THE QUEEN.....APPELLANT; 1882

AND *Oct. 30.

1883

GEORGE McLEOD.....RESPONDENT. *April 30.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Petition of right—Non-liability of Crown for non-feasance or misfeasance of its servants—Public work—Public police—Crown not a common carrier.

McL., the suppliant, purchased in 1880 a first-class railway passenger ticket to travel from *Charlottetown* to *Souris* on the *Prince Edward Island* railway, owned by the Dominion of *Canada*, and operated under the management of the Minister of Railways and Canals, and while on said journey sustained serious injuries, the result of an accident to the train. By petition of right the suppliant alleged that the railway was negligently and unskilfully conducted, managed and maintained by Her Majesty; that Her Majesty, disregarding her duty in that behalf and her promise, did not carry safely and securely suppliant on said railway, and that he was greatly and permanently injured in body and health, and claimed $50,000. The Attorney General pleaded that Her Majesty was not bound to carry safely and securely, and was not answerable by petition of right for the negligence of her servants.

The learned judge at the trial found that the road was in a most unsafe state from the rottenness of the ties, and that the safety of life had been recklessly jeopardized by running trains over it with passengers, and that there had been a breach of a contract to carry the suppliant safely and securely, and awarded $36,000.

On appeal to the Supreme Court of *Canada*:—

Held—(*Fournier* and *Henry*, J J., dissenting.) That the establishment of government railways in *Canada*, of which the Minister of Railways and Canals has the management, direction and control, under statutory provisions, for the benefit and advantage

* PRESENT:—Sir W. J. Ritchie, C.J., and Strong, Fournier, Henry, Taschereau and Gwynne, JJ.

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of the public, is a branch of the public police created by statute for purposes of public convenience, and not entered upon or to be treated as a private and mercantile speculation, and that a petition of right does not lie against the Crown for injuries resulting from the non-feasance or mis-feasance, wrongs, negligences, or omissions of duty of the subordinate officers or agents employed in the public service on said railways.

That the Crown is not liable as a common carrier for the safety and security of passengers using said railways.

APPEAL from the Exchequer Court of *Canada*.

The petition of right, the pleadings and the facts are set out at length in the judgment of *Henry*, J., in the Exchequer Court and in the judgments delivered in the Supreme Court.

The suppliant was represented in the Exchequer Court by Mr. *Lewis Davies*, Q.C., Mr. *Malcolm McLeod*, Q.C., and Mr. *Frederick Peters*; and the respondent by Mr. *Edward J. Hodgson*, Q.C., and Mr. *Walter Morson*,

On appeal to the Supreme Court the appellant was represented by Mr. *Lash*, Q C, and Mr. *Edward J. Hodgson*, Q.C.; and the respondent by Mr. *Lewis Davies*, Q.C., and Mr. *A. F. McIntyre*. The arguments of counsel and authorities relied on, are reviewed in the judgments.

The following is the judgment of *Henry*, J.:

"This is an action brought by the plaintiff by petition of right, to recover damages for injuries sustained by him, when a passenger in a railway car, on the railway in *Prince Edward Island*, owned by the Dominion of *Canada* and operated under the management of the Minister of Railways and Canals. The suppliant, in his petition, alleges that the railway in question was in the year 1880 run, worked and managed as a public work of the Dominion of *Canada*, and carried, for hire and reward, such passengers as presented themselves,

and such freight as was offered to be carried from station to station, on said railway.

"He therein further alleges that during that year he presented himself as a passenger on said railway from *Charlottetown* to *Souris*, and became and was received as a passenger between the two said stations on said railway for reward, Her Majesty promising in consideration of his becoming such passenger, for such reward, to safely and securely carry him upon the said railway, upon the said journey between the stations aforesaid; that all conditions were performed by the suppliant and all things happened to entitle him to be carried safely and securely by Her Majesty upon the said railway on the said journey, but that Her Majesty, disregarding her duty in that behalf and her said promise, did not safely and securely carry the suppliant on the said railway upon the said journey, but so negligently and unskilfully conducted, managed and maintained the said railway, and the train upon which the suppliant was a passenger as aforesaid on said journey, that, in the course of the said journey, the suppliant was greatly and permanently injured in body and health, and has become seriously incapacitated in his ability to earn a livelihood and has incurred great loss of time and expense in and about the cure of his wounds and injuries, and has suffered great pain of body in consequence of his injuries.

"The suppliant claimed $35,000 as damages, but on an application made to me on affidavit at the trial I granted a rule to extend the same to $50,000.

"The Attorney General of the Dominion fyled and served an answer to the suppliant's petition in which he admits that the railway in question was and is the property of Her Majesty, but says that the same was during the whole of the year 1880 under the control and management of the Minister of Railways and

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Canals of *Canada*, under the provisions of the statutes in that behalf.

"In the third clause of his answer he says: 'He has no knowledge of the alleged contract or of the facts and circumstances set out in the third paragraph of the suppliant's petition, and, therefore, on the part of Her Majesty, denies the same.'

"In the fourth paragraph of his answer he submits that the suppliant cannot enforce his alleged claim against Her Majesty by petition of right, and that the petition of the suppliant should be dismissed, and alleges as reasons:

"1st. That the control and management of the railway being vested by statute in the Minister of Railways and Canals, Her Majesty cannot be made liable upon petition of right because the same was negligently and unskilfully conducted, managed and maintained, as alleged; and,

"2nd. That even assuming the railway to be under the management and control of Her Majesty, no negligence can be imputed to her, and Her Majesty is not answerable by petition of right for the negligence of her servants.

"The suppliant was represented by the Hon. *Lewis Davies*, Q.C., *Malcolm McLeod*, Q.C., and *Frederick Peters*, Esq.; the defendant by *Edward J. Hodgson*, Q.C., and *Walter Morson*, Esq. The action was tried before me at *Charlottetown*, *Prince Edward Island*, in July last, and occupied several days.

"The suppliant proves that he was a first-class passenger on the train which left *Charlottetown* for *Souris* on the 25th August, 1880, had paid his fare at the station at the former place, and had a first-class ticket; that he was in a first-class car, in which he travelled until the train reached a place called *Robinson's* curve, near *York* station, when it left the track. The railway carriages

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were upset over a bank, and the suppliant and several other passengers severely injured.

"The train, on the occasion in question, consisted of an engine and tender, two flat cars loaded with coal, attached to the tender, and having on the top of the coal a large iron smokestack extending the length of the two cars; next to them was a luggage car, followed by a second-class car, to which was attached the first-class car, in which were the suppliant and several other passengers.

"The gauge of the road was three feet and a half, and the rate of speed at the time of the accident was shown to be from 18 to 20 miles an hour. The curve was shown to be one of the sharpest on the line—the commencement of it being on a down grade, then nearly level for a few yards, succeeded by the up grade.

"It was shown that the front one of the two flat cars was, where connected with the tender, eight to ten inches lower than the tender; that it was not connected therewith by the usual S link, but by a straight short one of not ten inches in length. It was satisfactorily shown, by evidence on the trial, that such a connection, when steam having been shut off going over a down grade and again used to increase the speed, has a tendency to lift the end of the car, and that momentum, suddenly given on a curve where the grade becomes an up one, is calculated to throw the cars off the track. Such was the position of the train when the accident occurred.

"It was shown that the part of the road at the curve in question was made in 1873, and was built principally with spruce ties, the life of which was proved to be about seven years, at which age they become rotten and useless as such; very little, if any, substitution of new for old ties had been made on that curve after the road was built, and

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when the accident occurred it was shown that the ties for eighty yards were torn up and broken, the most of them into fragments of decayed wood. It was shown, by independent testimony of a large number of respectable and reliable witnesses, that for months before the accident several of the ties were so rotten that the ends of them outside the rails could be kicked off, and several proved that they had done so. Several persons also proved that, because of the rottenness of the ties, they could and did draw out with their fingers the spikes which connected the rails with them. On a curve where there is so much lateral pressure the result might legitimately be expected to be the spreading out of the rail on one side and the going off of the train. Such was shown to have been the case where the train left the track. It was in evidence that the whole damage to the road was repaired by new ties, and the whole number required for doing so was charged by the track-master as having been used by him for that purpose.

"To show the bad state of the ties on the two lines going east and west from *Charlottetown*, evidence was given that after the accident 90,000 ties were procured and were used subsequently to replace rotten ones on the two lines.

"The only witness on the part of the defence who alleged the soundness of the ties was *Hoole*, the track-master at the section where the train went off; but his testimony was contradicted as to their state by upwards of thirty witnesses, as well as by his charge for repairing the damage to the road by *all new ties*. I have, therefore, no difficulty in reaching the conclusion and finding the fact that the road was in a most unsafe state from the rottenness of the ties, and to that cause I trace the accident; and that the safety of life had been recklessly jeopardized by running trains over it with passengers for some time before the accident occurred.

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"I also find that the connection of the coal cars, attached to the tender as they were, added to the danger when the train was running at express train speed.

"*Alexander McNab*, C.E., was in charge of the management of the road from the 1st May, 1879. He was examined as a witness on the part of the defence, and by him and others it was shown that before that date the road was worked and managed by an engineer and three other officers, all of whose duties he assumed, but which he said he found himself wholly unable to perform and had been obliged to resign. He stated that Mr. *Carvell* had made an inspection of the lines, and made a report as to their state shortly before he, Mr. *McNab*, took charge. That he had the report in his hands at *Ottawa* after or about the time of his appointment, but did not read it, and had never applied for or obtained it, or a copy of it, and that up to the time of the accident he had not inspected the lines or got any one else to do so, but depended, as he stated, upon irresponsible trackmen to keep the road in running order.

"He does not seem to have realized the importance of the duty he undertook, the first of which was to manage the road with a due and proper regard for the safety of passengers going over it.

"He had undertaken the management of a road that he knew had been several years built and worked, and his first duty was to prove its safety, but instead of that he neither inspected the lines nor availed himself of the information as to its state which Mr. *Carvell's* report was intended to, and which I have no doubt did, supply. Under the circumstances I have shortly stated, and from the evidence on the trial, the wonder is naturally not that such a serious accident occurred, but that the road was travelled so long without one. Had the road been so operated by a company the circumstances would have justified a finding of vindictive

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damages arising from the culpable conduct of their manager. When the car in which the suppliant was went over, he was thrown with great violence from one side of it to the other. His face struck on the side of the car; his upper and lower jaws were fractured on both sides so that his chin was moveable, and his nose also could be depressed by pressure, the upper and lower jaw bones on both sides having been fractured. Another portion of the upper jaw bone was also broken off. Eight of his lower teeth, with a part of the lower jaw bone, were knocked out and were left sticking in the side of the car, where his face struck against it. His back was also injured. He bled profusely from the nose and mouth and was insensible for some time. He was brought home (six miles) by a special train the same night, and attended immediately by Drs. *Hopkirk* and *Beer*, the latter sent by the railway department. They were examined and gave substantially the same description of the state of the suppliant. The former said he had been a member of the Royal College of Surgeons, *England*, since 1839, and a fellow of the same college since 1854, and had been in practice for about 40 years. He said that the suppliant was not recognizable. He said:

> He was covered with blood, and bleeding from the mouth and nose profusely; that the hemorrhage was so great, and the face so much swollen, it was impossible to make any examination; that the blood went down his throat.

"And that they had difficulty in stopping it for three days. They had to place him sitting up in bed, and support him in that position, as if he were placed in a lying position, he would have been suffocated by the blood. They packed ice round his head and face to stop the hemorrhage, and continued it for three days, and they administered styptics before they could examine his face. They

found the severe injuries I have stated, which this witness fully and minutely described.

The sufferings of the suppliant must have been intense for a long time. In the setting of the fractures of the jaw bones his mouth had to be nearly filled with supports to keep the bones in apposition, and he had to be supported for several weeks by liquid food poured into his stomach through a tube. His sufferings of mind and body were so great that it was feared by his physicians, for several weeks, that his recovery was improbable. At the trial, eleven months after the injuries, he testified to his inability to attend to his usual business as manager of a bank, and that he was continued in the position only by sufferance, he assisting only a few hours some days, when able, by advice and direction to subordinates, but unable to pursue any continued mental exertion. Previous to the injury he was very active and aged 32 years, rode a good deal on horseback, and took part in athletic exercises. When giving evidence he alleged, and I believe, truly, that he was unable to do either; that he could walk on smooth surfaces, but that he could not get down a step of a few inches without the greatest care, as the slightest shock was felt severely in his back, which, he alleged, was getting more troublesome than at first. He exhibited on the trial a photographic likeness of himself, taken four years before he was injured, compared with which he appears now a physical wreck. He showed his income from the bank which he managed to have been at the rate of $3,000 a year, and that his income from the agency of an insurance company was about $1,000 a year, both of which he stated he would have to resign in consequence of the result of his injuries. It was shown, also, by independent and reliable evidence, that as a bank manager he stood in the first rank; that besides

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his high qualifications as a bank manager in the Dominion, he was well acquainted with the system of banking in the *United States*, and was eligible to an appointment of that kind in *New York*, where salaries are paid ranging from four to ten thousand dollars. He was married a few years ago to a daughter of a worthy judge in *Charlottetown*, and has one or two children. The evidence is abundant to show that his worldly prospects, pecuniary and otherwise, have been blasted, and that he is but a wreck of what he was before the injuries complained of. Dr. *Hopkirk* said, when giving his evidence, that the suppliant was not even then out of danger from the injuries to his face. He described the result of a suppuration that supervened in his jaw after the fractures had united, which necessitated the extraction of two of his remaining teeth, and says that for months he must have suffered agony. He said that the injuries to the upper jaw were of very uncommon occurrence; that Sir *W. Ferguson*, in his late work on surgery, only mentions one case, and that in that case the patient died. He stated, with great minuteness, the then state of the suppliant, which will be found fully in the evidence, from which he gave his opinion as to the permanency of the injuries. After recounting a number of unfavourable symptoms, he says:

That shows that his injuries are connected with the brain. He cannot apply himself. He has want of application. He cannot sit down and occupy his mind for any time. Night before last he could not stand on his heels, and nearly fell down. He could not stand steady on both feet. We tried the tenderness on his back; it was there then.

