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*Nov. 4, 5.
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*April 4.

HER MAJESTY THE QUEEN (DEFENDANT) ..... } APPELLANT;

AND

JOSEPH ADHEMAR MARTIN (SUPPLIANT) ..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Negligence of servant—Crown—Liability of—50-51 *Vic. ch.* 16—*Prescription*—*Arts.* 2262, 2267, 2188, 2211 *C.C.*—44 *Vic. c.* 25—*R. S. C. c.* 38—50-51 *Vic. c.* 16 *s.* 18—*Retroactive operation.*

Held, reversing the judgment of the Exchequer Court, that even assuming 50-51 Vic. ch. 16 gives an action against the Crown for an injury to the person received on a public work resulting from negligence of which its officer or servant is guilty (upon which point the court expresses no opinion), such act is not retroactive in its effect and gives no right of action for injuries received prior to the passing of the act.

Held also, that even assuming that under the common law of the province of Quebec, or statutes in force at the time of the injury received, the Crown could be held liable, the injury complained of in this case having been received more than a year before the filing of the petition the right of action was prescribed under arts. 2262 and 2267 C.C.

Per Patterson J.—The Crown is made liable for damages caused by the negligence of its servants operating government railways by 44 Vic. c. 25 (R.S.C. ch. 38), but as the petition of right in this case was filed after the passing of 50-51 Vic. c. 16 (1887) the claimant became subject to the laws relating to prescription in the province of Quebec, and his action was prescribed.

APPEAL AND CROSS APPEAL from the judgment of the Exchequer Court of Canada (1).

This was a petition of right for injury to the suppliant's minor son received on the Intercolonial Railway.

*PRESENT:—Sir W. J. Ritchie C. J., and Fournier, Taschereau, Gwynne and Patterson JJ.

(1) 2 Can. Ex. C. R. 328.

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The facts and pleadings appear in the report of the case in 2 Can. Ex. C. R. p. 328 and in the judgments hereinafter given.

Robinson Q.C. and *Hogg* Q.C. for appellants.

The object and effect of subsection *c* of sec. 16, ch. 16 of 50-51 Vic. is to confer upon the Exchequer Court jurisdiction to hear and determine all cases of the classes indicated therein, in respect of which the Crown was liable before the passing of the act, and in cases where the Crown has been or may be rendered liable by legislation. It affects matters of procedure only, and not the legal rights of the Crown.

The heading of sections 15 and 16 of this act is "Jurisdiction" and in considering the proper construction to be placed on subsection *c* the heading should be looked to as not only explaining, but as affording a key to the construction of the said subsection.

The Eastern Counties v. *Marriage* (1). *Lang* v. *Kerr et al.* (2). Endlich on Interpretation of Statutes sec. 69. Wilberforce on Statute Law (3). *Wood* v. *Hurl* (4).

The question therefore is: Is the Crown liable in tort because a court is given jurisdiction to hear and determine such cases; and is the defence of the Crown that it cannot be sued in tort, no longer a defence because of this subsection *c*?

The Crown cannot be deprived of any prerogative right unless by express legislative enactment, subsec. 46 of sec. 7, Dominion Interpretation Act, and it is clear that there are no words in subsection *c* s. 16 of the Exchequer Court Act creating an express liability against the Crown in cases arising by or through the negligence of the Crown's officers or servants, and without

(1) 9 H. L. Cas. 32.
(2) 3 App. Cas. 529.
(3) P. 294-5.
(4) 28 Gr. 146.

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such express words in this subsection no extension of liability can be presumed.

See Endlich on Interpretation of Statutes (1), and Maxwell on Statutes (2).

