

safely through the slides, either expressly or impliedly entered into by the parties, as in the case of a carrier undertaking the carriage of goods, or arising by operation of law." Gwynne, J. (p. 244) regarded the case shaped in the petition as one of pure tort. So that the *McFarlane* case, thus analyzed, hardly affords a sure foundation for the doctrine that the Crown is not a common carrier in respect of government railways in Canada.

In the *McLeod* case the suppliant had been seriously injured in an accident while being carried as a passenger on a government railway. He had paid for and obtained a first-class ticket for his transportation between certain points, and was occupying a seat in a first-class car when the train was derailed. Having alleged in his petition that he had been received as a passenger upon a promise to be carried safely for reward between such points, the suppliant charged that "Her Majesty, disregarding her duty, in that behalf, and her said promise, did not safely and securely carry the suppliant . . . but so negligently and unskilfully conducted, managed and maintained the said railway, and the train upon which the suppliant was a passenger . . . that . . . suppliant was greatly and permanently injured in body and health, etc."

It will be observed that the *McLeod* case, as shaped in the petition of right, was not an action for the breach of an ordinary contract of common carriage in respect of which the carrier would be liable without negligence being shown. Railway companies are not common carriers as regards passengers. (See *per* Lindley, L.J., in *Dickson v. Great Northern R. Co.* (1886), 18 Q.B.D. at p. 185; Macnamara's Law of Carriers (2nd ed.) p. 519.) A carrier of passengers is not, as such, liable as a common carrier of goods. (*East Indian Ry. Co. v. Kalidas Mukerjee*, [1901] A.C. 396); but when a carrier of passengers also holds himself out as a carrier of goods, he is a common carrier *qua* the goods. (*Dickson v. G. N. R. Co.*, 18 Q.B.D. 183.) That Ritchie, C.J., appreciated the distinction between the *McLeod* case and that arising under a true contract of common carriage appears at pp. 20, 23 of the report. He says:—"This is, in my opinion, unquestionably a claim sounding in tort, a claim for a negligent breach of duty. A carrier of passengers is not an insurer." If the learned Chief Justice had stopped there, the case would hardly have been an authority for the proposition or doctrine in question. But he proceeds to take up the threads of an enquiry into the reasons of the Crown's immunity from ordinary civil actions, begun by him in the *McFarlane* case,—and finally arrives at the conclusion that "the establishment of the government railways in the Dominion is . . . 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 . . . 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." The majority of the Court also thought that the case could not be distinguished in principle from the *McFarlane* case, but Fournier, J., in his able dissenting judgment (p. 40) points out that the two