Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Louis Blue and Joseph Stephen Deschamps, trading together under the name and style of Blue and Deschamps v. *The Red Mountain Railway Company, from the Supreme Court of Canada; delivered the* 31*st March*, 1909.

Present at the Hearing:

LORD ATKINSON.

LORD COLLINS.

LORD SHAW.

SIR ARTHUR WILSON.

[*Delivered by Lord Shaw.*]

The Plaintiffs (Appellants) are saw-mill owners and timber merchants who own certain property in the neighbourhood of Rossland in the Province of British Columbia. The Defendants, the Red Mountain Railway Company, own and work a line of railway running northwards to Rossland from the boundary line of British Columbia and the United States of America.

On the 24th and 25th August, 1905, certain property of the Plaintiffs was destroyed by fire. The allegation is that this fire originated on the 23rd upon the property of the Railway Company and by reason of their negligence. The fire swept in a northerly direction; the damage caused to the Plaintiffs' property has been assessed by a jury at $18,000.

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In the Plaintiffs' Statement of Claim it is averred that the Defendants "started a fire on "their right of way"; that the right of way was not kept "free from dead or dry grass, weeds "or other unnecessary combustible matter"; and that the fire "was started through the negligence "of the Company." These allegations the Company deny. Both parties refer to the provisions of the Railway Act, 1888 (51 Vict. cap. 29), and the Railway Act, 1903 (3 Edw. VII. cap. 58). By section 239 of the latter statute it is provided that "the Company shall at all "times maintain and keep its right of way free "from dead or dry grass, weeds, and other "unnecessary combustible matter." By sub-section 2 it is provided that, 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. It is plain that, if the Company 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.

But the Railway Company throughout the proceedings in Canada strongly maintained that the point where the fire originated was not upon its right of way; and any difficulties which arise in the case spring from this contention. The ignition from engine sparks occurred at a rocky bluff on the north side of the track. Whether that rocky bluff was on the Railway Company's right of way is a point which, upon the pleadings, the Railway Company deny, and of which, in evidence, their witnesses professed ignorance. The awkwardness and possible injustice arising from doubt in such a state of matters is manifest; and this is well illustrated in the course of

the present action. But so far as the Legislature of Canada is concerned, every precaution had been taken by statute to prevent these. In both of the Railway Acts of 1888 and 1903, already cited, careful provision had been made not only for a clear delineation on plan of the location, width, and extent of the line, but by section 134 of the former Act, which is substantially repeated by section 128 of the latter, a "plan and profile of the completed railway "and of the land taken or obtained for "the use thereof" is to be made and filed with the Board; (2) plans, &c., of the parts located in different districts and counties are to be filed in the registry offices for those districts and counties; and (3) any railway company which fails in the duty of making and filing as above is liable to a statutory penalty of $200 per month. In face of these clear provisions the Plaintiffs, in preparing the case for trial, very naturally administered the following interrogatory to the Defendants:—"What width is your right of way "between said trestle and the section house as "shown on your plans filed under the provisions of "the Railway Act?" To this question, founded upon the statute, the following answer is given by the Secretary of the Company: "No plans of "the completed line of railway of the Defendants "have been filed under the provisions of the "Railway Act." One need not go through these protracted judicial proceedings in detail; but from them two things are abundantly clear—(1) that the Railway Company continued to assert as matter of fact that the plans, which it was their duty under the Acts of Parliament to make and file, had not been so made, or at least so filed, and were not available and could not be produced; and (2) that they have raised many objections and interposed many obstacles in the way of the

Plaintiffs otherwise establishing—by the evidence of those who laid out the railway and of acts of possession, including the slashing of timber, &c., since then—that the right of way did embrace the rocky bluff.

After viewing the ground and hearing the evidence the jury had the specific question put to them:—"Is the rocky bluff mentioned in "the evidence within the right of way of the "Defendants?" and to this the jury answered, "Yes," finding for the Plaintiffs and assessing the damages as before-mentioned.

An appeal on the ground of misdirection was made by the Defendants to the Full Court of the Supreme Court of British Columbia, and that Court, one of the learned Judges dissenting, dismissed the appeal. An appeal was then taken to the Supreme Court of Canada, and on the 20th November, 1907, that Court gave judgment allowing the appeal and ordering a new trial. From that judgment the appeal to the Privy Council, special leave having been given, is now made.

Before the hearing in the Supreme Court of Canada was reached, this circumstance had occurred, viz., that the plan which the Railway Company had throughout maintained had either never been made, or at least never been filed, had been actually discovered and was, in fact, available. It was tendered by the Plaintiffs to the Supreme Court of Canada; and it is plain that it not only was equivalent to the writ of the Railway Company, but that by the law of Canada it was a document to be filed with the Board and in the registry of the district through which the railway passed, and that, in short, its availability for public reference was part of the policy of the Legislature. The Defendants objected to the production of the plan. And the Supreme Court of Canada felt itself precluded from

admitting it to evidence, the learned Chief Justice, Sir Charles Fitzpatrick, expressing hesitation upon the point and his regret that it was not possible to entertain the application of the Plaintiffs.

