1921
March 14.

IN THE MATTER OF THE PETITION OF RIGHT OF FAIDA LEVASSEUR... } SUPPLIANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

Railways—Negligence—Latent Defect.

A platform had been made consisting of two rails placed transversally from the track towards the fence of the right of way, and across these 37 rails had been stacked.

Whilst L. was standing on this platform, awaiting the train on which rails were to be loaded, one of the rails placed transversally as above mentioned broke, with the result that the pile of rails slipped to the centre at the break, and L's. hand was caught between the rails, by reason of which he lost part of three fingers.

The platform was constructed according the usual custom and was strong enough under normal conditions and barring some defect in the rail, to carry the load upon it, and more.

Held: On the facts, that the breaking was accidental and the result of latent defect, or flaw in the rail; and that the defect being latent, the use of the rail in the manner indicated did not constitute want of care or negligence, on the part of any employee of the Crown whilst acting within the scope of his employment.

PETITION OF RIGHT to recover $5,000 for damages as result of an accident whilst in the employ of the Intercolonial Railway.

March 3rd, 1921.

Case now heard before the Honourable Mr. Justice Audette, at Quebec.

Napoléon Laliberté, for suppliant.

C. V. Darveau, for respondent.

The facts are stated in the reasons for judgment.

AUDETTE J. now (this 14th March, 1921), delivered judgment.

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This is a Petition of Right whereby it is sought by the suppliant, to recover the sum of $5,000 for damages, he alleges, he suffered as the result of an accident met with while in the employ of the Intercolonial Railway, a public work of Canada.

On the 22nd November, 1917, the suppliant, as a temporary employee of the railway, formed part of an extra gang of men, under foreman Chappedelaine, engaged in the general repairs or work on the railway.

Travelling on a working train, these men arrived at a certain place to load some rails piled on the side of the track. They alighted from their cars upon a platform formed by these rails and the train moved on to place opposite the rails the car upon which they were to be loaded.

While the train was being moved, the men, between 26 or 28 in number, remained on this kind of platform.

The platform was made up by placing two transversal rails running from the railway track towards the fence of the right of way. On the railway embankment, the end of the rail was placed and rested upon a tie and on the side of the fence, across the ditch, there were six ties adjusted in the manner mentioned by witness Masse upon which the other end of the rail rested. Then there were 37 rails placed upon these two transversal rails. A rail is 5 inches wide at the heel.

While the men were standing on the platform, one of the transversal rails broke, with the result that the rails, at that end, slipped to the centre,—at the break—and piled on top of one another, with the result that the suppliant's right hand was caught under some of the rails and injured thereby. He lost 1 1-3 phalange of the thumb, 2 phalanges of the index and one phalange of the major.

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Now it is satisfactorily established by the evidence that this pile or platform was made in the usual manner and that the rail, barring some defect, was strong enough to carry these men with even a larger quantity of rails.

No action sounding in tort will lie against the Crown, unless it is made liable therefor by statute. To succeed in the present action, the suppliant must bring his case within the ambit of sec. 20 of the Exchequer Court Act and he can only succeed, as thereby provided, when the accident is the result of the negligence of an officer or servant of the Crown while acting within the scope of his duties and employment. It is a law of exception.

This platform or pile of rails being made, as above mentioned, in the usual manner and it being established by uncontroverted evidence, that under normal conditions, the rail would not have broken under the weight submitted on the day of the accident, but for some defect; it must be found that the breaking was accidental or the result of a latent defect, or flaw in the cast, want of cohesion in the manufactured steel. The defect was hidden and inherent to the matter and could not be seen. To use the rail in the manner it has been used does not indicate any want of care or negligence in the circumstances in question.

The *onus* of establishing negligence is upon the suppliant and he has failed to do so. The accident remains unexplained. The case is not within the statute and the action fails. *Colpitts* v. *The Queen* (1); *Dube* v. *The Queen* (2).

What happened was fortuitous and unexpected. *Thompson* v. *Ashington Coal Co.* (3). The event was unforeseen and unintended, or was "an unlooked-for

(1) 6 Ex. C.R. 254. (2) 3 Ex. C.R. 147.
(3) 84 L.T.R. 412; 3 B.W.C. Cas. (O.S.) 21.

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mishap or an untoward event which was not expected or designed." *Fenton* v. *Thorley* Co. (1); *Higgins* v. *Campbell* (2). It was a personal injury by accident. In *Briscoe* v. *Metropolitan St. Ry. Co.* (3) an accident is defined as "such an unavoidable casualty as occurs without anybody being to blame for it; that is, without anybody being guilty of negligence in doing or permitting to be done, or in omitting to do, the particular things that caused such casualty."

Witness Chappedelaine, heard by the suppliant, explains the accident by hazarding the conjecture that the broken rail must have been defective, from the fact that the other rail did not break, and that it happens often that there is a flaw in the rail; but that such flaw is not easy to be seen. After examining the rail at the break, he says that the rust was not evenly spread over the break,—there was a part that was darker. At first sight, he adds the defect could not be detected. Witness Patry, also heard on behalf of the suppliant, testifies that there was no means of seeing if the rail was dangerous. Then witness Massé, heard on behalf of the Crown, testifies that he examined the rail in question before using it, without however turning it over, looking underneath, and contends that if there had been a break or a split (cassure ou felure) he would have seen it; but adds that when the rail is dry, one can slip or overlook it; and that neither himself nor any one else could have detected any flaw or defect before the accident.

The want of discovering such a defect or flaw, under the circumstances of the evidence, after exercising reasonable care and skill cannot amount to negligence. *Branniger* v. *Harrington* (4).

(1) [1903] A.C. 443; 89 L.T.R. 314; 52 W.R. 31.
(2) [1904] 1 K.B. 328.
(3) 120 Southwestern Rep. 1162 at 1165.
(4) 37 T.L.R. 349.

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Reasonable care has been used in the selection of the rail and the defect being latent and not capable of detection, as established by the evidence adduced on behalf of the suppliant, the break does not amount to negligence.

As already stated, to succeed in the present case, the suppliant must show affirmatively that there was negligence, the burden of proof was upon him and he has failed to do so and the action cannot be maintained,—unfortunate as the result might be. *Dube* v. *The Queen* (1).

The suppliant was a temporary employee of the railway and as a condition precedent to working upon the railway had become insured by the Association and Insurance of the Railway Employees. He had received the booklet, Ex. E, whereby, by one of its clauses, terms or conditions, the railway, in consideration of its financial contribution, is declared relieved from all claim for compensation in respect to injuries or death of the insured. However, in the view I take of the case, having found that no negligence has been proved, it becomes unnecessary to pass upon the question of insurance. *Conrad* v. *The King* (2); *Gingras* v. *The King* (3); *Gagnon* v. *The King* (4); *Thompson* v. *The King* (5).

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

Judgment accordingly.

(1) 3 Ex. C.R. 147.
(2) 49 S.C.R. 577, at 580.
(3) 18 Ex. C.R. 248.
(4) 17 Ex. C.R. 301.
(5) 20 Ex. C.R. 467.