1894
April 2.

GEORGE LEPROHON .....SUPPLIANT;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Tort—Injury to person falling on icy step of Government Post Office—Liability of Crown—50-51 Vict. c. 16 s. 16—Interpretation.

The Crown is under no legal duty or obligation to any one who goes to a post office building to post or get his letters, to repair or keep in a reasonably safe condition the walks and steps leading to such building.

2. A person who goes to a post office to post or get his letters goes of his own choice and on his own business; and the duty of the Crown as owner of the building, if such a duty were assumed to exist, would be to warn or otherwise secure him from any danger in the nature of a trap known to the owner and not open to ordinary observation.

3. A petition of right will not lie against the Crown for injuries sustained by one who falls upon a step of a public building by reason of ice which had formed there and which the caretaker of the building, employed by the Minister of Public Works, had failed to remove or to cover with sand or ashes.

4. The expression "public work" occurring in the 16th section of *The Exchequer Court Act* includes not only railways and canals and such other public undertakings in Canada as in older countries are usually left to private enterprise, but also all public works mentioned in *The Public Works Act*, R.S.C. c. 36, and other Acts in which such expression is defined.

PETITION OF RIGHT for damages for injury to the person sustained in falling on an approach to a Government post office by reason of ice having been allowed to form thereon.

The facts of the case are stated in the judgment.

The case was tried at Three Rivers, P. Q., on the 4th of November, 1893, *Belcourt* and *Harnois* appearing for the suppliant, and *Hogg* Q. C. and *Desilets* for the respondent.

The argument was reserved to be heard at Ottawa.

December, 12th, 1893.

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The case now came on to be argued.

Belcourt, for the suppliant:

This action is based on the remedy provided in sec. 16 (*c*) of 50-51 Vict. c. 16. We have, I think, no remedy under the Civil Code. The post office is a public work forming part of the public domain of the Crown, and the accident happened on that public work. It is a clear case within the quoted section. It was the duty of the caretaker of the post office, a servant of the Crown, to remove the snow and ice from the approaches to the building. This was not done, and this neglect was the proximate cause of the accident. The officer of the Crown was negligent within the scope of his duty. [Cites sub-section (*c*) of sec. 2 of *The Public Works Act* (1).] The post office is a public work thereunder.

The only questions necessary to discuss here are questions of evidence. The decisions already pronounced in this court as to the liability of the Crown under sub-section (*c*) of sec. 16 of *The Exchequer Court Act* render it unnecessary for me to discuss that point now (2).

There was a clear breach of duty by the Crown's servant that occasioned the accident, and therefore we must apply the doctrine of *respondeat superior*.

Curran, Q. C., S. G. Can., for the respondent:

The instructions to the caretaker do not say one word about sprinkling sand or ashes on the steps. He is only required to keep the approaches free from snow. You can only hold the Crown liable for the

(1) R. S. C. c. 36.

(2) REPORTER'S NOTE.—*See Brady* v. *The Queen* 2 Ex. C. R. 273; *The Corporation of the City of Quebec* v. *The Queen*, 2 Ex. C. R. 252; *Gilchrist* v. *The Queen* 2 Ex. C. R. 300; *Martin* v. *The Queen* 2 Ex. C. R. 328; and *Lavoie* v. *The Queen* 3 Ex. C. R. 96.

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breach of something in respect of which it was under an obligation to perform and which it had instructed its servant to perform. Anything the caretaker might do beyond his instructions would not bind the Crown. He must have a specific authorization for performing the service, whatever it might be. The instructions so provide. Merely doing it sometimes of his own motion would not make the Crown liable for his neglect to do it at others.

The current of authority in the Province of Quebec shows that in the case of accidents arising from slippery side-walks the defendant is not responsible where the cause is attributable to sudden climatic changes. [Cites *Foley* v. *The City of Montreal* (1); *Lulham* v. *City of Montreal* (2); *Sherbrooke* v. *Short* (3); *Beaucage* v. *Parish of Deschambault* (4); *Corporation du Canton de Douglass* v. *Maher* (5); *Perriam* v. *Dompierre* (6); *Allen* v. *Mullin* (7); *Moffette* v. *Grand Trunk Ry Co.* (8).]

