1892
Sept. 1.

CHARLES LAVOIE.. .... SUPPLIANT;

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

Liability of the Crown as common carrier—Negligence—Remedy—Regulations for carriage of freight—Notice by publication in Canada Gazette—The Government Railways Act, 1881—*The Exchequer Court Act* (50-51 *Vic.* c. 16 s. 16)—*Construction—Duty of conductor of train carrying live stock in box cars.*

1. Apart from statute the Crown is not liable for the loss or injury to goods or animals carried by a Government railway, occasioned by the negligence of the persons in charge of the train by which such goods or animals are shipped.

By virtue of the several Acts of the Parliament of Canada relating to Government railways and other public works the Crown is in such a case liable, and, under the Act 50-51 Vic. c. 16 a petition of right will lie for the recovery of damages resulting from such loss or injury.

The Queen v. *McLeod* (8 Can. S. C. R. 1) and *The Queen* v. *McFarlane* (7 Can. S. C. R. 216) distinguished.

2. The publication in the *Canada Gazette*, in accordance with the provisions of the statute under which they are made, of regulations for the carriage of freight on a Government railway is a notice thereof to all persons having occasion to ship goods or animals by such railway.

3. Under and by virtue of R. S. C. c. 38, certain regulations were made by the Governor-in-Council whereby it was provided that all live stock carried over the Intercolonial Railway were to be loaded and discharged by the owner or his agent, and that he assumed all risk of loss or injury in the loading, unloading and transportation of the same. The regulations were, by section 44, to be read as part of the Act, and by section 50 it was enacted that the Crown should not be relieved from liability by any notice, condition or declaration where damage arose from the negligence, omission or default of any of its officers, employees or servants.

Held, that the regulations did not relieve the Crown from liability where such negligence was shown.

4. The owner of a horse shipped in a box car, the doors of which can only be fastened from the outside, and who is inside the car with the horse, has a right to expect that the conductor of the train will see that the door of the car is closed and properly fastened before the train is started.

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Statement of Facts.

PETITION OF RIGHT for damages arising from injuries sustained by a horse while being carried on a Government railway.

The facts of the case are stated in the judgment.

October 21st and 22nd, 1891.

Belcourt, for the suppliant:

The law of the province of Quebec must govern this case. (Cites C. C. L. C. Arts. 1672 to 1683.) The obligation of a carrier under the articles I have cited is not that of an insurer, but is the same as that of an inn-keeper. The Crown in this case is simply a common carrier. That is the position contemplated by *The Government Railways Act*, 1881. The liability arises under this Act, and the remedy therefor is provided by 50-51 Vic. c. 16 s. 16. (Cites *The Attorney-General of the Straits Settlement* v. *Wemyss* (1); *Farnell* v. *Bowman* (2); *Sharp*, C. C. L. C. (3).

The Crown cannot escape liability by shielding itself behind the regulations. By section 44 (R. S. C. c 38) the regulations are to be read as part of the Act, and by section 50 the Crown is expressly denied the right to so shield itself where there has been negligence on the part of its servants causing damage and loss to a subject of the Crown. This claim can be maintained either under section 15 of chap. 16, 50-51 Vic., or under section 16 thereof. There is an action arising either *ex contractu* or *ex delicto*.

It was a *primâ facie* case of negligence to allow the horse to be shipped for carriage in a box car, when

(1) 13 App. Cas. 192. (2) 12 App. Cas. 648.
(3) Pp. 51, 59.

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there were special cars used for that purpose fitted with the necessary and proper appliances for safe carriage, which the box car lacked. The conductor of the train was cognizant of the way the horse was tied in the car, and yet took no precautions to prevent an accident. It was gross negligence on his part to omit to see that the door was fastened. A cleat should have been nailed on the side of the car to prevent the door from sliding open. (Cites *The Grand Trunk Railway Company* v. *Vogel* (1); *The Canadian Pacific Railway Co.* v. *Bates* (2).)

Choquette followed on the same side, reviewing the evidence and citing Art. 1053 C. C. L. C.

Hogg, Q.C., for the respondent:

The suppliant has proved a contract for the carriage of the horse, and his claim is founded in damages for a breach thereof. The Crown is not liable in such a case, because it is not a common carrier and cannot be assimilated to one. (Cites *The Queen* v. *McLeod*) (3). *The Exchequer Court Act* (4) does not affect the law as laid down in that leading case. The law in this regard is the same to-day as it was when that case was decided.

