 up to the first of May? A. Yes, we burnt several brush—we burnt as far as the weather would permit, and up to the 1st of May; cut and burnt.

30 Q. What did you burn? A. Old ties, and the brush that wouldn't burn in the fall when we was cutting.

Q. What was the condition of the right of way on the 1st of May, 1930? A. Good.

The Court: How many in your section gang? A. Just now three altogether.

Q. Frederick and the two men? A. Reece—the foreman Reece.

Q. Is that a full gang? A. Yes, in the meantime.

CROSS-EXAMINATION BY MR. MAITLAND:

40 Q. What about 1930, was it the same? A. No, we had another man, we had three men.

Cross-  
examination.

McIntyre, for Defendant—Cross-Examination.

McIntyre, for Defendant—Re-Examination.

Addison, for Defendant—Direct Examination.

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- Q. Three men and the section foreman? A. Yes.
- Q. And if she did a roaring business how many would you have? A. I don't know.
- The Court: What is a full gang, don't you know, a full section gang, on a road that is operating up to one hundred per cent. efficiency? A. I think three men and the foreman is about the ordinary regular; four men.
- 10 Mr. Maitland: You are covering ten miles of territory? A. Yes.
- Q. Do you know where 35.2 is? A. I do.
- Q. Do you know where Kapoor mill is? A. Yes.
- Q. Will you swear that in 1930 at any time before this fire you ever burnt any ties in that territory? A. I beg your pardon?
- Q. Will you swear that in 1930, before the date of the fire, that you ever burnt any ties between 35.2 and the Kapoor mill? A. Yes, we burnt ties.
- 20 Q. When? A. In the fall.
- Q. Any record of it? A. In the year before. No, I don't know of any record. But I know we burnt it out under Reece's instructions.
- Q. How does it come there are ties lying there on the right of way?
- The Court: He said in the year before. You asked for 1930.
- Mr. Maitland: In 1930 did you burn any? A. 1930?
- Q. Yes? A. No, that was the fall before; 1929
- Q. All right.

30 RE-EXAMINATION BY MR. MAYERS:

- Q. Did you burn all the ties that there were to be burnt?  
A. That we possibly could.

Re-exami-  
nation.

(Witness stands aside).

ROBERT HAMILTON ADDISON, a witness called on behalf of the Defendant, being first duly sworn, testified as follows:

R. H.  
Addison,  
Examina-  
tion.

DIRECT EXAMINATION BY MR. MAYERS:

- 40 Q. Your full name, please? A. Robert Hamilton Addison.
- Q. Where do you live? A. 1960 Brydon Avenue.
- Q. Victoria? A. Victoria.



Addison, for Defendant—Direct Examination.

Q. What is your occupation? A. Draughtsman.

Q. With whom? A. Canadian National Railway.

Q. Did you make a measurement of the distance from the right-hand rail going towards Kapoor to the toe of the dump? A. I did.

10 Q. Just explain to me what you did do? A. I had a tree cut by the section men, I got them to hold the tree at the point at the foot of the slope which I pointed out to them. I had previously tied the tape at the height of the fill. I then went up to the rail with the tape and measured that distance on the tape.

Q. This tree, was that perfectly perpendicular? A. Yes, as perpendicular as I could tell; perpendicular, yes.

Q. And what is the distance measured in the way, from the right-hand rail going towards Kapoor and the toe of the slope? A. 23 feet, four inches.

Q. Where would 15 feet from the right-hand rail come; is that shown on the plan? A. No; it is approximately half-way down the slope, the fill.

20 The Court: Is the toe defined there? A. Yes.

Q. Doesn't slur off? A. Oh, it is quite definite on the ground there; because the ground slopes away back from it. The slope comes down, and the natural ground slopes away up from it, you see. The fill comes down.

Q. It makes an even line between the two? A. Yes, an even line, quite definite.

Mr. Mayers: That will be Exhibit (marked Exhibit 50). This Exhibit 50 you prepared from your notes, did you? A. I did.

30 Q. I show you Exhibits 11, 12 and 13; will you tell me if you took those? A. Yes, I took these three photographs.

Q. Would you come over to the Jury, I want you to show where you were when you took them. Will you tell me on one of the photographs where you were when you took Exhibit 11? A. Here; I was standing there, back here behind this other rail that is not shown here.

Q. You were standing at a point just off Exhibit 12, were you? A. No, I beg your pardon, I am looking at the wrong point. You are asking as to this photograph?

40 Q. Yes, Exhibit 11? A. I was here between those two stumps, right there.

Q. That is you were near the left-hand cedar, white cedar, shown on Exhibit 12? A. Yes, just in front of it, yes.

Q. Where were you when you took Exhibit 12? A. I was here on the front right there.

Q. When you took Exhibit 12 you were standing on the track in Exhibit 11? A. Yes.

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Juror: And when did you take it? A. On the 14th of May of this year.

Q. In this present month? A. Yes.

Mr. Mayers: Where when you took Exhibit 13? A. Just about at the edge of this photograph here.

Q. Just about on the right-hand edge of Exhibit 11? A. Yes.

10 Q. That represents the rock cut, and there is the track?  
Juror: That is looking obliquely towards Kapoor?

Mr. Mayers: You would be looking obliquely, but the mill would be here—you were looking really away from Kapoor on the photograph the camera was pointing—

Mr. Maitland: I think Mr. Mayers better get the witness' evidence.

Q. Very well, look at it. A. The Kapoor mill, in this photograph would be about there, on the photograph.

Q. Then it would be off the photograph, on which side? A. The left-hand side.

20 Juror: Coming from Kapoor? A. No, if you are looking from the point where I took this photograph towards Kapoor mill, it would be here (indicating).

Mr. Mayers: You also took some measurements at or near the fill near mile 35.2, did you not? A. I did.

Q. Just describe to me what each man whose measurements you took, did. I will begin with Mineau; did you take a measurement?

30 Mr. Maitland: I submit this is not evidence. He could not, I submit my Lord, in our absence go out and ask men to do certain things, and come in here and describe what they did. While it is not words, nevertheless it is hearsay evidence. It is an exhibition of what these people did, and another witness coming in and saying that he saw certain witnesses do certain things. I submit that is not admissible.

The Court: I think it is evidence; the weight of it is for the Jury to consider. I cannot say it is hearsay.

Q. Mineau, for instance? A. He stood at a certain point on the ground, and I measured.

40 Q. From where? A. From the right-hand rail to where he stood.

Q. The right-hand rail; looking in which direction? A. To Kapoor.

Q. Will you give me the measurements? A. I will have to refer to my notes, which I have here.

The Court: You mean you measured at right angles to the track.

Q. You made it at right angles to the track? A. Yes, ex-

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actly. Mineau 119 feet.

Mr. Mayers: In order to save repetition, in each case you measured as his Lordship said, at right angles from the track? A. Yes.

Q. Horizontally to the place where the man was standing?  
A. Yes.

10 Q. Then take Standish? A. Standish, 86 feet.

Q. Mainprize? A. 83 feet.

Q. L. Smith? A. 141 feet.

Q. Miller? A. Miller gave a point 119 feet.

Mr. Maitland: Just a moment—Miller did not mark on this photograph, did he, where he went to?

Mr. Mayers: Yes, he did.

The Court: Miller is the conductor. A. On the 14th of May he gave it at 119 feet from the track. Today he stood at a point which was 101 feet from the track, the right rail.

20 Q. Miller changed his position? A. He did, yes, somewhat.

Q. Mulligan? A. 76 feet.

Q. Jones? A. 63 feet.

Q. Davies? A. 119 feet.

Q. Trestain? A. 119 feet.

Q. And McCague? A. 100 feet.

#### CROSS-EXAMINATION BY MR. MAITLAND:

Q. Do you see this Exhibit 44? A. Yes.

Q. You see the J there? A. Well, I can see your pencil on the photograph.

30 Q. I have my pencil on the stump J? A. Yes.

Q. The nearest stump to the rail. A. Yes, I see it.

Q. How far is J from the track, did you say?

The Court: From the right-hand rail.

Mr. Maitland: From the right-hand rail? A. That is 63 feet.

Q. 63 feet? A. Yes.

Q. And so in these photographs that we have produced we have missed apparently 63 feet of track right along?

The Court: That you cannot see at all in perspective. A. No, you cannot.

40 Q. How high would you have to hold your camera? Where were you looking to make that picture? A. I was standing behind the left rail, looking—

Q. You must have had it down low? A. The camera would be at my middle.

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Q. You were just holding it up? A. Yes, so that I could see the finder.

Q. It was not on a stand? A. No, I was holding it in my hand.

Mr. Maitland: Where were you standing? A. Behind the left rail.

The Court: This is an enlargement, then? A. Yes, this is an enlargement.

10 Mr. Maitland: You were standing behind the left rail? A. Yes.

Q. And you produced a picture with 65 feet missing in front; you start with that? A. Approximately, yes.

Q. And what is close for the jury to examine, a piece of rail the entire length of the picture, amounts actually to how many feet of rail? A. Well, I wouldn't like to say on that. Perhaps if you let me see it a little closer I could count the ties.

Q. Yes, count the ties. Get all the information you can about this picture.

20 The Court: What is the length of a rail? A. Thirty and thirty-three feet, sir.

Q. Does that show? A. No, it does not show that much. It shows about ten feet.

Mr. Maitland: It shows the ties. How much rail is there in that picture? A. About ten feet.

Q. About ten feet of rail? A. Yes.

Q. And so this picture of yours is a picture that takes in ten feet of something and stretches out like my arms (indicating)? A. Exactly.

30 Q. Like a triangle? A. Yes, I suppose it might be a triangle.

Q. Whose picture is that in Exhibit 13? A. What exactly do you mean?

Q. That man in the picture, who is that? A. Fraser.

Q. Mr. Fraser. Then Mr. Fraser must have been right there when you were taking these pictures, wasn't he? A. Oh, yes.

40 Q. Now, do I understand when you took these pictures you stood right on top of the railway track? I don't mean the track itself, but right on top of the roadbed? A. Yes, I did.

Q. Behind the left rail going towards Kapoor? A. Yes, in this picture. This is only an enlargement.

Q. And as you looked down on the right-hand side going towards Kapoor there is a gully there, isn't there—not a gully, but a sort of a ditch going along parallel with the track? A. No, there is no ditch.

Q. At the foot of that fill isn't there a ditch? A. No, not a

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made ditch, no.

The Court: Is there a natural ditch there formed in the depression? A. Well, there is the lowest point, of course along the edge of the fill.

Q. That is not built to make a ditch? A. No.

Mr. Maitland: There is no pronounced depression at the foot of the fill there.

The Court: Otherwise it would not be a fill? A. Yes, there is a depression in the ground there, yes, right there. That is why the fill is there.

Mr. Maitland: And the low point of that depression is how many feet from the right-hand track going to Kapoor? A. Twenty-three feet four.

Q. Twenty-three feet four? A. Yes.

The Court: At the point J, can you recollect what it looked like? A. I beg your pardon?

Q. That point J at the foot of the fill, can you recollect it? A. Oh, yes, I remember the stump.

Q. What is the appearance of it, can you give an idea of it to the Jury; a charred stump, or burnt stump, or something? A. Well, yes it is slightly charred, not heavily. There has been fire around it, but it has not been burnt into tinder. It is still fairly solid.

Q. And between that and the toe of the fill what is the nature of the ground? A. It slopes naturally down.

Q. Is it burnt over, has it been burnt over? A. That is a question that it is rather doubtful in my mind; it is rather gravelly, and green grass and stuff growing again, I couldn't say, and there is very little debris at the foot.

Q. That wouldn't help us any as to what it might look like in August, 1930? A. No.

(Witness stands aside).

Mr. Mayers: I have the auxilliary crew here, Cameron and the crew; they could do nothing but repeat what others have said; but I tender them for cross-examination to the other side.

Mr. Maitland: I don't want them.

The Court: They were not up there till the Tuesday?

Mr. Mayers: Yes, they were up there on Monday, on the auxilliary crew; but they simply saw what everybody else saw. That concludes my part on the cause.

The Court: That is on the question of liability.

Mr. Mayers: Yes.

The Court: Reserving your right, if you have overlooked something; and you would like to leave the question of damages.

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until Monday?

Mr. Mayers: If your Lordship pleases.

The Court: I think that is the better course.

(Court here adjourned, until Monday, May 30, 1932, at  
10 a.m.)

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Fraser, Re-called for Defendant—Direct-Examination.

Fraser, Re-called for Defendant—Cross-Examination.

Monday, May 30, 1932, at 10 a.m.

\* \* \* \* \*

NORMAN S. FRASER, a witness re-called on behalf of the Defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. MAYERS:

Q. That tank car stationed at Deerholme, could that move under its own power? A. No, it could not.

10 Q. On the 19th of August, 1930, was there any locomotive between Deer Creek and Kissinger? A. Not after mid-day.

Q. You are thinking of the way freight, are you? A. The way freight passed down on the Tuesday; and there was nothing up there after that time.

Q. After the way freight had got to Kapoor there was no locomotive between Deer Creek and Kissinger? A. No, there was not.

Q. And Deer Creek Bridge, what was the condition of Deer Creek Bridge when you arrived there? A. It was impassable.

20 CROSS-EXAMINATION BY MR. MAITLAND:

Q. It was impassable when, Mr. Fraser? A. When I arrived there with the train.

Q. On Tuesday? A. On Tuesday, yes.

Q. You remember telling me on your discovery, at question 269: "But the fire fighting equipment you had I suggest was the equipment that would have been there anyway, and was not affected by the fact that you had had any report that there was a fire?" This is speaking of Monday. (A.) We had the usual equipment. (Q.) Exactly; and you took nothing additional because of this telephone communication you had from Miller when you left Victoria? (A.) No. Our fire fighting tank car was beyond there. If it was necessary we would go and get that." That answer was correct, wasn't it, referring to the Monday? A. It was correct, certainly; we had nothing but the regular equipment with us, because in our auxilliary car we carry eighteen buckets, 26 shovels and a dozen—

30

Q. (Interrupting) Dealing with the tank car. A. You asked me if it was correct, I was explaining that we have all those over and above what each gang carried with themselves.

40 Q. Now, I want to read some more to you, questions 292 to

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301: "(Q.) And then you went on your journey, and you went past this fire to the point of derailment, didn't you? (A.) Yes. (Q.) You mentioned a moment ago about a tank car; where was it? (A.) That was located at Deerholme. (Q.) Where is that? (A.) Deerholme is at mileage 58. (Q.) That would be towards Kissinger? (A.) Yes. (Q.) Was it there at this time? (A.) Yes. (Q.) Now, when you came up from Victoria to re-rail this engine, I understand this engine was derailed on a spur? (A.) Yes. (Q.) There was nothing to prevent you going right through if you wanted to, to Deerholme, was there? (A.) No. (Q.) There was nothing to prevent you going up if you wanted to and getting that tank car, was there? (A.) No." Is that right?

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tion.

The Court: All on Monday? A. That is all on Monday. We could have followed the way freight, quite right, yes.

*--continued.*

Q. Why was that particular point selected to keep this tank at? Was it supposed to be central for fire fighting purposes? A. The first order of the Board, they insisted that it must be kept at a central point, and they specified mileage 42; I showed them that for strategic purposes, Deerholme being a junction point, if we had any engines working anywhere in that vicinity, no matter which way we had an engine, it could come there and pick it up. And in addition to that, that is much closer to a water tank so that we could fill it up.

Q. So that that could be located there and moved to wherever it was required from time to time? A. Yes. It cannot work without a locomotive to furnish the steam. And it cannot be moved without a locomotive.

30 Q. And that furnishes the steam? A. That is the idea.

(Witness stands aside.)

\* \* \* \* \*

JAMES JURE, a witness called on behalf of the Defendant, being first duly sworn, testified as follows:

J. Jure,  
Examina-  
tion.

DIRECT EXAMINATION BY MR. ALEXANDER:

Q. Your name, please? A. James Jure.

Q. You are by occupation a millwright, Mr. Jure? A. Yes.

Q. And are at present occupied with what Company? A. The Alberni Pacific.

40 Q. The Alberni Pacific Lumber Company? A. Yes; at Port Alberni.



Jure, for Defendant—Direct Examination.

Q. You were formerly millwright of the Kapoor Lumber Company, were you not? A. Yes.

Q. When did you commence your employment with them?  
A. On April the 16th of 1929.

Q. And you were with them until what time? A. September 15, 1929.

Q. No, surely you are wrong there. Did you leave before the fire? A. No.

10 Q. The fire was in 1930. A. Well, 1930.

Q. When did you commence with them? A. I commenced at April the 16th.

Q. Of what year? A. 1929.

Q. That was the year before the fire? A. No, the same year that the fire was.

Q. I will suggest to you, witness, that the fire was in 1930.  
A. 1930.

Q. And you continued employment with them until when?  
A. Until September the 15th.

20 Q. Of 1930? A. Yes.

\* \* \* \* \*

Q. You were at work on the 18th of August, were you? A. I was working in the lumber yard.

Q. Was there anything happened that morning which struck you as important? A. No, what do you mean about it?

Q. Well, was there any occurrence that you noticed that morning? A. In connection with the fire?

Q. Yes? A. Yes; I went up the stairs, and I looked down through there, and I seen smoke.

30 Q. Looked down through there; where was it you saw this smoke? Where were you when you saw the smoke? A. On the mill floor.

Q. In the mill? A. In the mill, upstairs on the mill floor.

Q. And you were looking in what direction? A. The direction down towards Victoria, I suppose.

Q. Towards Victoria. And what time of day was it that you saw this smoke? A. It was between ten and eleven o'clock, some time, I don't know what time.

40 Q. When did you go for your dinner? A. At eleven o'clock.

Q. Was it before dinner time? A. Yes.

Q. Now, I think—would you come over here, I want to explain this map to you before I ask you any questions. There is the mill, have you got your glasses? A. I don't need glasses; I was looking for a pencil.

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Q. Here is a pencil. Here is the mill, here is the planer, and the sorting racks there. A. Yes.

Q. Here is the loading platform. A. Yes.

Q. And here is supposed to be the lumber yard. A. Yes.

Q. Here is the rock cut.

Mr. Maitland: No, this is the one.

Q. There are two. This is the platform that comes right down here. You see that? A. Yes.

10 Q. This is the loading platform? A. Yes.

Q. And here is the rock cut, it starts here and ends here. A. Yes.

Q. You were up here in the mill? A. Yes.

Q. Now, tell the jury where you were looking, and what you saw? A. As soon as I could go up—there are the stairs there, and as I came up—

Q. You were inside the mill? A. Yes; there is the mill floor there; I am there; as I looked down from here, from the end of the mill right down there, I seen smoke.

20 Q. Mark where you think you saw it, approximately. A. I couldn't put it exactly, about half a mile down there.

Q. Do the best you can.

Mr. Maitland: He said half a mile—if he means that. A. I beg your pardon?

Q. Will you go on? A. I couldn't say whether this side of the road or this side of the road, but anywhere in this direction down here.

Q. Put an arrow in the direction you were looking. A. Well, it was down here.

30 Q. Make a mark there with an arrow. A. Where do you want the arrow?

Q. In the direction that the fire was. A. Get something to make a straight line.

Q. Get your line of vision on the map, so that you can mark an arrow in the direction. A. There is the stairs, and there is where I was in the mill; and there is about where I seen the fire (indicating).

Mr. Maitland: Mark that "Jure".

40 Mr. Alexander: A blue line from the mill in the general direction of the arrow marked, terminating at "Jure", is it? A circle with the word "Jure" inside.

The Court: As I understand, from this witness you are trying to show where on August 18th the point of vision was.

Mr. Alexander: Monday, 18th August, at before 11 o'clock.

The Court: Did you take any note of that at the time? According to Reece's evidence there was smoke around all the country?

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Mr. Alexander: When you saw that smoke, did you speak to anybody? A. I spoke to the mill foreman.

Q. You say when you saw that smoke you spoke to the mill foreman? A. Yes.

Q. What did you say? A. I said there is smoke down there, or a fire—I don't know what I said.

Q. What did he say? A. Yes.

10 The Court: What was his name? A. I don't know his name, he was one of the Hindus.

The Court: Perhaps it was one of the witnesses here.

Mr. Alexander: Was it Bal Mukand? A. No, not Bal—It was the mill foreman, the man who looked after the lumber at the mill, but I don't know his name, I never did.

Q. All Hindus to you? A. Yes.

#### CROSS-EXAMINATION BY MR. MAITLAND:

Q. Are you sure it was not a tally man you told that to? A. Well, it was the man we used to call the mill foreman.

20 The Court: How long were you working there? A. Six months.

Q. And you never knew the name? A. I had nothing to do with them. Bal Mukand was my boss.

Mr. Maitland: Was Bal there with them? A. Yes.

Q. Why did you not tell him about that fire? A. Because three days I did not see Bal. I suppose he was there, but I did not see him.

Q. What time did you go to lunch? A. 11 o'clock.

30 Q. When was it first drawn to your attention after the fire on the 18th August, 1930, that you had seen the fire—when was it drawn to your attention—You are telling us now you remember two years ago looking out and seeing smoke that morning? A. Yes.

Q. When did you first discuss that with anybody after the fire? A. I don't know what time I discussed it.

Q. Well, you did not drop through the skylight here, you have got here to give evidence.—When did you tell anybody, not us, that between 10 and 11 o'clock on the 18th August, you saw smoke, when did you tell anybody? A. I did not say I told it.

40 Q. How did you get here. How did Mr. Alexander get this information—he did get it from you? A. Yes.

Q. When did you discuss that with him first. A. Last night.

Q. Who was it before that that you discussed it with last—Who was the last person you discussed that with before talking

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to Mr. Alexander last night? A. I don't know.

Q. Anybody? A. I guess if talked about it to Bal Mukand and different ones; I guess I saw Mr. Cowan afterwards.

Q. You remember the Saturday fire that was put out—  
There was a Saturday fire in the same vicinity that was put out?  
A. I don't know anything about that.

10 The Court: Witness, try and apply your mind to the questions, exert your brain.

Mr. Maitland: You are sure you are not thinking about the Saturday fire that was put out? A. No, because I knew nothing about the Saturday fire.

Q. Who was the last person you told about this, before Mr. Alexander? A. I don't know.

Q. You say this was just before you went to lunch? A. Yes.

Q. Or when you got back? A. No, it was before—11 o'clock.

Q. What time did the Hindus go down to fight this fire? A. On Monday, I suppose.

20 Q. Did you see them go down? A. No.

Q. Or anybody taken out of the place were you were working going down to work at that fire? A. There was nobody in the place where I was working, there was only one man there, oiling, that I had anything to do with.

Q. Did anybody working in the vicinity where you were working leave to take part in fighting the fire? A. I cannot remember anybody taken away Monday, but they were taken away Tuesday.

30 A. Q. You cannot remember any being taken away Monday?  
A. No.

Q. But they were taken away on Tuesday? A. Yes.

Q. That is right? A. That is right.

Q. You knew Mr. Cowan pretty well? A. Yes.

Q. Did you have confidence in him? A. Well, very good man, as far as I would know the man. Have no reason not to have confidence in him.

\* \* \* \* \*

(Witness stands aside).

40 JOHN P. VAN ORSDEL, a witness called on behalf of the Defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. ALEXANDER:

Q. Mr. Van Orsdel, what is your occupation? A. I am a consulting engineer, particularly applied to lumber and pulp in-

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tion.



Van Orsdel, for Defendant—Direct Examination.

dustry.

Q. Where did you receive your technical education? A. Lake Royal Academy and Oregon State College.

Q. What year would that be? A. I was in Class 1903.

10 Q. When you left college what did you do? A. I was first engaged as an estimate man on some concentrated surveys throughout the western part of the United States, and later was United States surveyor in Wyoming; returned from there and was connected with the lumber business, and constructed the logging railroads, cruising of timber, and purchasing timber.

Q. Until what year? A. In 1905—During that period I was Chief Engineer of branch lines being built on the Southern Pacific, and associated with my father during the purchase of some timber. In 1908-9—1909 was with Thomas D. Lacey Timber Factories, head office in Chicago, branch offices in Canada and United States.

20 Q. That took you to what time? A. 1910. From 1910 I became senior partner of the firm of Van Orsdel & Bull, Forest Engineers, head office in Portland, Oregon. Gave up that to become Manager of the logging operations in the W—— Company, Michigan, and I was President of the Company and manager of the logging operations. My real duties were those of Engineer in charge of all construction and timber lines and logging operations. I was in this position for a period of 10 years.

Q. That was until 1921? A. Yes.

30 Q. What did you do then? A. Chief Engineer with Thomas D. Lacey, timber factories for a period of a little over a year, and then organized a company of my own called John P. Van Orsdel, Timber Engineers, and am practising that now, as an individual instead of a corporation—that is the only change in my position.

Q. Have you been to Kapoor? A. I have been to Kapoor, 4 trips, spent a week out there the first trip and then went back.

\* \* \* \* \*

Mr. Alexander: Did you inspect the tank car of the Kapoor Lumber Company? A. Yes.

Q. And measured it? A. Yes.

40 Q. And what result did you arrive at about its capacity in gallons? A. I found two wooden square tanks, each having the following inside dimensions: 78" x 63" x 134". That would make 2375 Imperial gallons in each tank. Two of them together they contained 4750 gallons; between this two tanks was a Worthington Duplex Steam Pump, 4½ x 2¾ x 4, operated with steam from the locomotive.

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British  
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No. 8  
Defendants'  
Evidence,  
25th to  
30th May  
1932.

J. P. Van  
Orsdel,  
Examina-  
tion,  
--continued.

Van Orsdel, for Defendant—Direct Examination.

Q. Would both these tanks be operated at the same time? A. By section hose at each of the places from one tank to the other when exhausted.

Q. Would both these tanks be in use at the same time? A. No, not with the one pump they could not be operated at the same time. They can use the same hose from the locomotive at the same time they were using the tank cars and use the tender from the locomotive or from one of these tanks.

10 Q. What would be the capacity per minute, are you able to tell? A. I checked that up and found that under normal speed the pump on the tank car itself would throw 20 gallons per minute; it could be raised by high speed to 40 gallons, a normal high speed of 30 gallons per minute.

Mr. Maitland: When was it when he was getting this evidence that he saw this tank? A. I measured the tank car in company with Mr. Munroe, I should say about a week ago.

Mr. Alexander: Did you examine that to see if it showed any signs of alteration in condition? A. Well, the tanks were  
20 full of water, so I assumed it was the same.

Q. What is that a tracing of? A. This is a plan prepared under my direction of the track lay-outs around the plant of the Kapoor Lumber Company, with particular reference to the tracks immediately adjacent and owned by the Kapoor Company and the C.N.R. Railway.

Q. Showing the tracks and sidings going off the C.N.R.? A. Yes.

Q. On to the Kapoor Lumber Company? A. Yes.

30 Q. Would you show on this plan where the tank car was when you examined it?

Mr. Maitland: I don't see what relevance this has. — The witness went out a week ago, and how can he say for the fire.

The Court: I think it is quicker to give the evidence. Mr. Alexander must have some reason. A. The location of the tank car a week or 10 days ago was as shown on this plan—marked on the plan as tank car, with an arrow pointing to the exact location.

Mr. Mayers: There is a blue print already in; you might mark this tracing as the same exhibit. (45).

The Foreman: No. 4?

40 Mr. Mayers: No. 4 does not show the run around track; it shows the spur. (Blue print 45, tracing 45 A.)

Mr. Alexander: Now I show you another plan.—What does that represent? A. This is a plan representing the various conditions on Block 103 at the time that operations were stopped in this block—Block 103.

Q. Did you examine the amount to find where the felled and

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bucked timber was that has been claimed as fire damaged? A. Yes.

Q. Where did you find it? A. In lot 13 of block 103.

Q. As shown on that plan? A. As shown on this plan, yes. (Exhibit 54).

Mr. Alexander: Generally, this is a plan of Block 103 and the lot numbers marked in squares and the felled and bucked timbers was in what lots? A. The lot indicated where that blue  
10 —marked in the legend there.

Q. Now did you examine the right of way and the fill to the Victoria side of the rock cut? A. Yes, sir.

Q. For what purpose? A. To determine if possible where the fire had burnt down to the toe of the slope of the fill East of the rock cut.

Q. And what conclusion did your examination lead you to? Mr. Hutchinson: When was this examination made? A. I have been down there several times within the last four weeks.

Mr. Alexander: And what did your observation lead you to  
20 conclude? A. That the fire had burned approximately within 10 feet from the toe of the fill.

Q. Could you see which way the fire had proceeded? A. The tendency of the fire is to run up the slope and back down here.

Mr. Hutchinson: This witness can only tell what he saw, he is not qualified—

The Court: Well, anyhow fire acts from different angles. Do you want him to say—Can you begin to say that that fire, two years ago almost, followed a certain course that day? A. I said the natural tendency of fire.

The Court: Can you say that there is any rule applied to  
30 fire—you are a lumber man? A. Yes.

Q. And had experience over 30 years? A. Not quite that long.

Mr. Alexander: You have been engaged in putting out various fires? A. Yes.

The Court: Can you apply any rule at all.—Did you ever see the Fernie fire? —Did you notice what happened there? A. No, I did not see the Fernie fire.

Q. You know, at any rate, it is peculiar, the vagaries of a  
40 fire? A. Absolutely.

The Court: He can tell what he saw.

Mr. Alexander: I would propose adopting your Lordship's suggestion as to fires—I don't think it would be as strong as your Lordship anticipated he was going to be.

Witness: I think my testimony was that the tendency of a fire would be to run up hill and back downhill, depending on how the wind is blowing. The wind will carry it, and it will create its

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own wind.

Q. Now have you made a recapitulation, witness—

The Court: If you think he has any evidence of this fire, I don't want to stop it, if it will assist the Jury. I felt he was embarking on a course which did not appeal to me, but the Jury should not be deprived of it, for what it is worth. — Don't you think the experience of a Jury — man in every day life — They should be governed by actual evidence, not by opinions formed on matters of this kind. At least I shall so instruct them, if they go contrary to my instructions, they have the right, if they want to.

(The Court adjourned to 2 p.m.)

May 30, 1932, at 2 p.m.

(Mr. Van Orsdel in the witness box).

\* \* \* \* \*

(Witness stands aside).

\* \* \* \* \*

Mr. Mayers: There are some dates in this action that I would like to speak of, so that they may appear on the record. The action was commenced on the 19th of August, 1931; it was not set down for trial by the plaintiff at all, but on the 7th of January, 1932, the defendant set down the action for trial on the 25th of January, 1932. The plaintiff then moved to adjourn the trial, and obtained an order adjourning the trial, that left either party to set it down at any time after the 30th of March, 1932. The plaintiff on the 22nd of February, 1932, set down the action for trial on the 16th of May, 1932, the defendant moved to abridge the time for the trial, but failed in that application, obtaining, however, a peremptory order for trial on the 16th of May; and the order reads as follows: It is peremptorily ordered that this action be set down for trial at Victoria on the 16th of May, 1932, and not later; and that no further application be made to adjourn the trial on the ground of further absence of Bal Mukand.

I would like to have my model marked, my Lord, as an exhibit; I have not had an exhibit number assigned to it (marked Exhibit 59). That is my case, my Lord.

Mr. Maitland: Is that all my learned friend Mr. Mayers is going to say about that application for adjournment—is that all he proposes to tell the Jury about it? Any reason for these ad-

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journments, and reason for our delay—is he not giving that at all—set out in the material?

Mr. Mayers: I have read the order. The prior applications were on the ground of the absence of Bal Mukand.

The Court: Was Bal Mukand available at this time?

Mr. Maitland: No, he was in India. That was the whole battle between us—to get this adjournment until Bal Mukand got here—and they wanted to force us on before he got here. And he is here now and has given evidence. They wanted to force us  
10 on while Bal Mukand was away.

The Court: Anything in rebuttal?

Mr. Maitland: Yes, if your Lordship pleases. I have two very short witnesses on the question of the escaping of sparks from an oil burning engine. I presume, in view of my learned friend's evidence, your Lordship would rule that I would be entitled to give rebuttal evidence in answer to the proposition. Generally I take Mr. Mayers' proposition to be that no such thing can happen as the escape of fire or sparks from an oil burning engine. I have rebuttal evidence on that point, if your Lordship  
20 rules with me that is proper rebuttal evidence.

The Court: The burden is attached to the railway company to show the condition of these appliances; that is an issue between the parties.

Mr. Mayers: I submit clearly not. My learned friend has to plead and prove that we set the fire. Now, he has submitted his proof; and that is the only cause that he has assigned for the fire at all; that the defendant was negligent in using engines on its right of way which were liable to cause fire, without taking any or adequate precaution to prevent their doing so. My learned  
30 friend has to support his pleading by showing that the fire was caused by sparks from the engine. He endeavoured to do so, by one witness, Mr. Orchard. He called Mr. Orchard, and without qualifying him, so far as I can see, he asked him, (Reading from testimony of Orchard). So that my learned friend has not only pleaded, as he was bound to do, but he has attempted to support his pleading by proof; and I submit that he cannot in that way split his case.

The Court: I think that the application of the section which relieves the railway company from liability beyond five thousand  
40 dollars also involves the proof by the railway company; and in order to limit that liability they are required to show that they used modern and efficient appliances.

Mr. Mayers: I have no objection to my learned friend calling evidence to show that the appliances on this engine were not modern and efficient.

Mr. Maitland: I am not concerned with that.

Mr. Mayers: My learned friend says he is not concerned

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with that, and therefore that issue does not arise. If that issue does not arise clearly my learned friend cannot in reply call evidence to bolster up the case that he attempted to make in chief.

The Court: Yes; but the difficulty arises here, you answer to the situation and issue, that taking that as a modern and efficient appliance, it would not emit sparks. Now, the point that you make, Mr. Mayers, there is something in it, to my mind; that the plaintiff has embarked upon a course which would imply the proof that an oil burning engine, any oil burning engine would or might emit sparks. And your point is that that would be splitting up the case. What do you say, Mr. Maitland?

10

Mr. Maitland: I have nothing to add to what I said. My friend has put before the Jury now a suggestion that I must at once make mention of, that is to the effect that my case rests entirely upon this fire being entirely started by this engine. So far as I am concerned I take no such view. That is one point of negligence in this case, if I can prove it, but it certainly is not by any means all that we are relying on.

The Court: I quite understand that.

20

Mr. Mayers: What I said was, that that was the only cause which you had assigned for the setting or starting of the fire. The emission of sparks from the engine, that is what you set.

Mr. Maitland: The answer to that is, my friend has brought in here and produced a certain model, we never saw it before, and we had no opportunity of examining it in any way whatsoever, that the jury never saw before, and the Court never saw before; and a man is brought in to give an opinion on that sort of engine; and he says practically that with proper combustion there is no way of emitting sparks. My evidence has to meet that. If your Lordship thinks I went as far as I am entitled to go in opening my case, by the evidence of Orchard, that is the end of it. I have these witnesses if your Lordship thinks I am entitled to call them. If not, well, that is that. I am entirely in your Lordship's hands on that.

30

The Court: It is rather an important point, I would like a little time to consider it.

Mr. Mayers: I want to be quite clear on the record. My learned friend is entitled to give evidence on the issue of modern and efficient appliances.

40

The Court: I see that point; on that point you (Mr. Maitland) are not concerned at all.

Mr. Mayers: My learned friend has said he does not want to do that; what he wants now to do is to deal with the question of sparks. Well, that is his case in chief.

Mr. Maitland: I want to meet the evidence my learned friend gave by an expert with a model that I never saw in my case in chief.

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Mr. Mayers: It is quite open for my learned friend to have a model made by himself.

Mr. Maitland: Oh, that would be ruled out on my learned friend's application.

The Court: My present view of the matter is this, once the plaintiff started out to prove a certain state of facts as constituting a ground of action, he should show and complete that line of evidence, and not leave the case in the position where the defense having been entered upon, it is sought then to supplement the evidence, slight though it might be, that was given by the plaintiff in chief. It seems to me that the evidence of Orchard tended in the direction to show that oil burning engines—and I may take it it applied to this model as well—are liable to emit embers, as he termed it. For that reason I think the plaintiff should be debarred from offering in rebuttal evidence along those lines. Next.