Hogg, Q. C., followed on the same side:

The cases arising out of accidents from snow or ice on the streets are decided in the same line in the provinces of Quebec and Ontario. Municipalities are not held responsible for the uncontrollable changes of the weather in Canadian winters. The same rule would apply to the Crown. [Cites *Ringland* v. *City of Toronto* (9); *Forward* v. *City of Toronto* (10); *Bleakley* v. *Corporation of Prescott* (11); *Nason* v. *City of Boston* (12); *Cook* v. *City of Milwaukee* (13); *Johnson* v. *City of Lowell* (14); *Wilson* v. *City of Charlestown* (15); *Burns*

(1) 2 Q. R., (S. C.,) 346.
(2) 6 L. N. 93 and 29 L. C. J. 18.
(3) 15 R. L. 283.
(4) 14 R. L. 655.
(5) 14 R. L. 45.
(6) 1 L. N. 5.
(7) 4 L. N. 387.
(8) 16 L. C. R. 231.
(9) 23 U. C. C. P. 93.
(10) 15 Ont. R. 370.
(11) 12 Ont. App. 637.
(12) 14 Allen 508.
(13) 24 Wisc. 270.
(14) 12 Allen 572.
(15) 8 Allen 137-138.

v. *City of Toronto* (1); *Senior* v. *Ward* (2); *Dowell* v. *General Steam Navigation Co.* (3); *Chalifoux* v. *Canadian Pacific Railway Co.* (4); *Lazarus* v. *City of Toronto* (5).]

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BURBIDGE, J. now (April 2nd, 1894) delivered judgment.

The suppliant brings his petition to recover damages for personal injuries occasioned by falling upon the step of the post office at the City of Three Rivers, in the province of Quebec. The porch of the main entrance to the post office there is, it appears, six or eight feet from the line of Notre Dame Street. Between the side-walk and this porch, and on the same level with the side-walk, is a plank walk or approach. The threshold of the porch door is about a foot above the level of the walk, across which, at the entrance, there is a plank that forms a step, and the only step, between the walk and the porch. This plank has been worn away somewhat, but it is not in itself dangerous or a menace to any one who has occasion to go to the post office. It was still in use at the time of the trial, and I think served its purpose fairly well. But the inclination and the unevenness occasioned by the wearing of the step has made it, of course, more dangerous when covered with ice than it would be if it were even and level, and has rendered it all the more necessary to remove any ice that forms upon it, or to cover the ice with sand or ashes or something of the kind, as a precaution and to prevent accidents. The accident that occasioned the injury of which the suppliant complains happened on the 2nd of January, 1893, between 5 and 5.30 p.m. The night before there had been a fall of

(1) 42 U. C. Q. B. 560.
(2) 1 El. & El. 385.
(3) 5 El. & Bl. 195.
(4) Cassels' Dig. 2nd ed. 749.
(5) 19 U. C. Q. B. 1.

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snow, and Carbonneau the caretaker of the post office, and Dubord, a labourer employed by him to assist him, were that day engaged in removing the snow from the side-walk and approaches to the building and from its roof. In the morning before the post office was opened they removed the snow from the step at the main entrance and threw ashes on the step. During the day a thaw set in which, with some rain and a little snow, continued up to 4 p. m. The rain and the water that dripped from the roof of the porch washed the ashes away leaving the step bare but wet. That was its condition when about four, or half-past four, in the afternoon, Carbonneau and Dubord left off work. The 2nd of January, 1893, was a public holiday and the post office was closed from one p.m. to five, at which hour, as Carbonneau knew, it was to be opened. Had he thought that it was going to turn cold enough to cause ice to form on the walk and step, he would have taken the precaution to sprinkle ashes over them. That was his practice, and as Dubord was leaving that day he spoke with him about the necessity of doing this. At the time, as the step was bare to the wood, and it was not freezing, they concluded it would not be necessary. In that they were mistaken. It turned cold suddenly, and when at five o'clock the post office was opened, or a few minutes later, the walk and step were in a slippery and dangerous condition in the sense that ice, and especially ice the surface of which is uneven, is dangerous to persons who have occasion to walk over it. Carbonneau who lived on the third floor of the building, and who had remained within doors, was not aware of the change in the temperature or of what was happening outside. It is doubtful who first told him, nor is it a matter of any consequence. The witness Larue, if one should accept his view of the time when he spoke to Carbonneau, would appear

