

BRITTON, J.

NOVEMBER 16TH, 1914.

CONWAY v. DENNIS CANADIAN CO.

Railway—Fire from Locomotive Engine—Destruction of Property—Control of Engine at Time of Escape of Fire—Liability of Railway Company—Evidence—Findings of Jury—Ontario Railway Act, R.S.O. 1914 ch. 185, sec. 139.

Action for damages for the destruction by fire, alleged to have been started by the defendants, of trees, timber, and fences upon the plaintiff's land in the township of Jones.

The action was tried before BRITTON, J., and a jury, at Pembroke.

T. W. McGarry, K.C., and F. T. Costello, for the plaintiff.
Peter White, K.C., and A. C. Hill, for the defendants.

BRITTON, J.:—The plaintiff alleges that the fire which occasioned the damage was started by a locomotive engine owned and operated by the defendants upon their mill property. This railway was about three or three and a half miles in length. It was called a stub line, and extended from the defendants' mill and mill-yard to the Grand Trunk Railway at a junction point. This engine was used for hauling lumber to and from piling places and for shipping the lumber away, and for such other purposes as required by the defendants.

The plaintiff's contention is, that the Ontario Railway Act, R.S.O. 1914 ch. 185, sec. 139, applies. He launched his case and conducted it upon the proposition that, as the damage done did not in the aggregate amount to \$5,000, it was not necessary to prove specific acts or omissions as to negligence. The defendants did not object to this interpretation of the law, and so no question as to negligence was submitted to the jury.

The contest at the trial, as to liability, was limited to two questions: first, was the fire which destroyed the plaintiff's property started by the locomotive engine of the defendants? and, secondly, was the fireman McDonell, who, as was contended by defendants, was in charge of the locomotive and driving it when the fire escaped from it, if it did so escape, about his master's business, or was he a wrong-doer for whose action the defendants would not be responsible?

At the close of the plaintiff's case, counsel for the defendants asked for dismissal of the action on the ground that the