Mr. Maitland: I want to recall Mr. Cowan, on several points. One is,—evidence was given by I think five witnesses to the effect that they had delivered an oil car, at the time of the derailment, your Lordship will remember. We gave no evidence of the delivery of an oil car; and I want to call rebuttal on that. Another witness was put in to say that he pumped that oil car out one morning between seven and nine-thirty—Tuesday morning. I want to call rebuttal evidence on that. Another point, I am very anxious to make—there is a suggestion by some of the C.N.R. officials that Mr. Cowan had made certain statements over the 'phone which I think my learned friend used the expression—lulled them to sleep. I would like to recall him on that, to show what he actually did say. I think it was Fraser gave evidence that he 'phoned us about 8:30 in the morning, and then about two o'clock. I would like to get Mr. Cowan's evidence in rebuttal as to what those conversations were. All of these questions I have put before your Lordship are I think questions that arose when my learned friend was developing his case. Then your Lordship will remember there were several witnesses who gave evidence about seeing smoke hovering over a green patch at the Sooke River. Of course that was not part of my case. I want to give evidence as to the proximity of the houses to that.

Mr. Mayers: I have no objection to the other items that my learned friend mentions; but the question of the oil car simply goes into the question of whether their main logging spur was blocked by our derailment; that was gone into in chief in the evidence of Bal Mukand. I read from his examination by Mr. Maitland (doing so). Now, that was the evidence in chief; and we cross-examined him on that (reading from cross-examination). If there was any intention of going into that question further it should have been done as part of their original case, and not in rebuttal. The only relevance at all of the question of the oil car

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being that the oil car was the one that was picked up on the siding by the engine that was subsequently derailed. It is not a question of the evidence that is given, it is a question of being able to reply to it. I do not want to have a bit of evidence given in chief, and then after I have given my evidence in reply to that, have the original evidence bolstered up again, and no opportunity to reply to it.

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10 The Court: Aside from the question of the materiality of this rebuttal evidence, it seems to me that as to the question of the oil car, that that was brought into the trial by the defence, and the plaintiff should be allowed to rebut that evidence for what it is worth. Call the witness.

### No. 9

#### Plaintiff's Rebutting Evidence.

MR. COWAN, a witness re-called on behalf of the Plaintiff, being first duly sworn, testified as follows:

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#### DIRECT EXAMINATION BY MR. MAITLAND:

Q. Mr. Cowan, you heard the evidence of a man called O'Malley the other day? A. Yes.

20 Q. To the effect that on this day, on the 18th, you took an oil car there that day—took an oil car up. Do you remember anything about that, whether that is so or not? A. That could not have been so.

Q. Why? A. Because we didn't buy an oil car that week.

Q. When did you buy your oil car? A. August 6 we were invoiced for 8300 gallons of oil.

Q. And who would you be buying that oil from? A. Imperial Oil, Limited. That oil was measured and delivered to us by the C.N.R.

30 Q. Now, he gave some evidence about taking and pumping it out between 7:30 and nine in the morning, what do you say as to that—on the 19th? A. That would be incorrect—on the morning of the 19th, or any other working day.

Q. Why? A. Because it would have been holding a locomotive and three men, and the whole logging operation up for the sake of pumping out a tank of oil, which could be done by one man after hours, anyway.

Q. How long would it take to pump it out? A. Between two and a half and four hours; depending on the size of the tank.

40 In this case it was a very big tank.

Q. What conversation did you have at two o'clock with Mr. Fraser as to the condition of the fire? A. At two o'clock, or approximately two o'clock, I cannot definitely place the time, but Mr. Fraser called up and asked me as to the condition of the fire, and I told him that the fire was in very serious shape, that we were

S. Cowan  
(Recalled)  
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tion.

Cowan, Re-Called for Plaintiff—Direct Examination.

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either shutting down or had shut down our mill and were turning every available man loose to fight it.

Q. Do you remember whether you had one or more conversations with Mr. Fraser that afternoon? A. I can only recollect the one.

Q. Now, you know the Sooke River green timber—is that what you call it? A. There is a fringe of green alder along a swamp that lies between the railroad and the Sooke River.

Q. And are there any houses down there? A. Yes.

Q. How many? A. There is one right in the middle of a clump of alder, and another right at the edge of the clump of alder.

Q. Were they occupied at this time? A. Yes, And in addition there was a tent down there that was occupied.

Mr. Maitland: I forgot to ask your Lordship's permission; I wanted to ask this witness about the over-size lumber that was mentioned by the witness this morning that he found there, on the question of over-run. Your Lordship will remember he said he was out there and he came across some over-size lumber. I want to ask this witness what that lumber was that was over-size lumber.

The Court: That is all right.

Q. What was that over-size lumber? A. That was an order for one by four by sixteen feet select common placed with us by the C.N.R. Railway and the order specified full size.

Q. What would that be? A. That meant that one-inch lumber ordinarily is considered up to size if it will dress down to standard thickness, which is three-quarters—or in other words seven-eighths lumber would ordinary go for one inch; but in this case they specified one inch, and we cut that order.

#### CROSS-EXAMINATION BY MR. MAYERS:

Q. You are quite hazy about the telephone conversations Tuesday? A. No, sir; I am quite clear on the recollection I have of the one telephone conversation.

Q. Your memory is quite definite, as you remember the telephone conversations, on what was said; is that right? A. Not as to the number of telephone conversations I had with Fraser.

Q. I see; you don't remember how many conversations you had with Fraser, is that right? A. I remember I had one with him.

Q. Is that right, witness, that you don't remember how many conversations you had with Mr. Fraser? A. My recollec-

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tion is that I had one conversation with Fraser.

Q. Is your memory hazy about that? A. About that one conversation? No.

Q. About the number of conversations, is it? A. No, the number is definite in my mind as one.

Q. Then your memory is not hazy? A. Not about that one conversation, no.

10 Q. But about the number of conversations? A. No, I have only got the one number of conversations in my mind.

Q. So that you are quite definite about that? A. Yes.

Q. You remember being examined for discovery, do you?  
A. Yes.

Q. What did you say in the first place as to the number of men that you were increasing your crew to, when you were speaking to Fraser? A. I didn't say anything about the number of men. I told him every available man.

20 Q. I will read what you said, in question 237—I will read a bit before that first—your answer to me: "I mentioned that we were increasing our crew to five"—did you say that? A. What time?

Q. Two, or two-thirty? A. No, sir, I don't recollect saying that.

Q. Why did you tell me that on your examination for discovery? A. Increase the crew to five?

Q. Yes, "We were increasing our crew to five"—why did you tell me that? A. I did not. I do not think so.

Q. Well, do you deny having said that? A. I would like to see the context of that, what it is dealing with.

30 Q. Do you deny you said that? A. I would like to see the context.

Q. Do you deny having said that? A. It was not in reference to the number of men we were taking to put the fire out.

The Court: Standing by itself, is that correct? A. I don't know what it has reference to, my Lord.

Q. Was it brought to your attention before? A. No, my Lord. I don't know what it has reference to.

40 Mr. Mayers: I am asking you whether in answer to my question you told me that in your conversation with Mr. Fraser about two or two-thirty you told him "that we were increasing our crew to five." Did you tell me that? A. No, sir, I did not.

Q. Now, did you tell Mr. Fraser that you had closed the mill down? A. No. I was not clear at the time in my mind as to whether we had shut down the mill then or whether we were just about to shut it down.

Q. But Mr. Fraser asked you why you had not told him before? A. Yes.

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Q. He did? A. Yes; and I told him that there was no telling where he was.

Q. Did you tell him that until twelve o'clock the fire had seemed to be practically under control? A. Yes, I did.

Q. Well, then, you seem to have told me all these things except the one that you deny, and this is your answer to 237.

Mr. Maitland: No, my learned friend cannot put that that way; he can say that that is the answer that he has read and the witness denies that he gave that answer.

10 Q. "(235 Q.) Had you any telephone conversations with anybody on the Tuesday afternoon August the 19th? (A.) Yes. (Q.) With whom? (A.) I recall one with Fraser. (Q.) What did you say to him? (A.) I cannot recall the exact words. But the gist of the conversation was, Mr. Fraser was anxious to know how the fire was, and I told him that she was extending her area, that due to the change of wind she had crossed the track, and that we were closing down the mill—I forget at the time whether we had closed the mill down or it was after my conversation with Bal  
20 Mukand; and I mentioned that we were increasing our crew to five. Mr. Fraser asked why I didn't let him know that morning. I am just giving you the gist of the conversation, not the exact words. And I told him that until twelve o'clock the fire had seemed to be practically under control. It was somewhere after twelve o'clock when the wind started to come up into a series of whirlwinds and began lifting the fire in every direction, and she immediately began to get out of control." Did you say that? A. Yes, sir, excepting there is obviously—

The Court: (Interrupting) Never mind. How many men  
30 had you employed at that time when you spoke about the fire? A. My Lord, we had in the neighborhood of twenty men, from what I can learn, though I wasn't on the spot. But there is obviously a mistake in the transcript; it doesn't read with the context.

Q. Five is ridiculous, you say? A. Yes.

Mr. Mayers: What should it be? A. Increasing the crew of men fighting fire.

Q. They were increased, the crew of men? A. They were increased, the crew of men to fight the fire. I say that that is a stenographic error. It does not fit in with the context.

40 Q. "(247 Q.) Your memory is hazy as to these telephone conversations on Tuesday, is it? (A.) Yes, I took no particular note of them." Did you say that? A. Yes, in regard to other conversations.

Q. And that is correct? A. That would be correct, in regard to other conversations.

Q. "(248 Q.) Did you have any telephone conversation with the dispatcher at Victoria? (A.) None that I recall. (Q.)

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Your memory does not serve you there? (A.) No." Is that right? A. That is correct.

Q. That is correct. A. It was a routine matter for me to talk to the dispatcher, with the other people.

Q. Do you happen to know what the system of the Imperial Oil Company was in regard to shipping oil? A. Yes, sir.

10 Q. That the Imperial Oil maintain a tank down at Point Ellice? A. I understand so.

Q. And when anybody ordered oil the Imperial Oil would advise the Canadian National to fill one of their cars; is that right? A. That is my understanding.

Q. And dispatch it? A. Yes, sir.

Q. Did I understand you to say that the lumber for the C.N.R. was over-size? A. There was one order specified full size, which was one by four by sixteen; I referred to that specifically.

20 Q. Is that the only order which was over-size? A. That was the only one I recall that was specified to be full size. That in cutting timbers, of which we shipped millions of feet to Brooks Brothers down at Minneapolis, their order called for full size sawn rough timbers. And that is the reason they were to be manufactured.

Q. Can you or can you not say whether the lumber in the yard at the time of the fire was specified to be over-size for others than the C.N.R.? A. My contact with the lumber in the yard physically was very slight. I remember the orders, that is all.

(Witness stands aside).

30 (The Court took recess for 5 minutes).

Mr. Maitland: I am finished.

The Court: I would like to discuss with you before you address the Jury the matter of whether questions should be submitted or not, and if so, the form of those questions.

40 Mr. Mayers: My Lord, I have an application to make with reference to a view. I would like the Jury to have an opportunity of now seeing the locality, after having heard all the evidence. And I would very strongly press that request, if the Jury think that it could be of any possible benefit. I would have any or all of my witnesses present, so that the Jury can ask any question of anybody on any matter or any subject they wish.

The Court: That would be too unsatisfactory; I don't know where it would end, if all the witnesses were there and they began to ask them questions.

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Mr. Mayers: Anything that the jury might want to know, we are anxious to satisfy them.

Mr. Maitland: So are we, but not that way.

The Court: What do you think, gentlemen? Personally, I have my own view of the matter, but I would rather you would express yours. Just retire for a moment, and consider whether you better—because you cannot discuss it here.

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(THE JURY HERE RETIRED.)

10 Mr. Maitland: I have, of course, very strong objection, even if they want to go out, on the question of taking the witnesses out. I let my witnesses go, on the basis that I would not need them.

The Court: Oh, I at once emphatically refuse to concede to that proposition. The trial is through, and the evidence has been given; and only now is a question of whether a view should be taken—which of course would be part of the evidence, it is true.

(THE JURY HERE RETURNED.)

The Court: Gentlemen, do you think any benefit could be gained by going out to have another view?

20 The Foreman: No, my Lord, we do not feel that it would help us any.

The Court: Then, so that I may try and do justice to Mr. Mayers' application, would you mind retiring again and I will see if he can give me any reason that I think can overcome your view. I do not want the Jury to hear the reasons.

(THE JURY HERE RETIRED.)

The Court: Now, Mr. Mayers, I can override them, of course. They are only stating what their view is.

30 Mr. Mayers: I do not think it is any use for me, if the Jury feel they are already satisfied upon the view of the locality, if they think they have enough information about it.

The Court: I think that is a reasonable way to look at it. I will call them in again.

(THE JURY HERE RETURNED.)

Mr. Mayers: My Lord, I would submit that questions are necessary, absolutely necessary in this case, because some of the points of law which may arise, and which will arise, are by no means simple or easy; and until we have the views of the Jury on the facts, establishing those, it is very difficult to frame any

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argument which would take in all the possible contingencies; in fact I don't really see how it can be done; because in addressing the Jury I would have to address myself to your Lordship in part on matters of law; and your Lordship would then have to give a most complicated and elaborate charge, embracing the whole variety of possible aspects of the case. And whereas if the Jury find answers to certain definite questions, it will lay the foundation for any subsequent argument on the law. I have drafted a series of questions, which I will submit cover all the aspects of this case; and if the questions are answered it will then be comparatively easy to ascertain what principles of law are applicable to that state of facts.

10

The Court: Speaking generally, I think questions should go to the Jury; I think it is quite right. And I think this discussion should take place in the absence of the Jury.

Mr. Mayers: I do not know that that is permissible, my Lord.

The Court: Oh, it is, by consent.

Mr. Mayers: Well, I could not consent, because that might prejudice my position.

20

Mr. Maitland: May I say a word on the question of the questions. As I understand the Rule regarding questions, it is this, that the questions that are put to a Jury are put by the learned trial judge, and he exercises his own discretion as to what questions shall be put, what form they shall take. I thought the practice was this, that both sides submitted to the presiding judge their set of questions, and the trial judge then gave the jury such questions as he thought fit.

The Court: In my experience it is done over and over again in the absence of the jury.

30

Mr. Maitland: What I was going to say, my Lord, was, that I entertained the assurance of Mr. Mayers that on the question of the fire he thought he would be a day and a half of this week, and I have not given the attention to these questions that I would like. I have seen his proposed questions, and I violently object to them; and I would like a chance to draw a set of my own, so that he can object to mine if he wishes to.

The Court: Unless Mr. Mayers opposes the suggestion of the Court that these questions be considered in the absence of the Jury, I will take the responsibility of instructing the Jury not to be present when the questions are being considered.

40

Mr. Mayers: I cannot consent to it, my Lord.

The Court: But if you do not oppose it, I will do it. Will you give me some reason why I should not do it ?

Mr. Mayers: I have no opinions of my own on the subject at all; but I have known courts to be severely commented on, upon the discussion of one branch of the case in the absence of

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the jury; and I do not wish to fall under the excommunication by the Court of Appeal for having assented, and failed to object to a course which the Court of Appeal has said ought not to be adopted. I have no opinion of my own, I just follow the Court's.

The Court: I take it from that, then, that while you are not consenting, you are leaving it to the Court to decide?

10 Mr. Mayers: No, I am objecting, my Lord, in order that I may do what I understand the Court of Appeal to say ought to be done.

The Court: All I can say, it will not be of very much benefit to the Jury to hear the discussion back and forward between Counsel as to the form of the questions. The Court will stand adjourned until 10 o'clock tomorrow; and you better frame your questions, Mr. Maitland, by that time. I have a few here.

Mr. Maitland: I thought the practice was for us both to hand up questions to the Judge; I didn't think Counsel had any say in those questions, it was for the learned Judge.

20 The Court: That is quite right. I may not adopt either one, but I consider they will be a guide. Here is what has occurred, the Judge prepares a set of questions, and they are submitted to Counsel; and the Counsel then, if he desires to have another question, may submit it. And then the shorthand notes would show that such and such a question was asked by a certain Counsel and submitted to the Court, and was refused or granted, as the case may be.

Mr. Mayers: So long as I get my questions on the record that is all I can ask for.

30 The Court: It is all in shape now, and typewritten, you can file it.

Mr. Mayers: I think I will, then, my Lord. Would your Lordship like to see them?

The Court: I will be glad to see them both tomorrow morning at half-past nine on my table. I would like to see them both together. I think we will make the adjournment until half-past ten.

Mr. Maitland: Would your Lordship give us to ten o'clock?

The Court: Well, ten o'clock; all right.

(Court here adjourned until 10:30 a.m. tomorrow).

40

.....  
 Tuesday, May 31st, 1932; at 10:30 a.m. (At 11:30)

The Court: I regret this delay—due to the discussion that took place last evening on the questions to be submitted to the

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Jury. At my suggestion both sides have submitted questions, which might be filed, and thus to that extent be of record. I have considered these questions. As I have already intimated, it has been my practice to settle the questions to be submitted to the Jury, in the absence of the Jury, and thus have a discussion, and perchance considerable assistance, as to their terms, perfectly unhampered by the presence of the Jury. Mr. Mayers, however, objected to this course being pursued, and contended that all  
 10 discussion should be in the presence of the Jury. Rather than have such a discussion before the Jury, particularly as to considering the involved matters of law and fact, I thought it better under the circumstances to frame such questions, which would, if properly answered, determine the liability. I repeat that I would have been pleased to have had assistance which might have been rendered through a discussion by the Counsel with respect to the questions that they submitted. In framing these questions I have endeavoured to attain the object to which I have referred, and have not put what might be termed cross-examining questions  
 20 to the Jury. My reason for endeavouring to avoid that course is that Mr. Justice McCreight, in the City of South Vancouver case, mentioned the result that might follow in that event, as follows: I will only add that cross-examining questions to be left to a jury like these two proposed by the defence, are not to be encouraged, if they are included to induce a jury to stand on their undoubted right to return a general verdict, whereas proper questions may be very useful in avoiding the expense of a new trial.

And I might add, fearing I may forget it later on, that it is my desire that the Jury should answer the questions, though, as  
 30 is mentioned by that learned Judge, they have the undoubted right to pursue a different course.

I think it out of place for me to refer to the questions submitted by Counsel, which have given me concern in this connection,—that is as to their nature. I will only add a word, however, with respect to one question, which both Counsel seem to agree should be submitted; and that is, in these I have framed is numbered 20—I doubt if it has any application to a case of this kind; however, seeing that both Counsel seem to agree that it has an application, I will submit to you gentlemen later on, what I trust  
 40 will be remarks that will enable you to deal with it satisfactorily.

I can only say in conclusion on this matter, that the responsibility for the framework of the questions rests upon my shoulders, and I accept my responsibility. I think it only fair to Counsel, and especially the Counsel who first addresses the Jury, that he should have an opportunity of considering these questions, for a moment or two, if he so desires, before he addresses the Jury.

Mr. Mayers: That is very good of Your Lordship; I should

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like to do so; but my address will take some little time, and I may have an opportunity of reading the questions during the lunch interval; so that I can say something about them before I conclude my address.

The Court: That will be satisfactory.

Mr. Mayers: May I have an exhibit number for my questions?

10 The Court: I cannot treat them as an exhibit. They will be of record.

Mr. Mayers: In any case, as long as it is part of the record.

The Court: They are filed; but you cannot treat it as an exhibit at the trial, because in that case the Jury would be entitled to see it.

Mr. Mayers: Not necessarily. As long as it is identified.

The Court: Identified by the Registrar—put your initials on the corner, and the date, that is all. You see the point, Mr. Mayers, if it is an exhibit then it is evidence. Give Mr. Mayers these questions (copies handed to both Counsel).

20 Mr. Mayers addressed the Jury.

(Court adjourned, until 2 p.m. today).

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Mr. Mayers concluded his address.

Mr. Maitland addressed the Jury.

The Court: Gentlemen of the Jury, after I have instructed you, you cannot separate. I am ready to go on now, and pleased to go on; but of course the other alternative would be to wait until the morning, and have a clear day ahead of you.

30 The Foreman: I wish you would. We have been in court all day now, we have listened to two long speeches, doubtless our brains are not quite as bright as they would be in the morning; we would be much better able to assimilate what your Lordship has to say.

The Court: Then we will start at ten o'clock tomorrow morning. It is better for the Jury not to take away any copies of the questions. And do not, although you have heard the addresses of Counsel, and may have individually formed some opinion as to what you think about the case, do not confer with one another in the meantime; and of course it follows, do not confer with anybody else. In other words, keep your minds clear until tomorrow. I mean that I cannot of course destroy your individual opinions as you may feel at the present time, but do not consult with one

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another as to what your collective opinion is.

(Court here adjourned, until tomorrow at 10 a.m.)

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Wednesday, June 1st, 1932; at 10 a.m.

**No. 10**

**Charge To Jury.**

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The Court: Mr. Foreman, and Gentlemen of the Jury: Plaintiff seeks to recover from the defendant a loss of over two hundred thousand dollars that it alleges it suffered, through destruction of its property by fire, on or about the 19th of August, 1930. It  
10 alleges that this fire, and consequent damage, arose from the defendant negligently causing, or permitting, a fire to start upon its right-of-way, near a point which has been called mile 35.2, some distance from the City of Victoria and a short distance from the sawmill owned and operated by the plaintiff at Kapoor, B. C. The basis of this action is negligence, on the part of the defendant, involving loss and liability. Where this occurs, the burden is cast upon the party asserting it, of proving the negligence by direct evidence, or by facts from which a court or jury may draw inferences, on a reasonable foundation, of such negligence.

20 As to the definition of negligence, there are many afforded by the textbooks; but, in a somewhat involved form, this is the definition usually accepted: It is the omitting to do something that a reasonable man would do, or the doing of something which a reasonable man would not do. It very often involves a breach of duty on the part of the party who is alleged to have been guilty of negligence. An easier definition, to my mind, is that it is a want of care according to the circumstances. Of course this want of care would vary according to the conditions. There would be a greater degree of care required at one time than another. So negligence varies as the required care varies. As to care or precaution  
30 which should be taken to avoid causing injury, I repeat this forms an essential feature of an action of negligence. Bear this in mind, then, during the course of my remarks, and when you come to deliberate upon the facts later on.

Fire is a very destructive element; and long ago it imposed very grave responsibilities upon an owner, where it occurred upon his property even by accident. He became, at common law, as far as a neighbouring owner is concerned, practically an insurer. This was referred to by Mr. Justice Idington, in the case of Laid-

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law v. Crows Nest Southern Railroad Company, to which case I will refer later on, on another aspect of the matter. In that case the learned Judge said: "At common law the liability of a possessor of land for the spreading of fire originating on his land was practically so great as to render him an insurer." This heavy burden, however, was lifted materially by subsequent legislation. The law, irrespective of any special liability which may attach to a railway company, is stated by Mr. Justice Duff in *Wilson v. Port Coquitlam*. In that case he said, "It may be taken to be the law that fires intentionally lighted, and fires arising through negligence, are outside the statute—that is protecting or remedial statutes to which I have referred—and that responsibility in respect to them is governed by the common law."

Then, particularly as to railway companies, and their responsibility for fires caused by their locomotives, the Parliament of Canada, presumably having in mind the danger attached to the operation of locomotives by railway companies, especially at certain seasons of the year, enacted a statute, with amendments from time to time. Railway companies receive exceptional privileges, and it seemed proper to Parliament that they should also bear certain burdens or restrictions. One of these, with respect to fires from locomotives, is Section 387 of the Railway Act. It in part reads as follows: "Whenever damage is caused to any property by a fire started by any railway locomotive, the company operating the railway on which the locomotive is being used, whether guilty of negligence or not, shall be liable for such damage, and may be sued for the recovery of the amount of such damage in any court of competent jurisdiction." Then there are some provisions with respect to this liability; in the first place, if the company has used modern and efficient appliances, and has not been otherwise guilty of negligence, the total amount of compensation recoverable is not to exceed five thousand dollars. And then if there is insurance effected by the party who suffered the loss, that insurance is taken into consideration, and, if more than five thousand dollars, then the section, so far as its drastic form to which I have referred, has no further effect. But there still remains the question of negligence to be considered. This enactment has been considered in many judgments in our Canadian courts. It came before the Privy Council for consideration in the *Blue & Deschamps* case, 1909 A. C. (361). There Lord Shaw, delivering the judgment of the Privy Council, referred to this legislation as follows: "When damage is caused by a fire started by a railway locomotive, the company, whether guilty of negligence or not, shall be liable, a proviso being added that the liability shall be limited to \$5,000 if no negligence be proved." I stress that again for your consideration. And then he adds, "It is plain that, if the com-

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pany did not maintain and keep its right of way free from combustible matter, they directly contravened the substantive provision of the statute. This negligence the Jury has affirmed.”

10 So, to clear up this aspect of the case, I think you will clearly understand, that under this provision relating to railway companies, and the operation of the locomotives—I am repeating myself—the liability is limited to \$5,000, and if the insurance is beyond that amount, there is no liability attached as against the railway company, if two things happen, that it is proved they are using modern efficient appliances, then there is no negligence on the part of the railway company. So, then, you have to consider whether the railway company has used modern efficient appliances, and, secondly, whether it has been guilty of negligence causing or contributing to the fire.

20 As to the first proposition, plaintiff contends that the fire started through sparks thrown by the defendant’s locomotive. It is for you to determine whether this contention has been proved to your satisfaction. You must consider the facts that have been adduced, and you are entitled to draw therefrom reasonable inferences. I will submit a question on this point.

30 Then, as you understood from the address of Counsel for the Plaintiff, he seeks to recover on behalf of his client, if failing with respect to the sparks from a locomotive having started the fire, that in any event the fire causing the damage originated on defendant’s right of way, which is admittedly 100 feet in width. Further, that the defendant had knowledge of such fire, and that a responsibility thereby arose, requiring the Defendant to control, and if possible, extinguish such fire. To put it another way, that a fire on the part of the defendant company in this respect constituted actionable negligence on the part of the defendant.

40 I have already incidentally referred to the case of *Laidlaw v. The Crows Nest Southern Railway Co.* Now, a situation in that case arose somewhat similar to the one here presented. At the trial before Mr. Justice Irving, he found that upon the evidence he could not lay at the door of the railway company the starting of this fire causing damage to the plaintiff. It was contended later on, particularly in the Supreme Court of Canada, that the evidence showed that the fire had originated on the right of way of the defendant company, and that it not having taken the necessary steps to control or extinguish the fire, a liability thus arose. The difficulty, however, was, according to the majority of the court in the Supreme Court of Canada, that this issue had not been pleaded nor presented at the trial. Mr. Justice Idington gave a dissenting judgment, and it appears to me from that, that you can see the distinction between such case and the one you are now considering. He made the reference which I have mentioned,

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as to the common law liability, and then added: "This clearly does not abrogate the entire common law relative to liability for fire once started, whether accidentally or otherwise. The owner of land is merely relieved from the inevitable consequences of such an accident. It leaves the avoidable consequences to be dealt with by applying those well known principles of justice and reason which are represented by the maxim 'sic utere tuo ut alienum non laedas'." To give that a practical translation it amounts to this, "You shall so use your property as not to injure your neighbour." And then he adds: "Was it reasonable or just for the respondents to have, to the knowledge of their employees (as the answers of their secretary to interrogatories show was done), the extinguishable fire in question on their premises from early in the morning of the 7th day of September and at other times in the forenoon of the 7th day of September?" And then he goes on to discuss the injustice of depriving the plaintiff Laidlaw of his rights through the lack of pleading, as the majority of the court held was the case.

20 Then a portion of the judgment of Anglin, J, now Chief Justice of Canada, elaborates the point I am endeavouring to draw to your attention. I am taking somewhat longer time than I would otherwise, on account of the importance that attaches to this phase of the case. He said: "The plaintiff's action was brought to recover damages sustained by them through the destruction by fire of a portion of a valuable timber limit. They charged that the fire in question originated on the right of way of the defendant railway company and was caused by sparks of fire negligently allowed to escape from an engine. They also charged

30 that the right of way was encumbered with combustible material facilitating the spread of the fire; and, finally, that the defendants were negligent in not preventing the spread of the fire and in allowing it to reach the plaintiff's land. At the trial the attention of all parties was directed to the effort made by the plaintiffs to establish that the fire was caused by sparks of fire which escaped from an engine of the defendant company. The learned trial judge held that the plaintiffs had failed to establish that this was the origin of the fire, although they probably had established that the fire was first seen upon the defendants' right-of-way. The learned

40 judge was of opinion that unless the fire was shewn to have originated from the operation of an engine the condition of the right-of-way did not constitute actionable negligence. No other ground of action appears to have been urged at the trial. Nothing was there said in argument of the allegation now put forward that the defendants through their servants had notice of the existence upon their right-of-way of the fire which eventually spread to the plaintiff's lands and were guilty of actionable negligence in not

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extinguishing it. Neither is any such cause of action alluded to in the notice of appeal to the Supreme Court of British Columbia, which affirmed the judgment in favour of the defendants."

10 So it must be clear to you that, from my reading of this portion of the judgment, the point that was solely passed upon by the trial judge was the one that was taken into consideration by the Supreme Court of Canada, and had the other ground been advanced, it would have been considered, and, if my view of the law be correct, would have created, if the facts warranted, actionable negligence.

20 I might read a further portion of that judgment, the judgment of Mr. Justice Anglin: "The duty of the defendants to maintain a clear right-of-way is inseparably connected with the operation of their railway. There is no such duty imposed upon them as mere land owners and, without proof of knowledge or notice of the existence of a fire, not shown to have been caused by the operation of their railway, the fact that the condition of their right-of-way facilitated its spread does not, in my opinion, amount to actionable negligence." Reading that as it were between the lines, the learned Judge is stating the law to be that, had there been such a fire with knowledge or notice of the existence of such fire, then it constituted actionable negligence.

Here, as I have already mentioned, the plaintiff has pleaded, and submitted evidence, as well as argument along the lines of what I may term the alternative cause of action.

30 So that, then, you come to consider two points in connection with this cause of action, based upon fire existing upon a railway company's right-of-way, and that fire coming to the knowledge of the railway company, in the space that it should control or extinguish the fire.

40 In the first place you have the important point to consider, as to whether the fire originated on or off the defendant's right-of-way. That has been drawn to your attention pointedly during the trial, and during the able arguments submitted by both Counsel. It is an important feature of the trial. And it is a matter of fact, and thus especially within your province. I will make very few remarks with respect to it, nor will I attempt to canvass the evidence, on this or any other point, in this lengthy trial. Might I say a word in this connection—it has been a lengthy trial, but the importance of it is apparent. And I might be allowed to say, I compliment Counsel on the way the trial has been conducted. I do not think that Counsel could have been more expeditious than they have been in bringing the evidence forward for your consideration. It was placed in very good order, there was no delay, and, I repeat, it is worthy of commendation from the Bench.

Now, as to this important point, in considering it, you will

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probably think for a moment or two as to just the course of events with respect to this fire, and what transpired afterwards; particularly, as to what has been termed the fire enquiry. Will you in your deliberations ponder upon what I think would be two points uppermost in the minds of those concerned at the time—and when I say that, I am only giving you my view as to what would be in the minds of the parties under those circumstances, and do not wish for a moment to interfere with your prerogative.

- 10 What, then, would persons concerned in a fire bear in mind? First, probably the railway company would deplore the destruction of business which ensued to both parties. It is quite apparent plaintiff company was a good customer of the railway company. To that extent the destruction of property would mean a curtailment of the revenue which is to be desired with respect to all railroads. Then, what next would be considered by both sides? Who is to blame? Wouldn't that be the enquiry they would make? Here is a fire, and great destruction has ensued in connection with that; would the minds of those especially holding responsible
- 20 positions be directed to the origin of the fire, as distinguished, even, from the cause of the fire? The two matters are distinct. If it originated on the right-of-way of the railway company, it would naturally follow that some responsibility, the extent of which probably they would take legal advice, showed, as to what length it reached. Then, again, the party injured—well, one is prone to blame someone else, naturally, and that would operate in the direction of seeing upon what basis it could be found that fault had occurred on the part of the railway company. If those
- 30 in control of the plaintiff Company felt that they had a weak case, as far as showing that sparks had actually come from a locomotive, and caused the fire, then they would begin to consider, Well, if that fire started on the railway right-of-way should not the railway company have looked after the fire—I am using ordinary everyday language. That is for you to consider. You have heard the discussion of Counsel, especially as to this important question as to where that fire originated. I doubt that I could assist you very much upon that point. There is a conflict between the witnesses, as to that point of origin. And also as to where the fire spread to, irrespective of the point of origin.

- 40 Now, when you find two stories, one opposed to the other, you have a right to apply what is known as the doctrine of probabilities. Lord Loreburn, in the Privy Council, referred to this as being of assistance in determining which of two stories might be accepted. He said this: "Something more is needed than the state of facts which is consistent with one view or the other. That something more is supplied if there is a probability one way or the other. No one can frame a formula by which one can measure

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probabilities. We must judge in each case as we should in other affairs in life." If I am allowed to say so, that must appeal to your reason and judgment.

- There has been a mass of evidence on this point, most of it by parties interested on one side or the other—I use that term broadly. Can you place Dunn in that same category? That is for you to say. Weighing evidence is the peculiar, and to my mind a very proper, right possessed by a jury. It is their peculiar privilege.
- 10 And that is what a jury is often selected for. And upon questions of fact, credibility of witnesses, I am certainly not an advocate of removing the right possessed by parties in actions of negligence to resort to a jury for a verdict. It is not out of place for me to say that in some provinces within the Dominion of Canada there has been an agitation in that respect. I remember when it was brewing in Manitoba. It was incumbent upon the party applying for the trial of an action by a jury, in the days long before automobiles came into use, to show to the satisfaction of the judge that the jury could better try the action than the judge. Well, it
- 20 rather required of counsel a considerable weight of assurance to make the argument and prevail; and very seldom did it prevail.

- Then, again, in considering these witnesses on this point, you will probably think, Well, now, which of these witnesses, or which body of witnesses, had the better opportunity of coming to a decision as to the point of origin? That point has been drawn to your attention by Counsel. I am speaking irrespective of Dunn, even, although, remember, he was an official, with some authority at any rate, on the ground—he was endeavouring to control that fire, as it was his duty to do, irrespective of where the liability
- 30 rested. When a fire takes place, it seems to me it is a sort of a common enemy, and everybody proposes, if they have got any feeling at all in the matter, to fight that fire. But here, as far as Dunn was concerned, it was his duty, it was his appointment to cover. If you believe his evidence that he was there and saw the point of origin of that fire, that in the presence of Fraser he went around and saw the extent of that fire, not once but twice, knew the exact location—if you do, it would be of great assistance to you in coming to a conclusion as to which of these stories as to the origin of the fire is to be accepted. However, I am canvassing
- 40 this portion of the evidence at greater length than I intended. You remember, as against that, you have employee after employee coming forward and saying that they recollect where that fire took place, and noticed some time after, and that they were able to go back there, and within approaching two years, designate the spot sufficiently to have it photographed—or rather the locality photographed, so that that could be produced at the trial in order to satisfy the jury as to their not only having located the point,

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but the distance it was from the track; meaning, if my memory serves me right, that in the case of each of the points that were selected by these witnesses, it was outside of the right-of-way.

As to the evidence, let me at this point add, that you must not be governed by my recollection, in the slightest; that burden is cast upon you. Further than that, if in your deliberations one or more of you may say that the Judge's recollection was wrong, along certain lines, discard it immediately; discard it if it does  
 10 not agree with your recollection. Then, further, if in your deliberations you come to a point where you do not agree upon some essential point of the evidence, the shorthand notes have been extended, and they will be available for your assistance.

Then, as to weighing evidence, which means the credit to be attached to it, you have to consider whether the witnesses are disinterested or otherwise, as to their integrity, and also, naturally, as to their veracity. That, amongst a mass of witnesses, is rather difficult—the latter proposition—but you might also consider what I have already referred to as to the means of knowledge,  
 20 assuming that witnesses as a rule tell the truth; and his powers of observation—whether such and such an event would be photographed into the mind of the witness or not, or whether it would be a passing incident in his everyday life. These are matters I am entitled to point out to you, which are also to be considered, and seem to me to be worthy of consideration. I repeat, however, this matter of evidence is wholly within your province. You have listened closely to the evidence; and your united recollection, aside from the conclusions you may reach, as to what that evidence is, is more likely to be correct than mine.

