tiffs placed a lien on the building for $948.45. The trial judge came to the conclusion that the $1,700 note must have included some of the materials supplied for the house in question, and that defendant Henshaw was entitled to a credit of some amount which the accounts ought to shew, dismissed the action as against defendants Henshaw and Senkler, and gave judgment against defendant Horrobin, who in the meantime had become insolvent. Plaintiffs appealed.

*Held*, on appeal, that there had been no appropriation, but

*Held*, on the facts, that as there had been a shortage in delivery of lumber entitling defendant Henshaw to a certain credit the claim had been brought for too much and there should be a new trial.

Observations on the effect of granting a lien to a material man under the amendments of 1900.

*Davis*, K.C., for plaintiff, appellants. *Senkler*, K.C., for respondent, Henshaw.

---

Full Court.] BLUE *v.* RED MOUNTAIN RY. CO. [Jan. 21.

*Railway right of way, what constitutes—Damages by fire caused by sparks from locomotive—Jury—Non-direction—Misdirection—Railway Act*—1903, *c.* 58, *s.* 239.

Where a railway company cleared a right of way, but had not filed any plans of same under either the Dominion or Provincial Railway Acts, and, in an action for damages caused by fire alleged to have been set alight by sparks from one of their locomotives, contended that the right of way must be considered to be confined to the roadbed itself.

*Held*, 1. It must be considered that the company have occupied the full statutory allowance.

2. Following *Spencer* v. *Alaska Packers Association* (1904) 35 S.C.R. 362, that non-direction is not a ground for a new trial unless it causes a verdict against the weight of evidence; and in this case the only non-direction specifically complained of being that the jury should have been charged that a certain point was not within the railway right of way, and there being no evi-