There is no positive enactment in *The Government Railways Act*, 1881, that the Crown shall be liable in respect of damages to property carried on its railways arising from the negligence of its servants. (Cites *McCawley* v. *The Furness Railway Co* (5); *Carr* v. *The Lancashire & Yorkshire Railway Co.* (6); *McManus* v. *The Lancashire Railway Co.* (7).)

The suppliant assumed the risk cast upon him by the regulations when he put his horse into the box

(1) 11 Can. S. C. R. 612.
(2) 18 Can. S. C. R. 697.
(3) 8 Can. S. C. R. 1, 26.
(4) 50-51 Vic. c. 16.
(5) L.R. 8 Q.B. 57.
(6) 7 Ex. c. 707.
(7) 4 H. & N. 327.

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car. He must take the consequences of his own negligence, if there was any.

Angers, Q. C., follows, citing Art. 1676 C. C. L. C.

Belcourt, in reply, cites *Hettihewage Siman Appu* v. *The Queen's Advocate* (1).

April 27th, 1892.

Upon the direction of the court further evidence was this day adduced by the suppliant to show whether or not a grain car is a proper car to use for the carriage of horses, and if so whether the necessary precautions were taken to prevent accident,—whether both the door and the grain door should have been closed. A model of the car in which the suppliant's horse was carried was also produced, showing the door and grain door and their fastenings.

BURBIDGE, J. now (September 1st, 1892) delivered judgment.

The suppliant, by his petition of right, seeks to recover damages for injuries that he says a horse, shipped by him on the 3rd July, 1890, at St. Thomas, on the Intercolonial Railway, for Bic, on the same line, sustained in consequence of the negligence of the persons in charge of the train. The first question to be determined is as to whether in such a case the petition will lie, and that depends upon considerations, which, in respect of injuries to the person received under like circumstances, have been the subject of some debate and difference of opinion. It is conceded, of course, that apart from statute the Crown is not in such a case liable. The question depends, and the difference of opinion arises, upon the construction to be put upon the Acts of the Parliament of Canada re-

(1) 9 App. Cas. 571.

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lating to railways and other public works, and the inferences to be drawn therefrom and from the regulations made thereunder (1).

In *The Queen* v. *McLeod* the majority of the court (2), following *The Queen* v. *McFarlane* (3), held that the Crown, in respect of Government railways, is not a common carrier, and that a petition of right would not lie against it at the suit of a passenger who was injured in an accident on a Government railway occasioned by the negligence of the Crown's servants in maintaining and operating such railway. The minority in that case (4) were of opinion that the Government, when working railways for gain and hire, is subject to the same responsibility as a common carrier of goods and passengers; and that there is a contract with the passenger to carry him with ordinary care and skill, for the breach of which a petition will lie. In *Martin* v. *The Queen* (5), referring to the views that I had expressed in the *City of Quebec* v. *The Queen* (6) and in *Brady* v. *The Queen* (7), I held that the Crown is liable in damages for an injury to the person received on a public work, resulting from the negligence of which its officer or servant is guilty while acting within the scope of his duties or employment; and that under the statutes then in force the

(1) See *The British North America Act*, 1867, s. 145; 31 Vic. c. 12; 31 Vic. c. 13; 31 Vic. c. 68 ss. 2 and 4; 33 Vic. c. 23; 34 Vic. c. 43 s. 5; 37 Vic. c. 15; 39 Vic. c. 16; 41 Vic. c. 8; 42 Vic. c. 7; 42 Vic. c. 8; 42 Vic. c. 9 ss. 2 and 4; 44 Vic. c. 25; R.S.C. cc. 38 and 40; and 50-51 Vic. c. 16. See also Regulations for the conveyance of freight on the Intercolonial Railway, &c., Orders-in-Council 1874, p. 325, Acts of 1875 pp. LXXXVII-CI; Orders-in-Council, 1889, p. 976; and the general rules and regulations respecting the working of Government Railways, Orders-in-Council, 1874, p. 345; Acts of 1889, pp. CVI-CXI; Orders-in-Council, 1889, p. 945.