Then, if—and I emphasize that little word, if, you have concluded the fire commenced or originated, whichever term seems the more applicable, upon the Defendant's right-of-way, did it spread to the neighbouring property, and cause the destruction alleged by the Plaintiff? There, again, that is a question of fact for you to determine. It is suggested by the Defendant that if such a fire originated, or you should so find, that still, as to the buildings and timber, that it did not cause the loss by fire of this property. I do not think it necessary for me to discuss that.  
 30 You have heard the proposition put forward. It is for you to determine as to that. But even, for the moment, laying aside the question as to the extent of the damage suffered, if it spread from the right-of-way that would be a point for you to determine, if you have passed the other question as to its origin.

Then, again, in that connection you have two points to consider: did the Defendant have knowledge that the fire existed, and if so, did it take proper or efficient steps to control and extinguish that fire? If a neighbouring property is on fire, say in a

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row of houses, and you were in possession of your home, and it appears probable that the fire is going to spread from a house which is unoccupied, it is true you might go to that house to see what you could do to stop the fire, and take such means as are available, so that you will not be injured; and the means at hand, if the fire is the fault of the owner of that property, could not be found fault with by such owner if he had knowledge and takes no steps himself to avert the disaster. There is another phase  
 10 of that situation, however, worthy of consideration; you, in your house, are not supposed to stand idly by and allow your property to be consumed, you may go to assist your neighbour, or you may determine to protect yourself. That has not been advanced in argument by either Counsel, or considered at any length during the trial, but it is not out of place for me to refer to that—and I may say a word or two later on in that respect.

Suffice, then, as to the point as to whether or no the Defendant took any steps to avert what appeared to be disaster that was going to ensue from a fire on its property, that is assuming that  
 20 you find knowledge on the part of the Defendant Company, the next point for you to consider is as to whether or no the Defendant kept its right of way in the condition required by the law. I have already referred to the danger attached to the operation of railways with locomotives used for motive power. The statute requires that a railway company shall at all times maintain and keep its right-of-way free from dead or dry grass, weeds, and other unnecessary combustible matter. You will notice that provision covers the entire period of the year, at least there is no period of the year that is limited, during which it may depart  
 30 from this statutory provision. It has been held by a decision of our courts that this duty is absolute. If a breach occurs, and through that breach injury is suffered, then liability ensues. There again you are the judges as to the evidence, you see, on the point as to origin, which stands by itself.

But there are two points further, if you have established to your satisfaction that the fire originated on Defendant's right-of-way, then you have a right to consider whether it spread through the negligent conduct of the Defendant, if you so find, with respect to the condition of its right-of-way. And you have the other  
 40 branch of it, and irrespective of that, did it spread because of or through the lack of precautions taken by the Defendant Railway Company to prevent such spreading?

I have tried to make it clear to you, then, that there are three important points standing out for your consideration. In doing so, I must not overlook any minor points that may, in your opinion, be important on the question of liability.

If you have found that the fire originated on the Defend-

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ant's right-of-way, and that it spread to the Plaintiff's property, under the conditions to which I have made reference, then are you satisfied that it went further, and consumed practically all the Plaintiff's property, except the sawmill, which was insured, and saved?

10 Now, I have prepared, with some difficulty, as I had not the usual assistance afforded by counsel, questions for your consideration. They are somewhat lengthy, and, to some extent, a repetition, that is, they cover in a limited way, the same ground. Have you got the questions in front of you?

The Foreman: We have all got them in front of us.

The Court: The first question, as to whether the fire started by an engine of the defendant, I have already referred to, and will say nothing further. Then, as to the second question, I need add nothing further.

20 And the third question is linked up with the first. Then you come to the important question, which I have endeavoured to cover somewhat at length, that is the origin of the fire. The fifth question I do not think requires further discussion; or the sixth. The same remarks will apply to the seventh, eighth, ninth and tenth. We come, then to the eleventh. That question was inserted because in those questions submitted by Counsel for the defendant it appeared; I thought it was fair to have it answered, and obtain an answer from you; as to the legal effect that may follow from your answers, that is a matter that I will deal with at the proper time. It might be a little better worded in the second line of that question,—did N. S. Fraser on behalf of the defendant Company tender the services of himself and his men—  
30 is put too broadly; you better in your answer, if you deal with that question, if you say that he did tender, say to whom it was; and then if it be the fact, or at least you so find he did not tender to the plaintiff Company, that is for you to say.

Then the twelfth question, to be candid, I do not like the form of it, but it is not of such importance that I will delay the trial by reconstructing that question. I followed more or less the form that was adopted by Counsel for the defendant in his question.

40 The Foreman: Can you give us any help, my Lord, on the standing of a Forest Ranger at such a period? if he says, Take your men away, is that a command? or is it an offer of opinion? Is he the man in charge?

The Court: Well, there you are then asking me a question of law, without having the foundation on which I could base it. I prefer for you to deal with the facts and I will find the law afterwards. You see, it has already been referred to, that question 12 involves almost two answers to it.

I have already dealt with questions 13 and 14, I think. Now

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as to the 15th question, in a sense you will have already dealt with that in your answers to the previous questions; and they are, of course, the repetition to which I have referred. However, it is submitted by both Counsel, and I incorporate it in my questions. But in answering it you should be careful not to bring about a result, which has happened with juries, a number of questions submitted and they have answered questions in such a manner that it was unsatisfactory, not so much to the trial judge, who

10 has not time to give it the consideration, but afterwards to a Court of Appeal, and result in a new trial, with attendant expense. Was the defendant guilty of negligence causing or contributing to the said fire? If you pass the stage as to the Question of what started the fire, and are unable on that point to agree with the contention of the plaintiff that it was started by an engine, then you come to the consideration of the other point—that is, if you so find. I repeat, that it is for you to determine. I have got to express in that way so as to make it clear—with respect to the lack of control, failure to extinguish, condition of the right of

20 way—assisting in the spread of the fire.

Then, 16 really involves a portion of the answer that you may or may not give to 15. “Negligent thereafter in connection with said fire,” the contention made by the plaintiff is that they held back and did nothing; the reason being one that I cannot discuss with you, because I am not aware of what the reason was. But it is suggested by the plaintiff that they improperly stood by and allowed the fighting to be done by the party that was not responsible. Of course self-preservation is apparent to a person, with respect to the body, and I suppose it is with respect to prop-

30 erty as well. And 17 is dovetailed in with 16.

18. Was the plaintiff Company guilty of negligence in connection with said fire? Well, I have not heard any allegation made that the plaintiff Company as far as the starting of the fire is concerned committed any act of negligence. But the question is put rather particularly, and I followed the question suggested. “In connection with said fire,” that must, if it has any applica-

40 tion at all, apply to what occurred afterwards. I have already intimated that what one may do under circumstances where you are cool, say in a court room, and what you may do in the excitement of a fire, are two different things altogether; especially when you see a property in jeopardy from an approaching fire. However, those are matters for you to consider. I have already stated that it was a duty of the plaintiff Company itself not to stand idly by and see the property destroyed.

It was not followed very closely as to this idea of the dynamite that it is suggested was in the lumber piles, whether that caused explosions later on or not; that seems to be a contested

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point. If they were encouraging the fire it might be a matter for you to consider why they did not allow the sawmill to burn down as well. However, those are all collateral matters.

10 Then there is contest as to whether they should have used the tank; and as to where the derailment took place. Now you may decide, again it is for you, that the railway company is right, that the derailment was not where the plaintiff's witnesses now contend it was. I do not suppose that in any excitement of that nature anyone is particularly careful to note exactly what has happened, and where certain things were, and what certain persons did—I am now speaking of the time when the conflagration got out of hand.

As to question 20, you heard the discussions with regard to that. Counsel both seemed anxious to have that submitted, for as I have already mentioned, it appeared in both sets of questions; and you need not pass upon it at all—I will take the responsibility of taking that course.

20 Then you come to the question of damages. I remember well a trial taking place when I was counsel where on the question of liability certain questions were submitted to the jury; and then after some little time spent—I think it was at Cranbrook it took place—they came in and gave answers that, in the opinion of the trial judge, involved liability, and then the jury were sent back to consider the question of damages. But I am not going to pursue that course; I think it is just as well for you to deal with all the questions, and the whole situation as you find it, according to these questions.

30 Now as to the questions, you are, for the purpose of assisting in this trial, not compelled to follow my instructions as to answering these questions; but I prefer that you should do so. It is of assistance, especially in actions of negligence, to have the answers of a jury to questions that may be submitted. But when I say that, I must also, in carrying out what I consider my duty, tell you that it is within your province to bring in what is called a general verdict. A general verdict means a verdict for the defendant or a verdict for the plaintiff; and if for the plaintiff, to assess the proper amount of damages. If you have determined to answer the questions, however, and proceeding along those  
40 lines, you can well come to a conclusion as to whether your answers involve liability or not. If you are in doubt during the trend of your deliberations, to this extent, as to whether your answers have produced such a result, I do not think it out of place, when you have reached say questions 12 or 13 or 14, to come out and ask for my advice as to whether you should proceed further. Or, assuming that your conclusions are in a direction that they involve liability, then proceed without coming for further direction at

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all; and proceed then to answer as far as you can all the questions, except question 20; and then deal with the question of damages.

Now, as to damages, I have already intimated during this trial that it is a difficult matter for a jury to arrive at any degree of accuracy on the extent of the loss that was suffered by the plaintiff through a fire. I am speaking of that in a general way; a fire of that kind, destroying practically all of the sawmill plant except the sawmill itself; it destroys the very basis upon which you can determine what existed before. So that the plaintiff is put in this position, that it is required to reconstruct, as it were, the situation existing before the fire, and present it for the consideration of the jury to determine the amount of damage it has suffered. As against that, the defendant, handicapped it is true, to some extent, as well, requires then to do the best he can to satisfy the jury that the amount is excessive. I quite appreciate your difficulty on that branch of the case. All I can say to you is, to be fair and reasonable, to do the best you can under the circumstances. You may retire.

20 Mr. Mayers: My Lord, there are some matters I wish to speak to. I would ask your Lordship to charge the Jury that the Statute of Anne, like our own statute, is expressed in wide terms. No owner of land is to be made liable for the consequences of an accidental fire. An accidental fire includes the case of a fire produced by mere chance or incapable of being traced to any cause.

I would ask your Lordship to instruct the Jury that in considering the question of danger from a locomotive they should take into consideration the Board's order 362 exempted oil burning engines from any fire protective device.

30 I would ask your Lordship to charge the Jury that the burden of proof of showing that any fire was started by the locomotive is upon the Plaintiff.

I would ask your Lordship to charge the Jury on the question of whether we used modern and efficient appliances; that there is no evidence to the contrary. May I assist your Lordship by pointing out what I was referring to?

The Court: Yes, do that. Oh yes. I remember it now.

Mr. Mayers: I would ask your Lordship to charge the Jury that in regard to the width of the right of-way, that means 50 feet on each side of the centre line.

The Court: Yes.

Mr. Mayers: I would ask your Lordship to charge the Jury that the facts of other cases are not relevant to this enquiry, and can be of no assistance in determining the facts of this case.

The Court: Quite right.

Mr. Mayers: I would ask your Lordship to charge the Jury that they should dismiss from their minds all considerations

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arising from the Fire Marshall's Enquiry, seeing that they have no knowledge, and no means of knowledge, of what witnesses were called, or what was the evidence, or the atmosphere in that Enquiry.

The Court: Why ask that? I do not know, and I do not know that the Jury know what the finding was.

Mr. Mayers: I understood your Lordship to make some reference to the Fire Enquiry.

10 The Court: No, only as to what was in the minds of the parties; not as to the Enquiry—which I did not know.

Mr. Mayers: But I should like to have it made clear to the Jury that nothing connected with the Fire Enquiry, or anything relating to the Fire Enquiry has any relevance to this enquiry.

I would ask your Lordship to charge the Jury that the witness Dunn did not pretend to, and had no means of knowing anything about the origin of the fire, seeing that he arrived at the scene of the fire many hours after it started.

20 I would ask your Lordship to charge the Jury that in considering the condition of the right of way the Jury is entitled to read and consider the Board's order 362, and Mr. Clyde Leavitt's regulations made under the order.

The Court: What part is it, do you know?

Mr. Mayers: I think it is 10, of the order—yes; 10, and especially B—and the certificate of the secretary.

The Court: What do you call his name?

Mr. Mayers: Clyde Leavitt. That is the certificate of Cartwright; but the rules are made by Clyde Leavitt.

30 The Court: Mr. Mayers, you better develop this last one; I do not quite appreciate your point.

Mr. Mayers: I argued it, my Lord, to the Jury, to the effect that the condition of the right-of-way was one which had to be—or, rather, I should say this, that the railway company had to keep their right-of-way in such a condition as the chief fire inspector of the Board may prescribe by his rules and regulations.

Mr. Maitland: That is not what the Act says.

The Court: Does it over-ride the statute? The statute over-rides any order of this kind—if there is any consequence to that point.

40 Mr. Mayers: My submission is this, my Lord, whatever the statute says must be construed with regard to the condition and circumstances of the particular part of the right-of-way in question; that the particular part of any right-of-way in question is subject to the order of the Board, by statute also, which they exercise by means of instructions under the instruction of their chief inspector; that their chief inspector has issued instructions, issued such instructions as he considered were necessary; and in

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order to insure further safety has committed the supervision and inspection of the right-of-way to the officials, the forest rangers and inspectors of British Columbia.

The Court: Is that all?

10 Mr. Mayers: I have one more, my Lord; with regard to question 18, that is the plaintiff's negligence. I would ask your Lordship to instruct the Jury that there are five matters to be considered under that heading, namely, whether the fire near mile 35.2 could have been put out on the Monday, either by water from Sooke River, or by earth, or by the tank car of the Kapoor Lumber Company. And also that under the same heading should be considered the question of the presence of dynamite in the lumber yard, and the cutting off of water in the lumber yard. And finally, that even if the defendant were guilty of negligence, the plaintiff was bound to use reasonable efforts to preserve its property. When the fire escaped the plaintiff had no right to fold its arms and permit its property to be consumed, without any efforts towards preservation.

20 The Court: Well, I covered that ground, surely. I would like to hear you with respect to the effects of this order of the Railway Board, as far as the statutory provisions are concerned as to keeping the right-of-way.

30 Mr. Maitland: I simply say that what my friend has tried to do, apparently, is to put before the Jury again his observations yesterday, when he called Mr. Leavitt of Ottawa as a witness in British Columbia. They have power under 281 to make orders and regulations relative to fire protection. With that I am not concerned. I say under 280 of the Act, which is the statute itself, and which neither Mr. Leavitt by facts or Mr. Mayers by argument can do away with, the company shall at all times maintain and keep its right-of-way free from dead or dry grass, weeds (reading from Section). Now whatever regulations they may make, precautionary or otherwise, that statute stands, and always has stood. That is one obligation they have it does not matter what Leavitt does. My friend had the opportunity yesterday to ask the Jury to bear that in mind. I cannot disagree with his right to do that. But I say that section 280 of the Railway Act, that is the section after all that is there, and cannot be changed.

40 The Court: Have you anything further to say with respect to the charge?

Mr. Maitland: No, my Lord, I have nothing, except I would like, with the greatest respect, my Lord, to say that I would prefer that question 20 be inserted. Your Lordship mentioned to the Jury that Mr. Mayers had wanted it answered—but I feel that it should be answered. And I just want to be in the position of saying that I prefer that it be answered, that is all.

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The Court: To protect yourself.

Mr. Maitland: Yes—as nicely as I can.

The Court: You have done it very nicely.

There are several points that Mr. Mayers thinks I should submit to you, and considers I ought to submit to you.

The Statute of Anne, and its effect,—I made it clear to you—I will repeat myself perhaps on that point. Mr. Justice Idington said, in the Laidlaw case, the owner of property allowing fire, whether accidentally or through negligence, to occur on his property, became an insurer of his neighbour's property. That was found to be such a heavy burden that legislation stepped in. First the Statute of Anne, and then further statutes were passed; and the result was, just as the statute says, that with respect to an accidental fire, no matter what—that there is no liability attached. If that accidental fire occurs, I instruct you, and I take the responsibility in that connection, and the owner takes no steps whatever to extinguish that fire, having become aware of the fire, he has allowed a nuisance to exist on his property,—as Chief Justice Hunter referred to in a case,—and it becomes actionable negligence. Now, can I make that any clearer?

The Foreman: That is clear.

The Court: Now, Mr. Mayers, what section is that dealing with the oil burning?

Mr. Mayers: The second, my Lord.

The Court: Then, Mr. Mayers asked that I draw to your attention that the provision exempting locomotives using oil as fuel, from certain requirements of order 362—that is quite correct. It was drawn to your attention already. And to that extent I am repeating his argument he presented to you on that point.

And then it is sought to have the jury further instructed upon the burden of proof. I thought I made that clear, that negligence alleged must be proved; you must not act upon suspicion. If you think in your mind that certain things occurred, that is not sufficient, it must be brought home to the jury, by what I think I remember I said by direct evidence, or facts proved from which you can draw reasonable inferences. That occurs over and over again, in every trial. In the absence of direct evidence we may find facts proved, and then a jury or judge is called upon to say whether from those facts I consider I am entitled to draw such and such an inference.

Then as to whether the railway company used modern efficient appliances, I am asked to instruct you or direct your attention to the fact, which must be apparent to your mind, that upon that branch of the case the plaintiff did not adduce any evidence at all.

Mr. Maitland: I did not contest it, my Lord.

The Court: That is that point. Then as to the width of the

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right of way, it was admitted during the course of the trial that the right of way at that point was 100 feet wide; and it is common ground, and the trial proceeded on the basis, that the track was laid in the centre of that 100 foot right of way.

10 Then I am asked to instruct you that the facts that might be brought to light, referred to in my remarks with respect to other cases, have no bearing upon this case. That is quite correct. But the law I endeavoured to adduce from those cases is applicable. Every case must be determined on its own facts. What are you sitting there this morning for, except to decide whether the facts really exist here or not. So far as the law is concerned, that responsibility is on me; and my thought was, when I used one particular case to illustrate, that it enabled me to elucidate in a clearer way the point that I was endeavouring to impart to your minds.

20 I was asked to instruct you that nothing with respect to the fire enquiry should operate on your minds. I am certainly sure I did not ask you to guess at what the fire enquiry result was. I do not know, and I do not think you know. You should not know at any rate. All we know is this, that the matter was the subject of enquiry; and for that reason I drew your attention to that as being a point you might consider in determining what was uppermost in the minds of those concerned with it at the time. Is that right?

The Foreman: Yes.

30 The Court: Then as to your accepting or rejecting the evidence of Dunn as to the point of origin, I confirm that point. If you think it important you might ask to have the notes extended—and it is actually extended, and no time will be lost—no delay on that point.

40 Then, as to the weight to be attached to what has been termed Clyde Leavitt's rules, I think you ought to understand my ruling on that; the statute prevails. Nor do I think on a closer glance at this order, that there is any attempt to invade the provisions of the statute. If there is, my instructions to you are that such an order cannot prevail. Statutes of Canada, until they are repealed or amended, prevail. When the statute is clear and explicit, as this particular statute is, it must prevail as the statute of the Parliament of Canada.

Then, under question 18, while there was no argument addressed, or the jury asked to embark upon a consideration of what amounts to the answer you should give in connection with that, I have already mentioned to you that I take it — and I am not pleased that Counsel is endeavouring, under his effort in this connection, to ask me to instruct you with respect to what I will call cross-examining questions, that are outlined in the question

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he submitted, which I decline to follow in this respect—I have already referred to the duty cast upon a person who sees a fire that may destroy him, to do something to protect himself or his property; or, as in this case, take steps to avert the disaster; you cannot stand idly by and let your property be consumed, and say, Oh, I will get redress at the hands of a jury some day for this damage—any more than a man who receives a consignment of goods in a perishable condition, that does not warrant acceptance; he is supposed to take such steps as he can to prevent loss that may ensue.

Now the consideration in that case of the goods, and the nuisance, is different from the view which may be taken by a jury of what a person ought to do when a fire occurs on property which adjoins their property, and is likely to cause destruction. I will give you an example of the questions I was asked to submit to you: Could the said fire have been extinguished by the said tank? That involves the question of whether the tank car was available or not, and whether the parties considered at the time the fire was of such a nature that it required them to bring the tank to that point. I am speaking now of the tank owned by the plaintiff. The defendant is not liable if the plaintiff did not take steps they might have taken. This always has to be considered by the jury upon a reasonable basis. If you take question 18 and deal with it along these lines, you can put in anything in it you like, that you think will show acts with respect to the fire that would assist in decreasing, if not destroying any liability existing, if you do so find, as against the defendant. Another question: Could the fire near mile 35.2 have been extinguished on the 18th of August, 1930, had Kapoor Lumber Company Limited employed a sufficient number of men? The inference being that if the jury should answer that question affirmatively, that the defendant Company should be relieved. Then, if you did answer that question, there would still be a point of law to be considered, which I would require to decide later on. So I do not think it would advance the question of liability one iota. You may retire.

The Foreman: May I ask, is it necessary that we should answer these questions unanimously, or is a majority verdict sufficient?

The Court: I hoped you would not ask me that question; it has got to be unanimous within three hours—I suppose you will know it later on, anyway.

The Foreman: Yes, my Lord.

The Court: And after three hours you may come out and I will give you further instructions.

The Foreman: We have got to be unanimous?

Mr. Maitland: They do not have to answer them at all, if

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they do not wish, as your Lordship told them.

The Court: I told them that, and I do not think you should refer to it again, Mr. Maitland. I do not think I will say anything more to you.

Mr. Mayers: May the jury have the Board's order and the regulations?

The Court: You can have access to all the exhibits.

The Foreman: We are going to ask for quite a number of  
10 them.

The Court: Try to keep them in order—the exhibit order.

Mr. Mayers: I would like the jury to have a copy of the evidence of Mr. Van Orsdel.

The Court: No, I am not going to allow you to put evidence before them, but I will let them ask for anything they want.

Mr. Mayers: This is an exhibit; the jury are entitled to see the exhibits.

Mr. Maitland: My learned friend wants to pick out an exhibit and give them eight copies of it, give each a copy, of the  
20 point he wants to make, and I object.

The Court: I will let them ask for any exhibits they wish.

Mr. Mayers: They are entitled to see any and all of the exhibits.

The Court: You understand that, Gentlemen?

The Foreman: Yes, quite, my Lord.

The Court: Have you all got copies of the questions?

The Foreman: Yes.

(AT 11:57 A.M. THE JURY HERE RETIRED)

30

AT 3:26 P.M. THE JURY RETURNED

The Court: Gentlemen, during the course of my remarks I stated that the notes of evidence had been extended, and they would be available for your assistance if you so desired. I thought at that time that the Court Stenographer was being utilized for the benefit of all concerned. I find since, however, that only one side sought to utilize the Court Stenographer's services for that purpose, and that the product of his industry is available only for that side that has paid for those services. I may say it is the defence; but however they very properly have placed the result of  
40 the notes being extended for the disposal of the Court.

The Foreman: Thank you very much.

The Court: The difficulty arises, that the other side has not had any opportunity so far of seeing these notes; and in the ordin-



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any course, if it were not for such extension, I would require to have Mr. Gilbert read off the notes to you, and it might take hours. And I am going to take the responsibility of allowing you to use the extended notes, and ask Mr. Gilbert, who is an official of the Court, to state that they are properly extended—he is sworn of course to do so—and possibly relieve you of the necessity of listening to the evidence being read. Have you any objection to that, Mr. Maitland?

10 Mr. Maitland: No.

The Court: You apparently have a better memory than I have, as you can remember the names apparently of the witnesses whose evidence you want. I notice the book is indexed, so that you can get at it. So that it is placed at your disposal—and I hope you will not require to use it all.

The Foreman: I hope not.

The Court: Is that satisfactory, Gentlemen? any questions?

(THE JURY HERE RETIRED AT 3:28 P.M.)

20

## AT 7:09 P.M., THE JURY RETURNED

The Court: Mr. Foreman, and Gentlemen, you asked me as to whether you required to be unanimous; my recollection is I told you after three hours that three-fourths would be sufficient—after three hours out.

The Foreman: I am afraid I did not understand that at all.

The Court: Does that assist you in your deliberations?

The Foreman: Oh, yes.

The Court: Would you like to retire?

The Foreman: Yes.

30 The Court: You remember my referring to three hours?

The Foreman: Yes; I thought that after three hours we might come back and ask questions.

The Court: Oh no.

The Foreman: That we had to stay there for three hours anyway. This question 10, my Lord, and question 15, can you help us there? There seems to be some conflict. The defendant there, does it mean after he had knowledge, that is to say the defendant—Jones and Mulligan, as far as we know, were the first people who had knowledge—the defendant had knowledge when

40 Jones and Mulligan saw the fire?

The Court: Yes.

The Foreman: Then, in the next case, if your Lordship will kindly turn to 15. This proper precaution—what we want to get

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at is this, my Lord; in the case of negligence, and taking proper precautions, and the words causing or contributing.

The Court: Well, really that comes back to my discussing the whole basis upon which actions of negligence will ensue or not.

The Foreman: The next paragraph 16 says if there was negligence in what did it consist?

The Court: Then you come back—there is the trouble, there is some repetition.

10 The Foreman: Yes, I agree with you. We are so afraid of contradicting ourselves in one place compared with another.

The Court: You come back there to 10.

The Foreman: Yes.

The Court: There is some repetition. I was rather hurried, I may tell you, in framing these questions yesterday morning—and I referred to the lack of assistance.

20 The Foreman: You see, what we are so anxious to avoid, my Lord, is, if we contradict ourselves—we know exactly what we want to say, but if we contradict ourselves in two of these questions, if it goes to a court of appeal they will naturally say, 'These people don't know what they are talking about, they say one thing in one and another in another.

The Court: You want to be consistent.

The Foreman: We want to be consistent.

The Court: I am afraid I cannot tell you anything without suggesting to you what your answer should be, and I am not going to do that—at least, not what you can do or cannot do.

The Foreman: Certainly. But wherever the defendant is mentioned, that means any agent of the defendant?

30 The Court: The defendant or its agents or employees.

The Foreman: That helps, gentlemen, doesn't it? Doesn't that help?

The Court: Those having something to do with the situation at that point.

The Foreman: Yes.

The Court: Of course, I mean to say, it would not be some agent down in Victoria.

40 The Foreman: Precisely, no, no, but some definite acting agent. Thank you, my Lord. I think that will help us quite a lot. I wish we had known about the majority sooner. I was dull, I didn't catch that point.

The Court: I wondered why you had not come back at the end of the three hours. But we were both at cross-purposes, it seems.

The Foreman: We were hoping, and we very nearly got unanimous down to a point, and we were trying to get unanimous, and we went over it, and then went back again.

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The Court: Do not say anything further.

The Foreman: No.

The Court: Would it be any advantage if I came back here at eight o'clock, or would you rather come back in the meantime? It is quite clear that at this stage you have not reached the question of damages at all.

The Foreman: No, indeed we have not.

The Court: I would suggest then that—

10 The Foreman: —that we go and have something to eat.

The Court: That I will be accessible, in call; the Sheriff will let me know.

The Foreman: Yes.

The Court: You will have them, Mr. Sheriff, in the meantime. I left it for them to go out and have a comfortable meal at mid-day, instead of having some coffee brought up here. In a criminal trial you know, it would not be allowable. But you do not take any objection to that.

Mr. Maitland: No, my Lord.

20 Mr. Mayers: No, my Lord.

The Court: You may go to a restaurant and have lunch.

Mr. Maitland: May I speak to you a moment before the jury retire—I mean in your room?

The Court: Certainly, yes.

Mr. Maitland: My learned friend thinks I can mention it here. I am not sure whether the jury understand that the majority is not a bare majority; but it must be six?

The Court: Six out of eight.

Mr. Mayers: Six to two.

30 The Court: Six are sufficient.

(THE JURY HERE RETIRED, AT 7:11 P.M.)

.....  
(AT 9:10 THE JURY RETURNED)

The Court: Gentlemen of the Jury, will you please submit the answers to your questions?

The Foreman: Do you wish me to read the question first and then the answer?

The Court: Just hand them up to me.

40 The Foreman: We have answered them all but one question, my Lord, and that we thought depended upon you (handed to Court).

The Court: Gentlemen, I would ask you to retire with respect to 19, to point out the failure referred to therein.

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The Foreman: Certainly.

Mr. Mayers: My Lord, may I respectfully suggest that we hear the answers read?

The Court: No, I prefer to have it done that way.

The Foreman: My Lord, you have told us not to answer 20.

The Court: You have room to carry it down below there—carry these, particulars as follows—just a few words to show what you are referring to.

10 The Foreman: If we had the words of that Act we could put the actual words in—the Act regarding sawmills, regarding the care—what their responsibility is in regard to a fire. We would like to have that Act, and put the wording in.

Mr. Mayers: The Forest Act, section 114.

The Foreman: The duty of sawmills in regard to the fires.

Mr. Mayers: Section 114 in the Forest Act. Your Lordship has my copy (handed to Foreman).

The Foreman: Thanks, my Lord.

(THE JURY HERE RETIRED AT 9:23 P.M.)

20 Mr. Maitland: My Lord, if the questions involve negligence on the part of the plaintiff, then I am going, with your Lordship's permission, to once more press for an answer to number 20; because it seems to me that under the decisions on the Contributory Negligence Act, if I did not do that I would be placed in the position of the Supreme Court of Canada decisions which say, if I wanted information as indicated by that question, I should have asked the learned trial judge to ask for it.

The Court: The decision of the Supreme Court of Canada is not before me. I properly instructed them on that part.

30 Mr. Maitland: I mean the general proposition of law, in jury cases, that I cannot go and say that there should have been an answer to a question, without saying to the Court I would like the question answered.

The Court: If I were to accede to your proposition I would require to have the case of the Supreme Court of Canada before me. And I would properly instruct them—and I have not yet decided whether I will or not.

Mr. Maitland: I will see if I can find it. Will your Lordship give me a moment to look that up?

40 The Court: Certainly.

(AT 9:38 P.M. THE JURY RETURNED)

The Foreman: My Lord, owing to not properly understanding the exact wording of that Act, we ask leave to take out the

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latter part of that answer to that question 19.

The Court: That is all; that is agreed, is it?

The Foreman: That is agreed, my Lord.

The Court: And the portion of the answer to question 19 now appears to be eliminated in blue pencil, with the consent of the Jury?

The Foreman: Yes, my Lord there was a dissenting—it was not with the agreement of all the jury.

10 The Court: Six of the jury, at any rate?

The Foreman: Yes, my Lord.

The Court: I am going to ask you to retire. You understand these questions are in order to enable me determine what the effect is. I am going to ask you to retire and answer a question which will be 10-A: If so, in what did such precautions consist? Do you understand that?

The Foreman: May I have it—10-A (writing it). Yes, my Lord, I quite understand that. Shall we retire?

20 The Court: Would you like instructions in connection with that question? I cannot appreciate your answer to be candid with you.

The Foreman: Yes.

The Court: And I will have to refer to it, your answer to 10, as it stands now.

The Foreman: Yes.

30 The Court: "Yes, except as qualified by answers to questions 15 and 16." The question is, Did defendant take proper precautions to prevent said fire from spreading from its right-of-way; that is, if you have already found that they had knowledge of the fire, and you found that it originated on its right of way.

The Foreman: The knowledge they found was that of Jones and Mulligan.

The Court: Well, you need not—I would like to know to what the mind of the jury is directed so far as precaution is concerned. In other words, without attempting to direct you, had you in mind that precautions were taken through Dunn, or had the precautions been taken by the carrying to the Kapoor, or had you regard to the precautions taken by the defendant Company.

40 The Foreman: By the defendant Company.

Mr. Mayers: Excuse me one moment, if your Lordship will allow me, I respectfully object to this course of procedure. I am submitting that the answers of the Jury should be read; and that the jury should not be subject to cross-examination.

The Court: When the answers are brought in by the Jury, for further consideration, they may then determine whether the last answer shall be reconsidered or not. That is the real object

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of your coming before me, as I understand.

The Foreman: Yes.

The Court: I have to determine what the effect of these questions are, and what they intend.

Mr. Mayers: I submit the questions and answers should be read in open court; and then the question should be debated whether any further cross-examination should be directed to the Jury. Your Lordship will allow me to respectfully object to the whole of this procedure.

The Court: All right. You may retire, gentlemen. Put in 10-A in there. You have the words?

The Foreman: Yes, if so, in what did such precautions consist?

(THE JURY HERE RETIRED AT 9:38 P.M.)

The Court: Have you found that case?

Mr. Maitland: I have not found that case; but a case where the proposition arose, where Counsel should have obtained an answer to a question, and did not ask for it at the time, they said the proper procedure was for the Counsel to ask the Court to submit that question to the jury.

The Court: I think perhaps they had in mind the MacTavish v. Langer case; there was some question of that arose there.

Mr. Maitland: I was in that, on the second trial. Yes, my Lord, I think that did arise there.

(AT 9:52 THE JURY RETURNED)

(VERDICT HANDED TO THE COURT)

The Court: I think it only proper that I should refer to a case I had in mind, where I pursued a somewhat similar course to that adopted this evening, namely *Ellis v. The B. C. Electric Railway Co.*; and I read a portion of the judgment of the Chief Justice of the Court of Appeal dealing with that matter. In that case the jury had attempted to answer questions; and upon the answers and questions being submitted to the Court, a discussion arose between myself and the jury, in which, according to the judgment of the Chief Justice, the jury were confused as to the meaning of the word "system." But after some further instructions from the judge, and after ascertaining that they might bring in a general verdict, they retired and brought in such a verdict, in favour of the plaintiff. The learned Chief Justice, then, adds further on in his judgment, dealing with that particular action, which was one of negligence,—a criticism having taken place as to the

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course pursued, in argument, before the Court below,—as follows:  
 “Instead of criticising the course adopted in sending the jury  
 back to reconsider their verdict, I would commend that course. In  
 negligence cases it is very desirable, in the interests of both par-  
 ties that the issues of fact should be found in the form of answers  
 to questions. That practice is to be encouraged, and the jury  
 assisted by the Judge and Counsel as far as possible to that end,  
 as was done in this case. To declare a jury at fault because they  
 10 had failed to make their meaning clear in their answers, and when  
 sent back had brought in a general verdict, unless the general ver-  
 dict was not an honest one, would be to discourage juries from  
 attempting to answer questions.”

I am seeking these questions, here, for the purpose of en-  
 abling the Court to consider the question of liability. And in that  
 connection I refer to remarks of Mr. Justice Duff in the *B. C.*  
*Electric Railway v. Dunphy* in which Mr. Mayers appeared before  
 the Supreme Court of Canada. There the learned Judge said,  
 20 “Had the answers been objected to as insufficient at the time they  
 were given, the trial judge, no doubt, could have presented to the  
 jury the alternative of specifying their findings of negligence  
 more particularly, or returning a general verdict in the usual  
 form. No such exception having been taken, it is not, I think,  
 open to the defendants to take exception to the form—albeit an  
 unusual form—in which the jury have expressed their findings.”

It was with that object that I asked the Jury to deal with  
 two of the questions which I had submitted.

Now, Gentlemen, I presume, from what has occurred, that  
 you are anxious to know my view as to whether you should con-  
 sider the question of damages or not? Is that the wish of the  
 30 Jury? Well, I think it would be better for you to do that.

The Foreman: You think it would be better for us to do so?

The Court: Yes.

The Foreman: All right, my Lord; we are entirely in your  
 Lordship's hands.

Mr. Mayers: May I be permitted to say this, my Lord; my  
 objection has gone to this, that we have not yet been permitted to  
 know what the answers of the Jury to the questions are, and,  
 therefore, it has not been open to us to object, or ask your Lord-  
 40 ship to direct any further questions; and I would submit now that  
 if the Jury wishes to bring in a general verdict for the defendant  
 it is open for them to do so.

Mr. Maitland: For the defendant?

Mr. Mayers: Yes.

The Court: I think, under the case to which I referred, you  
 are quite right, Mr. Mayers.

Mr. Maitland: Or the plaintiff.