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to have been the first, but I am inclined to think that he was not. He said it was before the accident, but he qualified that statement afterwards and admitted that he did not know. The answer that Carbonneau made to him would indicate that Manseau, the constable, had been before him. To the constable, Carbonneau at first objected that he was sick, that his man had gone, that the office was going to close and that it was not necessary to put sand on the ice. To Larue, Carbonneau said that he was going immediately to attend to it. In either case there was not, I think, any delay. The suppliant fell and was injured before Carbonneau, after notice, had time to make the step safe. Manseau saw the accident happen as he came down stairs, after notifying Carbonneau.

The suppliant fell twice, both times in coming out of the building. The first time he escaped without injury. Then he went back he says to get the letters of a Mr. Thompson, who had a box with him, and to tell the postmaster of the condition in which the step was. As was natural enough, he was angry because of his fall, and the desire to have a word with the postmaster afforded probably the more impelling motive for his return. Dominique Toupin, one of the clerks employed in the post office, who saw the suppliant when he came in the second time, and heard what he said, thought he was intoxicated. But it was shown that he was not. He was not addicted to drink, and had not, it appears, been drinking on the day in question. His excitement and boisterous manner are sufficiently accounted for by his fall. In going out the second time he took, he tells us, all possible precautions. He went out sideways, putting his foot on the step and holding himself by the door. It was not, he says, very dark, and there was some light from the post office. Apparently it was light enough to see

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from some distance what was going on, as the suppliant says that he told the postmaster that people were falling, and that those on the other side of the street were laughing at them, and that it was a shame. Notwithstanding his knowledge of the danger and the care he took, he fell a second time, and on this occasion sustained a simple fracture of the left arm, about one inch above the wrist.

The suppliant rests his case upon clause (*c*) of the 16th section of *The Exchequer Court Act*, which provides that the court shall have exclusive original jurisdiction to hear and determine "every claim against the "Crown arising out of any death or injury to the per- "son or to 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 or employ- "ment." And he says that the post office building and premises at Three Rivers was a public work, and that it was Carbonneau's duty as caretaker of the building to see that the ice that formed on the step of the building on the afternoon of the day in question was removed or covered with sand or ashes, to make it safe for persons going to the post office to post or get their letters.

The first question in cases of this kind is whether the injury has happened on a public work. In *Brady* v. *The Queen* (1) it was admitted by the demurrer that the Rocky Mountain Park of Canada is a public work; and in *The Corporation of the City of Quebec* v. *The Queen* (2) I thought that the Citadel at Quebec was a public work within the definitions contained in the Acts therein referred to. So here there can, I think, be no doubt that a post office building owned and occupied by the Crown is a "public work" within the definition given in *The Public Works Act* (3). The

(1) 2 Ex. C. R. 273. (2) 3 Ex. C. R. 176.
(3) R.S.C. c. 36, ss. 2 (*c*) and 7.