The jurisdiction conferred on the Exchequer Court by this subsection *c* differs from any jurisdiction which the official arbitrators of the Dominion had under the statutes which governed that body. Under 33 Vic. cap. 23, 41 Vic. cap. 8, 44 Vic. cap. 25, only such claims arising out of death or injury on a public work as the head of a department was instructed by the Governor in Council to refer, could be referred to the arbitrators, and under the two latter statutes the reference was only for investigation and report, and cap. 40 Revised Statutes of Canada is the same, and the fact that the Crown referred such cases to the Official Arbitrators for adjustment and settlement, forms no argument that the Crown had prior to the passing of 50 & 51 Vic. cap. 16 admitted or created any legal liability for the class of claims mentioned in subsection *c*.

The learned counsel also cited and relied on *The Queen* v. *McLeod* (3); *The Queen* v. *MacFarlane* (4), and on the question of contributory negligence; Beach on Negligence (5); Clerk & Lindsell on Torts (6); *Radley* v. *The L. & N. W. Ry. Co.* (7); *Seymour* v. *Greenwood* (8); *Rounds* v. *Delaware Railroad Co.* (9).

Belcourt and *Taché* for respondent, cited and relied on *Farnell* v. *Bowman* (10); *Atty. Gen. of the Straits Settlement* v. *Wemyss* (11); 50 & 51 Vic. ch. 16 sec. 16; Government Railway Act R.S.C. ch. 38, sec. 50; arts

(1) At sec. 161.
(2) Pp. 112-265 of ed. of 1875.
(3) 8 Can. S.C.R. 1.
(4) 7 Can. S.C.R. 216.
(5) P. 60.
(6) 1 ed. 383-5.
(7) 1 App. Cas. 754.
(8) 7 H. & N. 355.
(9) 64 N.Y. 129.
(10) 12 App. Cas. 643.
(11) 13 App. Cas. 192.

1053, 1054 C.C.; Toullier (1); Pothier, Obligations (2); and *The Central Vermont Ry. Co.* v. *Lareau* (3).

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Ritchie C.J.

Sir W. J. RITCHIE C.J.—I express no opinion as to whether 50 & 51 Vic. cap. 16 gives a new jurisdiction to the Exchequer Court in respect of cases where no liability previously existed against the Crown. But assuming it does, how can this act have a retroactive operation, and make the crown liable for the acts of their officers or servants which happened prior to the passing of the act and for which the Crown was not liable at the time of the happening of the events complained of? Surely it can only apply if at all to acts of negligence committed after the passing of the act. The accident happened on the 18th July, 1884, the statute was not passed until the 25th June, 1887. Then again the petition of right was not filed till the 27th March, 1888. So that if the act had reference to the time when the act was committed the action was prescribed before the act was passed. For these reasons I think the appeal should be allowed. It is not necessary and would not be proper for me to discuss the merits of this case, which to my mind are by no means clear against the employees of the Intercolonial Railway.

FOURNIER J. concurred with Taschereau J.

TASCHEREAU J.—I am of opinion that this suppliant's claim must be dismissed. First, if as he contended at the argument, he had, in 1884, by the laws of the province of Quebec a right of action against the Crown for the damages he now claims, his action was prescribed, when he filed his petition, by one year under articles

(1) 2 vol. No. 284. (2) No. 121.
(3) Ramsay's App. Cas. 593.

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2262, 2267, 2188 and 2211. I do not wish, however, to be understood as conceding that he had such an action at common law.

Secondly—If he had a right of action under section 27 of the statute of 1881, the Government Railways Act, which I very much doubt (1), his action was also prescribed in 1887 by one year under the same articles. The contention that these were continuous damages is unfounded. The tort which he complains of was not a continuous act.

Thirdly—The statute of 1887, assuming, without deciding, that it now gives a petition of right against the Crown for damages such as those claimed here, arising out of any death or injury to the person happening since the passing of the said act, which may be doubtful does not revive claims against the Crown which had previously been extinguished either under the common law of the province or under section 8, ch. 40 of the Revised Statutes, or for any cause whatsoever. It may be that under this statute of 1887 no petition of right at all lies for such damages arising out of any death or personal injury antecedent to the said act, even if the claim was not previously extinguished by prescription, though a reference to the Exchequer Court upon such a claim might perhaps be made under section 58 of the act, a point, however, which it is unnecessary to decide here.