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The Court: Or the plaintiff.

Mr. Maitland: I am rather interested in this case.

Mr. Mayers: Until we have heard the answers to the questions, one is not—

10 The Court: My view of the matter, so far as these questions are concerned, it is a matter which rests between the Jury and the Court for the time being to determine, if possible, that these questions are understood by the Jury, and their answers are intended in the direction which will enable the Court to consider the question of liability. That is the object of questions, as distinguished from having a general verdict. And then if the general verdict, of course, is for the defendant, there would be no question of damages to consider. With a general verdict for the plaintiff, you would still have to consider the question of damages. I do not wish to express myself more fully upon the result of your questions than I have done, to say that it is better for you, better for the litigants, I put it, to have that question of damages determined.

20 Mr. Mayers: I do submit, my Lord, that we ought to be allowed to hear the answers of the Jury to the questions.

The Court: It would not make any difference what view you might take of the answers to these questions, I would still have to determine that point; so there is no object to be gained by it; and I am quite satisfied that they remain as they are; there is no further concern about that.

The Foreman: We do not feel we could return—Do we feel we could return a general verdict, on the spur of the moment?

Juror: We would have to discuss that.

30 The Foreman: Shall we go outside to discuss that?

The Court: Yes.

(THE JURY HERE RETIRED, AT 10:05 P.M.)

The Court: The situation seems to be that if they do take that course, the questions being of record, it is open to either one of you to still contend that a general verdict should not have been given—whichever way it is given. I think you agree with me in that.

(AT 10:10 P.M. THE JURY RETURNED)

40 The Foreman: My Lord, the Jury do not feel they are qualified to give a general verdict; they feel that they would very much rather rely upon your Lordship forming a verdict on the answers to questions they have given. And your Lordship thinks that we should go into the matter of damages; well, of course we are in

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your Lordship's hands, and will have to do it.

10 The Court: Considering the time that has been consumed in this trial, and the way you have strenuously endeavoured to reach a conclusion today, I feel it almost like imposition to ask you to retire and do so. But, still, these litigants are first to be considered. And I do not wish to express myself pointedly as to the effect of the answers to your questions, but I did state a moment or two ago that it would be better for you, under all the circum-

stances, to assess the damages; and then it does not deprive either the plaintiff or defendant to contend before me that you should not have assessed any damages, for the result is no liability or the plaintiff may contend that I was right in the course pursued, and that it is entitled to damages. Do you follow me?

The Foreman: Yes, my Lord. In that case, we must get to work.

20 The Court: It is now past ten o'clock; and while it is usual to keep the jury together for the purpose of arriving at a final verdict, it would seem a sort of imposition at this late hour—I know you must all be tired. Do you prefer to have consent of Counsel to have the matter stand to tomorrow morning, and re-assemble for that purpose?

The Foreman: It would be fine if we could do that.

Mr. Maitland: I am afraid of that, my Lord; I discussed it this afternoon, we thought of that a little earlier; but once a jury have brought in answers to questions, and started to make a return of that kind, I am afraid—

30 The Court: I have no fear in the slightest, if Counsel have not. It is not like a criminal trial. However, you better retire, then.

(THE JURY HERE RETIRED, AT 10:12 P.M.)

The Court: Now, in view of the fact the Jury is considering only the one question, there is no harm whatever in the questions being handed down; and you can fill in the answers in your copies.

(THE VERDICT WAS HERE HANDED TO COUNSEL)

Mr. Mayers: I am very sorry, but I must once again object to this procedure; according to my understanding the answers ought to have been read in the presence of the Jury when they first came in.

40 The Court: I know of no such settled practice in that respect. It was quite apparent to me that the Jury were desirous of knowing my view as to whether they should assess the damages or not. My view is as I have already expressed it, it is better,

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under all the circumstances, to have the damages assessed, no matter what the result of the answers to the questions may be. I do that not only because I think it is the proper course, but because, in the end, it is going to be a great saving of expense. The Jury is here, and have all the facts before them, and it is far better to have an assessment of that kind take place.

10 Mr. Mayers: I do not wish to be misunderstood. I am not objecting to the Jury finding damages, but what I am objecting to is the addition of a further question without any possibility on our part of objecting to it with the knowledge of the answers to the questions which had already been settled. And your Lordship will observe, of course, that I had no opportunity of addressing the Jury on this additional question which your Lordship put, and no opportunity of objecting to the additional charge which your Lordship gave upon the additional question which your Lordship had directed.

The Court: I do not think any material advantage would be gained by my further discussing the matter.

20 (AT 10:59 THE JURY RETURNED, HANDING IN THEIR VERDICT)

The Court: You may think I am getting very finicky,—you must not estimate, you must find.

The Foreman: I beg your pardon; shall we alter that?

The Court: As you have got this with the consent of all, you may just retire. It might be said to amount to the same thing.

Mr. Maitland: My Lord, if they are going to retire, I have an application to make, and I think I might make it now?

The Court: Very good.

30 Mr. Maitland: Your Lordship will notice, in answer to the question 4, Did the said fire originate on the right-of-way of the defendant — now that answer is utterly inconsistent with the answer to question 5. There is no other evidence as to where the fire was, that would support 4 and 5 together; because a fire that was partly on the right-of-way and partly on the adjacent land—I don't know whether they mean that at five o'clock, or ten in the morning. I submit, under the Dunphy case I must get that cleared up.

40 The Court: Well, you may be right. Then, all I ask the Jury to do would be this, if they so intend—you have answered that "a" Yes; that is quite intelligible; then "b", your answer is this "Partly on the right-of-way and partly on adjacent land on right hand side of track going from Victoria to Kapoor near mile 35.2." Do you intend to find that to mean it was off the right-of-way?

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The Foreman: I am afraid, my Lord, there was a slip up; I quite see what Mr. Maitland means; I am sure we meant at that time, that that was when the defendant became aware of it actually; and at that moment we were thinking of Mr. Fraser, not only Jones.

Mr. Maitland: That should be cleared up, my Lord. When Fraser got there.

The Foreman: I am afraid that was it.

10 Mr. Mayers: I am sorry, my Lord, I must again object; because this is resolving itself into a cross-examination of the Jury.

The Court: It is not; it is trying to find out what the Jury mean. I am entitled to do that, so that I can come to a proper conclusion.

Mr. Mayers: What the Jury mean was embodied in their answers.

20 The Court: I am not going, especially in view of what the Foreman says, to have answers which will prevent me from coming to a conclusion as to what the result will be. You see, "b" is indefinite, and is not a conclusive answer to the question, because—

Mr. Mayers: I submit—

The Court: (Interrupting) It may be partly on the right-of-way and partly on the adjoining land on the right-hand side; if they mean off the right-of-way then it is a question of something different altogether.

Mr. Mayers: I submit it clearly says partly on right-of-way and partly on adjacent land, it is partly off the right-of-way.

30 Mr. Maitland: My learned friend does not understand my point, I think. My point is, these two answers are inconsistent, and they should be cleared up. It would be impossible to answer 4 the way it is answered, and 5 the way it is answered. And the Foreman has suggested that is so, that there was some mistake there. If that is apparent, ordinary natural justice would require that they be given an opportunity to correct it.

Mr. Mayers: With respect, my Lord, the two questions have nothing to do with each other. They are directed to different aspects of the matter altogether.

The Foreman: That is what we thought.

40 Mr. Mayers: There is no inconsistency between 4 and 5.

Mr. Maitland: My Lord, the Foreman, with respect, has stated there is. He said they meant by that when Fraser got there. That is absolutely inconsistent with when their servants first saw that fire.

The Court: Well, I trust the Jury will not think I am critical of their result.

The Foreman: No.

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The Court: I tried to draw to your attention the question of this knowledge was of importance, and when it was acquired. Now, if you have agreed that you have made an error in your answer, different from what you intended, it is only right to correct it. I do not know what is in your mind.

The Foreman: I speak subject to the other jurors correcting me. Shall we discuss that outside?

The Court: Yes.

- 10 Mr. Mayers: One moment; your Lordship will recall that before I had heard the answers to the questions, your Lordship directed the Jury to qualify or alter, or do something to their answer to question 19. I see that in the original the Jury have put, "and in failing to comply with the regulations of the act relating to sawmills and logging operations in relation to fires." They have now deleted that; but I understood that that deletion was due to the fact that the gentlemen of the Jury could not find what they wanted in the Act in question. And I would ask your Lordship to instruct them as to the effect of Section 114 of the Act, which is
- 20 obviously that to which they referred, and which they wished to embody in their verdict.

- That Act reads: "Any person who, in case of a fire, no matter how or by whom the fire may have been set:—burning on the person's own property; or burning on property on which he is conducting any land clearing, lumbering, industrial, engineering, or construction operation, fails to do his utmost to prevent the spread of fire, or refuses to place at the disposal of any officer of the Forest Branch for the purpose of preventing such fire from spreading from the property on which it is burning, and at the person's
- 30 own expense, his services and the services of any men employed by him, or who, without the written consent of an officer of the Forest Branch, continues to carry on, in whole or in part, any land clearing, lumbering, industrial, engineering, or construction operations while the fire is burning, or who without such consent resumes any such operations before the fire is wholly extinguished, shall be guilty of an offence against this Act." And I submit, my Lord, that the section in question is the section to which the gentlemen of the Jury referred when they were mentioning the
- 40 Act relating to sawmills and logging operations in relation to fires. And if they wished to embody that in their verdict it would be unfortunate if that wish should not be fulfilled by them through not having been able to find the exact words of the Act which they intended to incorporate in their verdict.

The Court: I did not so understand the Foreman. I understood, when they came back—I had asked them to apprise the Court of what in their opinion was the violation of that Act. And having the Act at hand, as I understood the Foreman when they

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returned, they deleted it because they did not feel in a position to determine the effect of that section.

Mr. Mayers: Precisely, my Lord. But if they wish to incorporate those words in the verdict, I do not think the words ought to be struck out, because the jurymen have not been able to understand this very confused and vague language of this very long section. They may have in their minds exactly the intention which they originally expressed in the verdict; and I submit that

10 should stand.

The Court: They were instructed, Mr. Mayers, as to the effect of that section.

Mr. Mayers: I submit that the Jury should have the opportunity of saying, if they wish, notwithstanding their being unable to follow the vague language of this section, to maintain in their original answer their reference to Section 114.

The Foreman: It would simplify this matter very much if I may say a word.

20 The Court: But you must be careful, when you are saying it, that you are saying it on behalf of all the Jury.

The Foreman: I hope they will correct me if they do not agree, that it was in consequence—not because we did not understand, but because, it was in consequence of the words that we read in the Act, that we asked that it be deleted.

30 The Court: It was in view of my inability to appreciate to what point your answer was directed as it stood originally, that I asked you to retire. And it would be out of place for me to further deal with that phase of the situation. I am now met with the application, founded, I presume, on the Dunphy case, that a question should be submitted to the jury for the purpose of elucidating the answer to question 5, in view of the answer to question 4. I understood from the Foreman that the answer as it stood did not bear out the conclusions of the Jury. Whether I am right in that, I do not ask him to say anything further, if he thinks, in justice to the parties, it would be better to retire and consider that answer; I give him an opportunity to do so.

The Foreman: We do think we better retire to discuss that, my Lord.

The Court: This is an important feature of the case.

40 The Foreman: Yes. We shall not be long.

(THE JURY HERE RETIRED, AT 11:16 P.M.)

The Court: I might add, as a matter of interest, that observations in the case of *Armishaw v. The B. C. Electric*, from Mr. Justice Martin and Mr. Justice Irving, throw some light on this matter,—the question of submitting questions to the jury, and the

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course of counsel, and so forth.

(AT 11:26 THE JURY RETURNED)

**No. 11**

**Discussion.**

The Foreman: Six signed on damages, without the estimate. And number 5 has been altered; and we wish to say that that was under a misapprehension of what the word "defendant" meant at that moment, we were subsequently informed.

10 The Court: Now, before the Jury is discharged, and the question of what judgment should be entered is discussed, have you anything to say? Because I do not wish to keep the Jury.

20 Mr. Maitland: I must again ask for an answer to question In view of these answers it seems to me, where by the fault of two parties damage is caused to one, under the Contributory Negligence Act, then they must say in what degree each party is responsible.

The Court: What do you say as to the applicability of that Act at all, Mr. Mayers?

20 Mr. Mayers: I say the Act has no application whatever, in view of the answers to these questions.

The Court: Well, has it any application to an action of this kind? I am using that term in a broad sense.

Mr. Mayers: I would not be prepared to say at this moment, my Lord, but I strongly oppose this application in the special circumstances of the answers to these particular questions.

The Court: You can see the danger that arises, if Mr. Maitland is right in his view of the law, and I should refuse to submit such a question; you have opposed it; it might be a matter for further consideration later on.

30 Mr. Mayers: I shall have to bear that responsibility, my Lord.

The Court: As I understand it, then, aside from any question as to the applicability of what we call the Contributory Negligence Act, your view is that it becomes unnecessary, in view of the answers to the questions?

Mr. Mayers: Yes, my Lord.

40 Mr. Maitland: I do this with great reluctance, at this hour; but this trial has cost the parties thousands of dollars, as everybody knows, and has taken ten days. Now, I am stating with confidence that I think that in view of the answers, that this Act does apply. My learned friend takes the other view. But, surely, after a ten-day trial, it would be a terrible thing, if I was right, and had to go to the Court of Appeal to find that out; when the Jury can very readily easily come to the conclusion as to what is the degree of negligence that contributed to this fire. Because they have said there was negligence of both parties that contributed to

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it. But if they mean to say that they cannot say, then that is the end of it.

The Court: Do they say that negligence of both parties contributed to it, or qualify it, thus minimizing the damage? They both contributed?

Mr. Maitland: Well, take the answer to 15—I don't want to go back to that again—it is Yes; and the answer to 18 is Yes.

10 The Court: Well, the fault here lies with respect to the origin of the fire, not as to the treatment of the fire afterwards.

Mr. Maitland: The question of the treatment of the fire I think is peculiarly relevant, that is, allowing it to spread. I regret pressing at this time of night, my Lord; but I very, very greatly feel the responsibility.

The Court: You regret, and I regret, bringing the Jury back tomorrow morning. And I doubt, in the face of opposition, whether I have power to direct the Jury to attend tomorrow morning, to consider another question to be submitted.

20 Mr. Maitland: Of course I will consent to that, if my learned friend will.

The Court: I understood Mr. Mayers was opposing it, before. I think you should endeavour to treat juries with consideration, and I suppose judges should, and it is now approaching midnight. To give this matter proper consideration, it seems to me out of place; because, if I did eventually decide it was a mixed question, it would involve considerable discussion and consideration on your part. What say you? It is not a question that has arisen as a result of the trial, but at the close of it, at least. And, as you remember, both parties had this question originally; but  
30 Mr. Mayers, properly enough, I thought at the time, receded from the position of desiring an answer to be obtained to that question. Mr. Maitland is now pressing; but if both Counsel consent, I think we better adjourn until tomorrow. Are you satisfied?

Mr. Maitland: Yes, my Lord.

The Court: That will be only to consider this one question; we do not want to start an argument on some other thing that has happened. And if I decide to submit the question, well and good; and if I decide not to, it will be open to Counsel to make mention of the point. Is that satisfactory?

40 Mr. Maitland: Yes, my Lord.

The Court: Silence gives consent.

Mr. Mayers: That, of course, permits me to renew my objection to the question being put.

The Court: Oh, certainly. I have not decided it. In fact, it is the lateness of the hour, and all being tired—a long tedious day—and I trust the Jury will not think it is any imposition.

The Foreman: No, my Lord; very sorry we kept you wait-

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ing so long. It was on some silly mistake on our part, I suppose.

The Court: Ten o'clock tomorrow morning. May I add a further injunction, and impress upon you, do not discuss with anybody what you have already decided with respect to these questions; in fact it would be as well not for any of us to allow the newspapers, even, to have it, until you finally conclude—because they would become public property.

(Court here adjourned, until 10 a.m. tomorrow).

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10

Thursday, June 2, 1932; at 10 a.m.

The Court: Mr. Maitland, have you anything further to advance in support of your application to submit what we have termed the 20th question?

Mr. Maitland: No, my Lord.

The Court: Mr. Mayers?

Mr. Mayers: My Lord, our objections are two. First, if any such question arises at all, which it is submitted does not, then it can only be a question of ultimate negligence. Secondly, the  
20 Jury cannot find any degree of fault in the defendant causing the loss or damage, consistently with their answers to the former questions. The only way in which the Jury can maintain consistency in their answers, is to find that the fault of the defendant did not in any degree cause the loss or damage. If your Lordship should be against me, then I submit that question 20, in its present form, is, in any case, improper.

The Court: Give me the Act. Am I right in my opinion, Gentlemen, that this Act, passed in 1925, and different wording prevailing in most of the Provinces of Canada, has never been  
30 utilized in any fire case that has been reported up to the present time?

Mr. Maitland: That is clear.

The Court: Do you agree with that?

Mr. Mayers: Yes, my Lord.

The Court: A fire case, in a broad sense. May I ask which one of you is responsible for the drafting of that question,—as both of you submitted this question in exactly the same form?

Mr. Mayers: We discussed it before.

Mr. Maitland: I think my learned friend did it to oblige me.

The Court: That was very fair.  
40

Mr. Maitland: As he always does.

The Court: To pursue that, then in any event, supposing I were to decide to submit this question, you think the form does



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not come within the Act, does it?

Mr. Mayers: It does not meet the circumstances of the case, my Lord.

The Court: I cannot say much on that at present.

Mr. Mayers: The question does not meet the circumstances. I would submit that if any question at all—which I oppose—is submitted to the Jury, it should be in this form—

The Court: Have you it written out?

Mr. Mayers: I have it written out, yes, my Lord.

The Court: Perhaps it is not long, and I can copy it in the bottom.

Mr. Mayers: It is at the bottom of that page (handed to his Lordship).

The Court: Is this your handwriting, Mr. Mayers?

Mr. Mayers: I regret to confess it is, my Lord.

The Court: I would compliment you. Well, the way it is framed is your argument; you do not want me to use that form of question? I will have to frame the question in a different form; I could not put that to the Jury in that shape.

Mr. Mayers: I do not quite see why, my Lord; because the matter of law is for the Court.

The Court: I do not want to as it were pre-judge this case, before I have heard argument.

Mr. Mayers: You are not; it is simply—

The Court: I want a finding from the Jury on which I can determine the question of liability.

Mr. Mayers: Well, that question is a conditional question, my Lord—if such and such a thing happens.

30 Mr. Maitland: Well, my Lord—

The Court: (Handing back document) Will you write that out in the form of a question? It is not yet—

Mr. Maitland: My Lord, I am in this position, unless your Lordship sees fit to put that question exactly in the language of the Act, I certainly am going to withdraw my application.

Mr. Mayers: This is in the language of the Act.

Mr. Maitland: I have not seen this at all yet. (Document handed to Mr. Maitland.)

40 The Court: Mr. Mayers, if I am allowed to say so, it is asking the Court to determine the question and then submitting it to the Jury afterwards.

Mr. Mayers: No, my Lord; it is entirely conditional. Your Lordship may or may not.

The Court: That is the position I am in this morning, I may or may not submit that question. I want to see upon what lines, if I do submit it, I will instruct the Jury.

Mr. Maitland: I am not going to press it, my Lord, excep-

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ting in the words of the Statute.

The Court: Have you endeavoured to follow the words of the Statute? For example, in the statute there is nothing about real and substantial cause of the ultimate damage.

Mr. Maitland: Your Lordship may recall that I put this before we had questions 4 and 5 answered last night. It was in my mind overnight; I have considered the new answers of the Jury. I do not want to be in a position of withdrawing my applica-  
10 cation, but yet—

The Court: Yes, but in the form that this question was submitted originally, I think at the time I thought I might properly disregard it—and on which I want to hear argument now, as to whether it should be submitted, whether I should change my mind, if I think I was wrong.

Mr. Maitland: Unless the language of the Act there itself is used—

The Court: You have gone beyond the language of the Act.

Mr. Maitland: My learned friend wants to open up now  
20 new issues. I would far rather not have this question answered than have the Jury start to consider any more issues.

The Court: As I understand, you are pressing for the submission of this question in the form that it was submitted originally.

Mr. Maitland: Yes, my Lord.

The Court: What you have suggested was an endeavour to frame a question in accordance with the Act, as you consider? Because you have got incorporated in this question a point of ultimate negligence, to instruct the Jury upon.

Mr. Maitland: I think, my Lord, my safest course would be  
30 to withdraw my application altogether. I don't want a question of law on that.

The Court: All right. Gentlemen, there is nothing more to be said; I think you may be discharged. Any reason from Counsel why the Jury should not be released from their arduous duty?

Mr. Maitland: I do not know of any reason.

The Court: No cause having been shown, Gentlemen, might I say that I thank you for your attendance; you have given very close attention to this long, tedious case, and I have not the slight-  
40 est doubt that your findings will accomplish what you thought, according to your light, was the proper conclusion. You are released.

## (THE JURY WITHDREW)

Mr. Maitland: My Lord, with regard to the answers given last night, your Lordship will recollect we got those answers about

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midnight—and I have had the same opportunity as my learned friend of considering them since then. I have had an opportunity of looking at those questions and considering them with a view to the argument this morning; and I must say, quite frankly, that having regard to the law involved in various cases, the Wilson case, and the Dunphy case, my submission is going to be, very strongly, that we are brought within both of these cases. And I very much prefer to have the opportunity of putting in a written  
10 argument. It was suggested we could argue this in Vancouver. That is not convenient to either Counsel. But it seems to me that the more these questions are studied, the more it becomes necessary that they should be properly and fully argued.

The Court: And studied again.

Mr. Maitland: And studied again, yes, my Lord. Because I did not have the feeling, for instance, after reading the first answers, that I unquestionably had after reading the second answers. But I would like to put in my argument which will defend the proposition that this is a clear verdict for us, and sup-  
20 porting that with some cases that I have not had time to look into at the present time.

Mr. Mayers: I have no objection to anything which will accommodate my learned friend.

Mr. Maitland: That is very nice, indeed.

The Court: I might say that I am not much in favour of written arguments, because there is almost certain to be some point arising that the Judge wishes to ask counsel. But it may be that your commitments—

Mr. Maitland: They are very bad at the present moment.

30 The Court: —are such that it suits your convenience. And whatever suits the convenience of counsel I generally try to follow.

Mr. Maitland: Thank you very much. I will have to get my argument in between Wednesday and Friday of next week. I will put it in as soon as I can; and Mr. Hutcheson can put in the reply.

The Court: That will suit you?

Mr. Mayers: Yes—whatever suits my learned friend.

The Court: You are asking for judgment, I take it?

40 Mr. Maitland: Yes, my Lord.

The Court: Then you better hand your argument, whatever you send me, to Mr. Mayers; and after his argument, any reply—so as to get them both clear-cut, at the same time.

Mr. Maitland: All right, my Lord.

The Court: If I require to hear counsel—it may be I will—there may be some point that suggests itself to my mind—I will notify you in convenient time. How long will you be away?



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Mr. Maitland: Until the end of August.

The Court: It may be a vacation matter for me.

(The Court here rose).

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## No. 12

## Questions, and Answers of Jury.

*In the  
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No. 12  
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.

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.

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) ~~Partly on right of way and partly on adjacent land~~ on right-hand side of track going from Victoria to Kapoor near mile 35.2.

20 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.

30 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, ~~subject to the answer~~ except as qualified

tiff's property? A. Yes, ~~subject to the answer~~ by answers to questions No. 15 and 16.

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.

40 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?

Questions, and answers of jury.

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.

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  
10 in not reporting promptly on arrival at Kapoor the same day.

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.

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.

19. Q. If so, in what did its negligence consist? A. In  
20 not using their water tank car as soon as it was possible to do so ~~and in failing to comply with the regulations of the act relating to sawmills and logging operations in relation to fires.~~

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.

30

“REG. N. HINCKS,  
Foreman.”

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.

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## No. 13

## Questions of Defendant's Counsel.

*In the  
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No. 13  
Questions  
of Defend-  
ant's  
Counsel.

1. Was the fire of the 18th of August, 1930, near Mile 35.2 started by any engine of the defendant?
2. Was the defendant in the month of August, 1930, using modern and efficient appliances on its engines?
3. If the answer to the first question is no, was the said fire of unknown origin?
4. Did the said fire spread from the plaintiff's lands to the defendant's lands, or from the defendant's lands to the plaintiff's lands?
5. Was the said fire at 5 o'clock in the afternoon of the 18th of August, 1930, wholly on the plaintiff's land or wholly on the defendant's land, or partly on the plaintiff's land and partly on the defendant's land?
6. Did N. S. Fraser tender the services of himself and his men on the 18th of August, 1930, for the purpose of fighting the fire near mile 35.2, and was he instructed by Forest Ranger Dunn to take his men away?
7. Did the plaintiff assume the task of fighting the fire near mile 35.2 on the 19th of August, 1930, under the direction of the Forest Ranger?
8. Was the fire near mile 35.2 safe and under control at 5 o'clock in the afternoon of the 18th of August, 1930, and up to noon on the 19th of August, 1930?
9. Could the tank car of Kapoor Lumber Co. Ltd. have been brought down to the fire near mile 35.2 at any time before noon on the 19th of August, 1930?
10. Could the said fire have been extinguished by the said tank car?
11. Could the fire near mile 35.2 have been extinguished on the 18th of August, 1930, had Kapoor Lumber Co. Ltd. employed a sufficient number of men?
12. Was the water distribution system in the lumber yard cut off at the time when the fire got into the lumber yard?
13. Were there any explosions of dynamite in the lumber yard at the time of the fire, and if so, approximately how many?
14. What was the origin of the fire which destroyed the buildings?
15. What was the origin of the fire which destroyed the lumber?
16. Did the plaintiff do anything which a reasonable man would not have done, and, if so, what? or did the plaintiff omit to do anything which a reasonable man would have done and if so, what?
17. If the answer to the last question is yes, was what the plaintiff did or omitted the real and substantial cause of the ultimate damage?

## Questions of Defendant's Counsel.

18. Did the defendant do anything which a reasonable man would not have done, and if so, what? or did the defendant omit to do anything which a reasonable man would have done, and if so, what?

19. If the answer to the last question is yes, was what the defendant did or omitted the real and substantial cause of the ultimate damage?

10 20. 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?

21. What loss did the plaintiff sustain, by reason of the fire of the 19th of August, 1930, in respect of:

- (a) Buildings.
- (b) Plant and equipment.
- (c) Lumber.
- (d) Timber.

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Questions  
of  
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ants'  
Counsel,  
--continued.



## No. 14

## Formal Judgment.

BEFORE THE HONOURABLE } Saturday, the 30th day of  
MR. JUSTICE W. A. MACDONALD } July, A.D. 1932.

*In the  
Supreme  
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British  
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—  
No. 14  
Formal  
Judgment,  
30th July,  
1932.

THIS action having been tried at Victoria, B. C., before the Honourable Mr. Justice W. A. Macdonald with a special jury of the County of Victoria, British Columbia, on the 16th, 17th, 18th, 19th, 20th, 25th, 26th, 27th, 30th and 31st days of May and the 1st and 2nd days of June, A.D. 1932, in the presence of R. L. Maitland, Esq., K.C., and J. G. A. Hutcheson, Esq., of Counsel for the Plaintiff, and E. C. Mayers, Esq., K.C., and A. Alexander, Esq., of Counsel for the Defendant AND UPON READING the pleadings and proceedings herein, and the Argument submitted in writing by Counsel on behalf of the Plaintiff and Defendant respectively and Judgment having been reserved until this day:

THIS COURT DOTH ORDER AND ADJUDGE that the Plaintiff do recover against the Defendant the sum of \$117,830.00.

AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the Plaintiff do recover against the Defendant the general costs of this action forthwith after taxation thereof.

AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the Defendant do recover against the Plaintiff the costs of the issues upon which the Defendant succeeded, and that such costs be offset against the costs recovered by the Plaintiff.

By the Court,

“J. F. MATHER”

District Registrar.

30 “Settled as Amended,  
J. F. M.,  
D. R.”

Minutes filed.  
“W. A. M. J.”

“Entered Sept. 8, 1932.  
Order Book Vol. 29, Fol. 78.  
Per A. L. R.”

Vancouver Registry, Sept. 8, 1932.

Seal

## No. 15

## Reasons For Judgment.

*In the  
Supreme  
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British  
Columbia.*

MACDONALD, J.—

Plaintiff, upon motion for judgment, submits that the findings of the jury entitle it to judgment for the amount awarded, viz., \$117,830.00. While the defendant, on the contrary, contends that the action should be dismissed.

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Reasons for  
Judgment,  
Macdon-  
ald, J.

10 Plaintiff suffered a serious loss to its property by fire, on the 19th August, 1930. It is alleged that such fire, and consequent damage, arose from the defendant negligently causing or per-  
mitting a fire, to start upon its right-of-way, at a point near its sawmill, being about 35 miles from the City of Victoria, and then allowing it to spread, destroying adjoining property owned by plaintiff.

20 Many facts, as well as proper inferences to be drawn therefrom required to be determined. I deemed it advisable to submit questions to the jury and gave Counsel an opportunity of suggesting those which they deemed appropriate. I encountered difficulty in this connection and was unable to satisfy Counsel, as to the form of all the questions submitted, though making an effort to meet their views. I think that in the outcome, the questions were thus more lengthy and complicated, than if I had adopted those which I had originally drafted. In my instructions to the jury I naturally sought to so assist them, that responsive answers might be given to the questions. Argument which ensued is outlined in the notes of the proceedings at the trial. When the jury had answered the questions, including the fixing of damages, it was arranged, with my approval, that written arguments should be presented, as to the legal effect of their  
30 findings.

Counsel for plaintiff in his argument, after referring to the fact that any allegation of negligence, as to the engines of the defendant causing the fire, not being pressed and thus abandoned, narrowed the ground upon which he contended that liability existed. I think it well to quote his own language as follows:

“We prefer to throw all of our weight upon the responsibility of the above Company for negligently letting the fire continue to burn upon their property and escape to ours and thereby do damage to the plaintiff’s property.”

40 Counsel for the defendant accepted this challenge, so terming it, stating that if it meant there was no liability on a landowner for damage, caused by an accidental fire originating on his land, in the absence of negligence causing (permitting) its spread to other premises, then there was no difference of opinion between Counsel as to the law. He contended that “the plaintiff must show that some negligence on the part of the defendant—active or passive—was the substantial or effective cause of the spread of

## Reasons for Judgment, Macdonald, J.

the fire." He added, however, this qualification in his interpretation of the position, as to liability, that such negligence would have this result "notwithstanding the reasonable efforts of the plaintiff to prevent its encroachment on to its land or to extinguish it."

- 10 The jury found that the origin of the fire was unknown, but that it was started on the right-of-way of the defendant and then spread to the plaintiff's lands and destroyed its property. Vid. Questions 3, 4, 5, 6, and 7 and answers thereto. The jury having so found and treating the defendant, with respect to its right-of-way, as a landowner, what is the effect of the other findings? Do they render defendant liable?

- 20 There was considerable evidence, adduced at the trial, as to whether the Railway Company had fulfilled the statutory obligation "of keeping its right-of-way free from dead or dry weeds, glass, wood or unnecessary combustible material." The plaintiff failed in establishing neglect of this nature on the part of the defendant. Anglin, J. (now Chief Justice) in *Laidlaw v. Crows Nest Southern Railway Company* 42 S.C.R. 355 at 360 refers to this matter as immaterial. After referring to the duty of a Railway Company to maintain and clear its right-of-way, he then stated: There is no such duty imposed upon them, as mere landowners, and without proof or notice of the existence of a fire, not shown to have been caused by the operation of their railway, the fact that the condition of their right-of-way facilitated its spread, does not, in my opinion, amount to actionable negligence." That case is, however, pertinent, as the plaintiff sought to obtain a new trial upon a ground, which is now submitted by the plaintiff was found in its favor. The trend of the trial had been directed to determine whether the fire was caused by sparks escaping from an engine of the defendant Company and "no other ground of action appears to have been urged at the trial." The learned Chief Justice then added: "nothing was there said in argument of the allegation now put forward, that the defendants, through their servants, had notice of the existence upon their right-of-way of the fire which eventually spread to the plaintiff's lands and were guilty of actionable negligence in not extinguishing it."
- 30 Idington, J. in his dissenting judgment, in that case, referred to the Statute of Anne, as replaced by 14 George III., Cap. 78, not abrogating the entire common law, relative to liability for a fire once started, whether accidental or otherwise. The owner of land was merely relieved from the inevitable consequences of such an accident. "It leaves the avoidable consequences, to be dealt with by applying those well-known principles of justice and reason which are represented by the maxim "sic utere tuo ut
- 40

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Supreme  
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No. 15  
Reasons  
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--continued.

Reasons for Judgment, Macdonald, J.

alienum non laedas." He was thus treating the Railway Company with respect to its right-of-way, as a land owner and required to use its property without detriment to its neighbour. He queried, whether it was reasonable or just for the Railway Company "to have to the knowledge of their employees, the extinguishable fire in question on their premises from early in the morning of the 7th day of September and at other times in the forenoon of the 7th day of September."

- 10 The fire having started from some unknown cause and being accidental, did the plaintiff in the language of Hodgins, J. A., in *McAuliffe v. Hubbell* (1931) 1 D.L.R. 835 "show negligence or some breach of duty arising out of the circumstances due to the progress of the fire which caused or produced loss and damage" to the plaintiff. Plaintiff submits that it has satisfied this burden. He contends, that the answer to Question 15, supplies the requisite proof and creates a liability against the defendant. Before considering the effect of this question and answer thereto I might refer to a statement of Girouard, J. in *Montreal Rolling*
- 20 *Mills Company vs. Corcoran* 26 S.C.R. 595 at p. 600, where he refers to the remarks of Lord Chief Justice Coleridge in *Smith v. Baker* 5 T.L.R. 519 as follows:

"If there were 500 acts of negligence and none of them caused the injury to the plaintiff such acts of negligence would not be a cause of action."

- Question 15 called for a two-fold answer. In the first place the jury was asked, as to whether or no the defendant was guilty of negligence, causing or contributing to the said fire and it answered in the affirmative. Then the further answer was requested, as to what constituted the negligence, should it be found
- 30 to exist, and the answer was "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."

- It seems to be apparent from these answers that the jury considered the employees of the defendant by their actions committed a breach of their duty with respect to the fire, which would constitute negligence causing or contributing to the fire. This was a feature of the case which was discussed somewhat at length
- 40 during the trial, and, in view of the previous questions and answers thereto, especially Question 10, the only reasonable construction to place, upon this finding of the jury, was that the negligence of defendants applied to the fire, as it existed after its discovery and became a source of danger. It could not sensibly apply to the fire before its discovery by the employees. There was no evidence, as to when the fire actually started, but it was first observed by the employees about 10:25 o'clock in the morning, of

*In the  
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No. 15

Reasons  
for  
Judgment,  
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J.

--continued.

Reasons for Judgment, Macdonald, J.

the 18th of August. It was the duty of contractors, engine men and trainmen employed by defendant, who discover or receive notice of a fire burning on or near the right-of-way or of a fire, which threatens land adjacent to the right-of-way, to report such fire by wire to the superintendent and also to the agent or person in charge at the nearest point, where there is telegraph or telephone communication. This provision of time table 3, filed as Exhibit No. 36 at the trial, does not explicitly state, that these

10 employees are to so act immediately, but in view of the danger attaching to a fire, especially during the dry season of the year and that the report is to be by wire, it may be assumed that the intention of the provision is that the employees are to act without delay. It was proved beyond question that the employees, coming within this category, did not upon discovery of the fire act promptly but neglected to report it, so that a delay of approximately two hours occurred before steps were taken to extinguish or control the fire and prevent its spreading. Defendant was in the position referred to by Idington, J. in the Laidlaw case

20 (supra) at p. 357.

