1899
April 4.

HAROLD HARDING COLPITTS.....SUPPLIANT;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Petition of right—Government railway—Accident to the person—Liability of Crown—Negligence—50-51 Vict. c. 16 s. 16—Undue speed.

It is not negligence *per se* for the engineer or conductor of a train to exceed the rate of speed prescribed by the time-table of the railway. If the time-table were framed with reference to a reasonable limit of safety at any given point, then it would be negligence to exceed it; but, *aliter*, if it is fixed from considerations of convenience and not with reference to what is safe or prudent.

In an action against the Crown for an injury received in an accident upon a Government railway, the suppliant cannot succeed unless he establish that the injury resulted from the negligence of some officer or servant of the Crown while acting within the scope of his duties or employment upon such railway. The Crown's liability in such a case rests upon the provisions of 50-51 Vict. c. 16, s. 16 (c.)

Semble:—In actions against railway companies the obligation of the company is to carry its passengers with reasonable care for their safety; and the company is responsible only for accidents arising from negligence.

PETITION OF RIGHT for damages for bodily injuries received by the suppliant on a Government railway.

The facts of the case are stated in the reasons for judgment.

October 28th to 31st and November 1st to 4th, 1898.

The hearing of the case was begun at St. John, N.B., and ordered to be continued at Ottawa.

December 28th, 1898.

The case was now resumed and argued at Ottawa.

Skinner, Q.C., and *A. W. McRae* for the suppliant, contended that there was negligence shown on the

part of the Crown's officers and servants sufficient to bring the case within 50-51 Vic., c. 16, s. 16 (c.) They cited *Beven on Negligence* (1). The accident itself bespoke negligence. The Crown must rebut that presumption.

W. Pugsley, Q. C. and *E. H. McAlpine*, for the respondent, relied on the case of *Dubé* v. *The Queen* (2), as establishing the non-liability of the Crown in such a case. Further, they contended that in view of *Daniel* v. *Metropolitan Railway Company* (3), the burden of proof was not shifted upon the Crown by the suppliant establishing that an accident occurred. It is not a case of *res ipsa loquitur* where the Crown is defendant; that doctrine does not apply. They cite *Blyth* v. *The Company of Proprietors of the Birmingham Waterworks* (4); 5 *Eng. & Am. Ency. of Law* (5).

THE JUDGE OF THE EXCHEQUER COURT now (April 4th, 1899) delivered judgment.

The suppliant, by his petition of right, seeks to recover damages for injuries sustained in an accident that happened on the 26th of January, 1897, to an express train on the Intercolonial Railway, at a place called Palmer's Pond, near Dorchester, in the Province of New Brunswick. The suppliant was a passenger by this train, which, on a down grade and on a curve at the place mentioned, left the rails, and going down the embankment was completely wrecked.

The action is brought under clause (c) of the 16th section of *The Exchequer Court Act*, by which it is enacted that the Exchequer Court shall have exclusive original jurisdiction to hear and determine every claim against the Crown arising out of any death or injury to the

(1) 2nd ed. pp. 140-142.
(2) 3 Ex. C. R. 147.
(3) L. R. 3 C. P 216 & 5 H. L. 45.
(4) 11 Exch. 781.
(5) P. 627.

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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. During the argument some stress was laid upon the fact that the suppliant had a ticket, and, though it was not strongly pressed, it was suggested that the contract thereby created carried the Crown's liability further than the words of the statute. To that suggestion or contention I am not able to accede. It is not to be forgotten that apart from the statute a petition of right in cases such as this cannot be sustained. *McLeod's* case (1) settles that beyond all controversy. And so if one recovers against the Crown in such cases he must recover under and by virtue of the statute. Even railway companies are not liable to the passengers they carry for injuries the latter may receive unless there is negligence of some kind. They do not insure the safety of their passengers. Their obligation is to use reasonable care to carry their passengers safely; and they undertake to do all that can be reasonably done or expected of them to prevent accidents. In actions against the Crown, however, we must look to the statute that gives the injured passenger his remedy, and we are not to go outside of it, or to give him relief unless his case falls within its terms In other words, it is upon the suppliant to show that the injury of which he complains resulted from the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment.

