

The Canadian Northern Pacific Railway Company - - - *Appellants*

v.

The Kapoor Lumber Company, Limited - - - *Respondents*

The Kapoor Lumber Company, Limited - - - *Appellants*

v.

The Canadian Northern Pacific Railway Company - - - *Respondents*  
(*Consolidated Appeals.*)

FROM

THE COURT OF APPEAL FOR BRITISH COLUMBIA.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF  
THE PRIVY COUNCIL, DELIVERED THE 9TH OCTOBER, 1933.

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*Present at the Hearing:*

LORD BLANESBURGH.

LORD MERRIVALE.

LORD THANKERTON.

LORD RUSSELL OF KILLOWEN.

SIR LANCELOT SANDERSON.

[*Delivered by* LORD RUSSELL OF KILLOWEN.]

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In this case an action was brought by the Kapoor Lumber Company, Limited (hereinafter called the Lumber Company), against the Canadian Northern Pacific Railway Company (hereinafter called the Railway Company), in which the Lumber Company claimed to recover a sum of \$234,285 as the damage sustained by them to their property through the negligence of the Railway Company in (1) causing or permitting a fire to start upon their right of way at or near the lumber mill owned and operated by the Lumber Company and (2) allowing the fire to get out of control and escape from their right of way and to destroy or damage the property of the Lumber Company.

The action was tried before the Hon. Mr. Justice W. A. Macdonald and a special jury in the city of Victoria. The jury gave specific answers to a series of questions which were submitted to them, and assessed the damage sustained by the Lumber Company at \$117,830. The trial judge entered judgment for the Lumber Company for that amount.

On appeal by the Railway Company to the Court of Appeal for British Columbia the judgment was set aside and an order was made for a new trial. The Court which heard the appeal was composed of five members. The Chief Justice and Macdonald, J.A., were in favour of ordering a new trial. Martin, J.A., was in favour of dismissing the action, but in the circumstances eventually concurred in the making of an order for a new trial. McPhillips, J.A., dissented, and would have dismissed the appeal. Galliher, J.A., having in the meantime become ill took no part in the judgment.

The Railway Company have appealed to His Majesty in Council, and ask to have the action dismissed upon the findings of the jury. By way of cross-appeal the Lumber Company ask to have the judgment of the trial judge restored.

The Railway Company's line of railway runs from Victoria to Kissinger, a distance of 95 miles. The stretch of the line which is the scene of the occurrences leading up to this litigation, is the mile between the 35th mile board and the 36th mile board, measured from Victoria towards Kissinger. This stretch roughly forms a loop in the shape of an inverted letter U. Near the top of the loop is a stopping place or station, Kapoor Station. The land on both sides of the Railway Company's right of way was owned by the Lumber Company, and was forest land partly already cut over and partly in process of being logged. The Lumber Company's mills and buildings are near the station. A plan (Exhibit 4) shows generally the locality.

On Sunday, the 17th August, 1930, no train had passed along the railway track, nor was there any indication of any fire in the locality. Early in the morning of Monday, the 18th August, 1930 (between 7 and 8 o'clock) some smoke was observed by an employee of the Lumber Company, who reported it to the Lumber Company's "woods boss." The smoke seen was approximately at a point marked OM2 on Exhibit 4, which is at about mile 35.2.

The first of the Railway Company's trains to pass through on the Monday morning was a motor train known as the gas car and propelled by gasoline. It reached Kapoor at 10.25 a.m. Its driver was Jones; its conductor Mulligan. They observed the smoke at about the same spot, but they made no report to anyone of what they had seen. A second train, called the way-freight and drawn by an oil-burning engine, reached Kapoor shortly after noon. The conductor (Miller) and the driver (Mineau) both observed the smoke when passing the point OM2.