Counsel for the defendant contends that the answer given by the Jury to this question 15 was simply intended by them "to censure the train crews" for not reporting or for delaying to report to Mr. Fraser, the Superintendent. I was too strongly impressed with the ability of the Jury and bearing in mind their close attention I decline to accept this argument. The admission of Jones and Milligan, in charge of the gas car, to report, at about 10:30 that morning; also the lack of regard for the rules shown, by Miller, the conductor of the way-freight train, in not reporting

30 until about 12:30 p.m., were stressed during the trial, not with a view of obtaining their censure, at the hands of the jury, but directed towards showing a liability, thus arising through neglect, as against the defendant. Then while endeavouring not to discuss the evidence, except when it is necessary in dealing with the findings, I should, as Counsel for the plaintiff has referred to it, mention another provision contained in said Exhibit 36 as follows:

40 "Engine men shall on discovery or on receiving notice of a fire stop and notify the first section foreman passed of such fire unless it is practicable for the train crew to extinguish same immediately, in which case this action has been taken."

Jones was an engine man and according to this rule he should, in order to avoid the fire spreading and doing damage, have notified the first available section employee or if the fire was not too extensive, he should himself with his train crew have extinguished it immediately. However, this breach of duty on the part of Jones and his crew and thus involving negligence, is not specifically

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referred to by the jury and they presumably only had in mind the neglect which they stated in their answer, as to the fire not being reported. I think I should not under these circumstances give any effect to this submission of the plaintiff.

The fire in question had, when plaintiff attempted to control it, covered considerable area. It constituted when on the right-of-way a private nuisance and unless abated would probably result in damage to the neighbouring property. In *Job v. Edwards Ltd. vs. Birmingham Navigations* (1924) 1 K.B.D. 341 the liability of the owner of land in the event of an accidental fire was considered. Bankes, L.J. in his judgment, at p. 349, refers to two questions of law being raised therein as follows:

- (1) What is the duty of a person upon whose land a nuisance exists, which is a danger to the land or properties of an adjoining owner, when attention is called to the danger and the fact is that he has neither created the nuisance nor consented to its continuance?
- (2) Assuming that a duty to abate the nuisance exists at common law, is the owner excused by Statute, if the nuisance is a fire which began accidentally?

He referred to the distinction between cases relating to public and private nuisances, especially as to the exceptional right at common law, where a person is threatened with injury, to enter upon the land, on which the nuisance exists and take necessary steps to abate it. He refers to the case of "fire," always been looked upon in the law as a somewhat exceptional and to the ancient law or custom of England in that respect." Further, that the view of the law, which he was taking did not touch a case, where the private nuisance has been caused or allowed to continue by any act or default on the part of the occupier of the land on which it exists nor did the mere refusal or neglect to remove a private nuisance in his case constitute a default. He then added that to constitute a continuance of a private nuisance, so as to create an actionable wrong, it must depend on the evidence in each case. A deliberate refusal to give an adjoining owner notice of the danger or an obstruction of that owner in abating the nuisance might be evidence of a continuance. There might be cases in which the act necessary, to abate the nuisance in the first instance, was of such a trifling nature that it might amount to an act of negligence on the part of the occupier of the land on which the nuisance existed not to take that step. He referred to the case of *Musgrove v. Pandelis* (1919) 1 K.B. p. 314—(1919) 2 K.B. 43 and the argument presented by Counsel that the original fire ceased to be an accidental fire within the meaning of the Statute, when the occupier of the land was informed of it and that from that time should be treated as a second and independent

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## Reasons for Judgment, Macdonald, J.

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--continued.

10 fire. He mentioned that Lush, J. in the last mentioned case, drew from the facts the inference, that there were in substance either two fires, "the first an accidental one which did no damage, and the second which was due to negligence, that did the damage or alternatively there was only one fire within the meaning of the Statute and that was the one due to negligence." Here plaintiff is presenting the same contention through its Counsel. It contends that the facts connected with the spreading of the fire constituted negligence and created the destructive fire. In the Job v. Edwards case, Scrutton, L.J., p. 357, discusses *Barker v. Herbert* (1911) 2 K.B. 633 and 642 and quoted therefrom as follows:

20 "Fletcher Moulton, L.J. says: "In a case where the nuisance is created by the act of a trespasser, it is done without the permission of the owner and against his will, and he cannot in any sense be said to have caused the nuisance; but the law recognizes that there may be a continuance by him of the nuisance. In that case the gravamen is the continuance of the nuisance, and not the original causing of it. An owner of premises may have a duty to prevent the continuance of the nuisance, but it is obvious that, just as, where the allegation is that he has caused the nuisance, it must be proved that it was there by his act or that of some one for whose action he is responsible, so, where it is alleged that he is responsible for the continuance of the nuisance, it must be proved that it was continued by his permission." Farwell, L.J. says (1911) 2 K.B. 645): "In my opinion a land owner is not liable for a nuisance caused, not by his own action but by something done by another person against his will, subject to the qualification that he may become liable, if he permits it to continue and fails to abate it within a reasonable time after it has come, or ought to have come, to his knowledge."

30

He then added:

40 "There is a great deal to be said for the view that if a man finds a dangerous and artificial thing on his land, which he and those for whom he is responsible did not put there; if he knows that if left alone it will damage other persons; if by reasonable care he can render it harmless, as if by stamping on a fire just beginning from a trespasser's match he can extinguish it; that then if he does nothing, he has permitted it to continue and becomes responsible for it."

He then referred, without approval, to the Saxby's case L.R. 4 C.P. 198, and later in his judgment, agreed with the statement in Salmond on the Law of Torts 5th Edition, 1920, p. 260.

"When a nuisance has been created by the act of a trespasser, or otherwise without the act, authority, or permission of the

## Reasons for Judgment, Macdonald, J.

occupier, the occupier is not responsible for that nuisance unless, with knowledge or means of knowledge of its existence, he suffers it to continue without taking reasonably prompt and efficient means for its abatement."

His conclusions in the case were as follows:

- 10 (1) That the land owner in possession is liable for a nuisance created by a trespasser, which causes damage to others, if he could, after he knows or ought to have known of it, prevent by reasonable care its spreading; but (2) that as the facts on this part of the case have not been sufficiently investigated, and the judge has not applied the true principle of liability, there would have to be a new trial to decide on them and their legal effect."

20 At p. 361 he discussed what he termed a difficult question, i.e., where a fire is caused by a trespasser by throwing down a lighted match and it could have been easily extinguished by the owner of the land and he does not do so, so that the fire spreads and damages his neighbour. "He is then aware of a dangerous thing on his land which may damage his neighbour, and which by reasonable care he can prevent from damaging his neighbour, and he does nothing. I agree he is not an absolute insurer of that dangerous thing, for he did not himself create it, but I think on principle he is bound to take reasonable care of a dangerous thing which he knows to exist."

Shortly the sequence of events, prior to the fire getting out of control and destroying the plaintiff's property, was as follows:

30 Upon the morning of the 18th August the fire which was smouldering had not done any harm; Reese, one of the defendant's employees, thought he could have extinguished it, but there is no finding to that effect. About noon that day the employees of plaintiff being advised of the fire gave it due attention and, as a precaution, fire trails were run around the fire. Apparently it was the consensus that there was no immediate danger of the fire spreading and doing damage. It was not, however, extinguished and remained as a source of danger. It is contended that the Railway Company was in the same position, as the defendant in *Musgrove v. Pandelis* (1919) 1 K.B., p. 314—2 K.B. 43 (Referred to recently in *Heake v. City Securities Company Limited* (1932) 40 S.C.R. 250). There the petrol in the carbureter of an automobile, for an unknown reason took fire and the operator negligently omitted to turn off the tap, to prevent further petrol flowing from the tank and being ignited, so the fire spread and did damage to the plaintiff. The ground of the decision was the negligence of the servant in failing to control the fire after it started which he could easily have done. The facts, however, differ from those

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--continued.



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here presented, as the servant was present at the time when the fire originated and his negligence directly brought about the destruction of the plaintiff's property. In other words, the fire became almost immediately out of control through such negligence.

10 In conclusion as to negligence, I think the finding of the jury with respect to the fire creates the liability, referred to by Farwell, L.J. in *Barker v. Herbert* (1911) 2 K.B. 633 at 645. He, after mentioning that a land owner is not liable for a nuisance caused by his own actions, said:

“That he became liable if he permits it to continue and fails to abate it within a reasonable time, after it has come or ought to have come to his knowledge.”

I have referred to the breach of duty on the part of the employees, which formed a basis of the finding. I think the subsequent actions of the parties should not affect the finding as to negligence, if through its neglect the defendant had placed itself in such a position that it was responsible for the condition of the fire, prior to the alarm being given and the plaintiff then endeavouring to keep it under control and preventing it doing damage. The finding as to the failure of the plaintiff subsequently to control the fire, should not, in my opinion, operate in favour of the defendant so as to relieve it from liability. The harm had been done by the defendant allowing the initial fire, which its employees had discovered and ignored to gain strength during the morning of the 18th August. The effort of those concerned, after the lack of attention during that period, was apparently only directed to keep the fire under control and prevent its spreading. If my memory serves me aright there was no attempt to actually extinguish the fire. It remained as a source of danger during a dry season in a mountainous country and naturally subject to winds.

30 As to ultimate negligence, the plaintiff sought to have an appropriate question submitted to the jury. I declined to do so at the outset, but subsequently gave leave to renew the application. This was done, after answers to the other numerous questions had been given. It occurred late at night and after some discussion the application stood over until the following morning. Further argument then ensued and eventually, without my giving a decision, plaintiff abandoned his application. Defendant did not make an application of like nature and the result is that there was no finding of the jury as to ultimate negligence.

40 Defendant contended that plaintiff had not complied with certain provisions of the Forestry Act and that such failure afforded it a defence, but I do not think, upon the facts, that the Act is applicable, so as to benefit the defendant.

I think that the finding of the jury, as to negligence, has not

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been impaired nor affected. It renders the defendant liable in damages for the said sum of \$117,830.00.

As to costs, the plaintiff is entitled to the general costs of the action, while the defendant is entitled to the costs of the issues upon which it succeeded. These costs may be set off against plaintiff's costs. Judgment accordingly.

“W. A. MACDONALD, J.”

30th July, 1932.

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Court of  
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Reasons  
for  
Judgment,  
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--continued.

## No. 16

## Notice of Appeal.

*In the  
Court of  
Appeal for  
British  
Columbia.*

TAKE NOTICE that the defendant intends to appeal and hereby appeals to the Court of Appeal of the Province of British Columbia, from the judgment pronounced in this action by the Honourable Mr. Justice Macdonald on the 30th day of July, 1932, whereby he gave judgment for the plaintiff amounting to the sum of \$117,830;

No. 16  
Notice of  
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17th  
August  
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AND FURTHER TAKE NOTICE that the Court of Appeal  
10 will be moved at the sittings thereof to be held at the Law Courts in the City of Vancouver, in the Province of British Columbia, on Tuesday, the 4th day of October, A.D. 1932, at the hour of eleven o'clock in the forenoon, or so soon thereafter as Counsel may be heard, on behalf of the defendant that the said judgment be set aside with costs and that judgment be entered dismissing the plaintiff's action or alternatively, for a new trial, on the following amongst other grounds:

1. The judgment is against the law.
2. The judgment is against the evidence or the weight of  
20 evidence.
3. The judgment is against the findings of the jury.
4. The judgment misinterprets the findings of the jury.
5. The learned judge erred in not holding upon the evidence and upon the findings of the jury that the plaintiff's negligence was the substantial or effective cause of its loss.
6. The learned judge erred in holding that the defendant was guilty of negligence which caused or contributed to the plaintiff's loss.
7. The learned judge should have held that the ultimate  
30 negligence was that of the plaintiff.
8. The findings of the jury, correctly interpreted, exonerated the defendant from all negligence in the legal sense, and convicted the plaintiff of negligence in the legal sense.
9. The findings of the jury, correctly interpreted, showed that either the default of the defendant was immaterial or at worst a mere condition.
10. The learned judge erred in not holding that the plaintiff's negligence contributed to its loss.
11. The learned judge erred in adopting the findings of the  
40 jury that the fire originated on the defendant's right-of-way, there being no evidence, as the learned judge expressly found, as to when the fire actually started.
12. The learned judge should have held that there was no evidence as to the place of origin of the fire, and should have so instructed the jury.

## Notice of Appeal.

13. The learned judge having correctly determined the legal status of the defendant to be that of a land-owner upon whose land a private nuisance had been created, for the origin of which the defendant was not responsible, should have held that the Railway Act, and the regulations and order of the Board of Railway Commissioners made under its authority, were inapplicable to the case, and that the liability of the defendant should be determined without regard thereto, or that there was nothing therein

10 which imposed any liability on the defendant in the circumstances.

14. The learned judge should have held that the mere omission by the defendant to extinguish the fire lit upon its property, or which had spread to its property, without its volition or knowledge did not render the defendant liable.

15. The learned judge erred in not holding upon the evidence and finding that the forest officials of the Land Department of the Province of British Columbia had taken charge of the fire-fighting and that the defendant was therefore not responsible for the spread of the fire.

20 16. The learned judge should have held that the defendant's servants, by virtue of the orders and regulations of the Board of Railway Commissioners, were subject to the orders of the forest officials of the Province of British Columbia, and that the defendant's servants having obeyed such orders, no liability did or could attach to the defendant.

17. The learned judge misdirected the jury in respect of the following particulars:

30 (a) In not instructing the jury that their answers to questions 15 and 16 did not constitute an effective finding of negligence accounting for the spread of the fire and in not asking it for a fuller statement thereof.

(b) In not instructing the jury that the standard of duty by which the defendant's conduct was to be measured was that of a land-owner upon whose land a private nuisance existed, for the origin of which it was not responsible, and that any breach of the statutory duty imposed by the Railway Act or the orders or regulations made under its authority should be disregarded.

40 (c) In instructing the jury that the law relating to accidental fires was in accordance with the quoted statement of Idington, J. in the case of Laidlaw vs. Crows Nest Southern Railway Company.

(d) In instructing the jury that Mr. Justice (now Chief Justice) Anglin in the case of Laidlaw vs. Crows Nest Southern Railway Company stated the law to be, that had there been in that case a fire occurring on the defendant's right-of-way with knowledge or notice of its existence, then it constituted actionable negligence.

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*--continued.*

## Notice of Appeal.

(e) In instructing the jury without qualification that in the case of an occurrence of an accidental fire where the land-owner takes no steps whatever to extinguish that fire, having become aware of it, he has allowed a nuisance to exist on his property which amounts to actionable negligence.

(f) In instructing the jury that in considering the conflict of evidence as to the place of origin of the fire, it should consider what happened at the proceedings of the fire inquiry.

10 (g) In suggesting to the jury that Forest Ranger Dunn was an independent witness, in the sense that he had no interest in the question as to the place of origin of the fire when the evidence showed, and the fact was, that an unsettled dispute existed between the defendant and the Forest Branch of the Provincial Land Department as to whether the cost of fighting the fire should be borne by the defendant or by the Provincial Government.

(h) In not instructing the jury that if it found that the Forest Branch of the Provincial Government had taken control of the fire-fighting, the Forest Ranger was in charge thereof and  
20 could order anyone on or off the premises.

(i) In instructing the jury that question 20 relating to contributory negligence was not applicable to the case and need not be answered.

(j) In confusing the jury by instructing it on the legal effect of its prospective findings, and in failing to give to it a full and complete instruction on the evidence applicable to each question submitted to it, and in failing to explain to it the full content of the legal concept of negligence as applicable to the heads of negligence particularized in the pleadings.

30 18. The learned judge erred in making interlocutory remarks during the reception of evidence, calculated to mislead the jury.

19. The learned judge erred in his method of procedure upon the return of the jury with answers to certain of the questions submitted to it, in that he did not allow counsel to hear the answers read in open court but proceeded to cross-examine the jury upon its meaning of the questions answered and to put supplementary questions without counsel's being given an opportunity to object thereto, with a knowledge of the answers to the questions already then settled, and without giving an opportunity  
40 to counsel to address the jury in respect of such additional questions or to object to the learned judge's charge thereon.

20. The learned judge erred in not submitting the questions to the jury contained in the written memorandum submitted by counsel for the defendant.

21. The learned judge erred in submitting to the jury questions which failed to determine the rights of the parties, and in

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—  
No. 16  
Notice of  
Appeal,  
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*--continued.*

## Notice of Appeal.

refusing to submit questions, the answers to which would have determined the rights of the parties.

22. The learned judge erred in not holding that by reason of two certain written contracts respectively dated the 23rd of January, 1928 and the 8th of August, 1929, (being exhibits No. 19 and No. 20), the plaintiff undertook to bear all loss resulting from the fire in question in this action.

10 23. The learned judge erred in not holding that the plaintiff had infringed the Forest Act, and thereby disentitled itself to recover.

24. The learned judge erred in failing to hold that the plaintiff could have prevented any damage or loss.

25. The learned judge erred in directing the jury to find the amount of damages.

26. And on other grounds.

DATED at Vancouver, B. C., this 17th day of August, A.D. 1932.

R. W. HANNINGTON,  
Solicitor for the Defendant.

20

TO the Plaintiff Kapoor Lumber Co. Ltd.

AND TO its Solicitors, Messrs. Maitland,  
Maitland, Hutcheson & Remnant.

*In the  
Court of  
Appeal for  
British  
Columbia.*

—  
No. 16  
Notice of  
Appeal,  
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*--continued.*

**Agreement as to Contents of Appeal Book.**

*In the  
Court of  
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British  
Columbia.*

IN THE COURT OF APPEAL

(On Appeal from the Supreme Court of British Columbia)

—  
No. 17  
Agreement  
as to  
Contents  
of Appeal  
Book, 13th  
September  
1932.

Between:

KAPOOR LUMBER COMPANY LIMITED

Plaintiff (Respondent)

and

CANADIAN NORTHERN PACIFIC RAILWAY COMPANY

10

Defendant (Appellant)

IT IS HEREBY AGREED that the contents of the appeal book herein be as set out in Schedule "A" attached hereto, and that the documents or parts of documents and portions of the transcript of the proceedings at the trial shown in Schedule "B" hereto be omitted from the said Appeal Book.

DATED this 13th day of September, 1932.

R. L. MAITLAND,

Solicitor for Plaintiff (Respondent)

R. W. HANNINGTON,

Solicitor for Defendant (Appellant)

20

## SCHEDULE "A"

*In the  
Court of  
Appeal for  
British  
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## 1. Pleadings, etc.

	Document	Date	No. 17 Agreement as to Contents of Appeal Book, 13th September 1932, <i>--continued.</i>
	(a) Amended Statement of Claim amended pursuant to the order of 15th Feb., 1932.	4th Sept., 1931	
10	(b) Amended particulars of statement of claim amended pursuant to order of 15th Feb., except paragraphs 5 to 21 inclusive and omitting paragraph 1 (d) struck out.	28th Oct., 1931	
	(c) Order—part relating to particulars of statement of claim, (except as to damages) and except the first paragraph and the paragraph re costs.	12th Jan., 1932	
	(d) Particulars, (except paragraph 5) of statement of claim pursuant to order of 12th January, 1932, as amended by Order dated 15th February, 1932.	18th Jan., 1932	
20	(e) Amended defence, amended 26th Feb. and further amended 16th Mar., pursuant to order of 15th Feb., and substituting paragraph 19 as set out in Notice of motion dated 13th May, 1932, for the original paragraph 19.	16th March, 1932	
	(f) Reply.	13th Oct., 1931	
	2. Proceedings at trial:		
	(a) The whole of the transcript except the portions set out in paragraph 2 of schedule "B" hereto.		
30	(b) The transcript of the examination de bene esse of Teja Singh.		
	(c) Excerpt from the examination for discovery of N. S. Fraser, being the parts read at trial, being questions and answers Nos. 1 to 10; 60 to 71; 84; 93 to 102; 106 to 153;		



169 to 211; 223 to 310; 313 to 342; 347 to 366; 436 to 478; 512 to 517; 526 to 531; 536 to 557; 664; 707 beginning "Are you familiar" to 730.

*In the  
Court of  
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- (d) Questions submitted to Jury with the Answers thereto. (Shewing alterations).
- (e) Questions submitted to the trial judge by counsel for defendant.

—  
No. 17  
Agreement  
as to  
Contents  
of Appeal  
Book, 13th  
September  
1932,  
--continued.

### 3. Exhibits.

No.	Description	Exceptions
10	4. Plan of locus.	
	4A. Plan of locus.	
	4B. Plan of locus.	
	6. Photo — Composite of mill and yard.	
	7. Photo, taken from air.	
	8. Enlargement of Exhibit 7.	
20	9. Department of Lands: Forest Branch — Fire Pay Roll: Book 1.	Extract from "Forest Act," date-headings under which there are no entries, all columns subsequent to column headed "Total No. Hours or Days," and sheet next to back cover.
30	10. Department of Lands: Forest Branch — Fire Pay Roll: Book 2.	Same as above set out in respect of Exhibit 9, and also all pages in which there are no entries.
	11. Photo of railway fill and track Mile 35. 2.	

No.	Description	Exceptions	<i>In the Court of Appeal for British Columbia.</i>
12.	Photo of scene of fire at Mile 35.2, taken from track.		
13.	Photo of hillock taken from track at Mile 35.2.		
19.	Siding Agreement Jan. 23, 1928.	The covers and the six typewritten sheets next to the top cover.	<hr/> No. 17 Agreement as to Contents of Appeal Book, 13th September 1932, <i>--continued.</i>
10	20.	Siding Agreement, August 8, 1929.	
20		The covers, the two typewritten sheets next to the top cover, and the following clauses of the Agreement: Clauses numbered 1 to 11 both inclusive, 14, 15, 16 and 18 to 31 both inclusive. (A note to be added at the end of the Agreement to the effect that these omitted clauses are the same or to the same effect as the corresponding clauses in Exhibit 19).	
	23.	Letter, Fraser to Conway.	
30	36.	Time Table.	All, except front cover page and that part of page 13 beginning with the heading "Working Instructions, etc." to bottom of said page.
	37.	Plan of locus.	
	44.	Large photo from track, mile 35.2.	
	45.	Blue print of spurs.	
	46.	General Order 362—Certified Copy.	

No.	Description	Exceptions	<i>In the Court of Appeal for British Columbia.</i>
10	47. Regulations of Board — Certified copy.	The last 19 lines of the first page of the document marked "A," page 2 thereof; the first 31 lines and the last 13 lines of page 3, the first 11 lines and the 22nd to the 40th lines inclusive of page 4, the last 10 lines of page 5, and the first 19 lines of page 6 thereof.	— No. 17 Agreement as to Contents of Appeal Book, 13th September 1932, --continued.
	48. Letter, Fraser to Conway — 20-8-30.		
	49. Blue print of locus.		
	50. Plan — cross-section of fill, Mile 35.2.		
	4. Judgments, etc.		
20	(a) Reasons for Judgment, Macdonald, J.		
	(b) Judgment, Macdonald, J.		
	(c) Notice of Appeal.		
	(d) Memorandum of Agreement re contents of Appeal Book.		

## SCHEDULE "B"

*In the  
Court of  
Appeal for  
British  
Columbia.*

## 1. Pleadings, etc.

	Document	Date	No. 17 Agreement as to Contents of Appeal Book, 13th September 1932, <i>--continued.</i>
	(a) Writ, including the indorsement.	19th Aug., 1931	
	(b) Statement of claim.	4th Sept., 1931	
	(c) Demand for particulars of statement of claim.	26th Sept., 1931	
	(d) Defence.	8th Oct., 1931	
	(e) Demand for particulars of defence.	26th Oct., 1931	
10	(f) Particulars of statement of claim.	28th Oct., 1931	
	(g) Paragraphs (d) and 5 to 21 inclusive of amended particulars of statement of claim.	28th Oct., 1931	
	(h) Plaintiff's affidavit of documents.	31st Oct., 1931.	
	(i) Defendant's affidavit of documents.	6th Nov., 1931	
	(j) Order for trial at Victoria.	16th Nov., 1931	
	(k) Order for examination of Cowan.	7th Dec., 1931	
	(l) Notice of Trial for 25th Jan., 1932.	7th Jan., 1932	
20	(m) Order—part relating to discovery, the first paragraph and the paragraph re damages and the paragraph re costs.	12th Jan., 1932	
	(n) Paragraph 5 of particulars of statement of claim pursuant to order of 12th January, 1932, as amended by Order dated 15th February, 1932.	18th Jan., 1932	
	(o) Order for examination of Miller and Jones.	18th Jan., 1932	
	(p) Order countermanding notice of trial.	18th Jan., 1932	

	(q) Order.	15th Feb., 1932	<i>In the Court of Appeal for British Columbia.</i>
	(r) Notice of trial for 16th May.	22nd Feb., 1932	
	(s) Notice of appeal from part of Order of 15th Feb.	23rd Feb., 1932	— No. 17 Agreement as to Contents of Appeal Book, 13th September 1932, <i>--continued.</i>
	(t) Amended defence, amended 26th Feb., 1932.	26th Feb., 1932.	
	(u) Order for trial with special jury.	26th Feb., 1932	
	(v) Order staying proceedings.	26th Feb., 1932	
10	(w) Plaintiff's further affidavit of docu- ments.	27th Feb., 1932	
	(x) Order for payment out of Court.	8th April, 1932	
	(y) Demand for further particulars of damage.	26th April, 1932	
	(z) Particulars of damage.	12th May, 1932	
	(aa) Affidavit of Mr. Hutcheson re Teja Singh.	18th May, 1932	

## 2. Transcript of Proceedings at Trial:

### (a) Evidence relating to quantum of damages.

20	Page 27 last 10 lines to Page 38 first 5 lines.
	Page 38 last 7 lines to page 40 first 8 lines.
	Page 65 last 7 lines to page 70 first 19 lines.
	Page 71 last 23 lines to page 73 first 3 lines.
	Page 118 last 2 lines to page 127 first line.
	Page 190 last 17 lines to page 248 first 24 lines.
	Page 250 last 10 lines to page 252 first 20 lines.
	Page 261 last 4 lines to page 378 first 7 lines.
	Page 384 last 26 lines to page 387 first 11 lines.
	Page 402 to page 410 first 5 lines.
	Page 412 last 29 lines to page 421 first 11 lines.
30	Page 728 last 12 lines to page 731 first 20 lines.
	Page 732 last 13 lines to page 739 first 23 lines.
	Page 744 last 4 lines to page 746.

Page 748 last 23 lines to page 769 first 18 lines.  
Page 773 last 3 lines to page 818 first 20 lines.

(b) Evidence relating to oil-burning locomotives:

Page 422 line 13 to end of page 447.  
Page 717 line 2 to page 726 line 9.

10 The evidence of the witnesses R. B. Miller, MacKenzie, Matheson and Quantie, which related solely to proving that the oil-burning locomotive charged with being the cause of the fire was in all respects modern and efficient and that a locomotive of this type does not emit sparks, capable of igniting anything, has been omitted by consent on the understanding that the finding of the jury to the effect that the defendant's locomotive did not cause the fire is amply supported by the omitted evidence.

3. Exhibits:

1, 2, 3, 5, 14, 15, 16, 17, 18, 21, 22, 24 to 35 inclusive; 38 to 43 inclusive, 45A, 51 to 59 inclusive, and those parts of 9, 10, 19, 20, 36 and 47 set out in the column headed "Exceptions" in paragraph 3 of Schedule "A" hereto.

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—  
No. 17  
Agreement  
as to  
Contents  
of Appeal  
Book, 13th  
September  
1932,  
*--continued.*

## Formal Judgment

*In the  
Court of  
Appeal for  
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No. 18  
Formal  
Judgment,  
27th January  
1933.

Coram:

The Honourable The CHIEF JUSTICE OF BRITISH  
COLUMBIA.

The Honourable Mr. JUSTICE MARTIN.

The Honourable Mr. JUSTICE GALLIHER.

The Honourable Mr. JUSTICE MCPHILLIPS.

The Honourable Mr. JUSTICE M. A. MACDONALD.

10 Victoria, B.C., the 27th day of January, A.D. 1933.

THIS APPEAL from the Judgment of The Honourable Mr. Justice W. A. Macdonald dated the 30th day of July, 1932, coming on to be heard at Vancouver on the 20th and 21st days of October, 1932, in the presence of Mr. Mayers and Mr. Alexander of Counsel for the Appellant and Mr. R. L. Maitland, K.C., and Mr. Hutcheson of Counsel for the Respondent, upon reading the notice of appeal herein dated the 17th day of August, 1932, and the appeal book herein, and UPON HEARING what was alleged by Counsel aforesaid, this Court did order this appeal to stand for  
20 judgment, and this appeal coming on this day for judgment:

THIS COURT DOTH ORDER AND ADJUDGE that this appeal be and the same is hereby allowed and that the judgment directed to be entered on the trial of this action before The Honourable Mr. Justice W. A. Macdonald and a special jury of the County of Victoria on the 30th day of July, 1932, be set aside and a new trial had between the parties, and that the costs of the first trial do abide the event of such new trial.

AND THIS COURT DOTH FURTHER ORDER that the Appellant recover against the Respondent its costs of this appeal  
30 to be taxed.

By the Court,  
H. BROWN,  
Dep. Registrar.

## No. 19

## Reasons For Judgment

(a) MACDONALD, C.J.B.C.—

*In the  
Court of  
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(a)  
Macdonald,  
C.J.B.C.

There have been several mistakes made on the trial of this action, which I think requires me to send it back for a new trial. The cause of action was negligence on the defendant's part for a fire which originated on its right-of-way, and spread to the plaintiff's land causing damage. I shall deal first with the essential questions answered by the jury. Answers to these questions found  
10 that the fire was not started by an engine of defendant; that the origin or start of the fire was unknown; that it originated on defendant's right-of-way; that the defendant became aware of it; that the right-of-way was clean; that the fire spread from the right-of-way to the plaintiff's land, and that it destroyed property of the plaintiff; that the defendant did not take proper steps to prevent it spreading to the plaintiff's land; that the plaintiff was guilty of negligence in connection with the fire; that plaintiff's negligence consisted in not using their water tank car as soon as  
20 it was possible to do so. Question 10 was answered in this way:—

20 Q. If the defendant had knowledge of the said fire and if you have found that it originated on its right-of-way (which was found) 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 15 and 16.

Then Question 15:—

30 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.

It appears that a gas car of the defendants passed the incipient fire in the morning at about half past ten and on reaching Kapoor a few miles away the crew did not report to their head office in Victoria the existence of the fire. Later in the forenoon a freight train passed the same point and there was delay in their  
40 reporting to their company. This is the sole negligence found against the defendant.

Then Question 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?

The question was not answered.



We, therefore, have a finding of negligence against the defendant in not reporting as aforesaid, and secondly a finding of negligence against the plaintiff in not using their gas car tank as soon as they might have done. There is, I think, a case of fault on both sides which falls within the Contributory Negligence Act, B. C. Statutes 1925, cap. 8, which requires the jury not only to find the negligence but the degree of fault of the respective parties. Question 20 appears to have been propounded for the purpose set out in said Act. The question was curiously dealt with by the parties and by the learned Judge at the trial. At page 381 of the Appeal Book, in the learned Judge's charge to the jury, we find this:—

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“As to question 20, you heard the discussions with regard to that. Counsel both seemed anxious to have that submitted, for as I have already mentioned, it appeared in both sets of questions (meaning proposed questions submitted to the Judge for his guidance by counsel); and you need not pass upon it at all—I will take the responsibility of taking that course.

20 Then again on the same page:—

“Now, as to the questions, you are, for the purpose of assisting in this trial, not compelled to follow my instructions as to answering these questions; but I prefer that you should do so.

And on the following page, the learned Judge said:—

“ . . . proceed then to answer as far as you can all the questions, except Question 20; and then deal with the question of damages.”

30 After the jury were sent to the jury-room they returned several times for further instructions, and Question 20 was insisted upon by plaintiff's counsel, but resisted by defendant's counsel, although he had originally asked that it be submitted. Mr. Maitland, plaintiff's counsel, (at page 402 of the Appeal Book) said:

“I must again ask for an answer to question 20. In view of these answers it seems to me, where by the fault of two parties damage is caused to one, under the Contributory Negligence Act, then they must say in what degree each party is responsible. .

40 Mr. Mayers: I say the Act has no application whatever, in view of the answers to these questions.

The Court: Well, has it any application to an action of this kind? I am using that term in a broad sense.

Mr. Maitland then presses his view; and at page 403 His Lordship said:—

. . . I have not decided it. In fact, it is the lateness of the hour, and all being tired—a long tedious day—and I trust the Jury will not think it is any imposition.

And at page 404, the Court asked Mr. Maitland:—

Have you anything further to advance in support of your application to submit what we have termed the 20th question?

Mr. Maitland: No, my Lord.

.....

10 Mr. Mayers: My Lord, our objections are two. First, if any such question arises at all, which it is submitted does not, then it can only be a question of ultimate negligence. Secondly, the Jury cannot find any degree of fault in the defendant causing the loss or damage, consistently with their answers to the former questions. The only way in which the Jury can maintain consistency in their answers, is to find that the fault of the defendant did not in any degree cause the loss or damage. If your Lordship should be against me, then I submit that Question 20, in its present form, is in any case improper.

And at page 405:—

20 The Court: That is the position I am in this morning, I may or may not submit that question. I want to see upon what lines if I do submit it, I will instruct the Jury.

And again at page 406:—

The Court: As I understand, you are pressing for the submission of this question in the form that it was submitted originally.

Mr. Maitland: Yes, my Lord.

30 The Court: What you have suggested was an endeavour to frame a question in accordance with the Act, as you consider? Because you have got incorporated in this question a point of ultimate negligence, to instruct the Jury upon.

Mr. Maitland: I think, my Lord, my safest course would be to withdraw my application altogether. I don't want a question of law on that.

The matter ended there and no further reference was made to Question 20, or to the principle upon which it should be decided.

40 Now to my mind there is no question but that the Contributory Negligence Act does apply to this case and that it was the duty of the learned Judge to instruct them so that they might intelligently dispose of the question. Usually when questions are submitted to a jury they answer the questions and the Judge applies the law, but that rule would not apply to this case, since the statute requires, in specific terms, that the degree of fault must be found by the jury. The result is that one of the most substantial factors in this case has not been decided at all. There is, as I have already pointed out, evidence of negligence on both sides. The terms "original negligence," "contributory negligence," and "ultimate negligence" are nothing more than convenient expressions to distinguish between the different characters of negli-

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(a) Reasons for Judgment. Macdonald, C.J.B.C.

--continued.

gence. The defendant's negligence was prior to and was the initial negligence. The plaintiff's negligence was secondary negligence and could, I think, be properly described as contributory negligence. Without, therefore, a finding of the jury as to the degree of fault, it is impossible to enter any proper judgment in this case. Then again no question as to ultimate negligence was submitted to the jury. The reason Mr. Maitland ultimately objected to Question 20 was his fear that the finding of that question by the jury might imply ultimate negligence, but that is  
 10 neither here nor there now. The question was not answered; it was not submitted to the jury, and the jury was not instructed upon the doctrine, if I may call it such, of ultimate negligence. In both of these cases, therefore, there was at least non-direction on essential points in the case. I think, also, it might be said that there was mis-direction when the learned Judge told the jury that they need not consider the question of damages, which involved this question of fault; that he would take responsibility for that. That may have been the cause of the jurymen's failure to answer the question.

20 No other negligence was found against the defendants except that mentioned in question and answer 15.

Under these circumstances, I think, that this Court cannot rectify the errors that were made at the trial, and our only course is to send the case back for a new trial.

I would set aside the judgment and order a new trial.

---

(Upon motion to settle the judgment): The costs of the appeal follow the event, as they would do independently of this motion, the appellants having succeeded.

30 With regard to the costs below, we think the usual order should be made, that the costs of the first trial should abide the event of the new trial.

My brother Martin dissents as to the costs of the former trial.

40 As this question of ultimate damage and ultimate negligence has been raised, I may state my view. I agree with my brother McPhillips that there is no such question as ultimate *damage* to be submitted to a jury. The ultimate damage is the damage that the jury might have found, arising from what? Negligence—and if that negligence is the sole negligence of one of the parties, that party has to pay the damage. The jury may assess this damage at \$100,000 or \$10,000, and while it is, you might say, the ultimate damage, this is not to be submitted to the jury in that way, they have it already and have to decide it amongst themselves. But what they must decide is that one party has been guilty of ultimate *negligence*—that the ultimate negligence of that party has brought about the damages.

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--continued.

(b) MARTIN, J. A.