"When asked as to the probability of his complete recovery from it (the injury to his back), he replied:

He never will. He will never be able to resume his business again. In another year or so he will be quite incapable, if he lives so long, and there is some doubt about that. He was, he says, a very sound man before the accident, and that if he had not been a tough man,

he never would have recovered from the accident. He had no affection. He played cricket and indulged in various exercises. The local pain in the back is the most dangerous symptom.

"In answer to a question: 'Is there any doubt as to the disease the symptoms indicate?' the witness replied:

There is no doubt inflammation of the spinal cord or membrane.

"The witness, in answer to a question, stated that the general period at which the disease described ends fatally is from two to four years, but that there was one case reported where the patient lived ten years, but that was uncommon.

"Dr. *Beer* stated that he attended the suppliant, in consultation with Dr. *Hopkirk*, for a month, at the instance of the railway superintendent. He corroborates his statements in every particular as to the nature of the injuries, and also as to the symptoms two nights before he gave evidence. When asked as to the probable consequences, he replied:

Death within four or five years, in my opinion, it is probable. According to *Bryant* and *Erickson*, the best authorities, it is laid down as an invariable rule that railway concussion of the spine, followed by paralysis, proves almost inevitably fatal. Each one of the symptoms indicate it, and, taken altogether, it is undoubted.

"He said he had no bill for his services against the suppliant, as he was paid by the railway department.

"Dr. *McLeod* proved that he shortly before examined the suppliant, and found the symptoms as stated by the two preceding witnesses, and gives the same opinion as to the probable results.

"Dr. *Blanchard* proved that he also was present at the examination; noticed the same symptoms as the other doctors, and agreed with them as to the probable result. He says: 'I think he will grow gradually 'worse. There may be some intervals when he may 'be better, but he will get steadily worse.'

"Mr. *Creamer* states he heard the symptoms of the

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suppliant's condition described by the other doctors, when giving their evidence, and said:

His injuries will result in paralysis. He has some complaint of the spine. The symptoms indicate that he will get worse, and it will end in death, after a certain length of time.

"The foregoing is a brief statement of the evidence to the nature and extent of the injuries sustained by the suppliant, of his sufferings, and the results up to the time of the trial, with the symptoms then lately ascertained, and the medical decision unanimously pronounced by the doctors examined as to the probable consequences and result of his injuries.

"It was shown that the medical expenses up to the time of the trial, medicines and other necessary expenses, amounted to over a thousand dollars, and that it would be necessary for the suppliant, in the opinion of his medical advisers, to go to *England* to obtain further medical aid and advice.

"After the evidence of the suppliant was concluded, Mr. *Hodgson*, on the part of the defence, moved for a non-suit on the grounds set out in the fourth paragraph of the answer, and was about to argue the objections therein stated. I, however, informed him that I had recently given judgment on demurrer in two cases where the same questions were raised, and having decided them in favor of the suppliants, suggested, that as the points would in those cases probably come before the whole court on appeal, he should be satisfied to have the motion noted, which would enable him subsequently to deal with them. To this he assented. I have, therefore, to deal with them.

"The first objection is that the present action cannot be maintained, because the control and management of the railway being vested by statute in the Minister of Railways and Canals, Her Majesty cannot be made liable upon petition of right, because the same was negligently and

unskilfully managed and maintained. The first answer I give to that objection is that the action is not brought to recover damages arising from the mere negligence of management or maintenance. It is alleged and proved that for a good consideration a valid contract was entered into by Her Majesty, and that she failed to perform it. Were it an action in similar circumstances against a company, what defence could be successfully maintained? In case the breach of contract were proved, how could they save themselves from the consequences? Only by proof of *vis major* of some kind. Something beyond their control, but certainly not the negligence of their own servants. If there was a contract in this case, and a breach shown, a legal excuse or justification must be shown.

"If, again, this action were against a company for the breach of a contract to carry and convey safely, the plaintiff's evidence that they did not do so would be sufficient, in the absence of proof of contributory negligence on the part of the plaintiff, to put the defendants on their defence. It is only necessary in such cases to prove the contract and the breach, with evidence as to the resulting damage. If, therefore, the present action is at all maintainable, the question of negligence or unskilfulness does not arise as a defence, but may be given in evidence to show how the damage was caused as part of the *res gestæ*. On sound principles of pleading and evidence, the question of negligence or unskilfulness is no part of the issue where an action is brought on contract to carry safely, and in such cases it has been held by many writers and judges that the going off the track of a railway by a train is in itself *primâ facie* evidence of negligence that calls for evidence in rebuttal.

"*Redfield*, in his treatise on railways, says (1):

The fact that injury was suffered by anyone while upon the com-

(1) Vol. 2, p. 176, 3rd Ed.

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pany's train as a passenger is regarded as *primâ facie* evidence of their liability.

and cites in support of that view *Carpin* v. *London & Bir. Railway Co.* (1), and several American decisions, stated in a note at p. 177, and shews that the same rule was acted on in a case in the Supreme Court of the *United States* (2), and in *Skinner* v. *L. Bri. & S. Coast Railway* (3).

"In *Galena & Chicago Railway* v. *Yarnrod* (4), it was held "that a passenger in a railway car need only show that he has received an injury to make a *primâ facie* case against the carrier. The carrier must rebut the presumption in order to exonerate himself (5).

"In *Hammack* v. *White* (6) it was held that mere proof of an accident having happened to a train does not cast upon the company the burden of showing the real cause of the injury, but it was held in *Dawson* v. *Manchester Sh. & L. Railway* (7), that if a carriage break down or run off the rail this will be a *primâ facie* evidence of negligence.

"In *Pym* v. *Great Northern Railway* (8), it occurred from a defective rail. In a note at page 189 the same learned author says:

So that, in regard to the undertakings of carriers of goods and passengers, the law has attached certain conditions to the general undertaking, implied from entering upon the transit, that the things or the person is to be carried safely through in a reasonable or the ordinary time unless prevented, in the case of carriers of goods by some invincible obstacle like the act of God or the public enemy, and in the case of carriers of passengers that it shall be so done, unless prevented by some agency not under the carriers' control, by the exercise of the strictest care and diligence consistent with the successful conduct of the business

(1) 5 Q. B. 747.
(2) 11 Pet. 181.
(3) 2 Law & Eq. Reports 860.
(4) 15 Ill. R. 468.
(5) See 2 Redfield on Railways, vol. 2, p. 179, note.
(6) 11 C. B. N. S. 587-591.
(7) 5 L. J. N. S. 682.
(8) 2 F. & F. 619.

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"If such be the law, and I do not think it will be doubted, then a contract to carry safely was by legal implication entered into in this case, and unless it can be found that Her Majesty in all cases of contract is above the law, I cannot arrive at the conclusion that because the injuries complained of were caused by the bad management, unskilfulness or negligence of those entrusted with the working of the railway, the suppliant must be denied redress. If the claim had been one founded on mere negligence, without a contract express or implied, the case would have stood upon a very different legal footing, and to such a case would the objection be alone, in my opinion, applicable.

"The objection that the action cannot be maintained, because the control and management of the railway in question was vested in the Minister of Railways and Canals, I disposed of in my judgment in *McFarlane* v. *The Queen* (1), and in *MacLean* v. *The Queen*. "It is held in *England* that an action by petition of right will lie in all cases in the Exchequer Court for breaches of contract entered into by departmental officers of the government, and by the 58th sec. of the Act of the Dominion establishing this court, exclusive jurisdiction is given to it 'in all cases in which the demand shall 'be made, or relief sought, in respect of any matter 'which might in *England* be the subject of a suit or 'action in the Exchequer Court on its revenue side 'against the Crown.'

"I find no qualification of the term 'contract' in any decision or proceeding in *England*, nor can I discover any reason for any such qualification. If there be a contract, the law makes no difference whether it be written or verbal, express or implied. In any case it is equally binding. The law in this case makes the contract sued on, and who can say that is less potent for

(1) 7 Can. S. C. R. 216.

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that purpose than if one had been made by the parties in writing, and even under seal.

"Suppose a case wherein a departmental officer in the government, in execution of the proper functions of his department, enters into an agreement in writing expressly undertaking, for a valuable consideration, that he will, on certain works being done, pay a certain sum of money, transfer property of some kind to the other contracting party, or to do some other act, but failed to do so, and an action by petition of right was brought, would it be any answer in law to allege that the failure to perform the contract arose from the improper conduct and negligence of the officer, and that Her Majesty was not answerable for the negligence of her servants?

"The other objection, 'that even, assuming the said 'railway to be under the management and control of 'Her Majesty, no negligence can be imputed to Her, and 'Her Majesty is not answerable by petition of right for 'the negligence of Her servants,' is, I think, fully answered, as far as this case is concerned, by what I have previously said. Were there no contract existing, and a duty and obligation accepted, it might possibly be considered the doctrine would be available. It might be urged, for instance, in a case where a person not a passenger was injured, or where property, not in the possession or under the control of the railway management, was destroyed or injured, through the improper conduct of the railway agents or servants, but I think it is wholly inapplicable where a contract for safe conduct exists. When the legislature has placed the title of certain railways in Her Majesty, and provided for the management and control of them in the minister specially assigned for that duty, it is clear that the title is in trust for the Dominion, and the minister was fully clothed with power to enter into all neces-

sary contracts on the part of the Dominion for the object in view. The amount of a judgment against the crown is to be paid out of the Dominion treasury, and the action, though nominally against Her Majesty, is virtually against the Dominion.

"When, therefore, a failure to perform a contract is found, the action I conceive to be properly brought by petition of right in this court.

"The question of the obligation to perform an implied contract is elementary in law, and I have therefore cited no authorities in support of the doctrine. It is fully treated on in every work on contract, and no doubt is expressed in regard to the binding effect of one.

"I am of opinion the action is properly within the jurisdiction of this court, and that the suppliant is entitled to a judgment.

"The only question left is as to the amount of damages. I have not stated in detail the length or acuteness of the sufferings endured by the suppliant for months after he was injured; or fully the evidence as to the probability of future sufferings. The evidence, however, is full upon those points. The suppliant was a young man (aged 32 years) and of robust health. In the language of Chief Justice *Cockburn* in *Philips* v. *South Western Ry.* (1):

> His health has been irreparably injured to such a degree as to render life a burden, and a source of the utmost misery. He has undergone a great amount of pain and suffering. The probability is that he will never recover. His condition is at once helpless and hopeless.

"The suppliant in this case was in the receipt of an annual income of $4,000 up to the time of the trial; he continued by the favour of the directors of the bank to receive his salary of $3,000 as manager of the bank,

(1) 4 Q. B. D. 408.

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although unable for months to perform any service, and but little afterwards. Both he and all the medical practitioners examined stated his inability to attend to business, and that, consequently, he would be unable to earn any salary or attend to any regular business. He had increased expenses, by reason of the injury, to over $1,000 for medical aid. I feel bound by the evidence he gave of his condition and inability hereafter to earn a livelihood, and sustained, as it has been, so fully by the evidence of the medical practitioners.

"In the case just mentioned, Chief Justice *Cockburn* (1) says:

It is extremely difficult to lay down any precise rule as to the measure of damages in cases of personal injury like the present. No doubt, as a general rule, when injury is caused to one person by the wrongful or negligent act of another, the compensation should be commensurate to the injury sustained. But there are personal injuries for which no amount of pecuniary damages afford adequate compensation. While, on the other hand, the attempt to award full compensation in damages might be attended with ruinous consequences to defendants, who cannot always, even with the utmost care, protect themselves against carelessness of persons in their employ. Generally speaking, we agree with the rule as laid down by *Brett*, J., in *Rowley* v. *London & N. W. Ry. Co.* (2), an action brought on the 9th and 10th *Vic.*, c. 93, that a jury in such cases must not attempt to give damages to the full amount of a perfect compensation for the pecuniary injury, but must take a reasonable view of the case, and give what they consider, under all circumstances, a fair compensation.

His Lordship then stated what he considered all the heads of damages, in respect of which a plaintiff, complaining of a personal injury, is entitled to compensation.

These are the bodily injury sustained, the pain undergone, the effect on the health of the sufferer, according to its degree, and if its probable duration is likely to be temporary or permanent; the expenses incidental to attempt to cure or lessen the amount of injury, the pecuniary loss sustained through inability to attend a profession or

(1) P. 407. (2) L. R. 8 Ex. 231.

business—as to which, again, the injury may be of a temporary character, or may be such as to incapacitate the party for the remainder of his life.

"In such a case it is necessary and proper to consider that, by accident or otherwise, a person's life may be suddenly shortened, even in cases of comparative youth and in cases of apparent robust health. On the other hand, a party like the suppliant, in his condition of health before the injury, had a reasonable prospect of living 30 or 40 years. He had, also, the reasonable prospect of enjoying his salary as long as he was able to attend to his duties, with a fair prospect of advancement. All these matters I have carefully weighed, and have adopted the heads of damage stated in the judgment of Chief Justice *Cockburn*, and, after long and full deliberation, I have concluded to award damages in this case to the amount that may, at first sight, seem high in this country, but which, in other countries, would not be so considered. I have felt great unwillingness to tax the Dominion resources more than could be helped, but, at the same time, it is my duty to award, not ample compensation for the injuries sustained, for no amount would be sufficient for that purpose, but the fair and reasonable compensation, under all the circumstances, to which I think the suppliant is entitled. To obtain a life annuity of $4,000 payable annually at six per cent., would require a sum beyond $50,000, but that would not be a correct mode of ascertaining the damages. I have, however, considered the fact as one legitimately connected with the matter of damages. Having very carefully weighed all the unfortunate circumstances of the case, I trust I have arrived at a conclusion that will do justice to all the interests involved. I award to the suppliant, for damages for the injuries sustained by him, as complained of in his petition, the sum of thirty-six thousand dollars."

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RITCHIE, C. J.:

I cannot distinguish this case from that of *McFarlane* v. *The Queen* (1), nor can we sustain this judgment without overruling the decision of this court in that case, which I am not prepared to do.