Between 12.30 and 1 p.m., Miller telephoned to one Fraser at Victoria and told him of the fire. Fraser is the assistant general agent to the Railway Company. On receiving this information, Fraser ordered out an auxiliary train with a fire-fighting gang aboard. They left Victoria at about 2.30, and after picking up two other gangs on the way, they arrived at Kapoor at about 4 p.m. Fraser went to the Lumber Company's office and there met one Dunn, an assistant Forest Ranger. Dunn had been sent there as the representative of the Forest Supervisor, whose authority covered this area. In the meanwhile the Lumber Company had sent out men to deal with the fire. There is a dispute as to the actual number of men engaged on this task; but a large number of men was available if required. A tank car of the Lumber Company, with a capacity of 30 gallons per minute, was also available, but was not used. Dunn and Fraser proceeded together to the scene of the fire. Dunn made a two-fold inspection of the fire; and as a result told Fraser to take his men home. That was Fraser's evidence and Dunn would not deny it. He agreed that he was satisfied when he let Fraser and his men go that there was no danger from the fire. It was only about a quarter of an acre in extent, and was not spreading. The Lumber Company, on whose land the fire then was, had taken over the fighting of it, when Dunn and Fraser left on the Monday afternoon.

It seems advisable to refer at this stage to the evidence relating to the state of affairs at this point of time.

Fraser's evidence was that when Dunn had made his first inspection he (Fraser) asked him—

“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 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.”

Dunn arrived on the scene about 4 p.m. on the Monday; by that time the fire had, as their Lordships read the evidence, ceased to be on the Railway Company's right of way. It was, if not wholly on the Lumber Company's land, in substance wholly on that land. Dunn's evidence states:—

*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?

*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.

When he got up there on the Monday Dunn says that the fire was approximately a quarter of an acre in extent. He was

then asked about his conversation on the spot with Fraser as to which his evidence is as follows :—

Q.—In fact you went around the fire twice, did you not? 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 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.

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 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? 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 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 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 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.

One further passage from Dunn's evidence should be quoted:

*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.

*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.

If further evidence were needed to show how small an affair the fire was when the Lumber Company took it over, reference can be made to the evidence of Teja Singh, one of the Lumber Company's employees, who was fighting the fire on the Monday afternoon. He left the scene at 5.30 p.m. as ordered by the yard foreman Narangan Singh. At that time the state of affairs as described by him was this:—

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.

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.

211 *Q.*—No. So that as far as you could see, it was perfectly safe? *A.*—Yes.

On the Tuesday morning the condition was the same:—

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.

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.

The evidence of other witnesses is to the same effect. There seems upon the evidence to be no room for doubt that (assuming the fire to have originated early on the Monday morning on the Railway Company's right of way) it was but a small affair which by 4 p.m. on Monday was substantially confined to the land of the Lumber Company, which was then taken over for fighting purposes by the Lumber Company under the direction of the forest official, and which continued to be a small affair under their (the Lumber Company's) control until some time on the Tuesday afternoon.

The rest of the story may be shortly told. Fraser on telephoning the next day was twice assured that no danger existed. The last telephonic assurance to him was at about 2 p.m. Unfortunately in the course of Tuesday afternoon a strong wind sprang up, the fire flared up and jumped the railway track into the loop and spread to the mill, eventually causing the damage which the jury assessed at the figure already mentioned.

At this point reference must be made to the allegations of the Lumber Company in their pleadings and to the findings of the jury.

The Lumber Company's claim is based entirely upon alleged negligence of the Railway Company. The negligence first alleged is thus charged in paragraph 6 of the Statement of Claim:—

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.

Particulars were subsequently delivered, but in regard to this the claim failed, because as will appear hereafter, the jury found that the fire was not started by any engine of the Railway Company, and that the origin of the fire was unknown.

The only other negligence alleged is thus charged in paragraph 7 of the Statement of Claim:—

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.

(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 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.

(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."

There then follow details of the alleged breaches of Order 362. These, however, as well as paragraphs (c), (d) and (e) may be disregarded in view of the jury's findings.