I wish to say, with respect to the form this judgment is taking, that my personal opinion is that the action should be dismissed, because the only ground upon which negligence has been found, or can be attributed by the jury's answers, is failure to warn, and in my opinion that is neither a cause itself of, nor a contribution to, the fire; therefore it is impossible to attach any negligence to the defendants. But in view of the fact that two of my brothers are firm in the view that a new trial should be  
 10 ordered, and to avoid any further unnecessary litigation or costs that might arise out of the formal judgment of this Court, I can at least go with my brothers so far as to say that a new trial should be ordered, though it would please me better, if I may say so with all respect, if we were to say that the action should be dismissed. I think, however, this judgment is, under the circumstances, the only proper course to take, in deference to their opinion, having regard to the fact that difficulties might arise if such were not the definite judgment of this Court, owing to one of its members being prevented by illness from participating therein.

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(b) Martin,  
J.A.

20 (Upon motion to settle the judgment): I wish to cite the case of *Victoria Corporation v. Patterson* 1899 A.C., p. 619, where it is stated:

“Their lordships are of opinion that no such question arises in this case, because the conduct of the trial was such that that question was never submitted to the jury.”

And there are a number of other cases to the same effect which I have in my notebook here, and of which I shall give a memorandum to the Registrar, showing that the course of the trial binds the conduct of the parties in the appellate tribunal.

30 I might add a word with regard to Question 20, which Counsel drew up and which appears, the learned Judge says, in the questions submitted by both Counsel and also by the learned Judge, viz: that the use of the words “ultimate *damage*,” not “*negligence*” therein, is in accord with the primary and general meaning of that word “ultimate” as meaning “final” or “resulting” as it would be understood when referred to and considered by a jury. The question as to whether it has another meaning when applied to something essentially different, viz. to the final “negligence” which caused that “damage” is another matter.  
 40 Although the word “ultimate” has generally received, by lawyers in Canada, the meaning of “final” in regard to acts of negligence, it has not received the same use in the Appellate Courts of England and Ireland.\* Its ordinary and primary lay meaning will be found in the Oxford Dictionary, and it is this:

(1) “Forming the final aim or object.”

(2) “Coming at the end of a process, course of action, etc., or as a final result or in the last resort.”

I only say this because there is no doubt in my mind that the language of that Q.20 would have hopelessly failed to attain the object to which it was supposedly directed.

\*[NOTE: Cf. *The "Chatwood"* (1930) P.272, 290 A.M.]

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(b) Martin,  
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(c) McPHILLIPS, J.A.

The majority of the Court have come to the conclusion that there should be a new trial. With that conclusion I cannot agree—my view is that the learned trial Judge W. A. Macdonald was right in entering judgment on the answers given by the jury to specific questions put to them and answered by the Jury. Even if it should have to be admitted that the answers of the jury cannot be considered as wholly satisfactory—something which I do not admit—yet even then, as the evidence in the case is in my  
 10 opinion such “that only one view can reasonably be taken of the effect of that evidence,” (I quote from Duff, J., now Chief Justice of Canada), the evidence is overwhelmingly complete that the Railway Company was guilty of negligence in failing to promptly extinguish the fire even after long delay in attempting to do so. Its officers and servants becoming aware of the fire were neglectful in reporting the fire to the Company—which neglect was really the proximate cause of the fire—loss to the plaintiff—as the fire was admittedly easily capable of being put out and prevented from passing into and upon the land of the plaintiff with the disastrous consequences which ensued—a fire loss to the plaintiff in  
 20 the sum of \$117,830.00 as found by the jury. Upon the question of the jurisdiction of the Court—even if the verdict of the jury should be considered unsatisfactory—if it is found that the evidence warrants judgment—upon a study of all the evidence—judgment may be given. I am satisfied after that study that judgment should be given for the plaintiff—I refer to the case of *McPhee v. Esquimalt and Nanaimo Railway Company* (1914) 49 Can.S.C.R. 43 at p.53, Duff, J., (now Chief Justice of Canada), said:

30 “By the law of British Columbia, the Court of Appeal in that province has jurisdiction to find upon a relevant question of fact (before it on appeal) in the absence of a finding by a jury or against such a finding where the evidence is of such a character that only one view can reasonably be taken of the effect of that evidence.

40 The power given by O.58,r.4, to draw inferences of fact and to make such further or other order as the case may require, enables the Court of Appeal to give judgment for one of the parties in circumstances in which the court of first instance would be powerless, as, for instance, where (there being some evidence for the jury) the only course open to the trial judge would be to give effect to the verdict; while, in the Court of Appeal, judgment might be given for the defendant if the court is satisfied that it has all the evidence before it that could be obtained and no reasonable view of that evidence could justify a verdict for the plaintiff.

This jurisdiction is one which, of course, ought to be and, no doubt, always will be exercised both sparingly and

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cautiously: *Paquin v. Beauclerk* (1906) A.C.148, at page 161: and *Skeate v. Slaters* (30 Times L.R.290).

Here in my opinion a reasonable view of the evidence did justify a verdict for the plaintiff and the learned trial Judge was on the evidence justified in entering judgment for the plaintiff. I would further refer to what Loreburn L.C. said in *Paquin Ltd. v. Beauclerk* (1906) A.C.148 at pp.160,161—

10 “The proper construction of Order LVIII.,r.4, has been the subject of criticism in *Millar v. Toulmin* (17 Q.B.D. 603) and *Allcock v. Hall* (1891) 1 Q.B.444. In the latter case all the judges of the Court of Appeal concurred in the opinion that they were at liberty to draw inferences of fact and enter judgment in cases where no jury could properly find a different verdict. Obviously the Court of Appeal is not at liberty to usurp the province of a jury; yet, if the evidence be such that only one conclusion can properly be drawn I agree that the Court may enter judgment. The distinction between cases where there is no evidence and those where there is some evidence, though not enough properly to be acted upon by a jury, is a fine distinction. 20 and the power is not unattended by danger. But if cautiously exercised it cannot fail to be of value.”

In my opinion in this case, upon a review of the evidence “only one conclusion can properly be drawn” and that is, that the defendant was solely guilty of the negligence which caused the plaintiff the serious fire loss sued for in this action. Now the fire that caused the loss here arose on the right-of-way of the defendant. It is clear under the law of England—and it is the same in British Columbia—that a man is liable for so negligently keeping his fire 30 that the house or property of his neighbours becomes damaged thereby: Further it is *prima facie* evidence of negligence when the fact is that the fire first broke out in his house and that is really the present case—the fire first broke out upon the Railway Company’s right-of-way (*Wilson v. City of Port Coquitlam* (1922) 30 B.C.R.449 and the *Municipality of the City of Port Coquitlam v. Wilson* (1923) Can.S.C.R.235).

It was held in *Winterbotham, Gurney & Co. v. Sibthorp and Cox* (1918) 1 K.B. 625 C.A. as succinctly set forth in the head-note—

40 “Where upon an appeal by a plaintiff to the Court of Appeal from the verdict and judgment for the defendant it appears that all the facts are before the Court, and the Court is satisfied that the evidence is such that only one possible verdict could be reasonably given, the Court is not bound to order a new trial, but has jurisdiction under Order LVIII., r.4, and ought to exercise it by directing judgment to be entered for the plaintiff notwithstanding the verdict of the jury.

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*Millar v. Toulmin* (1886) 17 Q.B.D.603, *Paquin Ld. v. Beauclerk* (1906) A.C.148, and *Skeate v. Slaters, Ld.* (1914) 2 K B. 429 considered.”

I would also refer to what Swinfen-Eady, L.J., said in the case at p.630—

10 “Assuming the verdict was utterly unreasonable having regard to the evidence, such as no reasonable men could possibly have given, what is the proper course for this Court to adopt? His answer was to grant a new trial. Then suppose the same process continued, as it must continue, it must go on, if necessary, *ad infinitum*, because all the Court can do is to direct a new trial and not to draw any inference of fact. In my opinion that is not the law, and although the Court ought to be exceedingly careful in interfering with the verdict of a jury, and still more so in giving a decision contrary to the finding of a jury, yet where it is manifest that all the facts have been ascertained, and that there is only one verdict that can be reasonably given, in my opinion it is the duty of this Court to draw the inference and to decide according to the rights of the parties, and the Court is not confined to sending the case for a new trial. That was the result of *Paquin Ld. v. Beauclerk* (1906) A.C. 148 in the House of Lords, where *Millar v. Toulmin* (17 Q. B D.603) was referred to.”

20

The learned Judge has given a very able and complete judgment in the case and my opinion is that the judgment for the plaintiff should be allowed to stand. I do not consider that any case has been made out for the direction of a new trial—on the contrary, as I view the case, both on the facts and the law the judgment of the learned trial Judge is right and should be affirmed.

30 I would dismiss the appeal.

(Upon motion to settle the judgment): In my opinion Section 60 of the Supreme Court Act applies to this appeal, because it says: “In the event of a new trial upon ground of objection not taken at the trial the costs of the appeal should be paid by the Appellant.” Now here the successful party did not take the ground, because the Judge framed his own question and put the question to the Jury. And knowing that the question ought to have been put to the jury, which the learned Judge did not put, it was an objection that the learned Counsel at the trial should have taken and have asked the learned Judge to put that question. Therefore I consider that I am right in applying Section 60 of the Supreme Court Act. The costs of the appeal in such case should be paid by the appellant, and that is my view.

40

With regard to the costs of the abortive trial, I agree with my learned brothers, that they should abide the event of the second trial.

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With regard to "ultimate damage" I still adhere to my view expressed during the argument that it would be a most embarrassing thing to present a question to a jury of ultimate *damage*. It is not known to the law, cannot be known to the law, and would create a great difficulty. I do not understand it myself; it has no meaning to me.

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MACDONALD, J.A.—

In an action to recover damages from appellant Railway Company for a fire loss the jury answered questions as follows:

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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.

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.

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.

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.

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.

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.

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.

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.

Other answers show that the fire was not started by appellant: that its engine had modern and efficient appliances; its right-of-way free from debris and that the origin of the fire was unknown. On motion for judgment the learned trial judge entered judgment in respondent's favour for \$117,830.00 damages.

20 This fire of unknown origin started on appellant's right-of-way. It was submitted that no evidence supports this finding: that it might have moved from adjoining land to the right-of-way. I think there was enough evidence from respondent's witnesses to enable the jury to reach that conclusion.

30 Appellant is liable as owner of the right-of-way if found guilty of negligence "causing" the resulting loss. Question 15 refers to negligence, "causing or contributing" to the fire. The jury found appellant negligent (causing or contributing) because the crew on a gas car did not report a fire noticed by them on the 18th of August at 10.25 a.m., and also because a crew on a way freight did not report promptly on arriving at Kapoor at noon on the same day. On the question of taking proper precautions "to prevent said fire from spreading" the jury found that proper precautions were taken as set out in the answer to question 10a except as qualified by the finding of failure to report promptly.

40 If it is clear that this fire loss would not have occurred at all had the crew of the gas car and way freight (particularly the former) reported promptly: in other words that it was the natural and inevitable consequence of this omission we might be justified in overlooking the words employed in submitting question 15 ("causing or contributing to") and confirm the verdict. If, on the other hand, the evidence shows that the failure to report was a contributing factor only and that other events so intervened that it should not be regarded as the decisive cause then we should assume that the answer was meant to be read in that sense or at least is open to that interpretation. In fact, viewing all the answers, and the failure to find ultimate negligence, it would appear that the jury meant that failure to report was a contributing factor only on the point of liability. If then there is no reasonable evidence to support a finding that failure to report was the effective cause of the fire loss the answer to the question *may* be assigned to the point of contribution.

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A review of the evidence is necessary. The fire started on the morning of Monday, August 18th, 1930, on appellant's right-of-way at mile post 35.2 about one-third of a mile from respondent's mill where the loss was sustained. A gas-propelled car operated by appellant passed the point of origin about 10.25 a.m., and the conductor and engineer saw smoke from logs and stumps covering a very small area. They re-passed it at 3.44 in the afternoon while it was still burning. No report was made by them. Then a way-freight passed on the same day at 12.05 noon or a few minutes earlier. The engineer and conductor saw smoke rising from a burnt log or burning stump. On arriving at Kapoor (in less than five minutes) the derailment of an engine caused the conductor to telephone to Fraser, appellant's assistant General Agent at Victoria, for assistance at 12.55 p.m., or 1 o'clock and in that conversation he told him:

"that there was a fire back behind us and that the fire apparently (as viewed at this time) was gaining considerable volume as the smoke was rising, getting bigger."

He saw some East-Indians from respondent's mill going in that direction with fire-fighting tools. Mr. Fraser said "alright I will get out as soon as I can" and he arrived with an auxiliary to repair the track at 4 p.m. We may assume therefore that there was a duty to report soon after 10.25 a.m., and failure to do so until 12.55 or 2½ hours later. Did failure to report for 2½ hours have any possible effect on the course of events? The purpose of a report is to bring men to the scene of the fire to extinguish it. If interested parties sufficiently numerous were aware of its existence and on hand to control or extinguish it a failure to report might not be the cause of the loss. It is necessary to show that if a report had been made shortly after 10.25 a.m., the fire could have been extinguished and the loss would not have occurred. On this point respondent can rely, with considerable confidence, on this evidence of Reece, appellant's section foreman:—

Q. Well, if you had been notified, at say 10 or 10.30 on Monday morning by your engine man or conductor that there was a fire on your right-of-way at 35.2, you would have gone to put it out?—A. Yes.

Q. There is no doubt about that?—A. No.

Q. And are you not supposed to receive from your conductors and engine men a report of any fires there are?—A.—Yes.

Q. And you immediately take steps to put it out?—A. Yes, go right away.

Q. And you got no report from any of your people that there was a fire at 35.2?—A. No.

Q. And if you had, you would have gone and put it out, as it was a small fire—that is correct?—A. Yes.

In our inquiry on this appeal however we have to find if the

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answer to question 15 should be regarded as exclusively responsive to the word "causing" and in doing so must survey and draw conclusions from the evidence as a whole.

If the existence of the fire was known at 1 o'clock and "controlled" during the afternoon negligence in failing to report earlier (as a decisive cause) may evaporate. It was equally capable of extinguishment—perhaps with a little greater effort—after 1 o'clock (little increase in area) and if fire-fighters thought it was out—or incapable of spreading (that is the meaning of "controlled") the later conflagration might be due to their neglect in failing to effectively control it. Respondent's superintendent was notified of the fire at 12.30 on the 18th and with the yard foreman went to the spot about one o'clock with 24 men. He had 150 available but thought he could put it out with 24 men. The fire then covered less than one-quarter of an acre. A dozen men cut a fire trail around it and another dozen worked with shovels and carried buckets of water from the Sooke river. They remained there until 6 p.m. He said they could not put the fire out but

10 "they had the fire under control between 4 and 5 o'clock on account of having the fire trail cut around the fire." Mr. Dunn, Asst. Forest Ranger, arrived in the afternoon about 4 o'clock and on his suggestion six men remained all night on fire patrol duty equipped with shovels, buckets, mattocks and axes. When he left about 5 p.m., "It appeared in good condition," i.e., the fire was surrounded by a trail and the trail was holding it in." As to the condition of the fire at 5.30 p.m., Teja Singh for respondent gave this evidence:—

30 Q. Just exactly what was the condition of the fire when you left?—A. There was just a small fire, it more or less burned right down.

Q. It had pretty well died down.—A. Yes.

Q. And there was just a slight smouldering or smoking, is that it?—A. Yes.

Q. Yes, no flame?—A. No, I don't think so.

Q. No, so that as far as you could see, it was perfectly safe?—A. Yes.

Mayo Singh gave this evidence as to conditions in the morning:—

40 Q. Did you go to the fire on the following morning Tuesday, the 19th of August, 1930?—A. Yes. (Q.) What time?—A. A little after seven.

Q. And what did you see then?—A. I saw some men working there; I did not count them. (Q.) How many about?—(A.) I think about over a dozen. (Q.) Over a dozen. Had the fire increased or diminished?—(A.) About the same. (Q.) How long did you stay at the scene of the fire?—(A.) Oh, about fifteen minutes.

Q. You were satisfied with the condition then?

.....

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Q. 377 to 380: "Now Bal Mukand (respondent's superintendent) as you have told me, reported to you on the Tuesday morning what he had done at the fire on the Monday?"

—(A.) Yes, sir.

Q. Did he tell you that he had finally got the fire under control?—A. Yes. (Q.) And the time when he got the fire under control was four o'clock in the afternoon, he told you that?

10 (A.) Monday? I don't know about the time; he just told me fire was under control all right.

Twenty-five men remained on the fire area on Tuesday. Over a hundred were still available but respondent kept the mill running all morning and until 2 p.m. Up to about 4 p.m., the Superintendent thought the condition was quite safe. But the wind changed at that time, fanned the embers into flame, starting a conflagration that soon after reached respondent's plant and lumber yard.

20 Returning to events on the 18th, Mr. Dunn, Forest Fire Ranger in the employ of the Forest Branch of the Provincial Government was called by respondent. He arrived at 4 p.m., and remained about an hour. Then he returned to the mill and saw Mr. Fraser, appellant's agent, and Mr. Cowan, respondent's accountant. He and Mr. Fraser went back to the scene of the fire. When Dunn left it appeared to be in good condition: also "they had an adequate crew to hold it." He was sent there by Forest Ranger Campbell to get a report on the fire and to report to him. This area was under Campbell's jurisdiction. Dunn had wide statutory powers; he could obtain practically all available help in the neighbourhood. Fraser had a crew and full fire-fighting 30 equipment with him and a number of men. The jury in answer to question 10a commended his efforts and general attitude. Dunn gave this evidence as to their withdrawal.

Q. So that you must have been perfectly satisfied when you let Mr. Fraser and his men go, that there was no danger from that fire at all; isn't that right?—A. The fire was in good condition at that time.

Q. Isn't that what I have said right?—A. Yes.

40 Q. When you left on the Monday you left the fire in charge of the Kapoor Lumber Company didn't you?—A. Yes.

Q. In fact the Kapoor Lumber Company *had taken over the fire* and were fighting it, that is right, isn't it?—A. Yes.

And again:—

Q. You saw the manner in which these Hindus were dealing with this fire?—A. Yes.

Q. And the equipment that they had there, that is the buckets and shovels?—A. Which day?

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Q. On the Monday.—A. Yes.

Q. And the manner in which that was being carried on, did you expect them to have put that fire out?—A. It would be some little time before the fire would be out; but it would be quite safe at the time that I saw it.

.....

Q. They could have extinguished the fire if they had worked on it, couldn't they?—A. In the course of time.

Q. How long?—A. It is hard to say.

10 Q. Well, six hours?—A. No, I wouldn't say six hours; it would take more than six hours.

Q. Twelve hours? How long?—A. It is hard to say. It depends on conditions; it depends on what is burning.

Q. Well, you saw what was burning?—A. Yes.

Q. Well, how long would it have taken to have put that fire completely out?—A. I am afraid I could not give you a definite answer on how long it would take to put any fire out.

Q. It was only a question of getting enough men there to put it out completely, wasn't it?—A. Yes.

20 The foregoing evidence (except the testimony of Reece) was given by respondent's witnesses. Without referring in detail to the evidence on the point it should be added that the jury found respondent negligent "in connection with" (a loose expression) the fire in not using their water tank car as soon as it was possible to do so. This finding must be considered in drawing conclusions because its failure in this regard may destroy any inference of negligence *causing* the damage through failure to report. It also discloses the light in which these respective acts of negligence were regarded by the jury. Respondent's tank car in two tanks had a  
30 capacity of 4750 gallons. Under normal high speed the pump would throw water at the rate of 30 gallons per minute. The track after derailment was repaired in the afternoon of the 18th and this tank car could pass freely over the main logging spur. Had it been utilized as soon as possible after the repair of the track the fire could have been, if not extinguished, at least rendered ineffective. The jury evidently thought so.

40 What interpretation then in the light of all the evidence should be given to the answer to question 15? If the failure to report for 2½ hours is simply an act of negligence *per se*; a dereliction of duty in the course of the day's events, which at best added only to the difficulty of extinguishing or effectively controlling the fire, it is clearly not the sole cause of the loss but rather a contributing factor in a series of incidents culminating in disaster. If too failure to use the tank car was an effective cause of the damage suffered, or even as the jury found, an act of negligence "in connection with" the fire the verdict cannot stand. Further findings would be necessary. If, notwithstanding origi-

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nal negligence the loss could have been averted, if respondent had not failed, with abundant means at hand in man power and equipment to extinguish it, the appellant would not be liable. The true issues were not determined by the answers. If again, the combined negligence of both was the real and substantial cause of the ultimate damage, a question of degree of fault would arise under the Contributory Negligence Act. In view of this situation; finding too inappropriate phrases in questions submitted in respect to negligence, viz., 15 and 18, it is reasonable to assume that the

10 jury answered them without proper regard to the question of effective cause. A new trial is necessary.

We are asked, however, to hold that on the law and the undisputed facts the action should be dismissed and this requires examination. We are concerned with the liability of an owner of land in respect to a fire of unknown origin starting on its property. That is, subject to this qualification. This landowner is a railway company and the strip of land a right-of-way and appellant was subject to all duties imposed by statute and by the orders of the Board of Railway Commissioners. The relevant orders are contained in working instructions and in section 14 of order 362, of

20 the Board. Respondent on its part was subject to the provisions of provincial acts. It had to do its "utmost to prevent the spread of the fire" (Cap. 93 R.S.B.C. 1924, sec. 114) when it reached its own property. It also had the common law right to enter—as it did—upon the right-of-way where the nuisance existed to abate it or to prevent it from doing damage. I think the principles laid down in *Job Edwards vs. Birmingham Canal Navigation* (1924) 93 L.J.K.B.D. 261 by Scrutton L.J. at 267 to 270 are sound. It is a dissenting judgment inasmuch as he would direct a new trial.

30 They are applicable in this case subject to the qualification that we must regard duties imposed by statute. It was the owner's duty to endeavour to abate this nuisance even though innocent of its creation, not necessarily successfully—an honest attempt carried out without negligence is enough. It is important to view its obligations aright when it is suggested that the only way appellant could be exonerated was by the total extinguishment of the fire on the 18th. Sir John Salmond in his *Law of Torts* 7th Edition at p. 225, after stating,

40 "In the case of a public nuisance, when once the existence of the nuisance becomes known to the occupier of the land it is his duty to endeavour to abate it, even though he is entirely innocent either of causing the nuisance or allowing it to continue."

says, as to a private nuisance,

"But in the case of a private nuisance there is no such duty unless the nuisance is allowed to continue by the occupier's default or negligence. What will constitute a continuance of a private nuisance so as to create

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an actionable wrong will depend on the evidence. A deliberate refusal to give an adjoining owner notice of the danger, or an obstruction of that owner in his endeavour to abate the nuisance, may be evidence of a continuance. There may be cases in which the act necessary to abate the nuisance, in the first instance, was of such a trifling nature that it might amount to an act of negligence on the part of the occupier of the land on which the nuisance existed not to take that step. You cannot be said to have permitted that to continue which you could not by any reasonable means prevent. In the absence of any such "continuance," the occupier will not be liable."

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10

The answer to 10a would appear to indicate that appellant did "take reasonable means to prevent" the mischief by doing all a reasonable man should be supposed to do in the special circumstances of the case. The difficulty, however, is that this is a question of fact and although question 10a and the answers thereto appear to be pertinent, indicating that the owner discharged its full duty yet in view of the way the whole case was presented to the jury I do not think we would be justified in basing a judgment on one isolated question and answer. Further the finding of failure to report cannot be divorced from this answer. Counsel for respondent, as the trial judge pointed out, rested his case on the allegation that "appellant *negligently* let the fire continue to burn on its property and to escape to ours thereby causing damage." That is another way of saying that this nuisance of unknown origin might have been rendered harmless by the exercise of care and skill. Respondent had to show that there was lack of care and skill and, if so, that it was the effective cause of the spreading of the fire and the subsequent damage. Because of the intervention of other parties acting lawfully several factors enter into the determination of the question. All these factors were not necessarily considered in the answer to question 10a. The case therefore was not tried. I may add that I do not think we derive any assistance from the statement of Anglin, J. (now Chief Justice) in *Laidlaw v. Crow's Nest Southern Ry. Co.* (1910) 42 S.C.R. 355 at 359, viz., that

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"Nothing was there said in argument of the allegation now put forward that the defendants through their servants had notice of the existence upon their right-of-way of the fire which eventually spread to the plaintiff's lands and were guilty of actionable negligence in not extinguishing it."

as it is merely a reference to a possible issue which might have been raised without any consideration of the evidence which would have to be considered in that event.

I would direct a new trial.

(Upon motion to settle the judgment): As I viewed it in my reasons it is not correct to say that the first trial was abortive because of the alleged position taken by the plaintiff's Counsel in respect to question 20.

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**Order Granting Defendant Conditional Leave To Appeal***In the  
Court of  
Appeal for  
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Coram:

The Honourable The CHIEF JUSTICE OF BRITISH  
COLUMBIA.

The Honourable Mr. JUSTICE McPHILLIPS.

The Honourable Mr. JUSTICE MACDONALD.

Victoria, B.C., the 9th day of February, A.D. 1933.

No. 20  
Order  
Granting  
Defendant  
Conditional  
Leave to  
Appeal, 9th  
February  
1933.

10 UPON MOTION made this day to this Court sitting at Vic-  
toria, B.C., on behalf of the above-named defendant (Appellant)  
for leave to appeal to His Majesty in His Privy Council from the  
Judgment of this Honourable Court pronounced herein on the  
27th day of January, 1933, and upon hearing Mr. Mayers, K.C.,  
of counsel for the Defendant (Appellant) and Mr. R. L. Maitland,  
K.C., of counsel for the Plaintiff (Respondent).

20 THIS COURT DOTH ORDER that subject to the perform-  
ance by the said Defendant (Appellant) of the conditions herein-  
after mentioned, and subject to the final order of this Court upon  
the due performance thereof, leave to appeal to His Majesty in  
His Privy Council against the said Judgment of this Honourable  
Court be granted to the Defendant (Appellant).

30 AND THIS COURT DOTH FURTHER ORDER that the  
said Defendant (Appellant) do within three months from the  
date hereof provide security to the satisfaction of this Honour-  
able Court in the sum of £500-0-0 sterling for the due prosecution  
of the said appeal and the payment of all such costs as may become  
payable to the Plaintiff (Respondent) in the event of the  
Defendant (Appellant) not obtaining an order granting it leave  
to appeal, or of the appeal being dismissed for non-prosecu-  
tion and for the payment of such costs as may be awarded by His  
Majesty, His Heirs and Successors, or by the Judicial Committee  
of the Privy Council to the said Plaintiff (Respondent) on such  
appeal.

40 AND THIS COURT DOTH FURTHER ORDER that the  
Defendant (Appellant) do within three (3) months from the date  
of this Order in due course take out all appointments that may be  
necessary for settling the transcript record on such appeal to  
enable the Registrar to certify that the transcript record has been  
settled and that the provisions of this Order on the part of the  
Defendant (Appellant) have been complied with.

AND THIS COURT DOTH FURTHER ORDER that the costs of the transcript record on appeal and of all necessary certificates and all costs of and occasioned by the said appeal shall abide the decision of the Privy Council with respect to the costs of appeal.

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AND THIS COURT DOTH FURTHER ORDER that the re-trial of this action be stayed pending the said appeal.

No. 20  
Order  
Granting  
Defendant  
Conditional  
Leave to  
Appeal, 9th  
February  
1933,  
*--continued.*

AND THIS COURT DOTH FURTHER ORDER that the Defendant (Appellant) be at liberty within three (3) months **10** from the date of this Order to apply for an Order for leave to appeal as aforesaid on production of a Certificate under the hand of the Registrar of due compliance on its part with the terms of this Order.

AND THIS COURT DOTH FURTHER ORDER that all parties may be at liberty to apply to this Court wheresoever the same may be sitting.

By the Court,  
J. F. MATHER,  
Registrar.

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## No. 21

**Order Granting Plaintiff Conditional Leave To Cross-Appeal**

*In the  
Court of  
Appeal for  
British  
Columbia.*

Coram :

The Honourable The CHIEF JUSTICE OF BRITISH  
COLUMBIA.

The Honourable Mr. JUSTICE MCPHILLIPS.

The Honourable Mr. JUSTICE MACDONALD.

Wednesday, the 15th day of February, A.D. 1933.

No. 21  
Order  
Granting  
Plaintiff  
Conditional  
Leave to  
Cross-  
appeal, 15th  
February  
1933.

10 UPON MOTION made this day to this Court sitting at Vic-  
toria, British Columbia, on behalf of the above-named Plaintiff  
(Respondent) for leave to cross-appeal to His Majesty in His  
Privy Council from the Judgment of this Honourable Court pro-  
nounced herein the 27th day of January, A.D. 1933, AND UPON  
READING the Judgment of this Honourable Court delivered  
the 27th day of January, A.D. 1933, and the Order of this Honour-  
able Court made the 9th day of February, A.D. 1933, granting to  
the above-named Defendant (Appellant) conditional leave to  
appeal to His Majesty in His Privy Council AND UPON HEAR-  
20 ING R. L. Maitland, K.C., of Counsel for the Plaintiff (Respond-  
ent) and E. C. Mayers, K.C., of Counsel for the Defendant  
(Appellant):

THIS COURT DOTH ORDER that subject to the perform-  
ance by the Plaintiff (Respondent) of condition hereinafter men-  
tioned, and subject to the final Order of this Court upon the due  
performance thereof, leave to cross-appeal to His Majesty in His  
Privy Council against the said Judgment of this Honourable  
Court be granted to the Plaintiff (Respondent).

30 AND THIS COURT DOTH FURTHER ORDER that the  
said Plaintiff (Respondent) do within three (3) months from  
the date hereof provide security to the satisfaction of this Hon-  
ourable Court in the sum of £100. for the due prosecution of the  
said cross-appeal and the payment of all such costs as may be  
payable to the Defendant (Appellant) in the event of the Plaintiff  
(Respondent) not obtaining an Order granting leave to cross-  
appeal or of the cross-appeal being dismissed for non-prosecution  
and for the payment of such costs as may be awarded by His  
Majesty, His Heirs and His Successors, or by the Judicial Com-  
mittee of the Privy Council to the said Defendant (Appellant) on  
such cross-appeal.

40 AND THIS COURT DOTH FURTHER ORDER that the  
Plaintiff (Respondent) be at liberty within three (3) months

from the date of this Order to apply for an Order for leave to cross-appeal as aforesaid, on production of a certificate under the hand of the Registrar, of due compliance on its part with the terms of this Order.

*In the  
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AND THIS COURT DOTH FURTHER ORDER that the said cross-appeal of the Plaintiff (Respondent) be consolidated with the appeal of the Defendant (Appellant) and be prosecuted and heard upon one printed case.

No. 21  
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Granting  
Plaintiff  
Conditional  
Leave to  
Cross-  
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February  
1933,

AND THIS COURT DOTH FURTHER ORDER that the  
10 costs of and incidental to this motion shall abide the decision of the Privy Council with respect to the costs of such cross-appeal.

--continued.

AND THIS COURT DOTH FURTHER ORDER that all parties may be at liberty to apply to this Court wheresoever the same may be sitting.

By the Court,  
B. H. TYRWHITT DRAKE,  
Registrar.

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**No. 22**

**Certificate of Registrar.**

*(Not printed.)*

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**No. 23**

**Certificate of Registrar.**

*(Not printed.)*

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*In the  
Court of  
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No. 22  
Certificate  
of  
Registrar.  
27th March  
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No. 23  
Certificate  
of  
Registrar.  
27th March  
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## No. 24

**Order Granting Final Leave To Appeal and To Cross-Appeal  
To His Majesty In Council.**

*In the  
Court of  
Appeal for  
British  
Columbia.*

Coram :

The Honourable The CHIEF JUSTICE OF BRITISH  
COLUMBIA.

The Honourable Mr. JUSTICE MCPHILLIPS.

The Honourable Mr. JUSTICE MACDONALD.

Vancouver, B. C., the 28th day of March, A.D. 1933.

No. 24  
Order  
Granting  
Final  
Leave to  
Appeal  
and to  
Cross-  
appeal to  
His  
Majesty in  
Council,  
28th March  
1933.

- 10 UPON MOTION made this day to this Court sitting at Van-  
couver on behalf of the above-named defendant (Appellant) for  
final leave to appeal to His Majesty in His Privy Council from the  
judgment of this Honourable Court pronounced herein on the 27th  
day of January, 1933; and UPON MOTION made at the same  
time on behalf of the above-named plaintiff (Respondent) for  
final leave to cross-appeal from the said judgment; and upon read-  
ing the Certificate of the Registrar, dated the 27th day of March,  
1933, of due compliance on the part of the defendant (Appellant)  
with the provisions of the order made herein on the 9th day of  
20 February, 1933, and the Certificate of the Registrar, dated the  
27th day of March, 1933, of payment into Court to the credit of  
this cause by the plaintiff (Respondent) of the sum of £100-0-0  
Sterling as security pursuant to the order made herein and dated  
the 15th day of February, 1933, and upon hearing Mr. Mayers,  
K.C., of counsel for the defendant (Appellant), and Mr. Hutche-  
son of counsel for the plaintiff (Respondent) :

30 THIS COURT DOTH ORDER that final leave to appeal and  
final leave to cross-appeal to His Majesty in His Privy Council  
from the said judgment be and the same are hereby granted to the  
defendant (Appellant) and the plaintiff (Respondent) respect-  
ively.

AND THIS COURT DOTH FURTHER ORDER that the  
costs of and incidental to this motion on behalf of the Plaintiff  
(Respondent) and the Defendant (Appellant) respectively, shall  
abide the decision of the Privy Council with respect to the costs  
of the appeal and the cross-appeal.

By the Court,  
J. F. MATHER,  
Registrar.

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No. 25

**Certificate of Registrar as to Reasons for Judgment.**

I, the undersigned Registrar at Vancouver of the Court of Appeal, DO HEREBY CERTIFY that the only reasons for judgment that have been handed down by the Honourable Judges of this Court sitting on this appeal are those of the Chief Justice of British Columbia, Mr. Justice Martin, Mr. Justice McPhillips and Mr. Justice Macdonald, and that Mr. Justice Galliher has not handed down any reasons for judgment.

*In the  
Court of  
Appeal for  
British  
Columbia.*

—  
No. 25  
Certificate  
of  
Registrar  
as to  
Reasons  
for  
Judgment.

10 DATED at Vancouver this 7th day of April, A.D. 1933.

By the Court,  
J. F. MATHER,  
Registrar.

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## EXHIBITS

	Exhibits.
<b>P.4.—Plan of Locus.</b> <i>(Separate document.)</i>	P.4.
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<b>P.4.—(a) Plan of Locus.</b> <i>(Separate document.)</i>	P.4a.
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<b>D.4.—(b) Plan of Locus.</b> <i>(Separate document.)</i>	D.4b.
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<b>P.6.—Photo, Composite of Mill and Yard.</b> <i>(Separate document.)</i>	P.6.
<hr/>	
10      style="text-align: center;"> <b>P.7.—Photo, Taken From Air.</b> <i>(Separate document.)</i>	P.7.
<hr/>	
<b>P.8.—Enlargement of Exhibit P.7.</b> <i>(Separate document.)</i>	P.8.
<hr/>	
<b>D.11.—Photo of Railway Fill and Track, Mile 35.2.</b> <i>(Separate document.)</i>	D.11.
<hr/>	
<b>D.12.—Photo of Scene of Fire at Mile 35.2, Taken From Track.</b> <i>(Separate document.)</i>	D.12.
<hr/>	
<b>D.13.—Photo of Hillock, Taken From Track at Mile 35.2.</b> <i>(Separate document.)</i>	D.13.
<hr/>	
20      style="text-align: center;"> <b>P.37.—Plan of Locus.</b> <i>(Separate document.)</i>	P.37.
<hr/>	
<b>D.44.—Large Photo, From Track, Mile 35.2.</b> <i>(Separate document.)</i>	D.44.
<hr/>	
<b>D.45.—Blue Print of Spurs.</b> <i>(Separate document.)</i>	D.45.
<hr/>	
<b>P.49.—Blue Print of Locus.</b> <i>(Separate document.)</i>	P.49.
<hr/>	
<b>D.50.—Plan, Cross-section of Fill, Mile 35.2.</b> <i>(Separate document.)</i>	D.50.
<hr/>	

Exhibit No. 46. D. **General Order No. 362.**

**EXHIBIT No. 46 D.**

**BOARD OF RAILWAY COMMISSIONERS FOR CANADA.**

**Exhibits.**  
**No. 46.D.**  
**General**  
**Order**  
**No. 362,**  
**19th April**  
**1922.**

I, ALEXANDER DOBBS CARTWRIGHT, of the City of Ottawa, in the County of Carleton, and Province of Ontario, Secretary of the Board of Railway Commissioners for Canada, pursuant to the provisions of Section 68 of the Railway Act, 1919, DO HEREBY CERTIFY as follows:

10 THAT the document hereto attached and marked "A" is a true and correct copy of General Order of the Board of Railway Commissioners for Canada numbered 362 dated April 19th, 1922.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the official seal of the Board of Railway Commissioners for Canada at Ottawa this first day of February, A.D. 1932.