This is, in my opinion, unquestionably a claim sounding in tort, a claim for a negligent breach of duty.

The suppliant's case is based on the allegation that being entitled "to be carried safely and securely by Her Majesty upon said railway on the said journey, Her Majesty, disregarding Her duty in that behalf, and Her said promise, did not safely and securely carry the suppliant upon the said railway upon the said journey, but so negligently and unskilfully conducted, managed and maintained the said railway, and the train upon which the suppliant was a passenger, that in the course of said journey the suppliant was greatly and permanently injured in body and health."

As between private individuals, it is thus laid down in all the text authors and sustained by the cases, that a carrier of passengers, not being an insurer and liable at all events as a carrier of goods is, actual negligence must be proved; it is not sufficient merely to show an accident, unless it is of such a description as to afford a presumption of negligence. See *Chitty* and *Temple* on Carriers (2).

In actions against carriers for injuries to passengers by the negligence of the defendant it lies upon the plaintiff to prove the negligence, and not on the carrier to show that he used reasonable care.

And in *Chitty* on Contracts (3) it is thus stated:

A carrier of passengers, therefore, is liable for personal injuries which they may sustain, whilst being carried by him, only where such injuries have been occasioned by his negligence and unskilfulness.

The proposition is fully established by the case of

(1) 7 Can. S. C. R. 216. (2) P. 309.
(2) 11 Am. Ed. 1 vol. p. 728.

Crofts v. *Waterhouse* (1). This was an action against a coach proprietor for having by the negligence and improper conduct of his servants overturned and injured the plaintiff—travelling in the defendant's coach.

Best, C. J.:

The action cannot be sustained unless negligence is proved.

Parke, J.:

The distinction between carriers of goods and carriers of passengers was not sufficiently left to the jury. A carrier of goods is liable in all events, except the act of God or the King's enemies—a carrier of passengers is only liable for negligence.

Aston v. *Heaven* (2) was a case against defendants as proprietors of the *Salisbury* stage coach for negligence in driving the said coach, in consequence of which the coach was overset and the plaintiff was bruised and her finger broken.

Eyre, C. J., said:

This action is founded entirely on negligence. * * * I am of opinion that the case of loss of goods by carriers and the present is totally unlike * * * this action stands on the ground of negligence alone.

But the learned judge in the Exchequer seems to base his judgment on the assumption that a carrier of passengers is liable at all events as a carrier of goods is, in other words an insurer, for as to the objection raised, "that Her Majesty cannot be made liable upon petitions "of right because the same was negligently and un-"skilfully managed and maintained," the learned judge says: "The first answer I give to that objection is "that the action is not brought to recover damages "arising from the mere negligence of management "or maintenance. It is alleged and proved that for a "good consideration a valid contract was entered into "by Her Majesty, and that she failed to perform it" Again, "If there was a contract in this case and a breach

(1) 3 Bing. 319. (2) 2 Esp. 534.

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"shown, a legal excuse or justification must be shown. "If again, this action were against a company for the "breach of a contract to carry and convey safely, the "plaintiff's evidence that they did not do so, would be "sufficient in the absence of proof of contributory "negligence on the part of the plaintiff to put the "defendants on their defence, it is only necessary in "such cases to prove the contract and the breach with "evidence as to the resulting damage." And again: "On sound principles of pleading and evidence the "question of negligence or unskilfulness is no part of "the issue where an action is brought on a contract to "carry safely."

The learned judge was addressing these observations in reference to and dealing with what was assumed to be the contract in this case; but no such contract was proved as that Her Majesty promised, in consideration of suppliant being a passenger for reward, safely and securely to carry him upon the said railway upon said journey between the said stations—the only evidence of any contract is that the suppliant paid his fare and received a ticket, as follows:

"Ticket, P. E. I. Railway, first class, *Charlottetown* to *Souris* and return.

"August 25th, 1880."

This indicates neither more nor less than that the holder had paid his toll and was entitled to a passage between the points indicated. Tolls on all public works are established under section fifty-eight of the Public Works Act (1), which deals with all tolls in the same manner; it is as follows:

The Governor may, by Order in Council to be issued and published as hereinafter provided, impose and authorize the collection of tolls and dues upon any canal, railway, harbor, road, bridge, ferry, slide, or other public works, vested in Her Majesty, or under the

(1) 31 Vic., ch. 12.

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control or management of the Minister, and from time to time in like manner may alter and change such dues or tolls, and may declare the exemptions therefrom; and all such dues and tolls shall be payable in advance and before the right to the use of the public work in respect of which they are incurred shall accrue, if so demanded by the collector thereof.

This doctrine of the learned judge might be all right enough, as between private individuals, if it could be established that carriers of passengers are, as carriers of goods were, insurers, or if there was an express contract to warrant and insure at all events the safe carriage of the passenger between the stations named in the ticket.

But the doctrine of the learned judge, as applicable to this case, cannot, in my opinion, be sustained.

The establishment of the government railways in the Dominion is, as has been said of the Post Office establishments, and as we thought of the slides in the case of *McFarlane* v. *The Queen* (1), a branch of the public police, created by statute for purposes of public convenience, and not entered upon or to be treated as private mercantile speculations.

As to the Intercolonial Railway, it was in no sense in the nature of a private undertaking, constructed for reasons influencing private promoters of similar works, or in the nature of a mercantile speculation—it was constructed as a great public undertaking essential to the consolidation of the union of *British North America*, and in fulfilment of a duty imposed on the government and parliament of *Canada* by the *British North America Act*.

And so with respect to the P. E. I. Railway now in question. We find from the Journals of the House of Assembly of P. E. I., 1871 (2), the following history of the legislation and reason for its construction:

Whereas, the trade and export of this island have much increased

(1) *Ubi supra.* (2) P. 109.

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during the past few years; and whereas, it is found almost impossible, in the absence of stone or gravel, to keep the roads in an efficient state of repair, to render easy the transport of the production of the colony; and whereas the construction and maintenance of a line of railway through the island would greatly facilitate its trade, develope its resources, enlarge its revenue, and open more frequent and easy communication with the neighboring Provinces and the United States;

Resolved, That a Bill be introduced authorizing the Government to undertake the construction of a railroad, to extend from *Cascumpec* to *Georgetown*, touching at *Summerside* and *Charlottetown*, and also branches to *Souris* and *Tignish*, at a cost not exceeding five thousand pounds currency, per mile, for construction, including all surveys and locating the line, and all suitable stations, station houses, sidings, turn-tables, rolling stock, fences, and all the necessary appliances suitable for a first class railroad, and the construction of suitable wharfs at *Cascumpec*, *Summerside*, *Charlottetown* and *Georgetown*, provided the contractors for building and furnishing the said railroad accept in payment the Government debentures of *Prince Edward Island*, at thirty years at par, without allowance for discount or otherwise.

On *Prince Edward Island* becoming a part of the Dominion this public undertaking became the property of the Dominion, the management, direction and control of which the legislature has entrusted to the Board of Works, under statutory provisions, for the benefit and advantage of the public; and being thus established for public purposes, it is subordinate to those principles of public policy which prevents the Crown being responsible for the misfeasances, wrongs, negligences, or omissions of duty of the subordinate officers or agents employed in the public service on these public works, and therefore the maxim *respondeat superior* does not apply in the case of the Crown itself, and the Sovereign is not liable for personal negligence, and, therefore, the principle *qui facit per alium facit per se*, which is applied to render the master liable for the negligence of his servant, because this has arisen from his own negligence or imprudence in selecting or re-

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taining a careless servant, is not applicable to the Sovereign, to whom negligence or misconduct cannot be imputed, and for which, if it occurs in fact, the law affords no remedy; for as Mr. *Story* says, "the Government does not undertake to guarantee to any persons the fidelity of any of the officers or agents it employs, since it would involve it in all its operations in endless embarrassment and difficulties and losses which would be subversive of the public interests."

In this respect the law places the crown in reference to the post office, railways, canals and other public works, and undertakings, and those availing themselves of the convenience and benefit of such institutions, in no better or no worse position than if they were owned by private individuals, who made it an express stipulation that they should not be liable to parties dealing with them for the consequences of the negligence or misconduct, wilful or otherwise, of their agents and servants (1). This, of course, does not touch or affect the question of the liability, or the personal responsibility to third persons of officers or subordinates for acts and omissions in their official conduct when injuries and losses have been sustained, still less, where they are guilty of direct misfeasances to third persons in the discharge of their official functions.

(1) See *Haigh et al* v. *Royal Mail Steam Packet Co.* (48 L. T. N. S. p. 267) reported since this judgment was prepared, the marginal note of which is as follows:

"The ticket of a passenger by a steamer of defendants contained a notice that the defendants would not be responsible for any loss, damage or detention of luggage under any circumstances, and that they would not be responsible for the maintenance or loss of time of a passenger during any detention of their vessels, nor for any delay arising out of accidents, nor for any loss or damage arising from perils of the seas, or from machinery, boilers or steam, or from any act, neglect or default whatsoever of the pilot, master of mariners."

Held, upon demurrer, that this provision exempted the defendants from liability in an action for the loss of life of a passenger by negligence of defendants' servants in a collision with another ship.

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There is therefore nothing unreasonable in limiting the liability of the crown and freeing it from liability for negligences and laches of its servants; none of the great public works having been undertaken with a view to mercantile gain, but for the general public good.

The public who use these government railways must understand what the law is, to what extent the law, on principles of public policy, prevents actions being brought against the Crown for injuries resulting from the nonfeasance or misfeasance of its servants—in other words, parties dealing with the crown, in reference to these great public undertakings, deal subject to those prerogatival rights of the Crown and those rules and principles, well known to the law, which, on considerations of public policy, are applicable to transactions between the Crown and a subject, but not between subject and subject.

To say that these great public works are to be treated as the property of private individuals or corporations, and the Queen, as the head of the government of the country, as a trader or common carrier, and as such chargeable with negligence, and liable therefor, and for all acts of negligence or improper conduct in the employees of the crown, from the stoker to the Minister of Railways, is simply to ignore all constitutional principles. These prerogatives of the Crown must not be treated as personal to the sovereign; they are great constitutional rights, conferred on the sovereign, upon principles of public policy, for the benefit of the people, and not, as it is said, "for the private gratification of the sovereign"—they form part of and are generally speaking "as ancient as the law itself."

The judiciary of the *United States* of *America*, ignoring prerogative rights, deal with matters, such as this

on principles of public policy, on the ground of the principles of the common law.

Thus in *Johnson* v. *United States* (1), *Nott*, J., says, in the Court of Claims:

> This court has again and again held to the principle of the common law that the government cannot be sued in an action sounding in tort, nor made liable for the tortious acts of its officers.

This constitutional principle this court cannot ignore; it must not attempt to make laws; it must administer the law, constitutional, local, public or private, as it is, and leave the Dominion Parliament, on general and constitutional questions affecting the whole Dominion, and the provincial assemblies, on local questions, each within the scope of their legislative functions, as declared by the *B. N. A. Act*, to alter or adapt the practices or principles in force, to make them, if found expedient so to do, more suitable and applicable to the circumstances of the country. As to the statutes which it is alleged recognize the right of a party to recover for damage or injuries sustained on any railroad, see 31 Vic., ch. 12; 33 Vic., ch. 23; 44 Vic., ch. 25.

The Crown not being liable, it is only necessary to say that in a case such as this at common law, if the legislature has given a remedy, the remedy prescribed must be pursued, because the statute gives no action at common law, there is only the statute to be relied on, it being clearly established that, where a new right is created by statute, the remedy is confined to that given by statute.

The statute 38 Vic., ch. 12, repealed by 39 Vic., ch. 27, giving power to this court to deal with petitions of right, expressly enacts that nothing in it shall prejudice or limit otherwise than therein provided the rights, privileges or prerogatives of Her Majesty or Her successors, or give to the subject any remedy against the

(1) 2 Nott & Hunt. 413.

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Crown in any case when not entitled in *England*, under any circumstances, by laws in force prior to the passing of the Imperial Statute 23 and 24 Vic., ch. 34.

I have not felt it necessary to go more minutely into the cases bearing on the questions involved in this case as they can be found in *McFarlane* v. *The Queen* (1). Under these circumstances, I am constrained to the conclusion that the judgment must be reversed, and this court should declare that the suppliant is not entitled to the relief sought by his petition.

I may be permitted to add that the suppliant in this case has my deepest sympathy, and, I trust, that an application on his part to the grace, favor and bounty of the Crown may yet enable him to get that relief which this court has been unable to grant him.

STRONG, J.:—

In the case of the *Queen* v. *McFarlane* (2), lately decided in this court, I stated my reasons for holding that a petition of right will not lie against the Crown in respect either of tortious injuries or breaches of contract, caused by the negligence of its servants or officers. In other words, that in the case of torts the maxim *Respondeat Superior* does not apply to the Crown, and in the case of contracts, that they are to be construed as though they contained an exception of the Crown for liability in respect of any wrongful or negligent breach by its servants.

I am unable to distinguish this case on principle from that of the *Queen* v. *McFarlane*, and as I adhere to what I then said, I refer to my judgment in that case for the grounds of the conclusion at which I have arrived as to the disposition of the present appeal, which is, that it must be allowed, and the petition of right dismissed.

(1) *Ubi supra.* (2) 7 Can. S. C. Rep. 216.

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[TRANSLATED]

FOURNIER, J.:

This is an appeal from a judgment of the Exchequer Court in the matter of the petition of right of the respondent, claiming the sum of $35,000 damages for injuries suffered by him in consequence of an accident which took place on the *Prince Edward Island* Railway, the property of the Dominion of *Canada*.

On the 25th August, 1880, the respondent presented himself as a passenger, and obtained, in consideration of the payment of the ordinary fare fixed by the Government, a passenger ticket entitling him to be carried upon the said railway from *Charlottetown* to *Souris*, and by his petition alleges that he fulfilled on his part all the conditions which entitled him to be carried safely and securely on said railway on the said journey. He avers that the said railway was run, worked, and managed so negligently and unskilfully that the train upon which he (the suppliant) was a passenger was run off the rails, and that in the accident he was greatly and permanently injured in body and health, and has become seriously incapacitated in his ability to earn a livelihood for himself and his family.