(2) Ritchie, C.J. and Strong and Gwynne, JJ. in 8 Can. S. C. R. 1.

(3) 7 Can. S. C. R. 216.

(4) Fournier and Henry, JJ. in 8 Can. S. C. R. 1.

(5) 2 Ex. C. R. 328.

(6) 2 Ex. C. R. 252.

(7) 2 Ex. C. R. 273.

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injured person had a remedy by petition of right. In that case the appeal was allowed (1) on grounds of defence not raised in the Court below; but Mr. Justice Patterson, in an opinion that adds much to the discussion, deals fully with the more important question raised but not decided by the appeal. He holds that since the passing of *The Government Railways Act*, 1881, (2) a person injured on the Intercolonial Railway through the negligence of the Crown's servants might have sustained his petition. He thinks that Act made some important changes, or, at all events, removed some questions that previously existed with respect to the liability of the Crown for the acts or defaults of the persons employed in the actual working of the road. It is to be observed, however, that the Act is a consolidation of parts of a number of Acts that were then applicable to the Intercolonial Railway, and which were exhaustively discussed in *The Queen* v. *McLeod* (3), in which it will be seen Mr. Justice Fournier expresses the opinion that the Act of 1881 was to be regarded as a legislative interpretation of *The Consolidated Railways Act*, 1879, on the subject of the Crown's responsibility in the working of Government railways (4). There appears, therefore, to be some difficulty in maintaining that the Crown's liability for the torts in question was created by the Act of 1881. It is, however, it seems to me, unnecessary to go so far as that, or even to appear to be in conflict with the law as affirmed in *The Queen* v. *McLeod* (5). That case and *McFarlane's Case* (6) established beyond controversy that as the law then stood no petition would lie for a wrong committed by an officer of the Crown. The subject was not, however, in such a

(1) 20 Can. S. C. R. 240.
(2) 44 Vic. c. 25.
(3) 31 Vic. c. 12 and the amendments thereof; 31 Vic. c. 13, and 42 Vic. c. 9.
(4) 8 Can. S. C. R. 58.
(5) 8 Can. S. C. R. 1.
(6) 7 Can. S. C. R. 216.

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case without a remedy. As Mr. Lash pointed out in his argument for the Crown in *The Queen* v. *McFarlane* (1), there might in certain cases have been a reference to the Official Arbitrators with, as we shall see, an appeal to the Exchequer Court and then, as in other cases, to the Supreme Court.

In the 14th section of the Intercolonial Railway Act (2) we find a reference to this tribunal, to whom, in certain cases of dispute, were to be referred for award claims for lands taken or damaged by the construction of the railway, and for whose appointment provision had been made by *The Public Works Act* (3). The latter Act also provided for a reference to such Arbitrators of any claims for property taken, for alleged direct or consequential damage to property arising from the construction or connected with the execution of any public works, or for the breach of any contract for the construction of a public work, and for the manner in which such claims should be heard and determined (4). By 33 Victoria, chapter 23, intituled, *An Act to extend the powers of the Official Arbitrators to certain cases therein mentioned*, such Arbitrators were given jurisdiction, among other things, to hear and award upon any claim arising out of any death or injury to the person or property on any railway, canal or public work, under the control and management of the Government of Canada, that the Head of the Department concerned should, under the instructions of the Governor-in-Council and within three months from the passing of the Act, or within six months after the occurrence of the accident, or the doing or not doing of the act upon which the claim was founded, refer to arbitration. By the 3rd section of 41 Victoria, chapter 8, the Minister of Public Works

(1) 7 Can. S. C. R. 216.
(2) 31 Vic. c. 13.
(3) 31 Vic. c. 12.
(4) 31 Vic. c. 12 ss. 31 and 48.

was given power to refer to the Official Arbitrators, for report only, claims against the Government of Canada such as those to which reference has been made; but the jurisdiction of the Arbitrators to hear and determine any case referred to them under either of the Acts, 31 Vic. c. 12 or 33 Vic. c. 23, was in no way limited or qualified.

