

HON. MR. JUSTICE MIDDLETON.

JUNE 26TH, 1914.

FAWCETT v. CANADIAN PACIFIC RW. CO.

6 O. W. N. 634.

Stay of Proceedings—Rule 523—Railway—Destruction of Timber—Action for Damages—Statutory Limitation of Amount Recoverable—Trial — Findings of Jury — Judgment—Issue Directed—Negligence—Order Staying Execution Pending Trial of Issue.

MIDDLETON, J., gave relief to defendants, under Rule 523, after judgment had been entered in an action for damages for the loss of timber on plaintiff's land by fire caused by defendants. A second trial was ordered to decide an issue neglected by the jury on the first trial and also to reconsider the amount of damages allowed in view of information which had come to light since first trial.

Motion to stay operation of judgment.

W. Laidlaw, K.C., for the plaintiff.

Angus MacMurchy, K.C., for the defendant.

HON. MR. JUSTICE MIDDLETON:—This action is brought to recover damages sustained by reason of the burning of certain timber lands. At the trial, both counsel agreed that the main issue was whether certain lands owned by the plaintiff, which had undoubtedly been burned over, were burned by a fire which undoubtedly originated from the defendants' railway or whether they were burned by another fire which had a separate origin; in other words, was there one fire only or were there two independent fires?

The amount of the damage sustained by the destruction of the timber has been agreed upon. The figures were not mentioned. Both counsel also agree that if there was only one fire, it would be necessary for the jury to ascertain whether there was negligence, as, in that case, the loss would exceed \$5,000.

My recollection is clear that Mr. Laidlaw told the jury that it would not be necessary for them to ascertain whether there was negligence, if they found that there were two fires, as, in that case, the loss sustained by his client and others within the area of the first fire would not exceed \$5,000.

I submitted two questions to the jury, in effect: Were there two fires? Was there negligence? The jury found there were two fires, but did not answer the question as to negligence.