By the defence put in on behalf of Her Majesty it is admitted that the *Prince Edward Island* Railway is the property of Her Majesty, but was, at the time of the accident in question, under the control and management of the Minister of Railways and Canals of *Canada*. The defence also denies any contract on behalf of Her Majesty to carry safely and securely the suppliant.

In the fourth paragraph of the statement of defence, two other grounds are set up in answer to the suppliant's claim, the first—"That the control and management of the said railway being vested by statute in the Minister of Railways and Canals, Her Majesty cannot be made liable upon petition of right for the bad

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management of the Minister as alleged—2nd. That even assuming the said railway to be under the management and control of Her Majesty, no negligence can be imputed to Her, and Her Majesty is not answerable by petition of right for the negligence of her servants.

The evidence adduced in this case, and the finding of the learned judge who tried the case, removes all doubt on the questions of fact, the cause of the accident, the extent of the damages suffered, &c. There was no dispute on this point on the part of the counsel on the argument before us, except, perhaps, an opinion put forward, that the amount awarded was excessive, but no good reason was given. On this appeal, therefore, the only question which arises, is one of law, viz.: Whether Her Majesty is responsible towards a subject for damages resulting in consequence of acts of omission or negligence by those who represent Her Majesty, or act for Her in the execution of a contract, when such acts as between subject and subject would constitute a breach of contract? The learned counsel for the appellant contends that Her Majesty is not responsible, relying on the old common law maxim, "The king can do no wrong." Is it not greatly extending the applicability of the true meaning of this maxim, to apply it to such a case as the present one, when in truth the political power of Her Majesty is not in question, but merely Her Majesty's civil responsibility in a matter of a contract?

Although the signification of this maxim is somewhat well known, it is necessary for me, in consequence of the opinion of the majority of the court in this case, to cite the opinion of some authors. Amongst others *Chitty*, in his work on Prerogatives of the Crown (1), says:—

"The king can do no wrong." The constitutional signification of

(1) P. 5.

this maxim was in former times misrepresented. It was pretended by some that it meant that every measure of the king was lawful, a doctrine subversive of all principles of which the constitution is compounded. It is a fundamental general rule, that the King cannot sanction any act forbidden by law, it is in that point of view that His Majesty is under, and not above, the laws, that he is bound by them equally with his subjects.

In *Broom's* Legal Maxims (1) it is said:

"The king can do no wrong." Its true meaning is—First, that the sovereign individually and personally, and in his natural capacity is independent of, and is not amenable to, any other earthly power or jurisdiction; and that whatever may be amiss in the condition of public affairs is not to be imputed to the king, so as to render him answerable for it personally to his people. Secondly, the above maxim means, that the prerogative of the crown extends not to do any injury, because, being created for the benefit of the people, it cannot be exercised to their prejudice, and it is therefore a fundamental rule that the king cannot sanction any act forbidden by law; so that, in this point of view, he is under, and not above, the laws, and is bound by them equally with his subjects.

And in *Todd's* Parliamentary Government in British Colonies (2):

Prominent among these constitutional maxims, is the principle that "the king can do no wrong." Rightly understood this precept means, that the personal actions of the sovereign, not being acts of the government, are not under the cognizance of the law, and that as an individual he is not amenable to any earthly power or jurisdiction. He is nevertheless in subjection to God and to the law. For the law controls the king, and it is, in fact, the only rule and measure of the power of the Crown, and of the obedience of the people. And while the sovereign is personally irresponsible for all acts of the government, yet the functions of royalty which appertain to him, in his political capacity, are regulated by law, or by constitutional precept, and must be discharged by him solely for the public good, and not to gratify personal inclinations.

Kent's Commentaries (3):

Another attribute of the royal character is irresponsibility, it being an ancient fundamental maxim that the king can do no wrong. This

(1) p. 53. (2) P. 1.
(3) P. 479 and 480.

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is not to be understood as if everything transacted by the government was, of course, just and legal. Its proper meaning is only this: that no crime or other misconduct must ever be imputed to the sovereign personally. However tyrannical or arbitrary, therefore, may be the measures pursued or sanctioned by him, he is himself saved from punishment of every description. On the same principle no action can be brought against the sovereign, even in civil matters. Indeed this immunity, both from civil suit and penal proceeding, rest on another subordinate reason also, viz: that no court can have jurisdiction over him. For all jurisdiction implies superiority of power, and proceeds from the Crown itself.

While the sovereign himself however is, in a personal sense, incapable of doing wrong, yet his acts may, in themselves, be contrary to law, and are in some cases subject to reversal on that ground.

After stating that patents granted by the sovereign may be declared null, not on account of any error or injustice on his part, but because the sovereign was misinformed by his agents, the author adds:

So, if a person has in point of property a just demand upon the sovereign, though he cannot bring an action against him, he may petition him in the High Court of Justice, and obtain a redress as a matter of grace, though not upon compulsion.

The passage I have above cited from *Chitty* shows that it is not the first time that the proper signification of this maxim has been misunderstood. The terse language used in order to prove how limited its signification is, clearly establishes the fact that this maxim cannot be invoked as laying down an absolute principle. Such a doctrine, in his opinion, would be subversive of all the principles of the constitution. It is a general and fundamental rule that the king cannot sanction any act forbidden by law. It is in this sense that the king is under and not above the laws, and is bound by them equally with his subjects. Therefore the laws relating to contracts, as well as other laws, are binding on the sovereign. Now, it is an elementary principle of law, that the conditions of a contract are as binding between the contracting parties, as if they were dispositions or provisions of the law itself.

If Her Majesty, as it is Her undoubted right, can enter into contracts, must she not be considered to be bound towards those with whom she contracts, in the same manner and to the same extent as they are bound to her? There must be reciprocity in such cases; as Lord Justice *Blackburn* says in *Thomas* v. *The Queen* (1):

> Contracts can be made on behalf of Her Majesty with subjects, and the Attorney-General, suing on her behalf, can enforce those contracts against the subject, and if the subject has no means of enforcing the contract on his part, there is certainly a want of reciprocity in such cases.

The right of Her Majesty to contract either in her name, or the name of her agents or public officers, cannot be doubted. The statutes creating the public departments, the Public Works Department and the Department of Railways and Canals, apart from the general power which Her Majesty possesses, as sole corporation, contain also numerous provisions relating to the manner in which Her Majesty may become a contracting party either in her name or in the name of her agents.

Moreover, the maxim that the king can do no wrong is not only limited in the manner stated in *Chitty*, but it is further limited by the allowance of the petition of right, "an ancient common law remedy for the subject against the Crown," as *Chitty* describes it, giving to the subject the right to claim from the sovereign, moveables, lands, debts, and unliquidated damages (2). This gives the subject the same right he would have by action against another subject. "The petition (he says) is, however, substantially as well as nominally, a petition of right, as the prayer, if it is grantable, is *ex debito justitiæ*." This is not a new question, it has been treated of in the case already referred to of *Thomas v.*

(1) L. R. 10 Q. B. 33.

(2) See Chitty's Prerogatives of the Crown pp. 340-345.

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The Queen. And in *Broom's* Constitutional Law (1), when speaking of the redress which the subject has against the sovereign, I find the language more precise. He recognizes but a single exception, that is when the redress sought is against the personal act of the sovereign. He adds :

> As for the most petty and inconsiderable trespass committed by his fellow subjects, so for the invasion of property by his sovereign, does our law give to a suppliant, fully, freely, and efficiently redress. One exception, and one only, to this rule (as just intimated) occurs, and that is, where the sovereign has done himself personally an act which injures or prejudices another, for the king of *England* can theoretically do no wrong. Our law thus recognizes his supremacy, it has omitted to frame any mode of redress for that which it deems to be impossible.

True, that out of respect for the dignity of the Crown, a petition cannot be tried without Her Majesty's consent, but when the petition is tried, it carries the same effect as an action between subject and subject. The petition is, however, substantially as well as nominally, a petition of right, as the prayer, if it is granted, is *ex debito justitiæ*. The mode of exercising this right has been regulated by our statute.

Now, in the present case, however, I find that Her Majesty, by her present statement of defence, as I have before stated, denies to the suppliant any right to claim a redress for the damages he has suffered, and, on the other hand, the suppliant contends that Her Majesty, having contracted to carry him safely and securely, is responsible to him for a breach of said contract, which took place by the accident happening under the circumstances disclosed by the evidence in the case. To decide whether this proposition is correct, I may say, is the principal question to be determined by this court on the present appeal. The question of the responsibility of the Crown in matters of breach of contract,

(1) P. 246.

is not a new one. In the case of *Thomas* v. *The Queen*, the Court of Queen's Bench in *England* decided the question affirmatively (1). In that case, the suppliant, being the inventor of a new system of heavy artillery, had made an agreement with the Secretary of State for the War Department, by which he consented to refer to a special committee at *Woolwich* the merits of his invention and to furnish all descriptions, plans and models necessary to enable the committee to express an opinion on the matter, obliging himself personally to give such explanations as would be required. The consideration of this arrangement was, that should his inventions be approved of by the committee, he should be remunerated by a sum of money to be determined by Her Majesty's General Board of Ordnance. He alleged also in his petition that he had been put to considerable expense and outlay in perfecting his invention, the Government having promised, should the experiment to be made be successful, to reimburse him for such outlay. That, although he had fulfilled all the conditions of the arrangement on his part, yet the amount which he was to receive had not yet been determined or paid.

After filing a demurrer to the petition, the Attorney General abandoned all preliminary objections which might be remedied by amending, and the points argued before the court were the following: "That a petition of right will not lie for any other object than specific chattels or lands, and that it will not lie for breach of contract, nor to recover money claimed either by way of debt or damages." I will only cite that part of Mr. Justice *Blackburn's* elaborate judgment which refers to the question whether a petition of right will lie for damages resulting from a breach of contract.

But it is quite settled that on account of Her dignity no action

(1) L. R. 10 Q. B. 33.

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can be brought against the Queen; the redress, if any, must be by petition of right, which is now regulated by 23 and 24 *Vic.* c. 34. If the suppliant ultimately recovers, he obtains, under section 9, a judgment of the court that he is entitled to such relief as the court shall think just. And this form of judgment would be applicable to the case in which it appeared to the court that the plaintiff was entitled to be paid damages for non-fulfilment of a contract.

It appears that at the time of the passing of the act there was a general impression that a petition of right was maintainable for a debt due on a breach of contract by the crown; the opinion to that effect expressed in Lord *Somers'* argument in the Banker's case (1) had been adopted by Chief Baron *Comyns* (2), and by Sergeant *Manning* in his treaties on the practice of the Court of Exchequer, where he says (3):

"That chattels, personal debts, or unliquidated damages may be recovered under it." * * * * Indeed, the framers of the act appeared to have considered its chief utility to consist in the applicability of its improved procedure to petitions on contracts between subjects and the various public departments of the government, so vastly on the increase in recent years, both in numbers and importance; whilst petitions of right in respect of specific lands or chattels for the future will be exceedingly rare.

But as sec. 7 of the act above quoted, declares expressly that, "nothing in this statute shall be construed to give to the subject any remedy against the Crown in any case in which he would not have been entitled to such remedy before the passing of this act," it became necessary to determine whether the general impression above mentioned, was well founded, and whether, before the passing of the statute, a petition would lie for breach of a contract, made with an authorized agent of the crown.

The determination of this question is of the utmost importance, as our statute regulating the procedure in petitions of right, 35 *Vic.*, c. 12, by sec. 19, gives to the subject only such rights as are given in *England* by 23 and 24 *Vic.*, c. 34. And as this latter act only gave such remedies as were in existence before the passing

(1) 14 How. St. Tr. p. 39. (2) 1 Com. Dig. Prer. D. p. 78.
(3) P. 84.

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of the Act, it necessarily follows that if the right did not exist in *England* prior to 23 and 24 *Vic.* c. 34, in cases of breach of contract, it would not exist in this country in a similar case, as the rights of the subject are declared to be the same in both countries. The learned judge after an able and exhaustive review of all the authorities and precedents relating to this question, concludes by answering it in the affirmative. I will only cite the concluding remarks of the learned judge at p. 43 of the report:

In *Comyns'* Digest, Prer. D. 78, it is said that petition lies if the king does not pay a debt, wages, &c., citing Lord *Somers* arg. 85, and Chief Baron *Comyns* expresses no doubt as to the soundness of the doctrine thus cited by him. It appears in *Macbeth* v. *Haldimand* (1) that Lord *Thurlow* and *Buller*, J., (both *obiter dicta* it is true) expressed an opinion that a petition of right lay against the Crown on a contract; and a similar opinion seems to have been expressed by the barons in the Exchequer in *Oldham* v. *Lord of the Treasury* (2); and in *Baron de Bode's Case* (3), in which the point was raised, but was not decided—Lord *Denman* declares "an unquestionable repugnance to the suggestion that the door ought to be closed against all redress and remedy." A doctrine much resembling what Lord *Somers* called Lord *Holt's* "popular opinion," that if there be a right there must be a remedy. In *Viscount Canterbury* v. *Attorney General* (4) it was decided that the sovereign could not be sued in petition of right for a wrong. But in neither case was any opinion expressed that a petition of right will not lie for a contract. *Erle*, C. J., expressly saying that "claims founded on contracts and grants made on behalf of the Crown are within a class legally distinct from wrongs;" and in *Feathers* v. *Reg.* (5), it is assumed in the judgment that it does lie "where the claim arises out of a contract, as for goods supplied on the public service." We think, therefore, that we are bound by the bankers case to hold that the judgment on the demurrer should be for the suppliant.

This decision and the numerous authorities there cited are so decisive in my opinion, that there can be no doubt a petition of right will lie for a breach of a

(1) 1 T. R. 178.
(2) 6 Sim. 270.
(3) 8 Q. B. 274.
(4) 1 Phill. 306.
(5) 6 B. & S. 294.

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contract, and that the Crown is responsible to the other contracting party for any damages suffered in consequence of such breach.