In 1879 the Exchequer Court which had been established in 1875 (1) was given appellate jurisdiction in all cases of arbitration arising under 31 Vic. c. 12 and the Acts in amendment thereof, when the claim exceeded five hundred dollars (2). It was, also, provided that in any such case the submission might be made a rule of court, and that the court should have power to set aside the award and remit the matters referred, or any of them, to the Arbitrators for reconsideration and redetermination; or that it might, upon the evidence taken before the Arbitrators, or upon the same or any further evidence that it might order to be adduced, make such final order and determination of the matters referred as it should deem just and right between the parties, and that such final order and determination should be enforced by the court, and the same should be taken and dealt with as a final award under the authority of *The Public Works Act* (3.) It was further provided that the court should have and might exercise all the powers contained in the Supreme and the Exchequer Court Acts which, according to the nature of the case, were applicable, and that an appeal should lie from the Exchequer Court to the Supreme Court from all judgments, orders, rules and decisions in like cases, and upon the same terms and conditions as was provided in the Supreme and Exchequer Courts Acts.

The subject of the Arbitrators' jurisdiction was also

(1) 38 Vic. c. 11 s. 1. (2) 42 Vic. c. 8 s. 2.
(3) 42 Vic. c. 8 ss. 4 & 6.

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dealt with in sections 27 to 48 of *The Government Railways Act*, 1881, where the claims that might be referred, and the procedure to be adopted on a reference and on an appeal to the Exchequer Court and thence to the Supreme Court were defined in language substantially the same as that used in *The Public Works Act* and amendments. There is one difference, which, though in my view it does not affect the argument, should not be overlooked. The power vested in the Minister of referring to the Official Arbitrators any claim arising out of any death or any injury to person or property on any Government Railway (1) is the power of reference for report only, defined in 41 Vic. c. 8 s. 3, and not the power of reference for hearing and award given in certain cases by 33 Vic. c. 23. The latter Act, however, remained in full force and applicable to Government railways as public works, and notwithstanding the omission it would appear that the Minister of Railways and Canals might, in accordance with its provisions, have referred such a claim to the Arbitrators for hearing and determination. That view is supported by reference to the corresponding provisions of *The Revised Statutes*, chapter 40, *An Act respecting the Official Arbitrators*, in which it will be found that, while in the 11th section the power of reference for report only, which was first given by 41 Vic. c. 8, was retained, the Minister might under the 6th section have referred to the Arbitrators for their decision, amongst other claims, any claim arising out of the death, or any injury to the person or property, on any public work, as was provided by 33 Vic. c. 23.

The Official Arbitrators' Act was repealed by *The Exchequer Court Act* (2), which, in reference to matters formerly within the jurisdiction of such Arbitrators, contains the following provisions:—

(1) 44 Vic. c. 25 s. 27 (3). (2) 50-51 Vic c. 16.

16. The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters :

(*a.*) Every claim against the Crown for property taken for any public purpose ;

(*b.*) Every claim against the Crown for damage to property, injuriously affected by the construction of any public work ;

(*c.*) Every claim against the Crown arising out of any death or injury to the person or to property on any public work, resulting from the negligence of any officer or servant of the Crown, while acting within the scope of his duties or employment. * * *

58. * * * and whenever in any Act of the Parliament of Canada, or in any Order of the Governor-in-Council, or in any document, it is provided or declared that any matter may be referred to the Official Arbitrators acting under the "*Act respecting the Official Arbitrators,*" or that any powers shall be vested in, or duty shall be performed by, such Arbitrators, such matters shall be referred to the Exchequer Court, and such powers shall be vested in, and such duties performed, by it ; and whenever the expression " Official Arbitrators " or " Official Arbitrator " occurs in any such Act, order or document, it shall be construed as meaning the Exchequer Court.

59. All matters pending before such Official Arbitrators when this Act comes into force shall be transferred to the Exchequer Court, and may therein be continued to a final decision in like manner as if the same had in the first instance been referred to the court under the provisions of this Act.

I have not cited section 15 of the Act in which the original jurisdiction of the court in all cases in which the claim arises out of a contract entered into by or on behalf of the Crown is continued, though it will of course be noticed that the Official Arbitrators exercised a like jurisdiction (1), and that the rules given in sections 33 and 34 of the Act for adjudicating upon claims arising out of contracts are taken from the Official Arbitrators Act (2).

