IN THE MATTER of the Petition of Right of

JAMES WILLIAM FLEMING.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

1920
Sept. 23.
Reasons for Judgment.

Petition of Right—Public Work—Negligence.

F. was a porter in the Post Office, at Halifax. and as such it was his duty to attend to incoming mail bags, some of which were pushed through a chute in the hall, to the basement. There was a door to the chute, and when open, as in this instance, a chain was across the opening as a warning, which was visible from the hall. It was also his duty to look after the strings by which the bags were tied, and he had frequently seen these strings break in the past, and knew they were at times defective. On the occasion in question, F. took hold of a bag, containing 27 or 28 empty bags, by the small string above referred to, giving it a powerful pull towards the chute, the string broke and he was thrown heavily against the chain protecting the opening, which gave way at one end, and he fell to the basement, injuring himself. It was not proved that the chain attachments were in a dangerous condition, but on the contrary, it was established that even if the attachments had been in perfect order, they could not have prevented the accident.

Held; On the facts, that there was no negligence on the part of any officer or servant of the Crown, and that the accident was entirely the result of suppliant's careless and imprudent conduct.

PETITION of Right seeking to recover damages from the respondent, for injuries alleged to be the result of negligence of respondent's employees in the Post Office building at Halifax.

The case was tried at Halifax, on the 29th of July, 1920, before the Honourable Mr. Justice Audette.

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J. Terrell for suppliant.

R. H. Murray for respondent.

The facts are stated in the reasons for judgment.

AUDETTE. J., non (23rd September, 1920) delivered judgment.

The suppliant, by his Petition of Right, seeks to recover damages for bodily injury caused by the negligence of the respondent's employees in the Post Office building, at Halifax, N.S.

The accident in question occurred on the 2nd April, 1919, when the suppliant, a porter in the Post Office, at Halifax, was attending to the incoming mail bags, which were being brought from the street,—as shown by a plan of the *locus in quo*, filed as Exhibit No. 3.

Keeping this plan before our eyes, it is sufficient to say that the mail-bags, after being taken inside the building, were deposited on the floor of the hall. The bags containing letters were taken upstairs, by the elevator, which is to the right coming in. Having seen to this, he then gave his attention to the other bags that went to the basement through the chute in the hall, which is shown, at the end of the hall by the chain across the frame of the door opening into it. He then took a bag, (containing 27 to 28 empty bags) by the (small rope) string and pee and gave it a strong pull to move it towards the chute into the basement, and when at about 2½ to 3 feet from the chute, the string broke and with all the momemtum acquired from such a strong swing of the body, he struck with his shoulder the chain placed across the door of the chute. The chain gave way on one side owing

to the weight and impact of his body; and the suppliant fell into the basement, sustaining serious bodily injury.

The suppliant was a porter whose duty it was to look after these mail bags and *push* them, as he says, under the chain into the basement. But he did not push this one, he pulled it. Had he pulled the bag to the orifice, as a prudent man would have done, and then pushed it into the chute, the accident would not have happened. Was not his way an unskilful way of handling the bag? Was he not doing his work in an awkward manner? His own evidence gives rise and justification for such an idea, when he tells us that those who were working with him complained that he was handling the bags with too much strength. He is a powerful and strong man. In addition to all this, one cannot overlook the unfortunate accident he had formerly met with, namely on the 12th July, 1918, when pulling a mail bag he had backed into the shaft of the elevator and fell to the basement on his head, when the elevator had gone up, and he had not even taken the elementary precaution to look before moving backward. He was severely injured in the first accident—he fell on his head and had both arms broken, and as a result of this first accident, he could not use his right hand to its full advantage.

He was in charge of these mail bags and it was his duty, as one of the porters, to look after those strings—and the bag in question was a Canadian bag.

He had seen such strings break in the past on several occasions, and he knew as a rule, he adds, "that the strings were bad."

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Coming to the question of the chain, it must first be said that this chain was placed across that door leading to the chute. That door was kept open in summer time, and it was when the door was open that the chain did show from the hall. Now the suppliant contends that this chain was nailed on the left side and screwed on the right. However, he asserts that the elevator-man, at his request, had repaired the side with the screws which were getting loose, and that he had filled the holes with matches and rescrewed them to their place. That is absolutely denied by the elevator-man, who says he has nothing to do with such work, that he attends to the elevator, is not a porter, and further that he had nothing to do with the repairs in the building. Umlah, this elevator-man, swears with emphasis that it is untrue Flemming ever asked him to repair this chain, and that he never screwed it before.

From the testimony of Flemming, which is so strongly denied by Umlah, who is a disinterested witness, it is impossible to find positively that these screws in the chain were ever loose or had been so replaced and, indeed, from what is said of Flemming's strength, it would appear he would, on the occasion in question, have pulled off the chain, whether in good or bad condition, by his manner of tugging at the bags and throwing his shoulder on the chain with such strength.

While it may be said to be the master's duty to take reasonable care and to make reasonable effort to provide a safe place and safe machinery in which and with which the servant is to work, he does not guarantee that the place and machinery shall be absolutely safe. (1)

(1) *Scott* v. *London & St. Katherine Dock Co.* (1865), 3 H. & C. 596, 601, 140 R.R. 627, 631.

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There was a door at the chute, and for greater prudence the government had a chain placed across, more as a warning not to go beyond, than with the idea of placing there a bulwark that would withstand the assaults and attacks of a strong man. The mere fact of a chain breaking off or unscrewing is not prima facie evidence of negligence (1).

Had the suppliant looked to the string, and it was subject to his official inspection, before tugging at it with such strength,—had he drawn the bag to the orifice of the chute, instead of endeavouring, in an awkward manner accentuated by limbs affected by his first accident, he would not have taken the chain across the door as a bulwark against which he could throw himself, but merely as a sign or notice of danger and acted accordingly. In other words, had he acted as an ordinary prudent and careful man the accident would have been avoided.

The case cannot in any manner be brought within the ambit of sec. 20 of the Exchequer Court Act, which requires, as a condition precedent to recovery, that the accident should be the result of the negligence of some officer of the Crown acting within the scope of his duties and employment.

Having so found upon the facts, it becomes unnecessary to consider the question of common employment (2).

(1) *Haywood* v. *Hamilton Bridge Works Co.*, 7 Ont. W.N. 231; *Hanson* v. *Lancashire & Yorkshire Ry. Co.*, (1872) 20 W.R. 297. *Courteau* v. *The King*, 17 Ex. C.R. 352.

(2) *Ryder* v. *The King*, 9 Ex. C.R. 330; 36 S.C.R. 462.

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I have, therefore, come to the conclusion that there is in this case no proof of negligence on behalf of an officer of the Crown, and that the accident was entirely the result of the suppliant's careless and imprudent conduct.

There will be judgment declaring that the suppliant is not entitled to any portion of the relief sought by his Petition of Right.

Solicitors for suppliant: *James Terrell.*

Solicitors for respondents: *Murray & McKinnon.*