But, although the right of the subject in such cases to claim redress by petition of right does not, in my opinion, suffer any doubt, it is contended also on behalf of the appellant, that as by 33 *Vic.* ch. 23, a special redress is given for damages in cases of accident on government railways, it was not open to the respondent to urge his claim otherwise; in other words, that he had only the redress *ex gratiâ* provided by that statute, and that he could not exercise his legal right (*ex debito justitiæ*) by petition. This statute, 33 *Vic.* c. 23, passed to extend the jurisdiction of the official arbitrators, in addition to the different kind of claims over which they had jurisdiction, enacted that the Minister of Public Works may, under 31 *Vic.* c. 12 s. 34, refer to the decision of the official arbitrators, amongst others, any claims for damages arising from accidents on railways and canals, causing death and grievous injuries. This claim must be made in accordance with the provisions contained in 31 *Vic.* c. 12, which, amongst others, provides that the minister may in his discretion arbitrarily refuse or grant a reference to the arbitrators. By 42 *Vic.* c. 7, which creates the Department of Railways and Canals, the minister of the new department is given the same powers in reference to claims for damages that was given to the Minister of Public Works. There can be no doubt that in virtue of the 5th section of the said Act the Minister of Railways and Canals can in his discretion receive and refer to the official arbitrators a claim in the nature of the present one. This power of reference existed by statutes relating to the construction of public works prior to 31 *Vic.* c. 12. It was extended, as I have just stated, in 1870 by 33 *Vic.* c. 23 to personal injuries,

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But can we not infer that, in addition to this right to obtain redress *ex gratiâ*, which by experience was shown to be exercised not without inconvenience, the legislature has thought fit to add a redress by legal right *ex debito justitiæ* by passing the 39 *Vic.* c. 27 regulating the procedure in matters of petition of right. This redress *ex gratiâ* must have been considered to be insufficient, as it placed the claimant entirely in the hands of his adversary. There were, no doubt, good reasons which induced the legislature to give to the subject a legal right by passing the petition of right act. And, therefore, I do not think the following rule of law has any application to the present case: "If the statute which imposes the obli-"gation, whether private or public, provides in the same "section a specific means or procedure for enforcing it, "no other course than that thus provided can be resorted "to." The statute in question, 33 *Vic.* ch. 23, did not give the right of action to the respondent, it merely enacts that official arbitrators shall hereafter have, at the minister's discretion, jurisdiction in matters over which they, prior to the passing of that statute, had no jurisdiction. The respondent in this case has not based his claim on that statute. His right of action is founded on the contract implied by his purchasing a passenger ticket, and on the statutes hereinafter mentioned relating to railways, and it is in virtue of the petition of right act that he proceeds to maintain his right of action. Moreover, the statute, 33 *Vic.*, ch. 23, cannot be said to have taken away any legal right a party may have, because it provides an optional remedy, and its provisions cannot affect the petition of right act which was passed subsequently.

Parliament, having by the latter statute regulated the procedure in matters of petition of right, had no doubt the power to revoke or modify statute 33 *Vic.*, ch. 23;

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but I may be permitted to express a doubt whether it has the power to deprive a subject of his constitutional right to submit by petition of right a claim he has against the Crown. And if this be so, it is evident that the subject cannot be deprived of such a right impliedly by a statute which merely provides for the mode of addressing oneself to the discretionary power of a minister. In my opinion the two remedies are not incompatible, and therefore both exist. Having the liberty of choice, it will not be denied that the majority of claimants would prefer to put forward their legal right.

It was contended also on behalf of Her Majesty that the decision of the majority of this court, in the case of the *Queen* v. *McFarlane* (1), laid down the principle of law which should govern this case. The facts are, however, in my opinion, totally different. In that case, the suppliant prayed that Her Majesty should be held responsible for the tort of a public officer, as may be seen by the following opinion given by Sir *Wiltiam Ritchie*, Chief Justice, on the nature of *McFarlane's* claim, in these words:

> I am of opinion there was no contract or breach of contract to give to the suppliant any claim against the Crown, nor do the suppliants put forward their claim to relief on any such grounds. The claim in the petition is a tort pure and simple.

Then as to the cases cited on the argument of *Lane* v. *Cotton* (2), and *Whitfield* v. *Le Despencer* (3); I am of opinion that they are not applicable to the present case. In these cases it was attempted to make the Postmaster General responsible for the acts of his employees. In the first case the majority of the court were of opinion that the establishment of the post office was a branch of the public services of police, created by statute, as well for the purpose of raising a state

(1) 7 Can. S. C. R. 216.

(2) L. Ray. 646. (3) 2 Camp. 754.

revenue as for the convenience of the public, and that it was under the control and administration of the Government. That the Postmaster General did not enter into any contract with individuals, and received no reward as in the case of a common carrier, proportionate to the number and value of the letters confided to his care, but a general remuneration from the Government in the form of a salary. In the second case, the claim was for certain monies stolen from a letter, and in that case Lord *Mansfield* says:

The postmaster has no hire, enters into no contract, carries on no merchandise or commerce. But the post office is a branch of revenue, and a branch of police, created by act of parliament. As a branch of revenue there are great receipts, but there is likewise a great surplus of benefit and advantage to the public arising from the fund. As a branch of police, it puts the whole correspondence of the country (for the exceptions are very trifling) under Government, and entrusts the management and direction of it to the Crown. There is no analogy, therefore, between the case of a postmaster and a common carrier.

Mr. *Story*, commenting on these observations, adds:

In truth in *England* and in *America*, the postmasters are mere public officers, appointed by the Government; and the contracts made by them officially are public and not private contracts.

This doctrine is now generally admitted. The same author adds (1):

In the ordinary course of things, an agent contracting on behalf of the government or the public, is not personally bound by such contract, even though he would be by the terms of the contract, if it were an agency of a private nature.

This principle I find also admitted in the case of *Dibley* v *Lord Palmerston* (2) as follows:

This is an action brought against the defendant, as Postmaster General, for an alleged breach of an implied undertaking, said to attach upon him in that character. With reference to this ground, it will be sufficient to advert to a class of cases too well known and established to be more particularly mentioned, and which in sub-

(1) No. 302. (2) 3 Brod. & King 275.

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stance and result have established, that an action will not lie against a public agent for anything done by him in his public character or employment, and constituting a personal and particular liability.

As it is seen, these decisions do no more than confirm what has since become a general principle, as remarked by Mr. *Story*, that is, that a public officer is not personally responsible for acts done in his official capacity. This is very different from the question to know whether or not Her Majesty is responsible for acts committed by her agents and constituting a breach of contract.

The law of the *United States* is also relied on; although in that country the maxim that "the king can do no wrong," is not applicable, yet the principle of law which declares the irresponsiblity of the State is also recognized there. See *Story* on Agency (1).

In the next place, as to the liability of public agents for torts or wrongs done in the course of their agency, it is plain that the government itself is not responsible for the misfeasance or wrongs, or negligences, or omissions of duty of the subordinate officers or agents employed in the public service; for it does not undertake to guarantee to any person the fidelity of any of the officers or agents whom it employs, since that would involve it in all its operations in endless embarrassments and difficulties and losses, which would be subversive of the public interest, and indeed laches are never imputable to the government. Our next inquiry therefore is, whether the heads of its departments or other superior functionaries are in a different predicament. And here the doctrine is now firmly established (subject to the qualification hereafter stated) that public officers and agents are not responsible for the misfeasances or positive wrongs, or for the misfeasances or negligences, or omissions of duty, of the sub-agents, or servants, or other persons properly employed by and under them in the discharge of their official duties. Thus, for example, it is now well settled, although it was formerly a matter of learned controversy, that the Postmaster General is not liable for any default, or negligence, or misfeasance, of any of the deputies or clerks employed under him in his office. This exemption is founded upon the general ground that he is a public officer, and that the whole establishment of the Post Office being for public purposes, and the officers therein being appointed

(1) P. 411, s. 319.

under public authority, it would be against public policy to make the head of the department personally responsible for the acts of all his subordinate officers, seeing it would be impracticable for him to supervise all their acts; and discouragement would thus be held out against such official employment in the public service.

It is true that the doctrine is there enunciated in such terms as would at first sight make us believe that the law in the American republic is upon this point more absolute than it is in *Great Britain*. In *England*, at all events, this doctrine is limited, as stated by *Chitty*, and also by the existence of the petition of right. But on reading attentively this passage of *Story*, it will be seen that this doctrine is only applicable to agents in the public service for acts committed in their official capacity, as forming part of the political government of the country. That it is an attribute of the State, as a political power, to be irresponsible, is a political truth not only in *Great Britain* and in the *United States*, but is common to all countries. But is this principle also true in civil matters? On this point this passage of *Story* has no bearing, for I find, on the contrary, that in the *United States* the responsibility of the State is expressly admitted in matters of contracts. They have there what is known as a special tribunal, viz.: the Court of Claims, whose jurisdiction, which has often been exercised, embraces claims for damages resulting from breach of contracts (1). The Court of Claims shall have jurisdiction to hear and determine the following matters:

First—All claims founded upon any law of Congress, or upon any regulation of any executive department, or upon any contract express or implied, with the Government of the *United States*, and all claims which may be referred to it by either House of Congress.

By the terms of this section jurisdiction is given in matters of contract express or implied. It is evident, as stated in 21 vol., *Albany* Law Journal (2), that the right

(1) Rev. Stats. U. S., sec. 1059, p. 195. (2) P. 397.

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exists only when the claim is founded upon a contract made with a person duly authorized, or on an implied contract when such a contract can be implied from the acts of a duly authorized person. And it is equally clear, that this section does not make the Government of the *United States* responsible for the wrongful acts nor even for contracts either expressed or implied made by parties, however exalted their position may be, if not duly authorized. But this section does not relieve the Government from being liable for damages resulting in consequence of a breach of contract. And the intrepretation which has been put upon it by the Court of Claims, as may be ascertained by referring to the long list of cases reported in the reports of the Court of Claims, and which are given under the word "damages," all prove that this liability has been admitted and acted upon.

It is manifest therefore that the responsibility of the State for a breach of contract is as well recognized and acted upon by the law and jurisprudence of the *United States* as it has been by the decisions in *England*. Now the respondent in this case relies on that responsibility, and does not put forward any pretension that could extend that doctrine. In order to see whether it is applicable to the present case, we must now examine whether the damages claimed arose in consequence of a breach of contract.

The respondent has alleged and proved that when he presented himself as a passenger on the railway in question he obtained from the duly authorized person to that effect, in consideration of a sum of money, equal to the tariff rate fixed by the Government, a passenger's ticket from *Charlottetown* to *Souris*. Now, was there not a contract, by this fact alone, entered into between Her Majesty and the suppliant? Has not Her Majesty obliged herself to carry this respondent on said railway

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on the ordinary conditions fixed by law on a contract for the carriage of passengers ?

What is a contract at common law ?

A contract is an agreement upon sufficient consideration to do or not to do a particular thing (1). A contract in legal contemplation is an agreement between two parties for the doing or the not doing of some particular thing (2).

In the note at the foot of the page I find also the following definition :

"A contract is an agreement in which a party undertakes to do or not to do a particular thing" (3).

In *Campbell's* law of negligence I find the following definition :

The English law makes no attempt to classify obligations arising out of contracts, but contemplates all contracts as moulded on a single type, namely, a promise grounded on a consideration. Where obligation is contracted by deed, consideration is presumed. But in other cases, the question whether or not a contract is enforceable by law generally resolves itself into the question whether or not the promise to be enforced is grounded upon a good legal consideration.

In the present case, these two essential elements for the existence of a contract of conveyance are to be found, on the part of *McLeod*, a good and valid consideration, given in exchange for the service demanded, by paying the railway fare according to the tariff,—on the part of the Government, the handing over of a passenger ticket as evidence of the promise to convey the respondent from *Charlottetown* to *Souris*. I should not have deemed necessary to refer at length to these elementary principles, had not the learned counsel for Her Majesty, on his argument, strongly contended that the right of action for damages resulting from an accident is founded in such a case on a tort and not on a contract. Although, according to the defini-

(1) 2 Bl. Com. 448. (2) Parsons on Contracts, Vol. 1, p. 7.
(3) Marshall, C. J., 4 Wheat. 198.

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tions above cited, there can be no doubt as to the nature of the obligation which results from the purchasing of a passengers' ticket for a journey over a railway, it may not be amiss to refer to the decisions in cases in *England*, in order to ascertain what they decide as to the character of such a transaction.

In *Mytton* v. *The Midland Ry. Co.* (1), the plaintiff, who had purchased a passengers' ticket from the *South Wales Ry. Co.* from *Newport* to *Birmingham* and lost his portmanteau while travelling on the *Midland Ry. Co.*, and with which latter company the *South Wales Ry. Co.* had connections, sued the *Midland Ry. Co.* for the value of the articles contained in his portmanteau. It was there decided that the purchase of the ticket created a contract, and that the contract was only with the company that had sold the ticket and received the price, and not with the *Midland Ry. Co.*, which was in accordance with certain arrangements, to receive only a proportionate part of the money. Baron *Martin* thus states his opinion on this point:

> Upon these facts the only question is, whether there was any contract between the plaintiff and the *Midland Ry. Co.*, or whether the contract was not an entire contract with the *South Wales Ry. Co.* to convey the plaintiff the whole distance from *Newport* to *Birmingham*. We are of opinion that there was but one contract with the *South Wales Ry. Co.*, and not with the *Midland Ry. Co.* There was one sum paid and one ticket given for the entire journey, and there was no evidence whatever of any privity of the *Midland Ry. Co.* to that contract, except that by arrangement with the *South Wales Ry. Co.*, they conveyed on their line passengers booked from *Newport* to *Birmingham*.