Now, as I said in *The City of Quebec* v. *The Queen* (3), I do not doubt that the words used in clause (*c*) of the 16th section of *The Exchequer Court Act* (4) recognize

(1) R. S. C. c. 40 s. 6.
(2) R. S. C. c. 40 s. 17
(3) 2 Ex. C. R. 269.
(4) 50-51 Vic. c. 16.

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the Crown's liability for certain torts committed by its officers and servants for which a remedy had theretofore been provided by a proceeding on a reference to the Official Arbitrators, and for the redress of which it was, for the first time, by that Act provided that proceedings might be instituted in this court.

The object of the Act was to make better provision for the trial of claims against the Crown, not to create new liabilities, for the origin of which we must look to the Acts under which the Government railways and the public works were constructed, maintained or operated. By the 145th section of *The British North America Act*, 1867, after reciting that inasmuch as the provinces of Canada, Nova Scotia and New Brunswick had joined in a declaration that the construction of the Intercolonial Railway was essential to the consolidation of the Union of British North America, and to the assent thereto of Nova Scotia and New Brunswick, and had, consequently, agreed that provision should be made for its immediate construction by the Government of Canada, it was provided that in order to give effect to that agreement it should be the duty of the Government and Parliament of Canada to provide for the commencement within six months after the Union of a railway connecting the river St. Lawrence with the City of Halifax, in Nova Scotia, and for the construction thereof without intermission, and the completion thereof with all practical speed. In performance of the duty so imposed, the Parliament of Canada in 1867 passed *An Act respecting the Construction of the Intercolonial Railway* (1) by which it was, among other things, provided that the railway should be a public work of Canada (2), that its construction and management, until completed, should be under the charge of four commissioners to be appointed by

(1) 31 Vic. c. 13. (2) Sec. 2.

the Governor (1), and that whenever the railway or any portion thereof should be completed, the Governor-in-Council might make suitable arrangements for the working of the same, for a period not longer than the end of the session of Parliament next after the making of the same. The commissioners were succeeded in such management and charge by the Minister of Public Works (2), and the latter by the Minister of Railways and Canals (3). By the 12th section of the Intercolonial Railway Act (4) it was provided that the commissioners should have all such powers (not inconsistent with the Act) as might be conferred upon railway companies by any Act which might be passed for the consolidation and regulation of the general clauses relating to railways. In the same session, but following year, an Act with this object was passed (5). By the 1st and 4th sections thereof it was provided that the Act should apply to the Intercolonial Railway and to all railways in course of construction by the Government of Canada and the property of Canada, so far as the same was not inconsistent with any special Act respecting any such railway. Among the provisions for the working of the railway thus made applicable were the following: That the train 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 were within a reasonable time previous thereto offered for transportation at the place of starting, and at the junction of other railways and at usual stopping places established for receiving and discharging way-passengers and goods from the trains; that such passengers and goods should be taken, transported and discharged

(1) Sec. 3.
(2) 37 Vic. c. 15.
(3) 42 Vic. c. 7.
(4) 31 Vic. c. 13 s. 12.
(5) *The Railway Act*, 1868, (31 Vic. c. 68.)

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at, from and to such places on the due payment of the toll, freight or fare legally authorized therefor; that the party aggrieved by any neglect or refusal in the premises should have an action therefor against the company; that the bell should be rung or the whistle sounded at the distance of at least eighty rods from any place where the railway crossed any highway, and that in case of neglect the company should be liable for all damage sustained by any person by reason thereof; and that a passenger injured while standing 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, should have no claim for injury, provided room inside of such passenger cars sufficient for the accommodation of the passengers was furnished at the time (1). It was also provided that every company conveying passengers should provide and cause to be used in and upon its trains such known apparatus and arrangements as would best afford good and sufficient means of immediate communication between the conductors and engine-drivers, of applying the brakes, of disconnecting the locomotive and carriages and of securing the seats or chairs in the carriages (2). By the 11th section of the Act it was provided that until fences and cattle-guards were duly made, as therein prescribed, the company should be liable for all damages done by its trains or engines to cattle, horses or other animals on the railway; and by the 21st that all suits for any damage or injury sustained by reason of the railway should be instituted within six months next after the time the damage was sustained. At this time there was no proceeding by which the right of a

(1) 31 Vic. c. 68, s. 20. (2) (6) (10) and (13). (2) 31 Vic. c. 68 s. 59.