Different cases will of course present different questions and difficulties. It will happen in some cases that the cause of the accident may be easily ascertained; and then the question will arise as to whether what happened resulted from the negligence of the Crown's officers or servants. In another case it may be per-

(1) 8 Can. S. C. R. 1.

fectly clear that there has been some negligence on the part of some such officer or servant, and the question to determine will be whether in fact such negligence caused, or may have caused, the accident. In other cases it may not be possible to ascertain the cause of the accident, and no case of negligence may be made out.

The present case falls, it seems to me, within the third class, and not within either the first or second classes mentioned. After the most careful consideration of the facts proved I am unable to form any conclusion as to the cause of the accident. The theory set up for the respondent to account for it rests upon the finding of a piece of a broken equalizing bar bearing evidence of having come in contact with one of the ties or sleepers This bar it is probable came from a truck under the dining carriage, or under the drawing room carriage; but from which there is nothing to show, and whether, through some latent defect it broke before and so may have been the cause of the derailment of the train, or whether it was broken in the accident, it is impossible to determine. It appears that the carriages of which the train was composed were well and strongly built; and that care had been taken to have them fit and safe for the traffic for which they were being used. It is suggested by counsel for the Crown that this equalizing bar broke through some latent defect therein, and the end of the broken piece falling down and catching upon one of the ties caused the derailment of the train. Another view is put forward by Mr. Gregory, a civil engineer of great experience who was examined for the Crown, and who formed the opinion, to state it very briefly, that the effect of the breaking of this equalizing bar was to so derange the automatic brakes with which the the train was provided, that they were instantly

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applied to all the carriages except the drawing room carriage, the momentum of which would cause the other carriages to be thrown from the rails. I am not able myself to adopt either of these theories. It is possible of course that in some way the breaking of this equalizing bar, if it broke before and not by reason of the accident, was in some way the cause thereof; but there is, it seems to me, no such certainty of this, or probability even, to justify me in finding that the accident was in fact occasioned thereby.

We come then to consider the evidence to see if any negligence on the part of any officer or servant of the Crown has been proved, and which may have been the cause of the accident.

The carriages of which the train was composed belonged to the Canadian Pacific Railway Company; but the train, as a whole, was, while it was running between Halifax and Saint John, under the control of the officers of the Intercolonial Railway. In that part of the postal and express carriage used by the Dominion Express Company eighty boxes of copper coin, weighing eleven thousand two hundred pounds, were being carried. For the suppliant it is contended that this quantity of coin ought not to have been carried in this part of the carriage, that the weight was too great, and that the boxes were not properly loaded; that in short this load of coin was a menace to the safety of the train and, taken in conjunction with the rate of speed at which the train was moving when it reached the curve at Palmer's Pond, was the cause of its derailment. These boxes of coin were loaded upon the carriage at Halifax by the servants of the express company and not by the servants of the Crown. There was, however, at Halifax an inspector, an officer in the employ of the Crown, whose duty it was to examine this and the other carriages

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of the train before the train left the station, to see that everything about them was in proper and safe condition. If these boxes of coin, either from their weight, or from the manner in which they were loaded, would in any way endanger the safety of the train it was his duty not to allow the carriage in which they were laden to go out of the station. This carriage was examined by the inspector before, but not after the coin was put on board thereof. He did not know how it was loaded, or the weight of it. He was busy elsewhere and this escaped him. So that if the weight were greater than was prudent, or the manner of loading improper, and this caused or contributed to the accident that happened, the Crown would, I think, be liable. The evidence, however, is all one way. Witnesses of experience say that the load was a proper one, that its weight was not unusual or excessive; and there is no one who testifies to the contrary. And with respect to the manner of loading, those who put them upon the carriage say that the boxes were evenly and properly distributed in the compartment of the carriage used by the express company.

It is also contended for the suppliant that the permanent way at the place where the accident occurred was not in a proper and safe condition; but here again it seems to me that the testimony of those competent to express an opinion is, substantially, all the other way. It is not possible, I think, on the evidence submitted to find that there was any negligence on the part of any officer or servant in respect of the construction or maintenance of the permanent way.

It is further contended for the suppliant that having regard to the train, the load it was carrying, and the grades and curve where the accident occurred, the rate of speed, for which the conductor and driver, both officers in the employ of the Crown, were responsible,

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was unusual and excessive; that the conductor and driver were in this respect careless and negligent, and the accident having happened by reason thereof, the Crown is liable.

