

1909
 *Oct. 19.
 *Oct. 20.

ALEXANDER F. CHAMBERLIN AND }
 JANET HIS WIFE (SUPPLIANTS) } APPELLANTS;

AND

HIS MAJESTY THE KING (RE- }
 SPONDENT) } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

*Crown—Negligence—Injury on public work—Government railway—
 Fire from engine—R.S. [1906] c. 140, s. 20 (c).*

The words "on a public work" in sub-sec. (c) of R.S. [1906] ch. 140, sec. 20 (The Exchequer Court Act), are descriptive of locality and to make the Crown liable for injury to property under that subsection such property must be situated on the work when injured.

APPEAL from the judgment of the Exchequer Court of Canada in favour of the Crown on a Petition of Right.

The suppliants by their petition claimed damages for loss of property, on land near the right of way of the Intercolonial Railway, by fire from sparks thrown by a passing engine. The Crown pleaded a denial of negligence and that the injury did not happen on a public work. The latter defence was not relied on at the trial, but the petition was dismissed on the ground that though sparks from an engine caused the fire, the suppliants had failed to prove that the engine was defective.

Currey K.C. and *Mott K.C.* for the appellants argued that the evidence established that the engine

*PRESENT:—Sir Charles Fitzpatrick C.J. and Girouard, Davies, Idington, Duff and Anglin JJ.

was defective shortly before the fire and that the court below was not justified in its deduction that such defect had been repaired.

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Chrysler K.C. and *McAlpine K.C.* for the respondent. The Crown can only be liable under sub-sec. (c) of sec. 20, "Exchequer Court Act," for "injury to person or property on a public work." Here the property destroyed was on land of the suppliants at some distance from the right of way and not "on a public work." The suppliants, therefore, do not bring their case within the statute and the judgment against them must stand. See *Larose v. The King* (1), per *Taschereau J.* at p. 209; *Letourneux v. The King* (2); *Paul v. The King* (3).

Currey K.C. in reply. If the cause of injury originates on a public work the Crown is liable. See *Price v. The King* (4).

THE CHIEF JUSTICE.—In a long series of decisions this court has held that the phrase "on a public work" in sec. 20, sub-sec. (c), of the "Exchequer Court Act," must be read, to borrow the language of Mr. Justice Duff in *The King v. Lefrancois* (5), at p. 436,

as descriptive of the locality in which the death or injury giving rise to the claim in question occurs,

and that to succeed the suppliant must come within the strict words of the statute. *Taschereau J.* in *Larose v. The King* (1). See also *Paul v. The King* (3), and cases there cited.

(1) 31 Can. S.C.R. 206.

(3) 38 Can. S.C.R. 126.

(2) 33 Can. S.C.R. 335.

(4) 10 Ex. C.R. 137.

(5) 40 Can. S.C.R. 431.

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In this case the property destroyed by fire, previous to and at the time of its destruction, was upon the land of the suppliant, some distance from the right of way of the Intercolonial Railway and was not property on a public work. As to the objection that this question was not raised in the court below I refer to *McKelvey v. Le Roi Mining Co.* (1) If questions of law raised here for the first time appear upon the record we cannot refuse to decide them where no evidence could have been brought to affect them had they been taken at the trial. The point was taken by the pleadings if not urged at the argument below.

GIROUARD J. agreed with the Chief Justice.

DAVIES J.—This was an action brought in the Exchequer Court on a claim for damages arising out of the destruction of the property of the suppliants claimed to have been caused by sparks from the smoke-stack of an Intercolonial Railway engine.

The property destroyed was previous to and at the time of its destruction upon the land of the suppliant some distance from the right of way of the railway, and was not property on a public work.

The learned judge, Mr. Justice Cassels, who delivered the judgment of the Court of Exchequer, had not heard the witnesses, who had given their testimony before the late Justice Burbidge.

The suppliants were desirous to avoid the expense of a re-hearing, and with the assent of the respondent the case was fully argued before Mr. Justice Cassels on the evidence taken before Mr. Justice Burbidge.

The learned judge found as a fair conclusion to be

(1) 32 Can. S.C.R. 664.

drawn from the evidence that the fire originated from a spark or sparks emitted from the engine, but he was unable to find that it was caused through any defect in the engine for the existence of which and the failure to remedy which the Crown could be held liable for the losses claimed.

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On this appeal the jurisdiction of the Court of Exchequer over the claim in question was challenged and denied by Mr. Chrysler, his contention being that such jurisdiction was limited to claims against the Crown arising out of injuries to the person or property *on a public work*, and did not extend to injuries happening away from a public work, although caused by the operations of the Crown's officers or servants.

The cases in which the question has already come before this court for consideration were all referred to.

We are all of the opinion that the point has already been expressly determined by this court, particularly in the case of *Paul v. The King* (1). In that case the majority of the court held after the fullest consideration that clause (c) of the 16th section of the "Exchequer Court Act," which alone could be invoked as conferring jurisdiction, only did so in the case of claims

arising out of any death or injury to the person or property *on any public work* resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties.

Claims for injuries not within these words of the section and occurring, not on, but away from, a public work, although arising out of operations wheresoever carried on, were held not to be within the jurisdiction conferred by the section.

With the policy of Parliament we have nothing to

(1) 38 Can. S.C.R. 126.

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do. Our duty is simply to construe the language used, and if that construction does not fully carry out the intention of Parliament, and if a wider and broader jurisdiction is desired to be given the Exchequer Court, the Act can easily be amended.

Under these circumstances we must, without expressing any opinion upon the conclusions of fact reached by the learned judge, dismiss this appeal with costs.

IDINGTON J. concurred in the opinion of the Chief Justice.

DUFF and ANGLIN JJ. agreed in the opinions stated by the Chief Justice and Mr. Justice Davies.

Appeal dismissed with costs.

Solicitor for the appellants: *W. A. Mott.*

Solicitor for the respondent: *E. H. McAlpine.*