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liability of the Crown for the negligence of its officers and servants in the construction and management of its public works was first recognized by the Act 33 Vict. c. 23, intituled: *An Act to extend the powers of the Official Arbitrators to certain cases therein mentioned*, by which such Arbitrators were, among other things, authorized to hear and determine claims "arising out of any death or injury to the person or property "on any railway, canal or public work under the control and management of the Government of Canada." And it is doubtful, looking at the provisions of this Act and of the Public Works Act then in force, (1) whether at the time Parliament had any intention to make the Crown liable in proceedings before the Official Arbitrators for the acts or negligence of its officers and servants in relation to public properties, other than railways and canals or works of a like character, which, as pointed out by the Judicial Committee of the Privy Council in cases that I shall refer to, are in other countries usually left to private enterprise. The Act 33 Vict. c. 23 was however followed two years later by another amendment to *The Public Works Act*, 1867 (2), by which, among other things, it was provided that every canal, lock, dam, hydraulic work, harbour, pier, public building, or other work or property of the nature of any of those mentioned in the 10th section of *The Public Works Act*, 1867 (3) should be a public work under the control and management of the Minister of Public Works, and that all the enactments and provisions of the Act last mentioned, and of any Act amending it, did and should apply to every such work. The Act 33 Vict. c. 23 was such an Act, and after 1872 there was, I think, no chance for any such distinction as that suggested, arising out of the character of the

(1) 31 Vict. c. 12.

(2) 35 Vict. c. 24.

(3) 31 Vict. c. 12.

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public work. The liability of the Crown in a proper case and in a proceeding before the Official Arbitrators for damages arising out of any death or injury to person or property on any public work was, without any such distinction, clearly recognized; and I think that the expression "public work" occurring in the 16th section of *The Exchequer Court Act* must be taken to include not only railways and canals and other undertakings which in older countries are usually left to private enterprise, but also all other "public works" mentioned in *The Public Works Act*, (3) and other Acts in which that term is defined.

Now it is obvious that the negligence of the Crown's officer or servant, for which it will be answerable, might arise either by his doing in a negligent and improper manner something that he should do, or in his neglecting to do something that it was his duty to do, and that his duty might arise in one or both of two ways. In the present case it might be that the Crown, quite apart from any question as to whether or not, as owner of the premises, it had any duty to remove the ice that formed on the step of the post office, or to cover the ice with sand, would impose that duty on the caretaker by the instructions or directions given to him; or if the Crown owed any such duty to those who went to the post office, the caretaker's duty might arise from his employment as caretaker.

Carbonneau's instructions from the Chief Architect of Public Works were, so far as it is necessary to refer to them, to take general care of the building, the grounds, the trees, and the yards, &c.; to remove the snow from the roof, and from all the side-walks and ways leading to the building, and from the yard at the necessary places; to give warning as soon as any pipe was broken, and to make no change or modification,

(1) R.S.C. c. 36.

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and to do no new work or repairs, without special authority. So far then as respects the duties imposed upon the caretaker by the authority of the Crown, there was no express direction to do anything or take care to protect anyone from any danger incident to the forming of ice upon the walk or step leading to the post office. It may be said, however, that such a duty is involved in, and to be implied from, the direction to take care of the building and grounds and to remove the snow from the side-walks and ways leading to the building. That would, I think, be so if the Crown itself owed any such duty to persons going to the post office. But that is another aspect of the case, and what I am now referring to are the instructions, by which, in express terms, the caretaker's duties are prescribed, and which are not, I think, to be enlarged against the Crown by any inference or implication.

Does the Crown then as the owner or proprietor of a public building, such as a post office, owe any duty, within the legal meaning of that term, to persons using the ways and steps leading to the building, to keep the same in repair, and in reasonably good condition, and in the winter time free from any accumulation of ice?

The suppliant put in evidence *La Charte et Règlements de la Cité des Trois-Rivières*, and relied upon sections 14, 89 and 92 of Chapter 7, respecting *Le Département des chemins et grèves*, by which certain duties in reference to the streets and side-walks of the city, and among others that of putting sand or ashes on the side-walks when icy, are imposed upon the owners of premises abutting upon such streets. Similar by-laws have, however, been thought to create no duty for neglect of which an action would lie against a private owner (1);

(1) *Ringland* v. *The City of Toronto*, 23 U. C. C. P. 92; *Skelton* v. *Thompson*, 3 Ont. R. 11; *Lulham* v. *The City of Montreal et al.* 29 L. C. J. 18.