person sustaining injury to his person or property on a Government railway could be inquired into and maintained, but that remedy, as we have seen, was supplied in 1870 by 33 Victoria, chapter 23, which gave jurisdiction in such a case to the Official Arbitrators. It is all the more important, therefore, to notice that when in 1871, subsection 4 of section 20 of *The Railway Act*, 1868, giving a cause of action to any one aggrieved by neglect of the company to carry passengers or goods according of the terms of that Act, was amended by adding that the company should not be relieved from any such action by any notice, condition or declaration if the damage arose from any negligence or omission of the company or of its servants, it was expressly enacted that the provisions of the amending Act should apply to those railways to which *The Railway Act*, 1868, was by its terms declared to be applicable (1).

Turning then to the condition and rules of carriage prescribed for the conveyance of freight on the Intercolonial Railway, it will be observed that they consist, in the main, of limitations of a general liability assumed to exist. The authority for the rules made in 1871 is to be found in *The Public Works Act* (2), which was applicable to the railway as a public work (3). By such rules it was, among other things, provided that the railway would not be accountable for any articles unless the same were signed for as received by a duly authorized agent (4); that it would not be responsible for the loss of, or damage to, money, jewellery, gold and silver plate, writings, marbles, china, and a number of other articles (5); nor for certain delays, nor that goods should be forwarded by a particular train (6); nor for

(1) 34 Vic. c. 43.
(2) 31 Vic. c. 12.
(3) Orders-in-Council 1874, p. 325.
(4) Sec. 1.
(5) Sec. 2.
(6) Sec. 3.

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packages insufficiently or improperly marked, nor for leakage arising from bad casks (1); nor for goods put into empties (2); nor for any risk of storage, loss or damage, however, caused in the loading or unloading of goods conveyed at a special or mileage rate (3); nor for dangerous articles (4); nor for articles landed at a way-station or platform to which they were directed, and where there were no buildings and no resident agent (5); nor for fresh fish, fruit, meat, poultry, oysters and other perishable articles (6).

With reference to goods intended to be forwarded by some other conveyance to their final destination, it was provided that the responsibility of the Intercolonial Railway should cease as soon as such goods were delivered to such other conveyance (7); and with respect to live stock that they should be loaded and discharged by the owner or his agent and should be under his sole care, and in all respects at his risk then and during transit (8). By the 14th section of the rules it was provided that no claim whatever for loss or damage would be allowed unless notice in writing was given to the station agent before the goods were removed.

In 1873, by virtue of *The Public Works Act*, general rules and regulations were made respecting the Intercolonial Railway and other Government railways in the provinces of Nova Scotia and New Brunswick. These rules dealt principally with the duties of station-masters, conductors, engine-drivers and other officers and employees of the railway. But in clauses 45 to 63 will be found a number of regulations respecting passengers; by the 60th of which it was provided that the

(1) Sec. 4.
(2) Sec. 5.
(3) Sec. 6.
(4) Sec. 8.
(5) Sec. 9.
(6) Sec. 10.
(7) Sec. 11.
(8) Sec. 25.

railway would not be responsible for any baggage or articles not properly given in charge to an officer authorized to receive the same, or in excess of the value of fifty dollars.

The provisions of *The Railway Act*, 1868, and the amendments of 1871, to which I have referred, were reproduced in *The Consolidated Railways Act*, 1879 (1), and with some modifications and additions were re-enacted in the *The Government Railways Act*, 1881 (2), and in the *Revised Statutes* (3). To one difference only shall I refer.

By the fourth clause of section 25 of the Act of 1879, following 31 Vic. c. 68 s. 20 (4) as amended by 34 Vic. c. 43 s. 5, it was provided, as we have seen, that the party aggrieved by any neglect or refusal in the premises thereinbefore mentioned should have an action against the company from which it should not be relieved by any notice, condition or declaration if the damage arose from any negligence or omission of the company or its servants. By the 74th, the corresponding section of *The Government Railways Act*, 1881, it was enacted that the Department of Railways, that is the Crown, should 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 should the officer in the like case be relieved. In the Act of 1881 the declaration that the person aggrieved should have an action was omitted, but the enactment against limiting any liability arising from a servant's negligence was made general, and not restricted as in the Act of 1879 to the premises therein defined.