Cockburn, C.J., in the case of *Tatton* v. *Great Western Ry. Co.* (2), says:

> The question therefore is, whether the present is an action of contract, or on the case. Now whatever may be the distinction between an obligation arising out of a contract and a duty imposed by the common law on persons entering into a contract, it is impossible to

(1) 4 H. & N. 615. (2) 2 El. & El. 844.

refer to cases to which our attention has been called, without seeing that they establish that a duty was imposed upon the defendants in the present case by the custom of the realm, so soon as they entered into the contract with the plaintiff, and independently of the terms of the contract itself. The plaintiff might, had he thought fit, have brought his action on the contract, but he was also entitled to sue the defendants for the breach of the common law duty.

Crompton, J., in the same case, appears to have expressed a different opinion, by stating that an action against a common carrier is in substance an action of tort, and he relies on the decision given in the case of *Pozzi* v. *Shipton* (1), and to which he refers as follows:

But ever since *Pozzi* v. *Shipton* it has been settled law that an action against a common carrier, as such, is substantially an action of tort on the case, founded on his common law duty to carry safely, independently of the particular contract which he makes.

Now, this opinion is not, as a matter of fact, opposed to that of *Cockburn*, C.J., who says that when there is a contract, the action can either be brought on the contract, or in tort on the case. In the case of *Pozzi* v. *Shipton*, the court did not hold, that whether there was a contract or not, the action was necessarily one of tort. What was there decided was, that even had there been no contract, the common carrier, according to the custom of the realm, *i.e.*, the common law, was responsible for his negligence. I find in this latter case nothing opposed to the opinion expressed by *Cockburn*, C. J., as may be seen by the following extract from *Patteson*, J's. judgment (2), when speaking of the declaration:

It does not state that the goods were delivered to the defendants at their special instance and request, nor contain any other delegation necessarily applicable to an express contract only, or even pointing to an express contract only; and it is sufficient for the present purpose, if the language in which it is couched is consistent with its being founded on the general custom as to carriers.

(1) 8 A & E 963. (2) P. 975.

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In the case of *Alton et al* v. *The Midland Ry. Co.* (1) it was also decided that the purchasing of a ticket created a contract between the company and the passenger. *Erle*, C. J., says:

> On the face of the declaration it appears that the relation between the defendants and *Baxter* arose out of a contract, for it alleges that *Baxter* was received by the defendants as a passenger to be carried by them upon their railway for hire and reward.

Shearman and *Redfield*, in their work on the law of negligence, after remarking that the obligations on the part of the carrier of passengers do not solely depend on a contract, but are in great measure founded on the provisions to be found in the common law as well as in the statutes passed for the protection of human life, conclude that these obligations are in the nature of a contract. At No. 261 (2) they say:

> Nevertheless the legal obligations of a carrier being called into activity by the action of each person separately who offers himself as a passenger, are in the nature of a contract, and no one can complain of their breach except the person with whom, or for whose benefit, the contract was made, or can rarely be other than the passenger himself.

There can be no doubt, that according to these English authorities it is well settled in *England* that the purchase of a passenger ticket constitutes a contract between the buyer and seller. On this contract, although the parties are silent thereon, the law engrafts an obligation to convey the passenger with sufficient care, skill and foresight to ensure his safety. Mr. *Campbell*, in his work on the law of negligence (1), after having treated of the responsibility of a carrier in the case of a latent defect in a tyre, which could not be attributed to any fault of the manufacturer, and which could not have been discovered before the accident, and after having cited the opinion of the judges in the case of *Redhead* v. *The Midland Ry. Co.*,

(1) 19 C. B. N. S. 213. (2) P. 353.

exonerating in such a case the company of all responsibility, continues as follows:

And the judges were unanimously of opinion that there is no contract either of general warrantry or insurance (such as that in the contract of a common carrier of goods), or of limited warranty (as to the vehicle being sufficient) entered into by the carrier of passengers, and the contract of such a carrier and the obligations undertaken by him are to take due care (including in him the use of skill and foresight) to carry a passenger safely.

In No. 41, after comparing the responsibility of a company to that of an individual who undertakes to erect a building for a public exhibition, as in the case of *Francis* v. *Cockerell* (1), the author adds the following observations:

This last case and the case of *Redhead* between them very clearly define the degree and kind of negligence which is sufficient to infer liability in the contract to carry passengers by fast conveyance. And it comes to this, that the carrier is bound to use the most exact diligence, and is answerable for any negligence however slight, and not only for his own personal default, but for the default of all employed by him, or from whom he has purchased work done or skill employed upon the thing. He is also bound to use such precautions for the preventions of accidents as a reasonable person having the management of the line would adopt for such purpose. *Daniel* v. *Metropolitan Ry. Co.* (2).

We find also the same doctrine propounded in the case of *Pym* v. *The Great Northern Ry. Co.* (3), where the accident was caused by a defective rail.

Now, does not the obligation contained in the contract, although implied, to carry passengers safely, form part of the contract as well as if it was expressly stated? And when an accident happens proving want of care or diligence, is there not a breach of the obligation to carry safely? True, it is negligence which causes the accident and which gives rise to the action for damages, but the origin of the action is nevertheless

(1) 5 Q. B. 184.

(2) L. R. 3 C. P. 216, 591 (a).

(3) 2 F. & F. 619.

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founded upon the contract, for a breach of one of its essential conditions, as in ordinary actions brought for breach of contract.

I admit that there exists an action independently of any contract, but it would be illogical to say that it is not founded on the contract when such a contract is proved.

If in the public interest the common law imposes on the carrying of passengers without any contract the obligation to carry safely, does it not follow as a necessary consequence that a breach of this duty through negligence entitles the party injured to claim damages? And in such a case if it is not a breach of contract, there is a breach of duty, for which the same remedy exists, as is shown by the following authorities. In *Bretherton* v. *Wood* (1), *Dallas*, C.J., in delivering the judgment of the Court of Error says:

> This action is on the case against a common carrier upon whom a duty is imposed by the custom of the realm, in other words by the common law, to carry and convey their goods or passengers safely and securely, so that by their negligence or default must no injury or damage happen. A breach of this duty is a breach of the law, and for this breach an action lies founded on the common law, which action wants not the aid of a contract to support it.

The same doctrine is laid down in the following cases: *Marshall* v. *The York & Newcastle Ry. Co.* (2); *Pozzi* v *Shipton* (3); *Peppin* v. *Shepherd* (4); and other cases cited at p. 296 of the volume of the Law Journal above cited.

Brown, on the Law of Railways (5), says:

> As carriers of passengers the company are bound, in the absence of any special contract, to exercise a due care and diligence, but they are not liable for accidents in the absence of negligence.
>
> They are liable for an accident arising from a defect in the carriages which can be detected by an ordinary reasonably proper and

(1) 3 Bro. & B. 54.
(2) 21 L. J. (C. P.) 34.
(3) 8 Ad. & E. 963.
(4) 11 Price 400.
(5) P. 303.

careful examination, but not for a latent defect which a careful and thorough examination would not disclose.

The liability for injury to a passenger from negligence does not depend upon express contract.

Addison on Torts (1) :

The action for negligence proceeds upon the idea of an obligation on the part of the defendant towards the plaintiff to use care, and a breach of that obligation to the plaintiff's injury.

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These authorities and numerous others in the same sense clearly demonstrate that in order to create the liability there need be no express contract. In the interest of the public the liability exists in favor of persons, who, although they have not purchased any ticket, are lawfully on the train of a railway company. But we must not conclude that in all cases negligence is the sole foundation for the right of action. No; it is negligence as violation of contract or duty.

Brown (*idem*) (2), after referring again to the well settled rule that a company engaged in carrying or conveying goods or passengers is bound to exercise due care and diligence, adds: "But they are not liable in the absence of negligence." What is meant by this restriction? Is it anything else than declaring that a company shall not be liable when an accident happens through no fault of the company? In other words, is it not just admitting the exception in favor of accidents caused by *vis major* and latent defects, as would be the case in ordinary contracts between individuals? This exception from liability is just as expressly recognized by the English law as it is by all civil codes.

Neither must we conclude that because this doctrine has been well established, an action for damages cannot originally be founded upon a contract, but can only be supported on the fact that the company has been negligent. The first part of the passage I have read

(1) P. 21. (2) P. 303.

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from the above text-writer is equally applicable to the latter part, and the only true conclusion to come to is the one which was arrived at in the case of *Tattan* v. *The Great Western Railway* (1), to wit, that an action for damages may, according to the circumstances of the case, either be brought on the contract or based entirely on the negligence of the company. In order to avoid all liability in this case, the learned counsel for Her Majesty contend that the breach of contract or breach of duty is nothing more than a simple tort or wrongful act, and thus claim the right of invoking the maxim "The king can do no wrong." But I cannot adopt that view. The authorities have expressly made a clear distinction between the two cases. For example, *Addison* on Torts (2), "Distinction between contracts and torts :"

> When the foundation of the action is a contract, and no right to sue exists independently of the contract, the action, though in form *ex delicto*, is in substance an action *ex contractu*, and the plaintiff must recover more than £20, or obtain a certificate rule or order in order to entitle himself to costs in the Superior Courts. On the other hand, when the foundation of the action is a wrongful act, as, for instance, a tort to the right of property and not a breach of contract, the action is in fact founded on tort. Where goods are delivered to a common carrier to be carried, and are lost on the road, the action against the common carrier is founded on contract; for, where an action is brought against a common carrier for breach of the common law duty to carry safely, the action is founded on a contract, and is not an action *ex delicto* for negligence, and therefore if the plaintiff does not recover more than £10 he is not entitled to costs.

In the present case the duty being imposed on Her Majesty by a contract, it is a breach of that contract that has taken place by the negligence which was the cause of the accident for which the respondent claims damages. The action must therefore be considered as being one *ex contractu* and not *ex delicto*. If Her Majesty is not to be held liable in such a case, when will

(1) 2 El. & El. p. 884. (2) P. 726.

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any responsibility be cast upon Her Majesty? If we adopt the contention of the learned counsel for the appellant, the Crown can never be held liable. For, after all, a breach of contract must always be the result of negligence, or omission to do something voluntarily or maliciously. If malice is relied on, I admit that in such a case Her Majesty cannot be made liable, but if she is not responsible for negligence or omission to do something under a contract then the right to petition is a mere delusion. In the case of *Thomas* v. *Queen* the contrary doctrine is certainly laid down. For on what was founded the suppliant's claim? Although he alleged that he had fulfilled all the conditions which he had undertaken to fulfil, the amount to which he claimed he was entitled to had neither been determined upon or paid. Evidently what he complained of was the negligence to do that which the Crown had contracted to do, and in that case it was not found to be derogatory to the dignity of the crown, nor was any principle of law supposed to be violated by granting the suppliant's prayer. This decision, which has not been in any way impugned by any other decision, settles, in my opinion, this question as to the responsibility of the Crown for negligence in matters of contract. And it also decides that it is by petition of right that the subject can obtain compensation in such cases, and therefore disposes, in my opinion, of all the questions raised on the present appeal in favor of respondent, for it, at the same time negatives the extraordinary proposition advanced by the learned counsel for the appellant, that Her Majesty is not answerable in the present case by petition of right, because the control and management of the government railways are by statute under the direction of the Minister of Railways and Canals. In virtue of 42 *Vic.* c. 7 this minister is the head of a Department of State as much as the Secretary of War is in

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England; and within the scope of his authority he acts not for himself but for the government of Her Majesty. It was not personally with Her Majesty that *Thomas* had contracted in respect of his invention, but with the Secretary of the War Department. This is the manner in which this ground of demurrer was disposed of in that case :

> Indeed the framers of the Act (Petition of Right Act, 23 and 24 *Vic.* c. 34) appeared to have considered its chief title to consist in the applicability of its improved procedure to petitions on contracts between subjects and the various public departments of the government so vastly on the increase in recent years, both in numbers and importance, whilst petitions of right in respect of specific lands or chattels for the public will be exceedingly rare.

Having considered the question of the responsibility of Her Majesty in matters of contract, and also in connection with the duty imposed by law on the carrier of passengers, it now remains for me to examine whether Her Majesty is not also liable in virtue of the statute laws passed in reference to the Government railways of *Canada*. I will at once state that I readily admit that the Government of the Dominion of *Canada*, when exercising its legislative authority over railways belonging either to private companies or to the Dominion, is free from all responsibility. But this irresponsibility ceases the moment the Government undertakes to work a railway as an ordinary company would. In such a case the Government ceases to exercise its political authority and undertakes an ordinary civil transaction, and in such transaction is not above, but under and subject to the ordinary rules of the common law. This would have been the legal and logical position to hold the Government to be in, when it undertook to do the business of a common carrier of passengers, without any statutory declaration to that effect, as was held by the Supreme Court of *Belgium*, when the government of that country began to work their railways. But our

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Government, in order to remove all doubt on this subject, has thought proper to define and limit its responsibility in the working of its railways.

That the Government should be considered as a common carrier of passengers does not seem to me to admit of a doubt according to the following definitions. *Shearman* and *Redfield* (1) :

> Any person or corporation making it a regular business to carry persons for hire or advantage of any kind is a common carrier between the places to and from which he is accustomed to transport persons. The owner of a stage, a railroad car, a ship or ferry boat, is, if he carries on such a business by means of such vehicles, a common carrier of persons.

This is certainly what the Government does when working its railways.

Now, then, what responsibility attaches under our statutes and the regulations passed by order in council for the working of said railways. It has been admitted that the *Prince Edward Island* Railway upon which the accident happened, causing damage to the respondent, is one of the railways which is under the control and management of the Minister of Railways and Canals. By 41 *Vic.*, ch. 3, sanctioned on the 16th April, 1878, the railway acts are made applicable to this railway. Since then there has been a consolidation of the railway acts, and the Consolidated Railway Act 42 *Vic.* c. 9 was passed and sanctioned on the 15th May, 1879.

The provisions of the first portion of this act, from the 5th section to the 34 section inclusive, are declared to be applicable to the Intercolonial Railway, also the property of the Government, in so far as they are not contrary to the provisions contained in the special acts relating to this railway.

The Act 41 *Vic.* c. 3, being repealed by the new consolidated act, it was declared by sec. 102 that the provi-

(1) P. 303.

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sions of the consolidated act were substituted for those of the act repealed.

