

border-land of obligations mentioned by Finch, J., is shown by the following extract from Keener on Quasi-Contract, p. 18:—"Of a quasi-contractual nature, it is submitted, is the duty of a carrier, founded upon the custom of the realm to receive and to carry safely. That the liability in such cases arises not from contract, but from a duty, is clear. While it is true that the liability is ordinarily described as one in tort, it is submitted that it has been so described because of the usual classification of legal rights into contracts and torts, and that since the obligation imposed upon the carrier is to act, the obligation is really quasi-contractual in its nature, and not in the nature of a tort."

Mr. Keener's view that the obligation of the carrier sounds in contract rather than in tort is strongly supported by the opinion of Lord Mansfield in *Forward v. Pittard*, quoted *ante*, and by that of Lord Kenyon, C.J., in *Buddle v. Willson* (1795), 6 T.R. 369 (101 E.R. 600), where he says, at p. 373, that a declaration against a carrier on the custom of the realm is, in substance, *ex contractu*. In the report of this case in the Revised Reports, vol. 3, at p. 202, the syllabus reads: "The cause of action in the ordinary case of an action against a common carrier is essentially *ex contractu*." In the editorial note to *Buddle v. Willson*, (*ubi sup.*) we find the following:—"Lord Kenyon's judgment in *Buddle v. Willson*, as well as the case of *Boson v. Sandford*, on which it is founded, is impeached by Lord Ellenborough in *Govett v. Radnidge*, 3 East, 62, 69 (102 E.R. 520). But the principle is reaffirmed by Sir J. Mansfield, C.J., in *Powell v. Layton*, 2 Bos. & P. (N.R.) 365, (127 E.R. 669), and Mr. Dicey (On Parties, p. 20) after reviewing these, with other conflicting authorities, supports the view of Sir J. Mansfield." Let us first quote Mr. Dicey's exact words, and then proceed with those of Sir James Mansfield in the case last mentioned, as they are both of high authority. Mr. Dicey says (p. 20.):—"In spite of conflicting decisions, the doctrine laid down by Sir J. Mansfield, C.J., is (it is submitted) in theory correct. Actions for torts, founded on contract, though in form actions for tort, are in reality actions for breach of contract. They owe their existence to the fact that for technical reasons . . . declarations were often framed in tort where the real cause of action was the breach of a contract." In *Powell v. Layton*, Sir James Mansfield, said (pp. 369, 370):—"Let us see what is meant by the defendant's duty? How did he undertake any duty, except by his agreement to carry and deliver the goods? The duty of a servant or the duty of an officer I understand, but the duty of a carrier I do not understand, otherwise than as that duty arises out of his contract . . . The form of the action cannot alter the nature of the transaction; the form of the transaction is originally contract." See also *Baltimore and Ohio R. Co. v. Pumphrey*, 59 Md. 390; and Pollock on Torts, 10th ed., p. 558.

It would appear from this examination of the authorities establishing the criteria of the carrier's obligation, that the remedy for a breach of that obligation extends itself within the province of contract rather than within that of tort.

Turning now to a consideration of the Supreme Court cases of *The Queen v. McFarlane*, and *The Queen v. McLeod*, it is well to bear in mind that when they were decided, the Dominion Petition of Right Act, 1876, was in force.