A. D. CARTWRIGHT,

Secretary,

Board of Railway Commissioners for Canada.

20 Board of  
Railway Commissioners  
for Canada  
Seal  
1904

Exhibit No. 46. D.

“A”

General Order No. 362

THE BOARD OF RAILWAY COMMISSIONERS  
FOR CANADA

Exhibits.  
No. 46.D.  
General  
Order  
No. 362,  
19th April  
1922,  
--continued.

Wednesday, the 19th day of  
April, A.D., 1922.

HON. F. B. CARVELL, K.C.,  
Chief Commissioner.

10 S. J. MCLEAN,  
Ass't Chief Commissioner.

A. C. BOYCE, K.C.,  
Commissioner.

J. G. RUTHERFORD, C.M.G.,  
Commissioner.

C. LAWRENCE,  
Commissioner.

IN THE MATTER OF  
the General Order of the  
Board, No. 107, dated July  
4th, 1913, prescribing regu-  
lations to be adopted by rail-  
way companies for the pre-  
vention of fires:

File No. 4741-A.

20 UPON reading the submissions filed by the Railway Associ-  
ation of Canada, on behalf of the railway companies interested;  
and upon the report and recommendation of the Chief Operating  
Officer and the Chief Fire Inspector of the Board—THE BOARD  
ORDERS as follows:

1. That Orders Nos. 3245, dated July 4th, 1907; 3465, dated  
August 14th, 1907; 8903, dated December 15th, 1909; 15995, dated  
February 16th, 1912; 16570, dated May 22nd, 1912; and General  
Order No. 107, dated July 4th, 1913, be, and they are hereby  
rescinded.

30 2. Unless exempted by special order of the Board, every  
railway company subject to the legislative authority of the Par-  
liament of Canada, the railway of which is under construction,  
or being operated by steam, shall cause all locomotives and other  
portable boilers, other than those using oil as fuel, used on the  
railway, to be fitted and kept fitted in good order with practical  
and efficient devices for arresting the escape of sparks or live  
coals, as hereinafter set forth:

40 (a) Every locomotive boiler equipped with an extension  
smokebox shall have installed therein, so as to extend  
completely over the aperture through which the smoke  
ascends a double-crimped wire netting, the mesh of which  
shall not be larger than 2½ x 2½ per inch of No. 10 Birming-  
ham wire gauge; the openings of said mesh not to exceed a

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 1922,  
 --continued.

quarter of an inch and one sixty-fourth (that is seventeen sixty-fourths) of an inch square when new. The condemning limit of the said netting shall be nineteen sixty-fourths of an inch.

Experimental or improved devices which are not in full accord with this clause shall be tried only on receipt of permission from the Chief Operating Officer of the Board.

10 (b) Every locomotive equipped with a diamond stack shall be fitted with a cast iron deflecting cone and double-crimped wire netting, with a mesh not more than 3 x 3 per inch of No. 10 Birmingham Wire Gauge, placed in the flare of the diamond of the stack, so as to cover the same completely; the openings of the said mesh not to exceed three-sixteenths and one sixty-fourth (that is thirteen sixty-fourths) of an inch square when new. The condemning limit of the said netting shall be fifteen sixty-fourths of an inch.

20 (c) All steam shovels, ditching machines and pile drivers, having exhaust in stack and burning coal, shall be equipped with a wire netting in the front end, in accordance with the standard prescribed in sub-section (a), or with a bonnet screen or double-crimped wire netting mesh device on the top of the smoke stack, as may be most practicable. All openings between the bonnet netting and stack must be fitted so as to leave no opening larger than the mesh of the netting. The condemning limit of the said netting shall be the same as sub-section (a).

30 3. Manhole and door openings of superheater type next to the tube sheet, shall be securely closed and held in place by cotters or keys, so constructed that they cannot fall out. All dead plates and nettings shall be securely fastened to the smokebox shell by angle irons of sufficient width to hold the same in position. In no case must there be an opening in the dead plates where fitted around steam pipes or superheater doors, or any joints, in excess of one-eighth of an inch in width. Cement or asbestos must not be used to fill openings in the fitting of fire-protective appliances.

4. (a) The openings of ashpan of locomotives with narrow fireboxes shall be covered with metal dampers.

40 (b) Ashpan slides and doors of locomotives, when closed, shall be secured in that position by a heavy spring or by any other positive method.

(c) Locomotive ashpan draft ports or openings shall be protected by solid deflecting plates, netting, or perforated plates, so placed as to protect the opening. Where netting is used, it shall be protected by deflecting plates.

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## Exhibit No. 46. D.

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--continued.

(d) On locomotives where rods pass through the ashpan, the opening for operation shall be no larger than is actually necessary, and shall be protected wherever practicable by deflecting aprons or hoods, so placed as to prevent the escape of ashes and fire. Damper rods from the cab shall be disconnected between the first day of April and the first day of November each year, or during the additional period, if any, as provided in sub-section (f).

10 (e) Overflow pipes from injectors, or a separate pipe from boiler, or water pipes from injector delivery pipe, shall be fitted into the ashpans with the necessary valve and other fixtures to supply water to all hoppers of the ashpan at the same time .

(f) Sufficient water to dampen ashes and extinguish fire falling from the grates must be supplied from April 1st to November 1st each year, or during such additional period as may be required in any particular territory by the Chief Operating Officer of the Board.

20 5. That every railway company provide adequate inspection at terminal or divisional points where its locomotive engines, steam shovels, ditching machines and pile drivers are housed and repaired, and at other points where necessary, and cause—

(a) An examination to be made, at least once a week, of—

1. The netting.
2. Dead plates.
3. Ashpans.
4. Dampers,
5. Slides and doors.

30 6. Any other fire-protective appliances;

(b) And a record to be kept of every inspection in a book to be furnished by the Railway Company for the purpose, showing—

1. The numbers of engines, steam shovels, ditching machines, and pile drivers inspected;
2. The date and hour of day of such inspection;
3. The condition of the said fire-protective appliances and arrangements; and
4. A record of repairs made in any of the above mentioned fire-protective appliances.

40

The said book to be opened for inspection by any authorized officer of the Board.

(c) In case any of the said fire-protective appliances are found to be defective, the said equipment shall be removed from service, and shall not (during the said prescribed period) be

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## Exhibit No. 46. D.

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 No. 46.D.  
 General  
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 --continued.

returned to service unless and until such defects are remedied.

(d) Every railway company shall make an independent examination of the fire-protective appliances on all locomotives, steam shovels, ditching machines, and pile drivers of such company, at least once each month, and the conditions of such fire-protective appliances shall be reported direct to the Chief Mechanical Officer of the railway company, or other chief officer held responsible for the condition of the motive power of the said company.

10

6. That no employee of any such railway company—

(a) Do, or in any way cause, damage to the netting or other fire-protective appliances on any locomotive or other boiler in service.

(b) Open the back dampers of any locomotive while running ahead, or the front dampers while running tender first, except when there is snow on the ground and it is necessary to take such action in order to have the engine steam properly.

20

7. That no such railway company permit fire, live coals, or ashes to be deposited on its tracks or right of way, unless they are extinguished immediately thereafter, except in pits provided for the purpose.

30

8. That, unless otherwise ordered, no such railway company, between April 1st and November 1st burn as fuel on its locomotives, steam shovels, ditching machines, and pile drivers, any coal not possessing good coking properties, the use of which with standard front-end fire-protective appliances prescribed by Clause 2, results in the emission of sparks from the stack to an extent deemed by the Board to be dangerous to the public interest, unless such equipment is provided with special fire-protective appliances approved by the Board. Whether any particular coal possesses good coking properties shall be determined by certificate from the Mines Branch, Department of Mines, Ottawa.

40

9. That railway companies take all reasonable precautions to eliminate the danger of fires being set along railway lines by passengers and employees throwing burning smoking materials from trains. The measures to be taken shall include the posting of warning notices in cars or compartments of cars in which smoking is permitted, and the issuance at suitable intervals during the fire season of verbal warnings to passengers in such cars or compartments, including observation platforms and open observation cars. The territory within which they shall be effective shall be determined by the Chief Fire Inspector.

10. That every such railway company establish, and maintain fireguards along the route of its railway as the Chief Fire

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## Exhibit No. 46.D.

Exhibits.

Inspector may prescribe. The nature, extent, establishment, and maintenance of such fireguards shall be determined as follows: :

No. 46.D.  
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1922,  
--continued.

- (a) The Chief Fire Inspector shall each year prepare and submit to every such railway company a statement of the measures necessary for establishing and maintaining the routes of such railways in a condition safe from fire, so far as may be practicable.
- 10 (b) Said measures may provide for the cutting and disposal by fire or otherwise of all or any growth of an inflammable character, and the burning or other disposal of debris and litter, on a strip of sufficient width on one or both sides of the track; the ploughing or digging of land in strips of sufficient width on one or both sides of the track; and such other work as may, under the existing local conditions and at reasonable expense, tend to reduce to a minimum the occurrence and spread of fire.
- (c) Said statements of the Chief Fire Inspector shall be so arranged as to deal with and prescribe measures for each separate portion of such railway upon and adjacent to which the fire risk calls for specific treatment. The intention shall be to adjust the protective measures to the local conditions, and to make the expense proportionate to the fire risk and possible damage.
- 20 (d) Said statements to the Chief Fire Inspector shall prescribe dates on or within which the foregoing protective measures shall be commenced and completed, and the fireguards maintained in a clean and safe condition.
- (e) No such railway company shall permit its employees, agents, or contractors to enter upon land under cultivation to construct or maintain fireguards, without the consent of the owner or occupant of such land.
- 30 (f) Wherever the owner or occupant of such land objects to the construction or maintenance of fireguards, on the ground that the said construction or maintenance would involve unreasonable loss or damage to property, the company shall at once refer the matter to the Board, giving full particulars thereof, and shall in the meantime refrain from proceeding with the work.
- (g) No such railway company shall permit its agents, employees, or contractors to leave gates open or to cut or leave fences down whereby stock or crops may be injured, or to do any other unnecessary damage to property in the construction or maintenance of fireguards.
- 40

11. That in carrying out the provisions of Section 280 of the Railway Act, 1919, which enacts that "the company shall at all times maintain and keep its right of way free from dead or dry

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## Exhibit No. 46. D.

Exhibits.

No. 46.D.  
General  
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--continued.

grass, weeds and other unnecessary combustible matter," no such railway company, or its agents or contractors, between the first day of April and the first day of November, burn or cause to be burned any ties, cuttings, debris, or litter upon or near its right of way, except under such supervision as will prevent such fires from spreading beyond the strip being cleared. The Chief Fire Inspector or other authorized officer of the Board may require that no such burning be done along specified portions of the line of any such railway, except with the written permission or under the direction of the Chief Fire Inspector or other authorized officer of the Board.

10 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.

20 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 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

30 (c) Any other measures which are considered by 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 require its sectionmen and other employees, agents, and contractors to take measures to report and extinguish fires on or near the right of way as follows:

40 (a) Conductors, engineers, or trainmen who discover or receive notice of the existence and location of a fire burning upon or near the right of way, or of a fire 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 immediately by a system of warning whistles, or by such other method as may be approved by

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## Exhibit No. 46. D.

Exhibits.

the Board.

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

10 (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.

20 (d) In case the sectionmen or other employees available are not a sufficient force to extinguish the fire promptly, the railway company shall, either independently 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.

(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.

30 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 railway. In case said instructions are not also carried in employees' 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 employees 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 judgment, the fire danger is not material.

30 16. That every such railway company allowing or permitting the violation of, or in any respect contravening or failing to obey any of the foregoing regulations, be subject, in addition to any other liability which the said company may have incurred, to a penalty of one hundred dollars for every such offence.

17. That 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

No. 46.D.  
General  
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1922,  
--continued.

A.D.C.

Exhibit No. 46. D.

such offence.

18. That the Board may, upon the application of any railway company or other party interested, vary or rescind any order or direction of the Chief Fire Inspector, made pursuant to the provisions of this Order.

Exhibits.

No. 46.D.  
General  
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No. 362,  
19th April  
1922,  
--continued.

Sgd. F. B. CARVELL,

Chief Commissioner,

Board of Railway Commissioners for Canada.

10 BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Examined and certified as a true copy under Section 23 of The "Railway Act."

(Sgd.) R. RICHARDSON,

Asst. Sec'y and Registrar, B.R.C.

OTTAWA, Nov. 21, 1928.

SUPREME COURT OF B. C.

Victoria Registry

EXHIBIT No. 46

KAPOOR CO. vs. C.N.P. RY.

20 Put in by Defendant Date 26-5-32

H. C. S., Registrar.

A.D.C.

Exhibit No. 19 D. **Siding Agreement.**

Exhibits.

EXHIBIT No. 19 D.

No. 19.D.  
Siding  
Agreement,  
23rd Jan-  
uary, 1928.

C.N.R. 1551  
11-25

CANADIAN NATIONAL RAILWAYS  
AGREEMENT FOR INDUSTRIAL SIDING

THIS AGREEMENT made this Twenty-third day of Janu-  
ary, one thousand nine hundred and twenty-eight.

BETWEEN :

10

<p>Approved for Execution:</p> <p><b>J. R. C.</b> <i>Assistant General Manager</i></p> <hr/> <p>Approved as to Form</p> <p><b>J. R. B.</b> <i>Solicitor</i></p>
---

THE CANADIAN NORTHERN  
RAILWAY COMPANY

—and—

THE CANADIAN NORTHERN  
PACIFIC RAILWAY COMPANY,

hereinafter called the "Railway",  
of the First Part.

AND

KAPOOR LUMBER COMPANY  
LIMITED

20

hereinafter called the "Industry",  
of the Second Part.

WHEREAS the Industry, for the economical and convenient  
conduct of the Industry's business, desires a railway spur or sid-  
ing (hereinafter called the "siding") into the Industry's premises  
at or near Mileage 35.5 Cowichan Subdivision as shown in red  
on the plan hereto attached, which said plan forms part of this  
agreement and is identified by the signatures of the parties hereto;

Approval.

30 AND WHEREAS the Railway has agreed to the construc-  
tion thereof on the terms hereinafter mentioned, upon and after  
the approval thereof, if necessary, by the Board of Railway Com-  
missioners for Canada, or other authority having jurisdiction.

## D.

Exhibit No. 19.

NOW THEREFORE IT IS HEREBY MUTUALLY AGREED between the parties:—

THE INDUSTRY AGREES, at its own expense:—

Exhibits.

No. 19.D.  
Siding  
Agreement,  
23rd Jan-  
uary 1928,  
--continued.

**COST OF**(a) Construc-  
tion.

10

(b) Laying  
track.

20

(c) Protection  
at high-  
ways and  
crossings.

Rental.

30

Right of way  
outside of  
Railway land.

40

Taxes, etc.

1. Subject to the provisions of Clauses 14 and 15 of this agreement and under the supervision and to the satisfaction of the Railway, and in strict accordance with the requirements of the said Board, or other authority having jurisdiction, to perform all work requisite for such construction, including grading, ditching, cattle guards, culverts, bridging, fencing and ballasting and, furnish all labor, tools, machinery, all ties, track bolts, spikes, spring washers, bond wires, insulating materials, sign posts, bumping post and all other articles, effects and things necessary for such construction (except the non-perishable materials, as defined in Clause 14) and lay the track on the siding from the junction point over its entire length, and pay all expenses incurred in connection therewith (except the cost of the non-perishable materials) including, where necessary, the cost of alterations to telegraph, telephone or power lines and the removal of any other obstructions to the safe operation of the said siding, and, subject to the provisions of Clause 14, to bear the entire cost of all protective appliances including the cost of operation of such appliances and of all structures at highways or railway crossings on the siding now or hereafter installed or constructed.

2. To pay compensation, hereinafter called "rental", to the Railway for the use of the non-perishable materials as defined in Clause 14 at the rate of seven (7) per cent. per annum on the final cost of the non-perishable materials, payable annually in advance, effective as from the date the siding is declared ready for traffic, and will in like manner pay to the Railway all costs and expenses which may be incurred by the Railway by reason of or arising out of any order or direction of the said Board or other authority having jurisdiction heretofore or hereafter made in respect of or in any way affecting the siding.

3. To secure the right of way for the siding outside of the land or property of the Railway used for right of way; also pay and indemnify the Railway against all claims for compensation or for damages or depreciation by reason of the construction or operation of the siding or any part thereof, whether made by the owners or occupiers of the said land or of other lands.

4. To pay and indemnify the Railway against all taxes, rates and assessments at any time levied or assessed in respect of the siding, or any properties required therefor or used in connec-

## Exhibit No. 19. D.

Exhibits.

tion therewith.

No. 19.D.  
Siding  
Agreement,  
23rd Jan-  
uary 1928,  
--continued.

Railway's  
regulations  
as to use.

5. To observe all rules and regulations from time to time made by the Railway respecting the use of the siding and switches and other facilities connected therewith.

Cattle.

6. To take all necessary steps to prevent cattle and other animals from getting upon the property of the Railway from that portion of the siding outside of the lands of the Railway.

Maintenance.

10

7. Subject to the provisions of Clause 14 hereof, to maintain and repair or renew the siding and all structures and facilities thereon. The Railway may, but shall not be bound to, give notice, verbally or in writing, to the Industry to repair or renew the siding, but lack of such notice shall not excuse the Industry from compliance with the Industry's obligations under this clause, nor shall the Railway by continuing to operate the siding with knowledge of any defect in the siding suffer any abatement in the Railway's right to indemnity under the provisions of Clause 12. If the Railway perform any work of maintenance and repairs or renewal or otherwise, which the Industry has agreed herein to perform, the Industry shall pay the Railway the cost thereof within twenty (20) days after bills therefor have been rendered by the Railway to the Industry.

20

Weeds, snow,  
ice, etc.

8. To keep the right of way on which the siding is constructed free from weeds, and also from all inflammable matter, and clear of snow, ice and other obstructions.

Lateral and  
overhead  
clearances.

9. To keep the distance of six feet laterally from guage side of nearest rail, and vertically twenty-two feet six inches above rail level, free at all times from obstructions of every nature.

Loading and  
unloading cars.

30

10. To cause all cars placed on the siding to be loaded and unloaded with despatch; and such cars shall in no case be loaded with a greater weight than the capacity marked thereon, or given by the Railway's station agent, and pay all car service charges under the rules of or relating to the Railway.

Volume of  
traffic.

11. To receive and ship upon the siding freight sufficient in quantity to warrant the Railway maintaining the connection with its tracks.

Routing of  
freight.

To cause all freight shipped from or to any part of the siding and destined to or coming from any point reached by the lines of the railway or its connections, so far as the Industry can legally

## Exhibit No. 19. D.

Exhibits.

control the same and provided the rates applicable are not higher than, and the service given is as good as, those of competitive lines, to be shipped over the lines of the railway by such routes as shall yield to the Railway the greatest revenue.

No. 19.D.  
Siding  
Agreement,  
23rd Jan-  
uary 1928,  
--continued.

Indemnity.

- 10 12. To indemnify the Railway against all claims and demands by whomsoever made (and the Industry hereby waives all personal claims of whatsoever description) whether for injuries to person or property, in any manner based upon, arising out of, or incidental to the user of the siding or the construction, maintenance or operation thereof, unless the same is directly attributable to the negligence of the Railway or its servants.

And to also indemnify the Railway against all loss or injury to the Railway's property arising from any default hereunder, or occurring on the siding, unless directly attributable to the negligence of the Railway or its servants.

Provided that in the event of loss or damage by fire to engines or cars owned or used by the Railway, the Industry shall not be liable to indemnify the Railway against such loss or damage.

Insurance.

- 20 13. To keep fully insured all insurable buildings, goods, merchandise and other property in respect of which the Industry has an insurable interest, wherever situated, which may be endangered by fire by reason of the operation (negligent or otherwise) of the siding, and assume all loss resulting from fires or from the Industry's neglect or failure so to insure.

## THE RAILWAY AGREES with the Industry:—

Non-perishable materials.

- 30 14. To furnish from time to time to the Industry, subject to the provisions of Clause 2 hereof, the requisite rails, splice bars, rail braces, tie plates, frogs, switches, guard rails, and, where interlocking plants, automatic signals, derails or metal car stops are necessary, to furnish such parts thereof as are of a non-perishable nature, the whole being in this agreement called "non-perishable materials" which shall, however, at all times remain the property of the Railway.

Railway doing construction work on request.

- 15 At the Industry's request in writing to supply any or all materials in addition to the non-perishable materials and to do the whole or any part of the work of construction of the siding, after deposit made by the Industry with the Railway of the Railway's estimate of the cost thereof. If such deposit is insufficient to meet the final cost of such materials and work of construction,

## Exhibit No. 19. D.

## Exhibits.

the Industry shall pay to the Railway the balance of such cost as soon as ascertained, but if more than sufficient, the Railway will repay the excess to the Industry. In computing such final cost there shall be added to the payroll cost of labor ten (10) per cent. thereof, to cover supervision.

No. 19.D.  
Siding  
Agreement,  
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uary 1928,  
--continued.

16. To operate the siding in accordance with the provisions of this agreement.

## AND MUTUALLY AGREED THAT:—

10  
Use of siding  
obstructed.

17. Without restricting the provisions of Clause 13, should the use of the siding, or any part thereof, be at any time or times obstructed or destroyed, or should any buildings adjacent to the siding or goods or other things of the Industry or other parties, in said buildings or on the siding or on any lands adjacent to the siding, be in any manner damaged, injured or lost, or the business carried on therein be hampered, by reason of the operation, repair or construction of the Railway's facilities, the Industry shall not by reason thereof have any claim or demand against the Railway unless the same is directly attributable to the negligence of the Railway or its servants.

Cost of recon-  
struction or  
repair of  
Siding.

18. All cost and expense incidental to the relocation, reconstruction or repair of the siding to meet any changed conditions occasioned by the relocation, reconstruction or repair of the Railway facilities, or to comply with any statute or regulation of the said Board or other authority, or by the introduction by the Railway of heavier locomotives or rolling stock wherewith to operate the siding, whether effected upon the Railway's lands or otherwise, shall be borne by the Industry (if the Industry desires siding facilities continued) on the same basis as provided in Clauses 1, 2, 14 and 15 of this agreement for the construction of new sidings.

Cost of moving  
Siding.

19. Where changes or additions are made to or upon the Railway's facilities in respect of any of the Railway's tracks, structures or other facilities whatsoever, all cost incidental to moving, disconnecting or connecting the siding shall be borne by the Industry, (if the Industry desires siding facilities continued) on the same basis as provided in Clauses 1, 2, 14 and 15 of this agreement for the construction of new sidings.

L.C.L.  
Freight.

20. Shipments in less than carload lots to be forwarded by the Railway shall be delivered to the Railway at its regular freight station, and shipments in less than carload lots received by the Railway for transportation to the Industry shall be considered as



Exhibit No. 19. D.

Exhibits.  
 No. 19.D.  
 Siding  
 Agreement,  
 23rd Jan-  
 uary 1928,  
 --continued.

delivered to the Industry when same have arrived at its said freight station and notice of the arrival has been given or sent by the agent of the Railway to the Industry.

Use, control  
 and extension  
 of Siding by  
 Railway.

21. Without unreasonably interfering with the use of the siding by the Industry,—the Railway

(a) May use the siding for the Railway's business or purposes free of charge.

10 (b) Shall control the use and operation of the siding in every particular.

(c) May extend the siding in any direction and connect other tracks or sidings therewith at any convenient point or points whether for the purposes of the Railway or of other parties.

Removal of  
 main line  
 switches.

22. It is understood that if the nature of the Industry's business is such that the use of the siding is not required during any certain period of the year, the Railway shall have the right to remove the main line switch and frog, during such period, but the Industry shall not be entitled to any refund of rental during such time the siding is not being used.

Assignment,  
 transfer or  
 sub-lease.

20 23. No assignment or transfer of any rights or privileges hereunder by the Industry shall be valid unless the consent of the Railway is obtained in writing thereto. The Industry may, upon receipt of the Railway's consent in writing, permit the use of the siding by others, the rates or charges for such use to be agreed between the Industry and such others, subject to the approval of the Railway. The arrangement entered into must not be inconsistent with the terms of this siding agreement, particularly Clause No. 11, it being, however, understood that the responsibility of the Industry to the Railway under any of the terms of this  
 30 agreement extends not only to the Industry's traffic, but also to all other traffic handled by reason of such permission or arrangement.

Default or  
 breach.

40 24. If the said rental or other payments herein provided for, or any part thereof, or if any tolls or rates as defined by the Railway Act, 1919, or referred to in the Interstate Commerce Act, where such applies, shall be in arrear and unpaid for the space of two calendar months next after the date on which same has become legally due, or if default or breach be made by the Industry in, or in respect of any of the Industry's covenants or the conditions herein contained, or if the Industry becomes insolvent or makes an assignment for the benefit of its creditors, then, and in

## Exhibit No. 19. D.

Exhibits.

every such case, the Railway may at its option, after giving written notice thereof to the Industry and allowing one week to elapse after such notice, unless in the meantime such rent, tolls or rates shall have been paid or such default shall have been remedied:—

No. 19.D.  
Siding  
Agreement,  
23rd Jan-  
uary 1928,  
--continued.

Railway's  
remedies.

(a) Discontinue the operation of the siding, either wholly or partly and the movement and supply of cars.

10 (b) If such default in payment or breach of covenant as above mentioned continue for two calendar months after notice to the Industry as above,—terminate this agreement without prejudice to the right of the Railway to employ such other remedies to protect its interests as may be provided by law.

(c) But, regardless of anything hereinbefore mentioned, the Railway may immediately any default or breach of this agreement by the Industry occurs, take such steps as may be necessary to protect its interests.

20 And no acceptance of rent subsequent to any breach or default other than non-payment of rent, nor any condoning, excusing or overlooking by the Railway on previous occasions of breaches or defaults similar to that in respect of which any such action is taken, shall be taken to operate as a waiver of this condition, nor in any way to defeat or affect the rights of the Railway hereunder.

Liens.

30 25. The Railway shall have a lien on all goods in or on cars placed by it on the siding for all moneys due to the Railway under this agreement or otherwise, including, without restricting the generality of the foregoing clause, all tolls or rates as defined by the Railway Act, 1919 or referred to in the Interstate Commerce Act, where such applies; and for the purpose of such lien, the siding and all cars thereon and all goods or other things therein shall be taken to be in the sole use and possession of the Railway.

Length of  
Term. Notice,  
Etc.

26. This agreement shall continue for one year from the date hereof, and thereafter at the will of the parties, provided that either party may at any time after the date hereof terminate it on two calendar months' notice in writing to the other; such notice may be given by the Railway by mailing the same to the Industry in a registered letter, addressed to the Industry at Duncan, in the Province of British Columbia.

Removal of  
Railway's  
property.

40 27. Upon the termination of this agreement in any manner, as hereinbefore provided, all material and works on the Railway's land shall remain the property of the Railway, and the

Exhibit No. 19. D.

**Exhibits.**  
 No. 19.D.  
 Siding  
 Agreement,  
 23rd Jan-  
 uary 1928,  
 --continued.

10 Railway may enter upon the siding and upon any land or structures belonging to or occupied by the Industry and take up and remove the non-perishable materials and other property of the Railway, and the Industry shall arrange with other owners of lands (if any) upon which the siding was constructed to allow the Railway to exercise such re-entry and right of removal and the Railway shall repay to the Industry the proper proportion of any unearned rental previously paid hereunder; Provided that should the siding be used for a period of less than one year, one year's rental shall nevertheless be paid.

Refund of unearned rental.

20 Should the Railway's Regional General Manager in charge consider that the ties and fastenings on the Railway's property, which the Industry has paid for, may be of value to the Industry, he may in his discretion make an equitable adjustment with the Industry, either by way of delivery to the Industry, on request, of such ties and fastenings as may reasonably be removed without damage to the Railway's property or by making an allowance for their value if the Railway wishes to retain them. The decision of the Regional General Manager in the premises shall be final.

**SPECIAL CONDITIONS**  
 Here state any special feature of construction that might affect safety in operation such as trestle work, heavy grade, sharp curves, etc.

28. In view of the fact that the siding will be constructed on excessive grades and partly on a trestle it is agreed that notwithstanding anything in this agreement contained, all loss, damage or injury of whatsoever kind in any manner attributable to such special feature of construction above referred to incurred or sustained in the course of handling the traffic of the Industry shall be borne by the Industry, whether the occasioning of such loss, damage or injury was contributed to or caused by the negligence of the Railway, its servants or otherwise.

30 29. Whenever in this agreement power is reserved to the Railway to consent to or to approve any action taken or proposed or to give any notice, such consent, approval or notice may be given or signed by the Railway's Regional General Manager.

30. The Industry is the owner of the rails, ties, spikes, bolts and all other material and equipment constituting the trackage as shewn colored yellow on blue print hereto attached and shall maintain and repair or renew such trackage and all structures and facilities thereon.

40 31. The Industry shall indemnify the Railway against any loss or damage to the Railway's property which may occur while being on or being moved over the said trackage of the Industry due to any default on the part of the Industry to maintain or repair the said trackage or from any other cause whatsoever.

Exhibit No. 19 D.

IN WITNESS WHEREOF the parties hereto have executed these presents.

THE CANADIAN NORTHERN RAILWAY COMPANY

—and—

THE CANADIAN NORTHERN PACIFIC RAILWAY COMPANY.

J. A. GORDON

By

W. A. KINGSLAND,

General Manager.

10

KAPOOR LUMBER CO. LTD., Industry.

MAYO SINGH, President

KAPOOR SINGH, Secretary.

GEO. M. BOYER,

Witness as to signature of Industry.

Seal of  
Kapoor Lumber  
Co. Limited

20

SUPREME COURT OF B. C.  
Victoria Registry  
EXHIBIT No. 19  
KAPOOR CO. vs. C. N. P. RY.  
Put in by Defendant Date 18-5-32  
H. C. S., Registrar

Exhibits.  
—  
No. 19.D.  
Siding  
Agreement,  
23rd Jan-  
uary 1928,  
--continued.

BLOCK 103  
 MALAHAT DISTRICT  
 Kapoor Lumber Co Limited



CANADIAN NATIONAL RAILWAYS  
 WESTERN REGION B.C. DISTRICT  
 VANCOUVER ISLAND  
 MILE 35.70 COWICHAN SUBDIVISION  
**KAPOOR LUMBER CO'S TRACKAGE**  
 VICTORIA B.C. 11<sup>th</sup> April 1929 SCALE 1" = 400'



Exhibit No. 20. D. **Siding Agreement.**

Exhibits.

EXHIBIT No. 20 D.

No. 20.D.  
Siding  
Agreement,  
8th August  
1929.

CANADIAN NATIONAL RAILWAYS  
AGREEMENT FOR INDUSTRIAL SIDING

THIS AGREEMENT, made this eighth day of August, one thousand nine hundred and twenty-nine.

BETWEEN :

10

<p>Approved for Execution</p> <hr/> <p><i>General Superintendent</i></p> <hr/> <p>Approved as to Form</p> <p><b>J. R. B.</b> <i>Solicitor</i></p>
---

THE CANADIAN NORTHERN  
RAILWAY COMPANY

and

THE CANADIAN NORTHERN  
PACIFIC RAILWAY COMPANY,

hereinafter jointly called the "Rail-  
way,"

of the First Part.

AND

KAPOOR LUMBER COMPANY  
LIMITED

20

hereinafter called the "Industry,"  
of the Second Part.

WHEREAS the Industry, for the economical and convenient conduct of the Industry's business, desires a railway spur or siding (hereinafter called the "siding") into the Industry's premises at or near Mileage 35.46 Cowichan Subdivision, as shown in red on the plan hereto attached, which said plan forms part of this agreement and is identified by the signatures of the parties hereto.

Approval.

30

AND WHEREAS the Railway has agreed to the construction thereof on the terms hereinafter mentioned, upon and after the approval thereof, if necessary, by the Board of Railway Commissioners for Canada, or other authority having jurisdiction.



Exhibit No. 20. D.

NOW THEREFORE IT IS HEREBY MUTUALLY AGREED between the parties:—

THE INDUSTRY AGREES, at its own expense:—

\* \* \* \* \*

Exhibits.  
No. 20.D.  
Siding  
Agreement,  
8th August  
1929,  
--continued.

Indemnity.

12. To indemnify the Railway against all claims and demands by whomsoever made (and the Industry hereby waives all personal claims of whatsoever description) whether for injuries to person or property, in any manner based upon, arising out of, or incidental to the use of the siding or the construction, maintenance or operation thereof, unless the same is directly attributable to the negligence of the Railway or its servants.

And to also indemnify the Railway against all loss or injury to the Railway's property arising from any default hereunder, or occurring on the siding, unless directly attributable to the negligence of the Railway or its servants.

20 Provided that in the event of loss or damages by fire to engines or cars owned or used by the Railway, the Industry shall not be liable to indemnify the Railway against such loss or damage.

Insurance.

13. To keep fully insured, without any right of sub-rogation to the Insurer, all insurable buildings, goods, merchandise and other property in respect of which the Industry has an insurable interest, wherever situated, which may be endangered by fire by reason of the operation (negligent or otherwise) of the siding, and assume all loss resulting from fires or from Industry's neglect or failure so to insure.

THE RAILWAY AGREES with the Industry:—

\* \* \* \* \*

30 AND MUTUALLY AGREED THAT:—

Use of siding obstructed.

17. Without restricting the provisions of Clause 13, should the use of the siding, or any part thereof, be at any time or times obstructed or destroyed, or should any buildings adjacent to the siding or goods or other things of the Industry or other parties, in said buildings or on the siding or on any lands adjacent to the siding, be in any manner damaged, injured or lost, or the business carried on therein be hampered, by reason of the operation, repair



Exhibit No. 20. **D.**

or construction of the Railway's facilities, the Industry shall not by reason thereof have any claim or demand against the Railway unless the same is directly attributable to the negligence of the Railway or its servants.

\* \* \* \* \*

Exhibits.  
No. 20.D.  
Siding  
Agreement,  
8th August  
1929,  
--continued.

IN WITNESS WHEREOF the parties hereto have executed these presents.

10 THE CANADIAN NORTHERN RAILWAY COMPANY  
and  
THE CANADIAN NORTHERN PACIFIC RAILWAY  
COMPANY.

J. A. GORDON By A. A. TISDALE,  
General Manager.

KAPOOR LUMBER CO. LTD.  
Industry.

MAYO SINGH, President.

KAPOOR SINGH.