The conditions and rules for the conveyance of freight

(1) 42 Vic. c. 9 s. 25 (2), (3), (4), (10), (13); s. 72, s. 16 (2) and s. 27.

(2) 44 Vic. c. 25 ss. 65, 72, 73, 74, 79, 81, 56, 108.

(3) C. 38, ss. 17, 24, 31, 32, 36, 38, 50.

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on the Intercolonial Railway, and the general regulations respecting the Government railways, to which I have referred, have been twice re-enacted since 1871 and 1873, respectively (1); but it will not be necessary to follow in detail the reproduction of the clauses to which allusion has been made.

Now, it seems to me that a fair consideration of the Acts to which I have referred, and the regulations respecting the Government railways, must lead to the conclusion that for the negligence of its servants employed upon the Government railways and acting within the scope of their duty, Parliament intended and the Crown undertook that in proper cases it should answer. As respects other public works the matter is in a somewhat different position. They were outside the range of the railway Acts and the case is not, perhaps, as clear,—the Act 33 Vic. c. 23 affording the chief support for the view that the liability as well as the remedy existed.

In *The City of Quebec* v. *The Queen* (2) several cases decided by the Judicial Committee of the Privy Council were cited in which, on statutes not clearer, to say the least, than those involved in this case, Colonial Governments were held liable for wrongs committed by their servants. *The Queen* v. *Williams* (3); *Hettihewage Siman Appu* v. *The Queen's Advocate* (4); *Farnell* v. *Bowman* (5); *The Attorney-General of the Straits Settlement* v. *Wemyss* (6).

Then in reference to the remedy it appears clear that a petition of right will now lie. The limitation contained in the 21st section of *The Petition of Right Act* (7) has been repealed, and it has been provided

(1) Acts of 1875 p. lxxxvii.; Acts of 1877, p. cii., and Orders-in-Council, 1889, pp. 945-976.
(2) 2 Ex. C. R. 263, 266.
(3) 9 App. Cas. 418.
(4) 9 App. Cas. 571.
(5) 12 App. Cas. 643.
(6) 13 App. Cas. 192.
(7) R. S. C. c. 136.

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that any claim against the Crown may be prosecuted by petition of right or may be referred to the court by the head of the department in connection with the administration of which the claim arises (1).

It will be convenient before referring to the facts of the case to notice more particularly the limitation of the Crown's liability for loss or injury to live stock carried on the Intercolonial Railway, contained in the 27th clause of the regulations made by His Excellency the Governor-General-in-Council on the 26th of October, 1889, in virtue of the powers vested in him by *The Government Railways Act*, 1881 (2).

By this clause, which is one of the general conditions of carriage applicable to live stock and other freight, it is provided that all live stock conveyed over the railway are to be loaded and discharged by the owner, or his agent, and he undertakes all risk of loss, injury, damage and other contingencies in loading, unloading, transportation, conveyance and otherwise, no matter how caused. The condition is expressed in the same terms as were used in the 24th paragraph of the conditions and rules of carriage prescribed in respect of the Intercolonial Railway by an order-in-council of the 12th December, 1 74 (3), and is similar to the 25th clause of the conditions made in respect of the same railway on 18th of April, 1871, (4), to which reference has already been made.

To the statement of defence setting up this condition the suppliant replies in substance that the regulations were not in force at the time of the accident, and that he had no notice thereof. Of the regulation being in force there can, of course, be no question, and with respect to notice it appears to me that publication in

(1) 50-51 Vic. c. 16. ss. 23 & 57.
(2) R. S. C. c. 38. Supplement 1889, p. 981.
(3) Acts of 1875, p. XCI.
(4) Orders-in-Council, 1874, p. 328.

7, 1889, p. 22 ; Orders-in-Council, to the *Canada Gazette*, December

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the *Canada Gazette*, in accordance with the terms of the statute under which it was made (1), constitutes notice to every one having occasion to forward live stock by the Intercolonial Railway.

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The more important question is as to whether or not this condition of carriage relieves the Crown from liability for the negligence of the persons who are in charge of trains by which live stock are conveyed. No doubt its terms are sufficiently large to relieve from such liability. But the regulations are to be taken and read as part of the Act (2), and by the 50th section thereof it is provided that Her Majesty shall not be relieved from liability by any notice, condition or declaration in the event of any damage arising from the negligence, omission or default of any officer, employee or servant of the Minister.