Section 101 is even more precise, for it says that the whole act, with the exception of sections 29 and 34, are applicable to the *Prince Edward Island* railway. Sec. 29 having reference to certain statistics, and section 34 relating to certain reports to be made to the minister. Among the provisions of this Act which are applicable to the Intercolonial as well as to the *Prince Edward Island* railway are to be found those in sec. 25 regulating the working of railways.

I will only cite those sections which declare that the working of these railways by the government, shall be a business of common carrier, and also those which have any bearing upon the responsibility of government in such case.

Sec. 25, sub. s. 2, is as follows:

The trains shall be started and run at regular hours to be fixed by public notice, and shall furnish sufficient accommodation for the transportation of all such passengers and goods as are within a reasonable time previous thereto offered for transportation.

3. Such passengers and goods shall be taken, transported and discharged at, from and to such places on due payment of the toll, freight or fare legally authorized therefor.

4. The party aggrieved by any neglect or refusal on the premises, shall have an action against the company, from which action the company shall not be relieved, by any notice, conditions or declarations, of the damages from any negligence or omissions of the company or of its servants.

13. Any person injured whilst on the platform of car, or on any baggage, wood, or freight car, in violation of the printed regulations posted up at the time in a conspicuous place inside of the passenger cars then in the train, shall have no claim for the injury, provided room inside of such passenger cars sufficient for the proper accommodation of the passengers was furnished at the time.

These sub-sections 4 and 13 clearly demonstrate that it was not the intention of the Government to work these railways on a different basis than that of railways of private companies. Evidently they have sub-

jected themselves to all the obligations and to the responsibility attached to private companies, by declaring these sections applicable to both government and private railways, and in order to make this plainer, if we replace the word "company" that is to be found in these sections by the word "Government," and which should be done in virtue of sections 2, 4, 101 and 102, there can be no question as to the result. Thus, for example, sub-sec. 4 should read as follows:

"Any person aggrieved by any neglect or refusal in the premises, shall have an action against the *Government* from which action the *Government* shall not be relieved, &c., &c."

It is evident also that by sec. 13 the Government is made responsible for injury to the person, for by claiming exemption from all responsibility for damage or injury caused to a person standing on the platform, it was in fact admitting the general principle of responsibility. This provision is also to be found in the orders in council regulating the working of the Government railways.

To my mind, it is sufficient to read these sections to convince one on this question of responsibility. If necessary to add to this, I will refer to sec. 27, also applicable to the *Prince Edward Island* Railway, which regulates and limits the right of action; it reads as follows:

All suits for indemnity for any damage or injury sustained by reason of the railway shall be instituted within six months after the time of such supposed damage sustained.

This section, as well as the preceding sections cited, whenever they are applicable either to the Intercolonial Railway or the *Prince Edward Island* Railway, in virtue of secs. 2, 4, 101 and 102 should be read as if the words "Government of *Canada*," were there specially inserted.

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As is seen, not only is the responsibility of the Government duly recognized, but the right of action, which is the natural sequence of such responsibility, is also provided for Then, again, notwithstanding that I consider it sufficiently established by the above sections, I might refer to the statute passed in 1881 by the parliament of *Canada*, entitled "an Act to consolidate and amend the law relating to Government railways." This act contains in a great measure a re-enactment of the clauses of the General Railway Act of 1879. The provisions relating to passengers journeying on said railways are identical in both acts, as can be readily ascertained by comparing secs. 1, 2, 3, 4 and 13 of the act of 1879 with secs. 71, 72, 73, 74 and 81 of the latter act. Although the act of 1881 came into force only after the accident in question in this cause, it may be looked at to discover what was the legislative interpretation of the act of 1879, as to government responsibility. In the act of 1879, as the sections which dealt with the question of responsibility only mentioned companies, it was necessary to refer to secs. 2, 4, 101 and 102 to find out whether they also could be applicable to the Government. In sec. 4 and other sections having reference to the Government, the language used is made clearer by stating that the "department" shall be liable in all cases mentioned, and, as I have already said, they are the same as those mentioned in the act of 1879. In sec. 123, which repeals the act of 1879, it is enacted that such portions of the new act as do not essentially differ from the provisions contained in the old act, can be referred to. This section has so much bearing upon this view of the case that I will cite it at length.

And provided also that anything heretofore done in pursuance of or contravention of any provision in any act heretofore in force and applying to government railways, which is repealed without material additions in this act, may be alleged or referred to as having been

done in pursuance of or in contravention of the act in which such provision was made or of this act; and every such provision shall be construed, not as a new enactment, but as having and as having had the same effect, and from the same time as under such act, and every reference in any former act or document, to any such act, or to any provisions in any such act, shall hereafter be construed as a reference to this act or to the c rresponding provisions in this act.

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In virtue of this section, the provisions contained in sections 74 and 81, which are in substance the same as those of sections 4 and 13 of the act of 1879, can be referred to as applicable to the present case, and in any case can be relied on to establish the applicability of the principle of responsibility when working railways.

For these reasons I have come to the conclusion that the maxim "the king can do no wrong" is literally true in a limited sense, *i.e.*, when the political authority of the sovereign is in question; that whenever the sovereign enters into a contract, either personally or by his duly authorized agent, he is subject to the laws relating to contracts; for all authors who have commented on this maxim agree that the sovereign is under and not above the laws, and is bound by them equally with the subjects; that it is true that in consequence of the immunity attached to his person, the sovereign cannot be summoned before the ordinary civil tribunals of the land to fulfil the obligations of his contracts, or to restore lands or chattels, or to pay a just debt, but, nevertheless, in all such cases the maxim must be accepted in a restricted sense, viz., subject to the constitutional right of every subject to claim from his sovereign, by petition, the payment of a just debt, the fulfilment of the obligations of a contract, or the delivery of lands or chattels, or unliquidated damages. True, this petition can only be adjudicated upon after leave has been granted and the fiat "let right be done" signed, but the right to the petition, which is founded on *ex debito justitiæ*, is in

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reality the same as the right of action of a subject against another subject; that a petition of right will lie for unliquidated damages for breach of a contract made in the name of or in the interest of the sovereign or the Government by persons duly authorized to that effect; that public departments are but agents of the crown, and when acting for the crown in matters of contract render the Crown liable, as has been decided in the case of *Thomas* v. *The Secretary of the War Department*; that in the present case a contract was entered into, by the purchase of a ticket, between the Government of *Canada* and the respondent, and to that contract the law implies the obligation to convey the passenger with ordinary care, diligence and skill for his personal safety; that under the circumstances disclosed by the evidence in this case there has been a breach of that contract which entitles the respondent to claim damages; that, moreover, as the common law, independent of any contract, imposes upon the common carrier of passengers the duty to convey safely and securely, and renders him liable for any damage caused by his negligence, there has been in the present case a breach of that duty, giving to the respondent the further and equal right to petition for the damages he has suffered; that the Government when working railways for gain and hire is subject to the same responsibility as a common carrier of goods and passengers; that the consolidated railway act of 1879 and the act of 1881, consolidating the laws relating to government railways, have expressly recognized this responsibility; that 33 *Vic.*, ch. 23 by giving to the injured person the option of addressing himself to the discretionary power of the Minister of Railways and Canals in order to obtain in the particular mode provided, redress for any damage suffered by him, has not thereby taken away his constitutional right to make his claim by way of

petition of right, and that the respondent having the option of choosing his remedy, he, in this case, is justified in relying upon his petition of right, and this appeal ought to be dismissed.

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HENRY, J.:—

In giving the judgment of the Exchequer Court in this case I laid down certain propositions as I thought affecting the positions of the different parties to this suit. I may possibly have laid down some of them a little too strongly—stronger than I intended. The legal obligation with regard to the carrying of passengers is well understood by those who have turned their attention to the subject. The obligation and the contract entered into by a railway company when issuing a ticket, is to convey the party from one point to another safely. That is part of the contract, but it goes further and includes a guarantee against negligence. It is part of the contract itself. But we are told when negligence comes in, that the contract is not to be performed, inasmuch as the *Queen* cannot be assumed to be guilty of negligence, and with regard to the negligence of her servants, the same doctrine applies. But I take it, there are two kinds of breach of contract, there may be a tortious breach as well as one that is not tortious, but the mere fact that a breaches of contract is tortious does not relieve the Crown from the breach of a contract by its servants. I take it that the principle applicable to those questions arising between companies and those they engage to carry, should be held applicable to the Crown when a contract has been entered into. How then are companies relieved from liability if an accident occurs and parties are injured? Only by showing why they were not only guilty of negligence; by showing that it was some thing over which they had no

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control; and that only. The absence of proof of negligence does not necessarily relieve a railway company. Sometimes it is assumed from the peculiarity of the accident which produced the injury. For instance, if two railway trains owned by the same company running on its own line come into collision, and thereby injure passengers, it is not necessary for a party to show where the negligence was, and which train caused the damage.

It is assumed the company being answerable for the conduct of both trains, the collision was the result of negligence. Then, it is not necessary in an action against a company to prove negligence at all: all that is necessary, is to prove circumstances under which negligence can be fairly presumed by a jury. Now, I consider that is the question which is involved when a company issues a railway ticket to a party to carry him safely. But we are told that this would negative our decision, in *The Queen* v. *Macfarlane* (1). Possibly it might, but possibly a decision the other way would negative one or two other judgments of this court. In *The Queen* v. *McLean & Roger*, which was an action brought to recover damages for violation of contract, this court, by a majority, decided that through the negligence or improper conduct of the Queen's officers, the work was not given to the contractors to perform according to their contract; and that, therefore, they were entitled to recover damages. How then can it be said that if the Queen is answerable under the circumstances in that case for the improper conduct of her officers and subordinates, she is not to be answerable in every like case? There was another case tried before my learned brother *Taschereau* in *Quebec* (2). It was an action brought to recover damages under similar circumstances. A party undertook to take all the rails imported for the

(1) 7 Can. S. C. R. 216. (2) Kenny & Queen, 2 Can. L. T. 193.

Government at *Montreal*, from ship there, and deliver them on the wharf at *Lachine*. By the negligence and improper conduct of the parties, who were acting there for the Government, a portion (about one-half) of these rails were transported by other means. The contractor brought his action in the Exchequer Court, and my learned brother decided, I think correctly, that the contract was broken; and that the contractor was entitled to damages, and judgment was given in his favor for such damages for, I think, $1,500. I cannot distinguish that case from this. If the Queen is answerable for the fulfilment of a contract, is it necessary to inquire whether it is through negligence or the wilful misconduct of the officers that a party sustained damage through a breach of it?

If the contract is broken or violated, does it make it any the less broken or violated because it was negligence that caused it? My learned brother *Fournier* has referred to the statute which provides certain exemptions from liability, which, however, do not touch this case. I take it there is in the statute making such exemptions a legislative acknowledgment of liability; but even without that we know that in *England* a foreign sovereign cannot be sued, nor a foreign minister, but there are many cases which show that if the foreign sovereign sends his ship into *England* and undertakes to take freight for payment, he becomes liable to be sued in *England*. Why? Because he puts himself in the place of a common carrier, and, therefore, although his prerogative right in one case shields him, the very moment he steps away from his prerogative position and becomes a common carrier, the law follows him and makes him answerable for all his contracts the same as all other common carriers. Apply that principle to this case and what have we? The Government, in the Queen's name, undertakes for hire to carry

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passengers, and convey them safely, for everyone must admit that failure to do so is neglect, and we are told because the servants of the Queen negligently managed her business, the party who was injured thereby cannot recover. It is not a recovery for mere negligence that is sought for in this case. If there were no contract, of course the Queen is not answerable, and the cases referred to are those where actions were brought for mere negligence without any contract. Therefore, they do not apply to this case. If this suit were against a company, it is admitted the company would have to respond for the negligence of its servants, but we are told the Queen is not answerable for the misconduct of her servants in such a case. But I take it the contract here is not unilateral, and that there is a liability to others under it on the part of the Queen. It is her duty to fulfil her contracts, is it any answer for the Queen any more than for a company to say, "My servants were guilty of negligence and other improper conduct, and therefore I am not bound to fulfil my contract?" It appears to me the reasoning is all on the side of liability. I have considered this case very fully, to some extent before I gave my judgment in the Exchequer Court, and since very fully, with a view to changing my opinion, if I could do so conscientiously, and coming to the same conclusion as my learned brothers. I have not been able to do so, but, on the contrary, consider that the verdict I gave in the first place is the right one. I think it should be held to be the law of the land, that where the Government of the country enters into contracts it should be obliged to keep them, and if it fails to do so, it should be as amenable to the law as private parties. I consider for the foregoing reasons and those appearing in my previous judgment that the appeal should be dismissed with costs.

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TASCHEREAU, J., who was not present at the argument took no part in the judgment.

GWYNNE, J.:—

The suppliant's claim in this case is stated in his petition of right to be founded upon a contract for the carriage of the suppliant for hire and reward, upon the *Prince Edward Island* Railway, alleged to have been entered into with the suppliant by Her Majesty, whereby, as is alleged, Her Majesty contracted with the suppliant and promised him, in consideration of certain hire and reward paid by him, to carry him safely and securely upon the said railway from a station called *Charlottetown* to another station called *Souris* upon the said railway, and the breach alleged is that Her Majesty, disregarding the duty which is alleged to have arisen from such her alleged contract and promise, did not carry the suppliant safely and securely upon the said railway upon his said journey, but so negligently and unskilfully conducted, managed, and maintained the said railway and the train upon which the suppliant was a passenger, in the course of his said journey, that he was greatly and permanently injured in body and health, &c., &c.

Upon behalf of the suppliant it was contended that, as the petition thus presented the suppliant's claim as founded upon a contract, no objection could be entertained founded upon the principle, which was admitted to be established by authority, that Her Majesty could not be made liable for an injury occasioned either by the negligence of the persons having in charge the maintenance of the road bed, or of the persons in charge of the engine and train running upon it.

