1917
Oct. 16

NEW BRUNSWICK RAILWAY COMPANY,
SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Crown—Liability for negligence—Railways—Fires—Leased road.

The Crown is liable under s. 20 (*c*) of the Exchequer Court Act (R.S.C. 1906, c. 140, as amended in 1910, c. 19), for an injury resulting from the negligent setting out of fires by section men on a railway track leased by the Crown and operated as part of the Intercolonial Railway system.

PETITION OF RIGHT for damages arising out of the destruction of property by fire, alleged to have been caused by negligence of servants of the Crown on a Government railway.

F. R. Taylor, K.C., for suppliants; *D. Mullin*, K.C., for respondent.

CASSELS, J. (October 16, 1917) delivered judgment.

The petition alleges that on August 1, 1916, the sectionmen in the employ of His Majesty the King on the said International branch of the Intercolonial Railway, negligently started fires for the purpose of burning grass, brush and refuse along the railway right of way. The suppliant claims that 600 acres of land owned by it were burnt over and the timber thereon destroyed, and asks that it should be paid the sum of $6,600 as damages.

Among other defences His Majesty the King by the Attorney-General of Canada denied that the injury to the suppliant's property, of which the suppliant complains, happened on a public work.

The case was called for trial before me at St. John, and counsel for both the suppliant and the respondent asked that the case should be adjourned to Ottawa, and that the issue raised that the damage did not occur on a public work should be first tried. Both counsel were of opinion that

this branch of the case could be better tried in Ottawa where the documents material to the case were filed.

It was also agreed by counsel that in the event of my coming to the conclusion that the International Railway referred to in the petition was a public work, that the evidence in the case as to whether there was negligence, and if so the petitioner entitled to damages and the quantum of damage should be taken in St. John, and both counsel agreed that such evidence should be taken before Mr. Sanford.

The course suggested by counsel was adopted, and the trial of this question as to whether or not the International Railway formed part of the Intercolonial Railway was proceeded with.

Since the argument I have carefully considered the question and am of the opinion that, assuming the petitioner can establish its case so as to bring the same within sec. 20 of the Exchequer Court Act, as amended, it will be entitled to succeed. Sec. 20 was amended by c. 19 of 9-10 Edw. VII., assented to on April 8, 1910. It reads as follows:—

Section 20 of the Exchequer Court Act is hereby amended by adding thereto as par. (*f*) the following:—

(*f*) Every claim against the Crown arising out of any death or injury or loss to the person or to property caused by the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment upon, in or about the construction, maintenance or operation of the Intercolonial Railway or the Prince Edward Island Railway.

Prior to this amendment it had been decided by the Supreme Court in the *Chamberlin* case,[1] and other cases, that unless the damage arose on a public work no action would lie as against the Crown.

By c. 16 of 5 Geo. V., s. 2, being An Act to amend the Government Railway Act, and to authorise the purchase of certain railways, it is provided that the indenture of August 1, 1914, between the International Railway of New Brunswick, Thomas Malcolm and His Majesty the King,

[1] 42 Can. S.C.R. 350.

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a copy of which is set out in Schedule "A," was thereupon ratified and confirmed. This agreement provides that "pending the completion of the purchase, as hereinbefore provided, the company shall demise and lease, and does hereby demise and lease, to his Majesty and His Majesty does hereby lease from the company, for a period not exceeding 5 years the said railway," etc.

By clause 6 of the agreement the lease had to be approved by the Lieutenant-Governor of New Brunswick in Council, as provided by the statute.

An order of the Lieutenant-Governor in Council approving the lease was produced and is on file.

It is shown in evidence that the International Railway at the time of the alleged negligence was being operated as part of the Intercolonial Railway.

Certain Orders-in-Council, namely, of April 30, 1909, of May 5, 1913, and of February 15, 1916, were produced with the object of showing that the Intercolonial Railway had apparently passed out of existence, and a new series of railways taken its place under the name of the Government Railways

I do not think that these Orders-in-Council in any way affect the question. They are merely passed with a view to a public management of the system as a whole.

Having regard to the decision of the Supreme Court of Canada in the case of the *King* v. *Le François*,[3] I am of opinion that the road in question at the time the injury complained of is alleged to have been sustained formed part of the Intercolonial Railway, and that the provisions of the statute of 1910 are applicable.

The question will therefore be referred to Mr. Sanford, to take the evidence in the case, and report the same to the Court, and when this is done an appointment can be obtained for the hearing of the argument.

Reference ordered.

Solicitors for suppliant: *Weldon & McLean.*

Solicitor for respondent: *Daniel Muelin.*

[3] 40 Can. S.C.R. 431.