The suppliant's horse was put in an empty box car, forming part of a freight-train, by the suppliant and two or three other persons who were acting for him, and was tied to an iron rod or upright near the door on the south side of the truck. As to whether or not the door was at the time closed or open a few inches, the witnesses are not agreed. The conductor of the train testified that he closed and fastened it at St. Pierre, a station six miles west of St. Thomas, and that he examined it at the latter place and found it fastened. Lagacé, a brakesman on the train, examined this box car at St. Pierre and found both doors bolted. Brock, the engine-driver, saw the conductor close the car. Lemieux, another train hand, said that at St. Thomas the door was closed, but whether fastened or not he could not say. Lavoie, the suppliant, states that when the horse was put into the car, this door was open fifteen or eighteen inches, and Guimont, from whom he bought the horse, and who was with him in the car,

(1) R. S. C. c. 38 s. 52. (2) R. S. C. c. 38 s. 44.

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says that the door was open one and a half or two inches, while Mercier who led the horse into the car, and Guay who tied him, think that the door was closed. Whatever the fact as to that may be, it is clear from what happened that the door if closed was not properly and securely fastened, and when the train was put in motion it opened and the horse starting at the same time got his leg through the opening and was injured.

All the witnesses who speak of the matter are agreed that there was nothing in the box car to which the horse could be tied except the iron rod near the door, and Lavoie, Guimont and Mercier say that the rod was pointed out to them by the conductor. The latter and the train hands on the contrary say that the conductor offered to attach to the car a bar or cleat to which the horse might be tied, but that the owner and those acting for him declined the offer and chose to tie the horse to the iron rod. The difference is not, I think, material, for the evidence shows, and there can be no question, that with the door closed securely, as it ought to have been, there was nothing out of the way in tying the horse to this rod. It was also suggested that if the horse had been tied shorter, he would have escaped injury. But there is no evidence that he was not properly tied assuming as the person who tied him had a right to assume that the door was closed. It was not the manner of tying the horse, but the open door that occasioned the accident.

The box car in question was built for carrying grain, and was provided with two sliding doors kept in position by iron rods or uprights, to one of which, as we have seen, the horse was tied. For the suppliant it was contended that the conductor should have seen that the grain or sliding door on the south side of the car was closed. But it appears that in using box cars

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for carrying horses and other large animals, as it is customary and proper to do, these grain doors are not in practice closed, because of the danger of the horse or animal getting its legs between the two doors and injuring itself.

With reference to the incident that Lavoie and Guimont remained in the car with the horse, and that, in their view of the facts, the car door near which the horse was tied was open, it is, I think, important to keep in mind that this door was one that could not be fastened except from the outside, and that the accident happened as the train was first put in motion. Up to that time Lavoie had, I think, a right to expect that the persons in charge of the train would do their duty and see the car door properly closed and fastened. If the accident had happened later and it had appeared that the suppliant had left the horse standing near the open door, and had made no effort to close it, or to have it closed, or to remove the horse from the dangerous position in which it stood, it might be that he would be held to have been guilty of contributory negligence. On the other hand, if the door was closed and not fastened, as probably the fact was, there was nothing to direct his attention to the danger, and he was in no way responsible for the accident that happened, which, it appears to me, resulted from the conductor's failure to secure the door of the car.

With reference to the damages, it appears that the horse at the time of the accident was worth three hundred dollars, that besides some personal expenses the suppliant incurred a liability of about one hundred and twenty-five dollars in the treatment of its injuries and in its care, and that now its value is not considerable. But it also appears that the treatment was not skilful, and it does not necessarily follow that the vici-

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ousness the horse has since displayed was the result of the accident.

Before the petition was brought the Crown offered to pay the suppliant one hundred and fifty dollars, but that offer was not renewed in the statement of defence which denied all liability. Under all the circumstances of the case, I am of opinion that there should be judgment for the suppliant for two hundred and fifty dollars and costs.

Judgment accordingly.

Solicitor for suppliant: *P. A. Choquette.*

Solicitors for respondent: *O'Connor, Hogg & Balderson.*