It is not necessary to decide whether the Supreme Court of Canada was precluded by law from admitting this document, and the point was not fully argued before their Lordships. But it is at least clear that the Judicial Committee of the Privy Council is not so precluded, but, on the contrary, has power to admit and look at the document. This was conceded by both sides. The plan is docqueted as follows:—

"Map of Constructed Line.
"Red Mountain Rly.
"Scale: 1 inch = 400 feet.
"E. J. Roberts, Chief Engineer.

"Plan of completed Railway filed in the Department
"of Railways and Canals this 15th March 1897,
"under Section 134 of the Railway Act of 1888.
"Collingwood Schreiber,
"Deputy of the Minister of Railways and Canals.

"Ottawa,
"15th March 1897."

There is no substantial dispute as to what it discloses. Put in a word, the Railway Company's own plan shows that the rocky bluff, where the fire originated, was within the delineated right of way. What the jury had arrived at after a troublesome and involved investigation is proved, so to speak, under the Railway Company's own hand to have been right, and the arguments on that head submitted by the Defendants, both before and after the plan was discovered, to have been wrong.

It is not necessary to examine in detail the judgment delivered by Mr. Justice Duff in the

Supreme Court of Canada. It proceeds upon the footing that the plan was not available. Having now been produced, it demonstrably contradicts the result arrived at, viz., that the Plantiffs had failed to establish that the fire had originated upon the Defendants' right of way; and this is an end of that portion of the case.

What remains is an argument, which was carefully presented to their Lordships, to the effect that Mr. Justice Morrison, the learned Judge who presided at the trial, misdirected or failed sufficiently or properly to direct the jury. This point does not appear to have been raised in the Supreme Court of Canada, and that Court does not deal with it. In their Lordships' opinion there was no misdirection, and they cannot agree with the opinion of Mr. Justice Martin, who dissented from the decision of the Full Court of British Columbia. It is not contended that the verdict is against the weight of evidence. All that is said is that by a certain sentence in the charge of Mr. Justice Morrison the jury were substantially directed to exclude all oral evidence from their minds. In dealing with the physical possibility of the fire leaping over from one point of ground of considerable altitude to the south of the Plaintiffs' buildings and reaching at a distance of 600 yards or so the lower altitude where these buildings were situated, the learned Judge properly gave much prominence to the view which had been obtained by the jury of the locality, and he said :—

> "Whether the fire which burned all these limits "was a continuation of that fire which started down "there so small and innocently at the Red Mountain "track, it is for you to say whether you can "determine that for yourselves, regardless of what "was said for or against."

Were that sentence to stand by itself, some colour might be given to the contention put forward,

but in the very next sentence the learned Judge adds:—

> "If you cannot decide from your own inspection, "then you must call to your assistance the oral "testimony, the evidence of those whom you have "heard. Do you believe from what you saw and what "you have heard that it was the same fire that started "from the railway that destroyed Blue & Deschamps' "timber?"

Taking these sentences in immediate context together, it seems impossible to maintain that there was the misdirection suggested, and their Lordships do not think it legitimate, in considering a judge's charge to a jury, to separate a single sentence in the manner suggested, unless such a sentence in fact dominated the reasoning upon which that portion of the charge was founded. Misdirection, to be a ground of new trial, must be substantial misdirection.

It is unnecessary to consider the further point put before their Lordships, viz., that there had been certain evidence that the fire at the St. Louis buildings must have started in point of time before the fire which originated upon the railway could have reached near that spot. In their Lordships' opinion (1) the learned Judge, in the latter portion of his charge, put the direct origination of the fire plainly before the jury, and upon that obtained an answer, and (2) in so putting the point, their Lordships do not think it was necessary for him to explain to the jury that they had heard evidence from certain witnesses suggesting that the fire on the Plaintiffs' premises could not have been caused by the fire from the right of way, because its outbreak had preceded the time when the railway fire reached the vicinity of the St. Louis buildings. Their Lordships do not think that it was the judge's duty to assume that a jury, considering the cause of a fire at the St. Louis

buildings, might fall into the fundamental error that this fire, as an effect, preceded instead of succeeded the originating cause, viz., the right of way fire. In their Lordships' opinion the effect of the reference by the Judge to the jury's view of the locus has been much exaggerated, and the jury were properly left to put together all that they had seen and heard.

Their Lordships will, therefore, humbly advise His Majesty that the Judgment of the Supreme Court of Canada should be reversed with costs, and the Judgment of the Full Court of British Columbia restored.

The Respondents must pay the costs of this Appeal.

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