In actions of this nature between an injured person and a railway company the gist and gravamen of the action, whether it is framed in contract or in tort, is the

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negligence and misconduct of the defendants, or of their servants, for whom they are responsible. The action, although in form it be founded upon a contract, is in substance and reality for a negligent breach of a duty arising out of the alleged contract, so that Her Majesty could not be made liable by the mere fact that the pleader has framed his complaint as upon a contract, if she would not be liable under the like circumstances, if it had been framed in tort. Her Majesty's liability can not depend upon the pleader's choice as to the form of the complaint; no authority was cited in support of such a contention, and in principle it cannot be sustained.

In the *Metropolitan Railway Co.* v. *Jackson* (1), Lord *Blackburn*, in the House of Lords, says:

> In all cases to recover damages for a personal injury against Railway Companies, the plaintiff has to prove first that there was, on the part of the defendants, a neglect of the duty cast upon them under the circumstances, and second that the damage he has sustained was the consequence of that neglect of duty.

If Her Majesty could not be made liable in tort for the negligence of the persons who caused the injury to the suppliant of which he complains, it is impossible that she should become liable from the fact that the negligence which is said to have caused the injury is alleged to be in breach of a duty arising out of a contract.

But in truth there never was any such contract between the suppliant and Her Majesty as is alleged in the petition of right. It is not pretended that there was any express contract, but it is contended that the force and effect of certain sections of the Consolidated Railway Act of 1879 is to make the Dominion Government, and Her Majesty, as the executive head of that Government, common carriers, and that upon receipt

(1) 3 App. Cases 208.

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by the agents and servants of the Government of the suppliant's railway fare, and upon his becoming a passenger upon the railway, a contract is to be implied to the effect that the Government shall and will carry the suppliant safely, and that he shall not suffer any damage or injury upon his journey upon the railway for which he had so become a passenger: and *Thomas* v. *The Queen* (1) is relied upon in support of this contention; but that case relates to contracts of a wholly different nature from that which is relied upon as existing here, namely, express contracts made with officers of the Government upon behalf of Her Majesty for the payment of reward for services rendered to the Government. I have already, in *McFarlane* v. *The Queen* (2), expressed my opinion to be that the argument upon which the existence of such a contract as is relied upon is rested is fallacious.

The facts disclose no contract whatever between the suppliant and Her Majesty.

The sections of the act of 1879, which are relied upon are section 101 and section 25, sub-sections 2, 3 and 4. The 101st section declared that all the provisions of the act of 1879, except those contained in the 29th to the 34th both inclusive, shall be held to have applied to *Prince Edward Island* from the time of the passing of 41st *Vict.* ch. 3, unless declared to be applicable only to one or more of the provinces composing the Dominion. By sec. 25, sub-sections 2, 3 and 4, it was enacted that—

2nd. Trains should be started and run at regular hours to be fixed by public notice and should furnish sufficient accommodation for the transportation of all such passengers and goods as are within a reasonable time previous thereto offered for transportation at the place of starting, and at the junctions of other railways and at usual stopping places established for receiving and discharging way passengers and goods from the train.

(1) L. R. 10 Q. B. 31. (2) 7 Can. S. C. R. 216.

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3rd. Such passengers and goods shall be taken, transported and discharged, at, from and to such places on the due payment of the toll, freight or fare legally authorized therefor.

4th. The party aggrieved by any neglect or refusal in the premises shall have an action therefor against the company, from which action the company shall not be relieved by any notice, condition or declaration, if the damage arises from any negligence or omission of the company or of its servants.

Now, as it appears to me, it is obvious that, apart from the act, no obligation to carry passengers or goods, even upon receipt of tolls, freight, or fare in consideration of such carriage, could ever be imposed upon the Government by the common law, as it could upon a trading corporation assuming the duties and responsibilities of common carriers for reward; assuming, therefore, the 25th section and its sub-sections to be by the 101st section made to apply to the working of the *Prince Edward Island* Railway by the Government and not by a company, although it seems to me to be difficult so to read the 4th sub-section, still the obligation imposed in that case upon the Government by the 3rd sub-section would be a duty imposed by the act of Parliament and not one arising from any contract, the neglect or refusal to discharge which would be what is made by the 4th sub-section actionable; so that whatever may have been intended by applying the 25th section and the sub-sections, assuming them to apply to the working of this railway under the control and management of the Government, no proceeding by petition of right against Her Majesty can be authorized by the 3rd sub-section of section 25, for what is there made actionable is the tort or wrong consisting in the neglect or refusal to discharge a statutory duty imposed upon the Government and not the breach of any contract; moreover, with this act of 1879 must be read the provisions of 33 *Vic.* c. 23, which enacted among other things, that

if any person should have any claim against the Government of *Canada* for alleged direct or consequent damages arising out of any death or any injury to person or property on any railway, canal, or public work under the control and management of the Government of *Canada*, such person might give notice in writing of such claim to the Secretary of State for *Canada*, stating the particulars thereof and how the same has arisen, which notice the Secretary of State should refer to the head of the department with respect to which the claim has so arisen, who should then have power to tender satisfaction, and, if it be not accepted, to refer the claim to one or more of the official arbitrators appointed under the act respecting the public works of *Canada*, and the said official arbitrators should then have power to hear and award upon such claim, and that all the provisions of the act respecting the public works of *Canada* with respect to cases referred to arbitration and to the powers of the arbitrators, and proceedings by or before them, should apply to such claim, to the head of the department concerned and to the said official arbitrators respectively: Provided always, that nothing in the said act 33 *Vic.* c. 23 should be construed as making it imperative on the Government to entertain any claim under said act, but that the head of the department concerned should refer to arbitration such claims only as he might be instructed so to refer by the Governor in Council.

The Act 44 *Vict.*, ch. 25, entitled "An Act to amend and consolidate the laws relating to Government Railways," was also relied upon by the learned counsel for the suppliant. This act was passed after the happening of the accident at which the suppliant sustained the injuries complained of; assuming it, however, to have application to the present case, its provisions do not in my judgment support the suppliant's contention.

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The 3rd sub-sec. of the 27th section of this act makes provision for the case of any person having any supposed claim arising out of any death or any injury to person or property on any such railway, similar to the provision, above extracted, which had in like case been made by 33rd *Vict.*, ch. 23. Sections 65 to 84 inclusive make provision for the working of the Government Railways. Section 72 makes provision for the Government Railways identical with the provision by the 2nd sub-section of section 25 of the Consolidated Railway Act of 1879, and section 73 is identical with sub-sec. 3 of section 25 of the act of 1879. Section 74 enacts that:

> The department shall not be relieved from liability by any notice, condition or declaration in case of any damage arising from any negligence, omission or default of any officer, employee or servant of the department; nor shall any officer, employee or servant be relieved from liability by any notice, condition or declaration if the damage arise from his negligence or omission.

By sec. 78 it is enacted that: every locomotive engine shall be furnished with a bell of at least 30 lbs. weight and with a steam whistle; and by section 79, that: the bell shall be rung and the whistle sounded at the distance of at least 80 rods from every place where the railway crosses any highway, and be kept ringing or be sounded at short intervals until the engine has crossed such highway; and the department shall be liable for all damages sustained by any person by reason of any neglect thereof, and one half of such damages shall be chargeable to and deducted from any salary due to the engineer having charge of such engine and neglecting to sound the whistle or ring the bell as aforesaid, or shall be collected from such engineer. By sec. 81 it is enacted that any person injured while on the platform of a car, or on any baggage, wood or freight car, in violation of the printed regulations posted up at the time in a conspicuous place inside of the passenger cars then in the train, shall have no claim for the injury, provided

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room inside of such passenger cars sufficient for the proper accommodation of the possengers was furnished at the time. Section 64 was relied upon as enacting that,

Neither the department nor any officer, employee or servant thereof (except where the killing or injuring is negligent or wilful) shall be liable for any damage which may be done by any train or engine to cattle, horses or other animals on the railway.

1. Where they, being at large contrary to the provisions of section 60, are killed or injured by any engine, &c., &c.

2. Where they gain access to the railway from property other than that of the owner, or in which the owner has a right of pasturage.

3. When they gain access to the railway through a gate of a farm or private crossing, the fastenings of which are in good order, unless such gate is left open by an employee of the Department.

4. When they gain access to the railway through or over a fence constructed in accordance with sec. 55.

6. Where they being at large contrary to the provisions of sec. 60, gain access to the railway from the highway at the point of intersection.

Secs. 108 and 109 enact, the former that all claims for indemnity or injury sustained by reason of the railway shall be made within six months next after the time of such supposed damage sustained, or, if there be continuance of damage, then within six months next after the doing or committing of such damage ceases, and not afterwards; and sec. 109, that no action shall be brought against any officer, employee or servant of the department for anything done by virtue of his office, service or employment unless within three months after the act committed, and upon one month's previous notice thereof in writing; and the action shall be tried in the county or judicial district where the cause of action arose.

Sec. 101 enacts, that the Minister, or any person acting for him in investigating and making enquiry into any accident upon the railway, or relating to the management of the railway, may examine witnesses under oath,

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and for that purpose shall have full power to administer such oath. By sec. 85 it is enacted, that the Governor may, by Order in Council to be issued and published (in the *Canada Gazette*), impose and authorize the collection of tolls and dues upon any railway under the control or management of the Minister, and from time to time in like manner may alter and change such dues or tolls, and may declare the exemptions therefrom, and that all such dues should be payable in advance, if so demanded by the collector thereof; and by sec. 86, that all such tolls and dues might be recovered with costs in any court having civil jurisdiction to the amount, by the collector or person appointed to receive the same, in his own name or in the name of Her Majesty, and by any form of proceeding by which debts to the Crown may be recovered; and by sec. 83 it was enacted, that for the due use and proper maintenance of Government railways, and to advance the public good, the Governor might, by Order in Council, enact from time to time such regulations as he might deem necessary for, among other things, the management of all or any such railways, or for the ascertaining and collection of the tolls, dues and revenues thereon, or to be observed by the conductors, engine drivers and other officers and servants of the department; and by sec. 89, that he might by such orders and regulations impose such fines, not exceeding in any case four hundred dollars, for any contravention or infraction of any such orders or regulations, as he should deem necessary for insuring the observance of the same, and the payment of the tolls and dues to be imposed as aforesaid, &c.; and that such orders and regulations should be read as part of the act. Now, from this act it is, I think, sufficiently clear that all superintendents, engineers, conductors, engine drivers and all other officers and servants of the department, are severally and respectively servants of

the public, having certain statutory duties imposed upon each of them; for any injury caused to any person by their negligent and improper conduct in the discharge of which duties they are, each of them severally, responsible to the injured person, and this not in virtue of any contract, but as tortfeasors by reason of their negligent and improper conduct in the discharge of the duties imposed upon them by the statute having been the direct cause of injury to another. It is also, I think, obvious that all tolls, dues or fares, payable by all persons travelling upon or using the railway, are payable and recoverable solely under the authority of the statute which makes them to be recoverable, when not paid in advance to the person authorized to collect them, either by the collector in his own name, or in the name of Her Majesty as a statutory debt due to the Crown. The payment and collection of them rests upon the provisions and authority of the statute alone, and not upon any contract made with Her Majesty or with any person. There is no foundation whatever for the contention that Her Majesty is by the statute constituted a common carrier of goods and passengers by railway, and so exposed to all the liabilities by the common law attached to such carriers, or that the use of the railway for the carriage of passengers and freight is in virtue of a contract entered into by Her Majesty as such carrier; that is a position in which Her Majesty could never be placed, unless at least by the express terms of an Act of Parliament to which she herself should be an assenting party. But it is said that several of the above sections recognize and refer to a liability "of the department," and that, there being no mode indicated by the statute for suing the department *eo nomine*, it must be liable in this mode of proceeding by petition of right against Her Majesty.

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To this contention there are, as it appears to me, two answers.

By the interpretation clause of the statute it is declared that the word "department" shall mean the Department of Railways and Canals, and the word "minister" the Minister of Railways and Canals. Now, there is no pretence that the department is made a corporation and capable of being sued as such. Indeed, its not being so is made the basis of the contention that Her Majesty may be proceeded against by petition of right. All officers and servants of the department of every degree are individually responsible for any injury directly caused to any person by their own negligent or improper conduct in the discharge of the duties imposed upon them respectively by the statute, but the remedy to give effect to the liability of the department referred to in certain clauses of the act must, I am of opinion, be that given by the 27th section of the act, and if that remedy be insufficient it is for the Parliament to interfere. The statute which imposes a liability upon the department without making it liable to be sued *eo nomine* by any process, and which at the same time provides a particular mode of ascertaining the extent of the liability in each particular case, must, I think, be construed as confining all persons having, or supposing themselves to have, any claim upon the Government of *Canada* arising out of any injury to person or property on any Government railway, to the particular mode given in the act, while as against all officers of the department for their individual misconduct aggrieved parties are left unrestricted in their right to pursue whatever remedy the law may give them.

2nd. It is sufficient to say that by virtue of the provisions of 39 *Vic.*, ch. 27, sec. 19, Her Majesty cannot be proceeded against by petition of right in respect of

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any liability of the department, unless it be such a case as would have entitled the suppliant to the remedy by petition of right under similar circumstances in *England* by the laws in force there prior to the passing of the Imperial Statute, 23 and 24 *Vic.*, ch. 34.

Now, the case of the carriage of letters by the Post Office Department under the provisions of the statutes regulating that Department, is a case precisely similar in circumstances, as it appears to me, to the carriage of passengers and freight on a Dominion Government railway under the statutes in that behalf, and, although at an early period an attempt was made to make the head of the Post Office Department responsible for losses occasioned by the negligence of subordinate officers of the Department, no attempt has ever been made to institute proceedings by petition of right against Her Majesty in such a case, nor has it ever been supposed that such a proceeding could be taken, although there is as much reason for implying a contract in that case as in the present. So neither can such proceeding be instituted in the present case in the absence of special legislation authorizing it. However much the suppliant's grievous sufferings and the great injury sustained by him call for and receive our deepest sympathy with him, I can come to no other conclusion upon the question of law involved than that the appeal must be allowed and the petition of right dismissed.

Appeal allowed with costs.

Solicitors for appellants: *O'Connor & Hogg.*

Solicitors for respondent: *Cockburn & McIntyre.*