

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. The appeal must be dismissed with costs.

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 smokestack of an Intercolonial Railway engine.

The property destroyed was previous to and at the time of the 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 Mr. Justice Burbidge.

The suppliants were desirous to avoid the expense of a rehearing, 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 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.

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*, 38 S. C. R. 126. In that case the ma-