The sole remaining basis of the claim is alleged negligence in not (after knowing of the fire) taking any steps or adequate steps to prevent the fire from spreading and damaging the property of the Lumber Company.

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

1. Q.—Was the fire of the 18th August, 1930, near mile 35·2 on defendant's railway and which destroyed property of the plaintiff on the 19th August, 1930, and subsequent dates, started by any engine of the defendant? A.—No.

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

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

4. Q.—Did the said fire originate on the right-of-way of the defendant? A.—Yes.

5. Q.—If the answer to the 4th question be in the affirmative then (a) did the defendant become aware of the said fire? (b) if so where was the said fire then burning? A.—(a) Yes. (b) On right-of-way on right-hand side of track going from Victoria to Kapoor near mile 35·2.

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

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

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

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

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

10. (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.

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

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

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.

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

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

21. Q.—Damages? A.—

We find that the total loss sustained by the Kapoor Lumber Company in the fire on August 19th, 1930, was \$117,830.00."



Question No. 20, which has relation to the Contributory Negligence Act (Statutes of B.C. 1925, c. 8), was not answered by the jury. Counsel for the Railway Company took the view that in view of the other answers of the jury, the Act had no application. Counsel for the Lumber Company, although he at one time pressed for the question to be answered, ultimately withdrew his application in that regard. The case accordingly falls to be considered solely in the light of the answers actually given by the jury to the questions which were deemed by the parties to include all matters of fact the determination of which by the jury was necessary for the purpose of ascertaining their respective legal rights and liability.

These findings of fact their Lordships now proceed to consider.

Certain points appear to them to be made abundantly clear. In the first place the Railway Company cannot be made liable upon the footing that they were responsible for starting the fire. The answers to questions 1, 2, 3, 8, establish this. In the next place the only negligence of any kind which the jury have found against the Railway Company is the negligence specified in the answer to question 15. By their answer to question 16 the jury, in terms, find that the Railway Company were not guilty of any other negligence at all. Further, they find in answer to question 10 that the Railway Company took all proper precautions to prevent the fire from spreading, subject to the single qualification of the negligence specified in the answer to question 15. Finally, the jury, by their answers to questions 10, 10A, 11 and 12, show that they accept Fraser's evidence as to what passed between him and Dunn on the Monday afternoon.

The question for their Lordships' consideration is whether, in the face of those findings of the jury, any liability can rest upon the Railway Company for the damage caused to the Lumber Company by the fire.

In order to justify a judgment against the Railway Company it must be established that they were guilty of some negligence which caused the damage in question. The only negligence found by the jury consists of (a) the omission by Jones and Mulligan to report at about 10.30 on the Monday morning, and (b) the delay of half an hour or forty minutes by Miller in reporting between 12.30 and 1 p.m. on the Monday, instead of reporting immediately on his arrival at Kapoor. The question is whether it is possible on the evidence in this case to hold that the damage to the Lumber Company was caused by *that* negligence, which is the only negligence which can be alleged against the Railway Company?

Their Lordships are of opinion that it is impossible so to hold. It is, they think, clear to demonstration upon the evidence (1) that even at 5 p.m. on the Monday (when Fraser was told to withdraw his men and leave the matter in the hands of the Lumber Company), the fire was quite a small affair; (2) that at

that time it was on the land of the Lumber Company who had assumed the task of extinguishing it, and (3) that it continued to be quite a small affair at least up to 2 p.m. on the Tuesday, by which time it could and should have been extinguished. In these circumstances it cannot by any distortion of the evidence or stretch of the imagination be said that the subsequent spread of the fire and the damage thereby occasioned were in any way due to the failure or delay of the Railway Company in reporting on the Monday morning, or indeed due to any cause other than the failure by the Lumber Company to discharge their task of extinguishment.