The train in question left Sackville at twelve o'clock noon, eleven minutes late. From Sackville to Dorchester the distance is eleven miles, and the time prescribed for this train by the time-table then in force, twenty-two minutes. Palmer's Pond, the place of the accident, is about nine miles from Sackville. If credit is given to the testimony of Alfred Wood, the fireman on the train that day—and I see no reason for not giving credit to it—the accident happened at twenty minutes after twelve o'clock. So that the train had only made nine miles in the twenty minutes next before the accident. Between Sackville and Dorchester, and about six miles from Sackville is a station called "Evans" at which this train did not stop. But it was none the less the duty of the agent there to report the time at which the train passed. From Sackville to Evans there is an up grade, and the time prescribed for this train for the six miles between the two stations was thirteen minutes. From near Evans to Dorchester there was a down grade, the time prescribed for the five miles between the two points being nine minutes. In mentioning the time given in the time-table for this train I am not to be understood as holding the view that it would, as a matter of course, be negligence on the part of the conductor or driver to exceed the prescribed rate of speed. That would depend largely upon other considerations. If the rate of speed were fixed with reference to the reasonable limit of safety at any given point, then of course the conductor and driver ought not to exceed it, and it would be negligence on their part to do so. But if the time allowed is fixed or prescribed from considerations of convenience or other-

wise, andnot with reference to what is safe or prudent, the conductor and driver would not be guilty of negligence simply because they made up time, any more than they could excuse themselves by saying that they did not exceed the prescribed rate of speed at some point where for any reason they ought in prudence to have gone more slowly. It must, I think, be in each case a question of whether under all the circumstances the rate of speed is in excess of that which is safe and prudent.

On the day of the accident the agent at Evans station reported this train as passing there at sixteen minutes after twelve. It is, however, satisfactorily established that his clock was on that day two minutes fast; and if he reported the passing of the train, as he says he did, by reference to his clock, it would appear that the train passed Evans at fourteen minutes after twelve, and was six minutes in going the three miles from there to the place of the accident. That would give a rate of speed well within what witnesses of experience say is safe and prudent, as well as within that prescribed for that portion of the road. Under ordinary circumstances a record such as this kept by a careful and attentive person would afford about as satisfactory evidence as one could expect to have, and might reasonably be taken to be conclusive on that point. But where, as here, that conclusion has to be reached by relying upon the memory and attention of one who in another particular has admittedly been inattentive and at fault, one hesitates to accept the evidence as conclusive. Apart from this evidence as to the time when the train left Sackville, when it passed Evans, and when it was wrecked, we have the opinions and impressions of the rate of speed at which the train was moving of a number of witnesses who were officials of the railway, or passengers, or who

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happened to see it passing. These impressions or opinions differ considerably. The weight of the evidence, however, goes to show that the rate of speed before and at the time of the accident was not unusual or excessive. In saying that I wish to disclaim any intention of throwing any discredit upon the testimony of witnesses whose impressions and opinions are to the contrary. The train, shortly before the accident, had passed what has been spoken of as a double curve—reverse curves without any tangent between them—and at that point the brakes had been applied to steady the train. But no doubt there would at such a place, notwithstanding the application of the brakes, be some oscillation or swaying of the train. To those who knew the reason therefor this would not seem unusual or greatly to be noticed; but others who did not know would receive a different impression and might reasonably attribute to the speed of the train the oscillation which to them seemed unusual and out of the ordinary. Taking the evidence as a whole, the case of negligence sought to be established against the conductor and driver is not, it seems to me, made out.

There being nothing to show how the accident happened and no negligence that may have caused it being established the case falls, as has been said, within the third class of cases mentioned. In such a case, the action, it seems to me, fails. The case is not within the statute. As has been said already, unless the suppliant is able to show that the injuries he has suffered, by an accident on a Government railway or other public work, are the result of some negligence on the part of one or more officers or servants of the Crown while acting within the scope of his or their duties or employment, the judgment of the court should, under the statute, go in favour of the Crown. I do not

think that in the present case that has been established and the judgment will be that the suppliant is not entitled to any portion of the relief sought by his petition.

Judgment accordingly.

Solicitor for suppliant: *A. W. McRae.*

Solicitor for respondent: *E. H. McAlpine.*