IN THE MATTER OF THE PETITION OF RIGHT OF

1905
Oct. 4.

THOMAS FINIGAN,.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Public work—Negligence—Freight elevator— Use of by employees—City by-law—Liability of Crown.

The suppliant, an employee of the Post Office in the city of Montreal, was injured by falling from a lift to the floor of the basement. The lift was used for the transfer of mail bags and matter with those in charge of them from one floor to another in the Post Office building. It was proved that the lift was constructed in the usual and customary manner of freight elevators; but the suppliant contended that as the lift was allowed to be used by certain employees in going from one floor to another it should have been provided with guards or something to prevent anyone from falling from it, as the suppliant did while passing from the first floor to the basement.

Held, that such user by the employees did not constitute the lift a passenger elevator and impose a duty upon those in charge of it to see that it was better protected than it was.

2. In any event the suppliant was not using the lift as a passenger at the time of the accident, but to transfer mail matter of which he was then in charge.

3. The by-law of the City of Montreal respecting freight and passenger elevators passed on the 4th February, 1901, did not affect the liability of the Crown in this case. The lift in question was built in 1897, before the enactment of such by-law, and was situated in the Post Office at Montreal, which building constitutes part of the public property of the Dominion, and so was within the exclusive legislative authority of the Parliament of Canada.

PETITION OF RIGHT for damages for an injury to the person alleged to have been caused by negligence on a public work.

The fact of the case are stated in the reasons for judgment.

H. N. Chauvin, for the suppliant:

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Argument of Counsel.

The case is governed by the law of Quebec, which holds the master responsible for injury done to his employee if the injury might have been prevented by the exercise of reasonable care. *Durand* v. *The Asbestos and Asbestic Company* (1); In *McCarthy* v. *The Thomas Davidson Mfg. Company* (2) it was laid down that there is a tacit or implied contract between the employer and employee, by which the former guarantees the safety of the latter during the performance of his work. See also *St. Arnaud* v. *Gibson* (3); *Archbald* v. *Yelle* (4).

There was nothing to prevent the elevator well being enclosed on the ground floor. On the other hand, an arm might have been placed at the back and front of the platform which would not have interfered with the working of the elevator.

This was used as a passenger elevator to the knowledge of those in charge. The Crown is liable in such a case.

Even if the suppliant were guilty of contributory negligence, the Crown would not be released from liability under the law of Quebec. *Price* v. *Roy* (5).

S. P. Leet, for the respondent, argued that there was no negligence, and the suppliant had not succeeded in bringing his case within *The Exchequer Court Act*, sec. 16 (c).

The question of the liability of the Crown in such a case is a matter of public law and not civil law. The suppliant undertook the risk, and while the maxim *volenti non fit injuria* is not a part of the civil law of Quebec it applies to this case as being part of the public law of England which must be administered in this court until changed by legislative enactment.

(1) Q. R. 19 S. C. 39; 30 S.C.R. 285.
(2) Q. R. 18 S. C. 272.
(3) Q. R. 13 S. C. 22.
(4) Q. R. 6 Q. B. 334.
(5) 29 S.C.R. 494.

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City of Quebec v. *The Queen* (1); *Wyman* v. *The Steamship "Duart Castle"* (2); *Grenier* v. *The Queen* (3); *Burke* v. *Witherbee* (4).

Reasons for Judgment.

Mr. Chauvin replied.

THE JUDGE OF THE EXCHEQUER COURT now (October 4th, 1905), delivered judgment.

The petition is brought to recover damages for injuries sustained by the suppliant in falling from a lift used in the Post Office, at the City of Montreal. The accident happened on the 16th of February, 1904, between the hours of one and two in the morning. At that time the suppliant was using the lift to descend to the basement of the Post Office to receive the incoming mails, which were late in arriving. In descending from the first floor of the building to the basement he in some way lost his balance, fell from the platform of the lift to the floor, and was severely injured. The lift is used for the transfer of mail bags and matter with those in charge of the same. It was not a lift for passengers, and the Minister of Public Works and the Postmaster General had given instructions that no one should be allowed on it except those entitled to use it.

The lift itself is enclosed or protected on two sides only. It is open both at the front and the back. From the first floor upwards the space in which it runs is enclosed. From the first floor to the basement it is not so enclosed. On the occasion when the accident happened the suppliant at first had hold of a stay, which is shown in one of the exhibits. He let go of this stay to speak to another person, when his foot slipped and he lost his balance, falling, as has been stated, from the lift to the floor of the basement.

(1) 24 S.C.R. 420.
(2) 6 Ex. C.R. 387.
(3) 6 Ex. C.R. 276.
(4) 98 N. Y. App. 562.

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The petition cannot be sustained unless the case falls within the provisions of clause (*c*) of the 16th section of *The Exchequer Court Act* (1). In that respect it matters not whether such an accident occurs in the Province of Quebec or elsewhere in Canada. The law as to that is the same throughout the Dominion. The clause referred to 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 person 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 em-"ployment."

The suppliant made no complaint of the manner in which the lift was operated. His complaint is that the lift should have been provided with guards or something to prevent anyone using it from falling from it while passing between the basement and first floor; or that the lift should have been enclosed between these floors in the manner in which it was above the first floor. There is some evidence as to the danger of persons employed in the basement being struck by the lift when descending, but that is not relevant in the present case, which turns upon the issue as to whether or not some officer or servant of the Crown was guilty of negligence in not providing the protection mentioned. As to that it is alleged that the Minister of Public Works, and Mr. John T. Murphy, the superintendent of elevators in the Post Office at Montreal, were guilty of negligence.

The present lift was put in by contractors in the year 1897. The superintendent who had charge of the installation of the lift says it was constructed as other freight elevators were constructed in the usual

(1) 50-51 Vict. c. 16.

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and customary manner, and the weight of evidence is in the same direction.

The issue as to the alleged negligence of the Minister of Public Works and of Mr. Murphy, the superintendent of elevators in the Post Office at Montreal, ought, it seems to me, to be found for the respondent. That being the case, it is not necessary to discuss the question sometimes raised as to whether or not a Minister of the Crown is an officer or servant of the Crown within the meaning of the statute. (See *McHugh* v. *The Queen* (1); *The Hamburg American Packet Co.* v. *The King* (2).

Some stress was in argument laid upon the fact that the instructions of the Minister of Public Works, and of the Postmaster General, that no one should be allowed upon this lift except those entitled to use it, were not at all times followed; and that at times certain employees were permitted to use it in going from one floor of the building to another. It was contended that this made the lift a passenger elevator, and raised a duty on the part of those in charge of it to see that it was better protected than it was. With that contention I do not agree; and in any event the suppliant was not using the lift as a passenger, but to transfer mail matter, of which he was then in charge.

The suppliant also relied upon a by-law of the City of Montreal passed on the 4th of February, 1901, respecting freight and passenger elevators and dumb waiters. The object of the by-law was to protect, as far as possible from fire, buildings in which such elevators and waiters were placed. The by-law has, I think, no bearing on the present case. The lift here was built in 1897, before it was passed, and is situated in the Post Office at Montreal, which building constitutes part of the public property of the Dominion, and

(1) 6 Ex. C. R. 381. (2) 7 Ex. C. R. 179.

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so is within the exclusive legislative authority of the Parliament of Canada. (*The British North America Act*, 1867, (s. 91) (1).

Reasons for Judgment.

The suppliant is not, it seems to me, entitled to any portion of the relief sought by his petition.

Judgment accordingly.

Solicitors for suppliant: *Atwater, Duclos & Chauvin.*

Solicitor for respondent: *E. L. Newcombe.*