It is true that owing to the frame of question 15 the jury have apparently found as a fact that the failure and delay in reporting caused the fire or contributed to the fire. It is difficult to give an intelligible meaning to this alternative finding. The failure and delay clearly could not and did not cause the fire; and if the answer is to be taken as meaning that the failure and delay in reporting contributed to the fire, it is of no assistance to the Lumber Company unless its meaning be further expanded so as to amount to a finding of fact that the damage suffered by the Lumber Company was caused by the failure and delay in reporting. If that be its intended meaning (and their Lordships do not think it can be), then in their Lordships' opinion such a finding could not stand in the face of the evidence in the case. Indeed it must be pointed out that no such allegation is even made in the Statement of Claim or particulars.

The learned trial Judge entered judgment for the Lumber Company because he thought that the jury's finding in answer to question 15 was conclusive in fixing the Railway Company with liability, and that the subsequent actions of the parties could not affect this finding. He does not appear to have directed his mind to what in their Lordships' view is the crucial question in the present case, viz., whether the alleged negligence caused the damage.

Upon appeal the learned Chief Justice thought that the Contributory Negligence Act applied, and that a new trial should take place in order that the jury might answer question 20 and be instructed upon what he termed "the doctrine of ultimate negligence." By this their Lordships understand him to mean that the jury should be asked to decide whether the negligence of either and which of the parties was the negligence which caused the damage. This justification for a new trial does not appear sustainable in view of the election of counsel on behalf of the Lumber Company not to have question No. 20 answered, but to fight the case upon the footing that the Railway Company were liable because their negligence and their negligence alone caused the damage which the Lumber Company had sustained.

McPhillips, J.A., thought that the trial Judge was right in entering judgment for the Lumber Company, indeed he took the

view "that the defendant was solely guilty of the negligence which caused the plaintiff the serious fire-loss sued for in this action." Their Lordships have already indicated why in their opinion it is impossible that this view should prevail.

Macdonald, J.A., reviewed the evidence in order to see what was the true interpretation of the jury's answer to question No. 15. He came to the conclusion that the jury had answered that question as also question No. 18 without proper regard to the question as to whose negligence was the effective cause of the damage. On that ground he thought that a new trial was necessary.

Martin, J.A., took the view with which their Lordships agree, viz., that the only negligence found against the railway company could not have caused the damage in respect of which the action was brought. He thought that the action should have been dismissed.

The action took twelve days to try, in the course of which the arguments ranged over a wide field. Numerous authorities were cited at the trial, in the Court of Appeal and before their Lordships' Board, relating to various points of law, including the duty of an owner of land to abate nuisances, public and private, arising thereon and whether originated by the landowner or by a stranger. Their Lordships do not consider it necessary or advisable to discuss any of these points, for in their opinion the findings of the jury and the facts of this particular case are such that no such questions can arise. Indeed, they cannot help feeling that if the true position had been appreciated at the trial, just as the fire might at an early stage have been extinguished by the Lumber Company, so might the area of discussion have been confined, and the arguments prevented from spreading.

When all is said and done the case is simply this. The Lumber Company sought to make the Railway Company liable for the damages caused to them by the negligence of the Railway Company. They failed to prove any of the negligence which they alleged against the Railway Company; and the only negligence found by the jury is negligence which upon the clear evidence in the case could not have caused the damages which the Lumber Company have sustained.

In these circumstances their Lordships are of opinion that the appeal succeeds and the cross-appeal fails.

The order of the Court of Appeal should be varied by striking out all the words thereof which occur after the words "be set aside," and inserting in the place of the words so struck out the following words: "and that judgment be entered dismissing the plaintiffs' action." The Lumber Company must pay to the Railway Company their costs of the action, of the appeal to the Court of Appeal for British Columbia and of the proceedings before their Lordships' Board. Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

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THE CANADIAN NORTHERN PACIFIC RAILWAY  
COMPANY

vs.

THE KAPOOR LUMBER COMPANY, LIMITED.

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DELIVERED BY LORD RUSSELL OF KILLOWEN.

Printed by  
Harrison & Sons, Ltd., St. Martin's Lane, W.C. 2.

1933.