

cases are distinguishable inasmuch as the claim in the *McFarlane* case was for a pure tort while in the *McLeod* case "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, by the handing over of a passenger ticket as evidence of the promise to convey the respondent from C. to S."

The *McLeod* case was decided in 1883, and comparing it with the *Windsor and Annapolis Railway* case, decided by the Judicial Committee of the Privy Council three years later (1886), 11 App. Cas. 607, and referred to *ante*, it will be seen that Fournier, J.'s, view that the Crown was liable for a tortious breach of contract is supported by Lord Watson's observations in the case last mentioned. Furthermore, Fournier, J., expressly controverted the argument put forward by the majority of the judges in the *McFarlane* and *McLeod* cases to the effect that it would be contrary to the interests of administration and public convenience to hold the Crown liable as a trader or common carrier in respect of railways and other undertakings operated by the government; and it is both interesting and important to note that Sir Barnes Peacock, in *Farnell v. Bowman* (1887), 12 App. Cas. 643, at p. 649, takes much the same view of the *ab inconvenienti* argument against the Crown's liability in these matters as Fournier, J., does. His language is so much to the point that it would almost seem that he expressly intended to impugn the conclusions of the majority of the Supreme Court of Canada in the cases mentioned. He says:—"It must be borne in mind that the local governments in the colonies, as pioneers of improvements, are frequently obliged to embark in undertakings which in other countries are left to private enterprise, such, for instance, as the construction of railways, canals, and other works for the construction of which it is necessary to employ many inferior officers and workmen. If, therefore, the maxim that 'the King can do no wrong', were applied to colonial governments . . . it would work much greater hardship than it does in England."

The Supreme Court of Georgia, in *Western & Atlantic Rd. v. Carlton* (1850), 28 Georgia, at p. 182, might be cited as arriving at the same conclusion by a parity of reasoning:—"It is insisted that the State is not a common carrier, and is not subject to the rules of law which apply to common carriers. When a State embarks in an enterprise which is usually carried on by individual persons or companies, it voluntarily waives its sovereign character and is subject to like regulation with persons engaged in the same calling."

It is convenient at this place to note that the Judicial Committee of the Privy Council has decided that the Crown, represented by a colonial government, can be chargeable with a warehouseman's obligations as a bailee.

In the case of *Brabant & Co. v. King*, [1895] A.C. 632, the question is decided unequivocally in the affirmative. The Government of Queensland had, under the provisions of the Queensland Navigation Act of 1876 (41 Vict. No. 3), accepted from the plaintiffs certain explosives and stored them in one of their magazines at Brisbane under the control of the Government's servants, charging the plaintiff storage-rent for the same. The Act provided that if such storage-rent was not paid, the goods might be sold by the Government.