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and it is clear, I think, that under any circumstances the Crown, as an owner of land abutting on a street or highway, would not be bound thereby. No duty for breach of which the Crown would be answerable in any of its courts could be created by such by-laws. Then, as to the present case, the accident did not happen on the side-walk or in the street, but at the post office door, and some feet from the line of the street; and no question arises as to the duty of an owner of premises in the city to remove the snow or ice from, or to put sand on the ice, on the side-walk adjoining his property.

It is equally clear, it seems to me, that the Crown as the owner of the walk or way leading to the building is under no duty or obligation to keep the same in repair, for neglect of which an action would lie against it; and that not merely because of the incident, that, apart from certain special statutes, such as that on which the suppliant relies in this case, there is no remedy against the Crown in cases of tort, but also for the reason that there is no legal duty or obligation. I do not suppose that anyone would for one moment think that the Crown's obligation or liability in such a case would be greater than that of a municipal or other body to which the ownership of such a way might be transferred by grant, charter or statute, and the latter, it seems, would not be liable for non-repair only—for non-feasance—unless the duty to repair and maintain in good condition were imposed by the instrument of transfer or by statute. (1). Where the legislature of a colony has given the subject a remedy against the Crown for the wrongs of its officers, and the Government of the colony has embarked on undertakings such as the construction of railways, canals,

(1) *Russell* v. *The Men of Devon*, 2 T. R., 667; *The Mayor, &c., of Lyme* v. *Regis* v. *Henley*, 3 B. & A., 77; *The Sanitary Commissioner of Gibraltar* v. *Orfila*, L. R. 15 App. Cas. 401; *The Municipality of Pictou* v. *Geldert*, (1893) A. C. 524.

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and other works, which in England are usually left to private enterprise, the Judicial Committee of the Privy Council has said that to apply the maxim that "the King can do no wrong" would work much greater hardship than it does in England, and that justice requires that the subject should in such cases have relief against the colonial Government for torts as well as in cases of breach of contract, or the detention of property wrongfully seized into the hands of the Crown (1). And in accordance with that view of the question, but before it was stated in the terms I have used, it was held that the Executive Government of New Zealand owed a duty to persons bringing their vessels to a wharf owned by the Government, and for which wharfage and tonnage dues were collected, to take reasonable care that a vessel using the wharf in the ordinary manner might do so without danger to the vessel, and that the Government was liable for injuries received by a steamship grounding upon a snag at the bottom of the harbour, and alongside the wharf, at which the steamship was lying, the proper officer of the Government having had notice of the obstruction and having failed to give warning (2). In respect, however, of any duty incident to the ownership of a public building in which the administration of public affairs, such as the business of the Post Office Department, is carried on, the Government of a colony stands in the same position as the Government of the United Kingdom; and it cannot, I think, be doubted that there rests upon the latter no duty, for neglect of which a petition of right would lie, to maintain or keep such a building in repair and in a reasonably good and safe condition. Neither at common law nor by statute is any such obligation

(1) *Farnell* v. *Bowman*, 12 App. Cas. 648; *The Attorney-General of the Straits Settlement* v. *Wemyss*, 13 App. Cas. 192.

(2) *The Queen* v. *Williams*, App. Cas. 418.

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cast upon the Crown, and it follows of course that if there is no duty or obligation there can be no action for the breach of it.