20 S. COWAN,  
Witness as to signature of Industry.

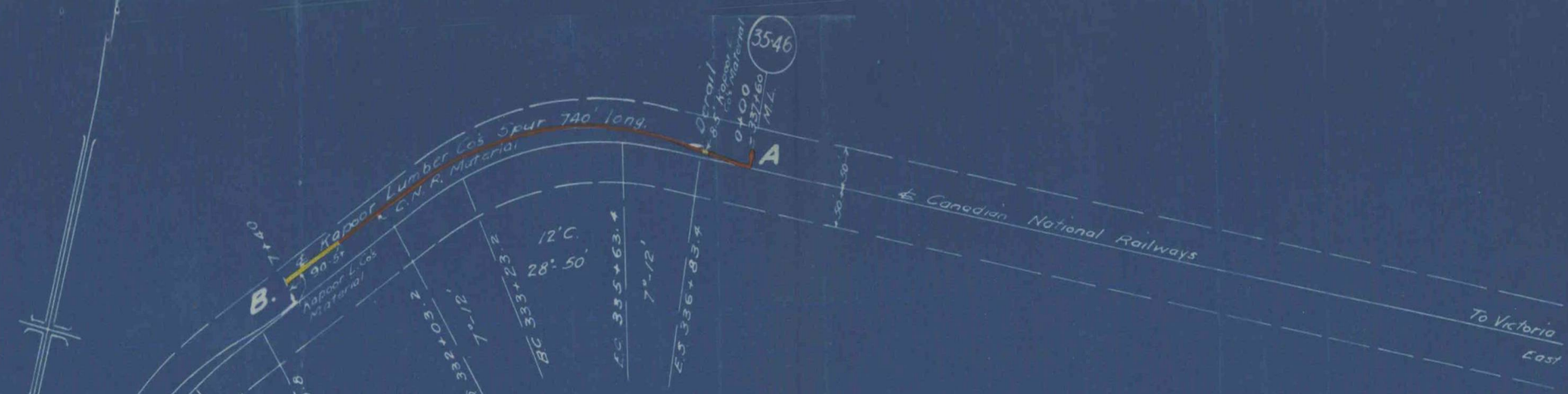
KAPOOR SINGH, Secretary.

Seal of  
Kapoor Lumber  
Co. Limited

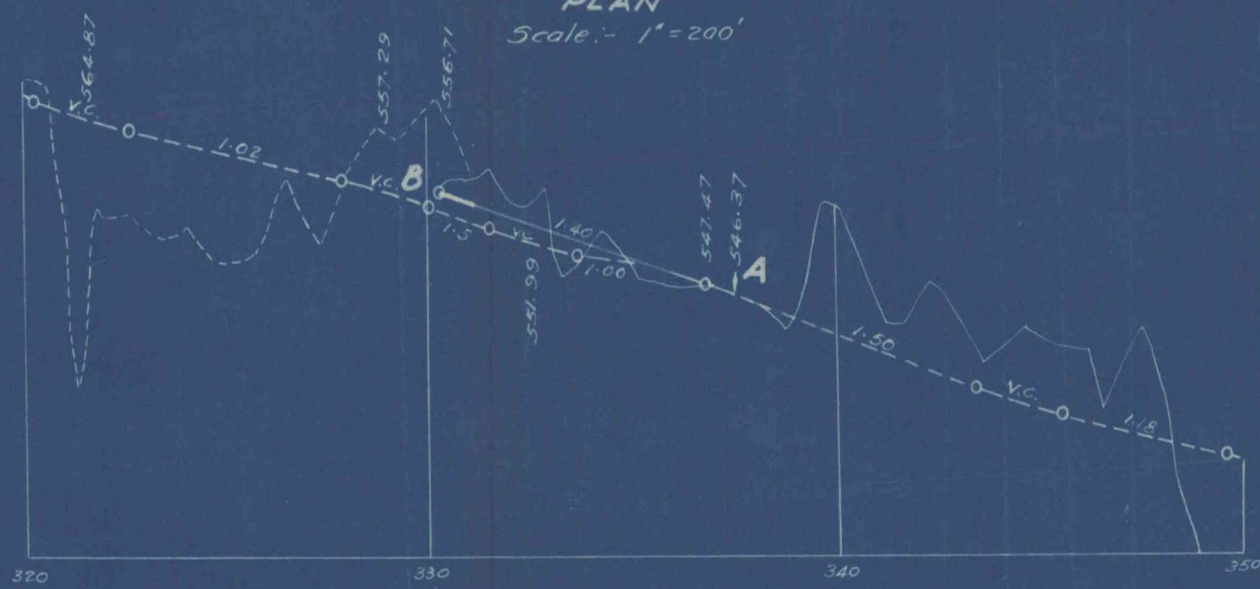
30 SUPREME COURT OF B. C.  
Victoria Registry  
EXHIBIT No. 20  
KAPOOR CO. vs. C.N.P. RY.  
Put in by Defendant Date 18-5-32  
H. C. S., Registrar

(Clauses numbered 1 to 11 inclusive, 14, 15, 16, and 18 to 31 inclusive of this agreement are the same as the corresponding clauses of the agreement of 23rd January, 1928, Exhibit 19, and have been omitted in printing).





PLAN  
Scale: - 1" = 200'



SCALES { HOR. 1" = 400'  
VER 1" = 20'

PROFILE

CANADIAN NATIONAL RAILWAYS  
CANADIAN NORTHERN PACIFIC RAILWAY  
WESTERN REGION B. C. DISTRICT  
VANCOUVER ISLAND  
MILE 35.46 COWICHAN SUBDIVISION  
SPUR AS CONSTRUCTED FOR KAPOOR  
LUMBER CO.

VICTORIA B.C. 4th March 1930

SCALES AS SHOWN

*[Signature]*  
Division Engineer

The B/p attached to Apt. Aug 8<sup>th</sup>/29

Ex. 20



Exhibit No. 47 D. **Statement of Chief Fire Inspector.**

Exhibits.

EXHIBIT No. 47 D.

No. 47.D.  
Statement  
of Chief  
Fire  
Inspector,  
1st March  
1930.

THE BOARD OF RAILWAY COMMISSIONERS  
FOR CANADA

I, ALEXANDER DOBBS CARTWRIGHT, of the City of Ottawa, in the County of Carleton, and Province of Ontario, Secretary of the Board of Railway Commissioners for Canada, pursuant to the provisions of Section 68 of the Railway Act, 1919, DO HEREBY CERTIFY as follows:

10        1. THAT the document hereto attached and marked "A" is a true and correct copy of original statement submitted by the Chief Fire Inspector of the Board of Railway Commissioners to the Canadian National Railways in the year 1930 under clause 13 of General Order No. 362 of the said Board.

2. THAT no fire guards were prescribed by the Chief Fire Inspector of the Board of Railway Commissioners for the Cowichan Subdivision (Vancouver Island) of the Canadian National Railways for the year 1930 under Clause 10 of General Order No. 362 of the said Board.

20        IN WITNESS WHEREOF I have hereunto set my hand and affixed the official seal of the Board of Railway Commissioners for Canada at Ottawa this 29th Day of December, A.D. 1931.

A. D. CARTWRIGHT,

Secretary,

Board of Railway Commissioners for Canada

Board of  
Railway Commissioners  
for Canada

Seal  
1904



Exhibit No. 47. D.

“A”

BOARD OF RAILWAY COMMISSIONERS FOR CANADA

Fire Inspection Dept., Ottawa,

March 1, 1930.

Exhibits.  
No. 47.D.  
Statement  
of Chief  
Fire  
Inspector,  
1st March  
1930,  
--continued.

The Canadian National Railways,

Mr. A. E. Warren, Vice-President, Western Region,

Winnipeg, Manitoba.

File 4741-F-8

10 Dear Sir:—

In accordance with the provisions of General Order No. 362 of the Board of Railway Commissioners, you are hereby directed to maintain upon such portions of the Canadian National Railways as are hereinafter described, a force of fire rangers fit and sufficient for efficient patrol and fire fighting duty during the period from April 1 to November 1 of the current year, except in so far as you may be relieved in writing, by an authorized officer of the Board, from the necessity of maintaining such patrol.

PATROLS

20 For 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 prescribed, 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.

30 On the following portions of lines, unless otherwise stated, there shall be a special patrol by section forces, subject to the conditions hereinafter specified.

\* \* \* \* \*

A.D.C.



Exhibit No. 47. D.

Exhibits.

BRITISH COLUMBIA DISTRICT

No. 47.D.  
Statement  
of Chief  
Fire  
Inspector,  
1st March  
1930,  
--continued.

\* \* \* \* \*

VANCOUVER ISLAND

Patricia Bay Subdivision

Between Junction and Patricia Bay, 15.2 miles, and between Sidney Junction and Sidney, 1.7 miles, working instructions.

Cowichan Subdivision

10 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 Youbou, 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.

\* \* \* \* \*

CONDITIONS GOVERNING SPECIAL PATROLS BY SECTION FORCES

20 The following are the conditions under which the special patrol by section forces above prescribed shall be performed:

(1.) The patrol on each section shall be performed by an experienced and reliable member of the section crew.

(2.) Each such patrolman shall be supplied with a velocipede and a set of fire fighting tools as hereinafter specified.

(3.) Except in so far as relief in writing may be granted by an officer of the Board, and except where two round trips per day are herein specified, there shall be a minimum patrol of one round trip per day, to be performed at such times of the day as shall be approved by the local officer of the Board concerned.

30 (4.) When on account of increased fire hazard, due to weather or other conditions, such action is necessary in the judgment of the local officer of the Board, the patrol shall, on notice being given by wire or in writing, be increased to two or three round trips per day.

A.D.C.

Exhibit No. 47.D.

(5.) The Company shall forward promptly at the end of each week, to the local officer of the Board concerned, a daily report for each section affected, on Form 8560.

### GENERAL PROVISIONS

Power speeder patrolmen shall register at each end of patrol beat. As to special velocipede patrols, there shall be forwarded promptly at the end of each week, to the field officer of the Board concerned, a daily report on Form 8560.

- 10 Each velocipede patrolman shall be equipped with and carry when patrolling, one round nosed shovel, two buckets and one axe. Each power speeder patrolman shall be equipped with and carry when patrolling two round nosed shovels, two buckets and one axe.

In territory where power speeder patrols are prescribed, extra power speeders and spare parts therefor shall be kept stored at suitable points, to ensure continuity of service.

- 20 In addition to the above, and to the regular section equipment, there shall be stored at the tool house for each section in each special patrol district the following emergency fire fighting equipment, one axe, three mattocks and four buckets of not less than twelve quarts capacity each. Similar equipment shall also be stored at section tool houses between Rearguard and Endako, on the Smithers Division.

- 30 In each case of interruption of special velocipede or power speeder patrols during periods when such patrol is required, the patrol shall be performed by section forces pending the restoration of special patrol in accordance with the requirements. The local officer of the Board concerned shall be promptly advised in any such case.

On Smithers Division and Vancouver Island lines heretofore mentioned, special patrol is not prescribed, in consideration of the exclusive use of oil as locomotive fuel. However, should a coal burning engine be operated over any portion of these lines in the day time, during the fire season, a special patrol shall be provided to follow twenty minutes after such engine.

### INSPECTION

- 40 For the efficient inspection of and general supervision over the work of the Company under the Board's Order, with special reference to the patrols herein specified, the following have been

Exhibits.

No. 47.D.  
Statement  
of Chief  
Fire  
Inspector,  
1st March  
1930,  
--continued.

A.D.C.



Exhibit No. 47. D.

designated to act locally for the Board, with jurisdiction as indicated:

\* \* \* \* \*

- 10 Lines in British Columbia west of Lucerne and exclusive of Railway Belt: P. Z. Caverhill, Provincial Fire Inspector, E. C. Manning and F. A. MacDonald, Assistant Provincial Fire Inspectors, B. C. Forest Branch, Victoria. Local inspection under the direction of the following District Fire Inspectors: C. D. Orchard, Forest Branch, Prince George; between Red Pass Jct. and Fraser Lake, and between Lucerne and mileage 69.7 Albreda Subdivision. R. E. Allen, Forest Branch, Prince Rupert: between Fraser Lake and Prince Rupert. L. S. Hope, Forest Branch, Kamloops: between mileage 69.7 Albreda Subdivision and mileage 120.9 Clearwater Subdivision. G. P. Melrose, District Fire Inspector, and C. J. Haddon, Assistant District Fire Inspector, Forest Branch, Nelson: Lumby Subdivision, and Okanagan Subdivision between Vernon Jct. and Kelowna. R. C. St. Clair, Forest Branch, Court House, Vancouver, assisted by J. B. Conway,
- 20 Assistant District Fire Inspector, Forest Branch, Nanaimo: Lines on Vancouver Island.

Exhibits.  
 No. 47.D.  
 Statement  
 of Chief  
 Fire  
 Inspector,  
 1st March  
 1930,  
 --continued.

Very truly yours,

CLYDE LEAVITT,

Chief Fire Inspector, B.R.C.

SUPREME COURT OF B. C.  
 Victoria Registry  
 EXHIBIT No. 47  
 KAPOOR CO. vs. C.N.P. RY.  
 Put in by Defendant Date 26-5-32  
 H. C. S., Registrar

30

A.D.C.

Exhibit No. 36. P. **Time Table.**

EXHIBIT No. 36 P.

Safety First

CANADIAN NATIONAL RAILWAYS

Western Region—British Columbia District

TIME **3** TABLE

**TAKING EFFECT AT 24.01 O'CLOCK,  
SUNDAY, MAY 18th, 1930**

For the information and government of employees only


10 Governed by Pacific Standard Time

The superior direction is east or south, and eastward or southward trains are superior to trains of the same class in the opposite (inferior) direction

Destroy all former Time Tables

The Company's Rules are printed separately in book form. Every employee whose duties are connected with the movement of trains must have a copy of the Rules and of the current Time Table accessible when on duty.

20 Read Special Rules and Instructions carefully:  
Important changes have been made

 Check Days of Week with Care

A. A. TISDALE,  
General Manager  
Winnipeg

N. B. WALTON,  
Gen. Supt. of Transportation  
Winnipeg

B. T. CHAPPELL,  
General Superintendent  
Vancouver

L. F. MUNCEY,  
Supt. of Transportation  
Vancouver

Exhibits.  
—  
No. 36.P.  
Time  
Table,  
18th May  
1930.



Exhibit No. 36. P.

Exhibits.

\* \* \* \* \*

WORKING INSTRUCTIONS IN CONNECTION WITH  
GENERAL ORDER No. 362 OF THE BOARD OF RAILWAY  
COMMISSIONERS FOR CANADA, DATED APRIL 19th,  
1922

No. 36.P.  
Time  
Table,  
18th May  
1930.

--continued.

To all Employees Generally

10 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

20 Conductors, Enginemen or Trainmen who discover or 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 telegraph 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 such fire, unless it is practicable for the train crew to extinguish 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.

30 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 cabooses be thrown out on the right-of-way while running. Burning or smouldering waste taken from hot-boxes shall be covered with earth or otherwise completely extinguished.

To All Agents, Despatchers and Operators

40 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 Roadmaster by wire, also the section foreman and local Fire Inspector of the Railway Commission, giving the exact location, by mileage, of the fire, its

## Exhibit No. 36. P.

extent, and any other information which may be of value, particularly as to the number of men needed to fight same.

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

10 In all cases where fire occurs, it shall be your duty to proceed immediately to such fire and extinguish same, remaining 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 extinguished. In case the fire cannot be extinguished as above, additional help shall be immediately requested by telegraph or telephone message to the Superintendent or Roadmaster. 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 submitted covering every fire starting or burning within three  
20 hundred feet of the track, regardless of size or damage done.

Between April 1st and November 1st, no ties, cuttings, 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 Concerned

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

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

“If any employee or other person included in the said regula-

Exhibits.

No. 36.P.  
Time  
Table,  
18th May  
1930.

--continued.

Exhibit No. 36. P.

tions 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.”

Exhibits.

No. 36.P.  
Time  
Table,  
18th May  
1930.

--continued.

SUPREME COURT OF B. C.  
Victoria Registry

EXHIBIT No. 36

KAPOOR CO. vs. C. N. P. RY.

Put in by Plaintiff Date 20-5-32

10 H. C. S., Registrar.

EXHIBIT "A"

18 Dec./31.

J. G.

Exhibit No. 48 D. **Letter, Fraser to Conway.**

EXHIBIT No. 48 D.

CNR 5

INTER DEPARTMENTAL CORRESPONDENCE

Victoria, B. C., August 20th, 1930

MR. J. B. CONWAY,  
District Forester.

Your File

Subject

Our File

Your memo. date regarding fire at mileage 35.2 Cowichan  
10 Subdivision.

We cannot accept responsibility for same until further investigation and until the Railway is proven responsible.

We are willing to assist you in every way possible in fighting this fire.

Assistant General Agent.

Refused by Orchard and Conway

SUPREME COURT OF B. C.  
Victoria Registry  
EXHIBIT No. 48  
20 KAPOOR CO. vs. C. N. P. RY.  
Put in by Defendant Date 27-5-32  
H. C. S., Registrar  
"B"

Exhibits.

No. 48.D.  
Letter from  
Fraser to  
Conway,  
20th  
August  
1930.

Exhibit No. 23 P. Letter, Fraser to Conway.

EXHIBIT No. 23 P.

CANADIAN NATIONAL RAILWAYS

Victoria, B. C., August 20th, 1930.

Mr. J. B. Conway,  
District Forester,  
Victoria, B. C.

Dear Sir:

Your memo. date regarding fire at mileage 35.2, Cowichan  
10 Subdivision.

Will you please take over this fire for this Company.

“N. S. FRASER,”

Assistant General Agent.

Forest Branch,

RECEIVED, Oct 10, 1930

Vancouver Office.

SUPREME COURT OF B. C.  
Victoria Registry  
EXHIBIT No. 23  
20 KAPOOR CO. vs. C. N. P. RY.  
Put in by Plaintiff, Date 18-5-32  
H. C. S., Registrar

Exhibits.

No. 23.P.  
Letter from  
Fraser to  
Conway,  
20th  
August  
1930.

Exhibit No. 9. D. **Fire Pay Roll, Book 1.**

EXHIBIT No. 9 D.

Book 1

Department of Lands

Claim Books of Crew Working under Direction of  
Mill Company only.

W. N. C.

Forest Branch

# FIRE PAY ROLL AND CLAIM

10

Preliminary Report No. 7667a

Fire No. ....  
(To be filled in by District Forester.)

Name of Fire, Mile 35.2, C.N.R.

Claim submitted by Kapoor Lbr. Co. Ltd.

Address, Mile 35, C.N.R.  
Via Victoria, B. C.

Date, Sept. 17th, 1930

Received

20

NOTE.—“Register when Mailing”

Exhibits.

No. 9.D.  
Fire Pay  
Roll Book  
1, 17th  
September  
1930,

Exhibit No. 9. D.

Exhibits.

Sept. 13th, 1930

No. 9.D.  
Fire Pay  
Roll Book  
1, 17th  
September  
1930,  
--continued.

District Forester,

Victoria, B. C.

We hereby declare that the attached is a correct pay roll of the men employed by us to fight fire know as Mile 35.2 Cowichan fire, which occurred on Can. Nat. Rlys. right of way at Mile 35.2 on Aug. 18th, 1930, and that the men whose names are given on said pay-roll have duly received the amounts set opposite their names for fighting said fire.

10

We also declare that to the best our knowledge said fire originated on C.N.R. right of way at Mile 35.2 and was caused by

.....  
(State cause if known)

Notice of said fire was dispatched to W. N. Campbell, Ranger, at Victoria by telephone, being best means of communication available.

KAPOOR LUMBER CO., LTD.,

(Signed) Bal Mukand,

20

Superintendent.

Witness, Kishan Singh.

Exhibit No. 9. D.

Exhibits.

Forest District: Vancouver

No. 9.D.  
Fire Pay  
Roll Book  
1, 17th  
September  
1930,  
--continued.

Fire or Project No.

Month of August, 1930

FIRE PAY ROLL

Page 1

10	Name of Employee	DAYS OF MONTH											Total No. Hours or Days				
		16	17	18	19	20	21	22	23	24	25	26		27	28	29	30
	Banta Singh .....			18	12	12	12	12	12	12			12			12	114
	Bishen Singh .....			18	12	12	12	12	12	12	12						102
	Sardara Singh .....			18	12	12	12	12	12	12							90
	Mahia .....			18	12	12	12	12	12	12							90
	Pooran .....			18	12	12	12	12			12	12	12				102
	Basanta .....			18	12	12	12	12	12								78
	Lakha Singh, No. 1 .....			18	12	12											42
	Isher Singh .....			18	12	12	12	12	12	12	12						102
	Sayjan Singh .....			18	12	12	12	12	12								78
20	Bishen Singh .....			18	12	12	12										54
	Lakha Singh, No. 2 .....			18	12	12	10										52
	Phuman Singh, No. 1 .....			18	12	12	12	12									66
	Phuman Singh, No. 2 .....			18	12	12	12	12	12	12							90
	Bishen Singh .....			18	12	12	12										54
	Jagat Singh .....			18	12	12	12	12	12								78
	Teja Singh .....			18	12	12	12	12	12								78
	Mota Singh .....			18	12	12	12	12									66
	Kishen Singh .....			18	12	12	12	12	12								78
	Kashmura Singh .....			18	12	12	12	12									66
30	Arjan Singh .....			18	12	12	12	12	12	12	12						102
	Kehar Singh .....			18	12	12	12	12	12	12	12						102
	Dalip Singh .....			18	12	12	12	12	12	12	12						102
	Sarda Singh .....			18	12	12	12										54
	Sunder Singh .....			18	12	12	12	12	12	4							82
	Gurbachan Singh .....			18	12	12	12	12									66
	TOTAL .....																1988

Certified correct:

.....Forest Officer



Exhibit No. 9. D.

Forest District: Vancouver

Fire or Project No.

Month of August, 1930

Exhibits.

No. 9.D.  
Fire Pay  
Roll Book  
1, 17th  
September  
1930,  
--continued.

## FIRE PAY ROLL

Page 2

10	Name of Employee	DAYS OF MONTH														Total No. Hours or Days		
		16	17	18	19	20	21	22	23	24	25	26	27	28	29		30	31
	Baboo .....			18	12	12	12	12	12									78
	Rattan Singh .....			18	12	12	12	12										66
	T. Tobo .....			18	12	12												42
	T. Tommago .....			18	12	12												42
	S. Maruno .....			18	12	12												42
	T. Kaguno .....			18	12	12												42
	P. Kawaguchi .....			18	12	12												42
	A. Kazuno .....			18	12	12												42
	T. Takezawa .....			18	12	12												42
20	S. Miyaki .....			18	12	12												42
	T. Tamaki .....			18	12	12												42
	D. Tayota .....			18	12	12												42
	S. Koushi .....			18	12	12												42
	N. Hirokado .....			18	12	12												42
	L. Yow .....			18	12	12	12	12	12							8		86
	Sack Roon .....			18	12	12	12	12	12							8		86
	Joe Ching .....			18	12	12	12	12								8		76
	Joe Jam .....			18	12	12	12											54
	Law Jing .....			18	12	12	12	12	12									78
30	Joe Chuck .....			18	12	12	12	12	12									78
	Soo Kee .....			18	12	12	12	12	12									78
	Soo .....			18	12	12	12	12	12									78
	Wing Kin Ching .....			18	12	12	12	12	12									78
	L. Hoy .....			18	12	12	12	12	12									78
	Magan Sang .....			18	12	12	12	12	12									78
	TOTAL .....																	1496

Certified correct:

.....Forest Officer

Exhibit No. 9. D.

Forest District: Vancouver

Fire or Project No.

Month of August, 1930

Exhibits.

No. 9.D.  
Fire Pay  
Roll Book  
1, 17th  
September  
1930,  
--continued.

## FIRE PAY ROLL

Page 3

10	Name of Employee	DAYS OF MONTH														Total No. Hours or Days		
		16	17	18	19	20	21	22	23	24	25	26	27	28	29		30	31
	Hokam Singh, No. 1 .....			18	12	12	12	12	12	12	12	8						98
	Ganda Singh .....			18	13	13	13	13	13	13	13	13	13			13		135
	Balwant Singh .....			18	12	12	12	12	12	12	12	12	12		12	12		138
	Hagara .....			18	12	12	12	12	12	12	8							98
	Hardeal Singh .....			18	12	12	12											54
	Pola Singh .....			18	13	13	1	1	1	1	1	1	1	1	1	1	1	54
	Hokam Singh, No. 2 .....			18	12	12	12	12	12									78
	Banta Singh, No. 2 .....			18	12	12	12	12	12									78
	Narinder Singh .....			18	12	12	12	12	12	12	12	12	12	8				134
20	Gurdial Singh .....			18	12	12	12											54
	Mula Singh .....			18	12	12												42
	Mausha Singh .....			18	12	12												42
	Doman Singh .....			18	12	12												42
	Bal Mukand .....			18			10	10	10									48
	Udham Singh .....	6		9	18	12	12	12	10	10								89
	Ran Singh .....	6		9	18	12	12	12	9	10								88
	Narayan Singh .....	6		9	18	12	12	12	12									81
	Jawawalle Singh .....			18	12	12	12	12	10									76
	Harnam Singh .....	6		9	18	12	12	12	12	10								91
30	Magher Singh .....	6		9	18	12	12	12										69
	Milkla Singh .....			18	10	10	10	10	10	10	10	10	10	10	10	10	10	138
	Kewal Krishen .....	6		9	18	12	12	12	12	12								93
	Ranjit Singh .....			18	12	12	12	12										66
	Santa Singh .....			18	12	12	12	12	12									78
	Mangle Singh .....			18	12	12	12	12	12									78
	TOTAL .....																	2042

Certified correct:

.....Forest Officer

Exhibit No. 9. D.

Forest District: Vancouver

Fire or Project No.

Month of August, 1930

Exhibits.

No. 9.D.  
 Fire Pay  
 Roll Book  
 1, 17th  
 September  
 1930,  
 --continued.

## FIRE PAY ROLL

Page 4

10	Name of Employee	DAYS OF MONTH											Total No. Hours or Days				
		16	17	18	19	20	21	22	23	24	25	26		27	28	29	30
	Sohan Singh .....			18	12	12	12	12	12								66
	Fore Sue .....			18	12	12	12	12	12	12							78
	Souie Sing .....			18	12	12	12	12	12	12							78
	Joe Tuen .....			18	12	12	12										54
	Y. Tobo .....			18	12	12											42
	M. Herokado .....			18	12	12											42
	T. Kuromi .....			18	12	12											42
	S. Sago .....			18	12	12											42
	I. Yamada .....			18	12	12											42
20	H. Hashimoto .....			18	12	12											42
	M. Yoshinura .....			18	12	12											42
	S. Fukashima .....			18	12	12											42
	Y. Fuji .....			18	12	12											42
	N. Watanabe .....			18	12	12											42
	S. Ikeda .....			18	12	12											42
	K. Kido .....			18	12	12											42
	C. Kananura .....			18	12	12											42
	H. Yamamoto .....			18	12	12											42
	I. Samejima .....			18	12	12											42
30	C. Simu .....			18	12	12											42
	Young Chew .....			18	12	12											42
	Young Yuen .....			18	12	12											42
	Soo .....			18	12	12											42
	Young Yet .....			18	12	12											42
	Wong Chung .....			18	12	12											42
	TOTAL .....																1158

Certified correct:

.....Forest Officer

Exhibit No. 9. D.

Exhibits.

Forest District:

No. 9.D.  
Fire Pay  
Roll Book  
1, 17th  
September  
1930,

Fire or Project No.

Month of August, 1930

--continued.

FIRE PAY ROLL

Page 5

10	Name of Employee	DAYS OF MONTH														Total No. Hours or Days		
		16	17	18	19	20	21	22	23	24	25	26	27	28	29		30	31
	Chu Pay .....				18	12	12											42
	Way Chung .....				18	12	12											42
	York Boo .....				18	12	12											42
	Hop Sing .....				18	12	12											42
	Done So .....				18	12	12											42
	Wane Lum .....				18	12	12											42
	Gam Lum .....				18	12	12											42
	Chu Wing .....				18	12	12											42
	Wong Tuen .....				18	12	12											42
20	Sam Gam .....				18	12	12											42
	Jane Young .....				18	12	12											42
	Chow Chung .....				18	12	12											42
	Thing Yet .....				18	12	12											42
	D. Miles .....				18	12	12	12										54
	J. Clarke .....				18	12	12	12										54
	J. Kingscote .....				18	12	12	12										54
	A. Kilby .....				18	12	12	12										54
	M. O'Malley .....				18	12	12											42
	T. Timothy .....				18	6												24
30	W. Prouse .....				18	12	12	12										54
	R. Walker .....				18	12												30
	C. Martin .....				18	12	12	12										54
	R. Swanson .....				18	8												26
	C. Cotsford .....				18	12	12											42
	McEachern .....				18	12	12											42
	TOTAL .....																	1076

Certified correct:

.....Forest Officer

Exhibit No. 9. D.

Exhibits.

## RECAPITULATION—

Page	Hours	Wages	Board	Balance	Ded.	Net Bal.
1	1988	\$ 512.30	\$184.00	\$ 696.30	\$ 3.32	\$ 692.98
2	1496	374.00	135.60	509.60	2.48	507.12
3	2042	517.70	195.60	713.30	3.50	709.80
4	1158	289.50	100.80	390.30	1.93	388.37
5	1076	269.00	93.20	362.20	1.79	360.41
<b>10</b> Totals	<u>7760</u>	<u>\$1962.50</u>	<u>\$709.20</u>	<u>\$2671.70</u>	<u>\$13.02</u>	<u>\$2658.68</u>

No. 9.D.  
Fire Pay  
Roll Book  
1, 17th  
September  
1930,  
--continues

Checked October 10, 1930,  
O.K., A.S.B.

W. N. CAMPBELL,  
Rgr.

SUPREME COURT OF B. C.  
Victoria Registry  
EXHIBIT No. 9  
KAPOOR vs. C.N.P. RY.  
Put in by Defendant Date 16-5-32  
H.C.S.  
Registrar  
Company

502

454

Exhibit No. 10. **D. Fire Pay Roll, Book 2.**

**EXHIBIT No. 10** **D.**

Book 2

Department of Lands

Claim Books of Crew Working under Direction of  
Mill Company only.

W. N. C.

Forest Branch

# **FIRE PAY ROLL AND CLAIM**

10

Preliminary Report No. 7667a

Fire No. ....  
(To be filled in by District Forester.)

Name of Fire, Mile 35.2, C.N.R.

Claim submitted by Kapoor Lbr. Co. Ltd.

Address, Mile 35, C.N.R.  
Via Victoria, B. C.

Date, Sept. 17th, 1930

Received

20

**NOTE.—“Register when Mailing”**

**Exhibits.**

**No. 10.D.  
Fire Pay  
Roll Book  
2, 17th  
September  
1930.**

Exhibit No. 10. D.

Exhibits.

Sept. 13th, 1930

No. 10.D.  
Fire Pay  
Roll Book  
2, 17th  
September  
1930,  
--continued.

District Forester,

Victoria, B. C.

We hereby declare that the attached is a correct pay roll of the men employed by us to fight fire know as Mile 35.2 Cowichan fire, which occurred on Can. Nat. Rlys. right of way at Mile 35.2 on Aug. 18th, 1930, and that the men whose names are given on said pay-roll have duly received the amounts set opposite their  
10 names for fighting said fire.

We also declare that to the best our knowledge said fire originated on C.N.R. right of way at Mile 35.2 and was caused by

.....  
(State cause if known)

Notice of said fire was dispatched to W. N. Campbell, Ranger, at Victoria by telephone, being best means of communication available.

KAPOOR LUMBER CO., LTD.,

(Signed) Bal Mukand,

20

Superintendent.

Witness, Kishan Singh.

Exhibit No. 10. D.

Exhibits.

No. 10.D.

Fire Pay

Roll Book

2, 17th

September

1930,

--continued.

Forest District :

Fire or Project No.

Month of August, 1930

## FIRE PAY ROLL

Page 1

Name of Employee	DAYS OF MONTH																Total No. Hours or Days
	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	
0 J. G. Jure .....				18	12	12											42
M. Barker .....				18	12	12											42
W. Webber .....				18													18
J. Woods .....				18													18
J. T. Green .....				18	12												30
J. McKinnon .....				18													18
M. Nikich .....				7	11	3											21
Joe Dorzich .....				7	11	3											21
A. Grubrich .....				7	11	3											21
10 John Dorzich .....				7	11												18
R. Dorzich .....				7	11												18
W. J. McLean .....				12													12
Bhan Singh .....				6	12												18
Ghania Singh .....				6	12												18
Tara Singh .....				6	12												18
Ganda Singh .....				6	12												18
Sohan Lab .....				6	12												18
Naranjan Singh .....				6	12												18
Bhagwan Singh .....				6	12												18
30 Gurbachs .....				6	12												18
Lall Singh .....				6	12												18
Jaginder Singh .....				6	12												18
Basant Singh .....				6	12												18
Sanatev .....				6	12												18
Kashmura Singh .....				6	12												18
TOTAL .....																	513

Certified correct:

.....Forest Officer



Exhibit No. 10. D.

Exhibits.

Forest District:

No. 10.D.

Fire or Project No.

Month of August, 1930

Fire Pay  
Roll Book  
2, 17th  
September  
1930,  
--continued.

## FIRE PAY ROLL

Page 2

10	Name of Employee	DAYS OF MONTH														Total No. Hours or Days		
		16	17	18	19	20	21	22	23	24	25	26	27	28	29		30	31
	Sunder Singh .....					6	12											18
	Jawan Singh .....					6	12											18
	Lachman Singh .....					6	12											18
	Bhagat Singh .....					6	12											18
	Doman Singh .....					6	12											18
	Curdit Singh .....					6	12											18
	Taroo .....					6	12											18
	Ganga Singh .....					6	12											18
	Banta .....					6	12											18
20	Udham Singh .....					6	12											18
	Jagat Singh .....					6	12											18
	Santa, No. 2 .....					6	12											18
	Jagat Singh, No. 2 .....					6	12											18
	Isher Singh .....					6	12											18
	Narayan Singh .....					6	12											18
	Chanan Singh .....					6	12											18
	Ram Singh .....					6	12											18
	Naman .....					6	12											18
	Gurdial Singh .....					6	12											18
30	Tara Singh .....					6	12											18
	Mohinder Singh .....					6	12											18
	Naud Singh .....					6	12											18
	Bir Singh .....					6	12											18
	Jainel Singh .....					6	12											18
	Kapoor Singh .....					6	12											18
	TOTAL .....																	450

Certified correct:

W. N. CAMPBELL, Forest Officer.

Exhibit No. 10. D.

Exhibits.

Forest District:

No. 10.D.

Fire or Project No.

Month of August, 1930

Fire Pay  
Roll Book

2, 17th  
September

1930,  
--continued.

FIRE PAY ROLL

Page 3

10	Name of Employee	DAYS OF MONTH											Total No. Hours or Days					
		16	17	18	19	20	21	22	23	24	25	26		27	28	29	30	31
	J. W. Armstrong .....					6	12											18
	G. M. Bouyer .....					6	12											18
	D. McCollough .....					6	12											18
	J. Leask .....					6	12											18
	J. Carmichael .....					6	12											18
	G. Schultz .....					6	12											18
	J. Gelu .....					6	12											18
	S. Toyota .....					6	12											18
	S. Inouye .....					6	12											18
20	Lum Wah .....					6	12											18
	R. Muira .....				5	3	5											13
	M. Gamuda .....				5	3	5											13
	Y. C. Kawaguchi .....				5	3	5											13
	I. Yasudu .....				5	3	5											13
	I. Inafuki .....				5	3	5											13
	M. Araki .....				5	3	5											13
	Y. Tamura .....				5	3	5											13
	S. Okuda .....				5	3	5											13
	U. Kakuichi .....				5	3	5											13
30	M. Meyida .....				5	3	5											13
	S. Hosono .....				5	3												8
	T. Toishi .....				5	3												8
	K. Miyayaki .....				5	3												8
	TOTAL .....																	334

Certified correct:

W. N. CAMPBELL, Forest Officer.

Exhibit No. 10. D.

Exhibits.

Forest District:

No. 10.D.  
Fire Pay  
Roll Book  
2, 17th  
September  
1930,  
--continued.

Fire or Project No.

Month of August, 1930

FIRE PAY ROLL

Page 4

10	Name of Employee	DAYS OF MONTH														Total No. Hours or Days		
		16	17	18	19	20	21	22	23	24	25	26	27	28	29		30	31
	K. Kato .....				5	3												8
	Soo Bong .....				5													5
	C. Kawaguchi .....				5	3	5											13
	TOTAL .....																	26

RECAPITULATION—

	(1)	513
	(2)	450
20	(3)	334
	(4)	26
		<u>1323</u>

Checked Oct. 10/30.  
O.K., A.S.B.

30 SUPREME COURT OF B. C.  
Victoria Registry  
EXHIBIT No. 10  
KAPOOR vs. C.N.P. RY.  
Put in by deft. Date 16-5-32  
H.C.S.  
Registrar.  
Company