Assuming, however, that such a duty exists and that the Crown is bound to the exercise of such care as a prudent owner would take in a like case, then its duty is either to warn or otherwise secure persons coming to the building from hidden dangers in the nature of a trap, not open to ordinary observation; or to keep it in a reasonably safe condition to secure such persons from harm from anything about the premises hidden or open to observation making it dangerous for such persons, using reasonable care, to be upon the premises for the purposes for which they are induced to come. Whether the Crown's obligation in such a case would fall within the larger or the more limited definition that I have given would depend upon the view taken as to whether or not such persons went to the post office as well on the business and interests of the Government as on their own business. The open door of the public building, and the public service therein performed, invite every one to enter who has occasion to do so, but that is not the determining test. As suggested by Byles, J., in *Smith* v. *The London and Saint Catharines Dock Company* (1), the knocker on the door of a private residence says "come and knock me," and the bell "come and ring me," but any one who of his own choice, and for his own pleasure or business, accepts the invitation and goes upon the door-step to knock or ring must take the step as he finds it, and the owner owes him no larger duty than to take the care of a prudent man to warn or otherwise secure him from hidden dangers known to the owner. If the visitor sees ice on the door-step, and venturing upon it, falls and is injured, he may very properly have an unfavour-

(1) L. R. 3 C. P. 331.

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able opinion of the owner's care for the safety of his friends, but he will have no cause of action against him.

A more severe rule is applied as between the shopkeeper and his customer, or between the owner of premises and those who, on his invitation, go there upon business that concerns the owner. "The distinction" says Earle, J. in *Chapman v. Rothwell* (1), "is between the case of a visitor (as the plaintiff was "in *Southcote* v. *Stanley*) (2) who must take care of "himself, and a customer who, as one of the public, "is invited for the purposes of business carried on by "the defendant."

The class to which customers belong as defined by Willes, J., in the leading case of *Indermaur* v. *Danes* (3), includes persons who go not as mere volunteers, or licensees or guests or servants, or persons whose employment is such that danger may be considered as bargained for, but who go upon business which concerns the occupier and upon his invitation express or implied.

Does the person who goes to a post office to mail a letter or to get one go on his own business or on business that concerns the Government? It seems to me that he goes on his own business. The Government does not carry on the business of the post office for profit. It is part of the public service. A revenue is collected by requiring the sender of a letter or parcel to attach a stamp, but the difference between the expenditure and income, and the latter it is well known never exceeds or equals the former, is paid out of the public treasury. The Government is concerned of course to perform the service as efficiently and economically as possible, but it is not concerned about the

(1) E. Bl. & E. 170. (2) 1 H. & N. 247
(3) L. R. 1 C. P. 288.

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receipts from, or profits of, the business in the sense that a shopkeeper is concerned. As the agent of the public it conducts the public business for the public, of whom the person who goes to the post office to get his letters is one. The business as a whole, is the business of the public, the business on which the individual goes to the post office is his own business; and assuming, as we have been doing, that the Crown, as the owner of the building, owes him a duty in respect to the condition, as regards his safety, in which the building is kept, it is to warn or otherwise secure him from any danger, in the nature of a trap, known to the owner and not open to ordinary observation. If that, on the assumption that I have mentioned, would, and I think it would, be a true definition of the Crown's duty in such a case, it is obvious that the petition in this case cannot be maintained.

Being of opinion to dismiss the petition on the ground that the caretaker of the building owed the suppliant no duty, for neglect of which the Crown is liable to an action, to remove the ice that formed on the step on the day of the accident, or to cover the ice with sand or ashes, it is unnecessary for me to come to any conclusion as to whether or not, having regard to conditions of climate, there was in fact any negligence on the part of the caretaker. If he were held to be under any such obligation or duty, he would not have the same excuse for his neglect that civic or municipal bodies often have. The law does not, of course, exact the impossible; and, in cases where streets become impassable or dangerous because of storms or sudden changes of the weather, it allows such bodies a reasonable delay and latitude in putting the streets in a good and safe condition again. In the present case, however, it would have been a matter of only a few minutes'

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work for the caretaker to make the walk and step leading to the post office building perfectly safe.

Neither is it necessary for me to express any opinion as to whether or not, assuming actionable negligence on Carbonneau's part, the suppliant must still fail because he voluntarily encountered the danger, and the second time, with a full knowledge of the risk he ran.

Judgment for the respondent.

Solicitors for the suppliant: *Harnois & Méthot.*

Solicitors for the respondent: *O'Connor & Hogg.*