GWYNNE J.—It is unnecessary in the present case to determine whether or not the main point relied upon by the learned counsel for the appellant is well founded, namely, that the Dominion statute 50 & 51 Vic. ch. 16 gives no action against the Dominion Government for an injury to the person assuming such injury to have been caused in the manner charged in

(1) 3 Vic. ch. 27 sec. 19 ; *The Queen* v. *McLeod*, 8 Can. S.C.R. 1.

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the petition of right in this case. That act enacts that the Court of Exchequer shall have exclusive original jurisdiction to hear and determine 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; and the contention is that this provision in the act operates merely as giving to the Court of Exchequer jurisdiction to try all cases wherein by law, independently of that statute, parties had a claim for compensation to be given to them by the Crown as representing the Dominion Government for injuries received from the negligence of the servants of that government, but not as giving any new cause of action or demand against the government, and that as, independently of the above statute, it had been held by this court that the Crown as representing the Dominion Government was not responsible for injuries to the person caused by the tort, default or neglect of the persons employed on the Intercolonial Railway, that therefore the petition of right in the present case could not be maintained.

Whatever may be the operation of the statute under consideration in respect of injuries occasioned to any person subsequently to the passing of the act it is sufficient for the determination of the present case to say that the act has no operation in respect of an injury sustained three years before the passing of the act, all right of action in respect of which injury, if any had existed independently of the above statute, as is contended there had by the law of the province of Quebec in which province the injury complained of was sustained, had been prescribed by the law of that province long previously to the passing of the statute 50 & 51 Vic. ch. 16. The evidence also, although in

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the view which I have taken it is not necessary to rest my judgment upon this point, fails to satisfy my mind that the brakesman Belanger, whose alleged negligence is relied upon as having caused the injury complained of, can be properly charged with any negligence whatever as causing the injury, which seems to have been wholly caused by the wrongful conduct of the boy who suffered the injury by falling from a train of cars on the Intercolonial Railway while in the act of committing in company with several other boys a wilful trespass thereon.

The appeal must, in my opinion, be allowed and the cross-appeal dismissed.

PATTERSON J.—On the 19th July, 1884, a son of the petitioner, 13 years old, was, with other boys, amusing himself by riding on a freight car of the Intercolonial Railway as it was moving along the track at the station of Rimouski. He fell off the step of the car and was injured. It is charged that his fall and the consequent injury were caused by the improper conduct of a brakesman upon the car, and that charge has been held to be established by the evidence. That conclusion of fact has been challenged and we have had a full discussion of the evidence bearing upon it. The conclusion depends upon the weight attached to parts of the evidence in which there is not perfect agreement among the witnesses, and is a matter of inference quite as much as of direct proof. Therefore, while there may be room for the conclusion that the boy's misfortune was either an accident for which no one was to blame, or was brought on him entirely by his own doings, I cannot say that the finding of the learned judge is not warranted or that it is so clearly wrong as to make it our duty to reverse it.

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The important question upon the appeal is the liability of the Crown for the negligence or misconduct of the brakesman.

On the part of the Crown it is denied that any liability exists; and secondly, that if there is a liability, it can be enforced by petition of right.

The position is pleaded in these terms:

Her Majesty's Attorney General for a further defence says that the said petition of right does not disclose any claim which the suppliant can enforce by petition of right, nor does the said petition disclose any cause of action for which Her Majesty can be rendered liable, inasmuch as the claim and cause of action therein alleged and set out are founded upon the negligence and misconduct of the servants and employees of Her Majesty upon the said Intercolonial Railway; and it is submitted that the control and management of the said Intercolonial Railway being vested by statute in the Minister of Railways and Canals, Her Majesty cannot be made liable upon petition of right because of any negligence or misconduct in the management thereof; and that even assuming the said railway to be under the management and control of Her Majesty, no negligence can be imputed to her, and Her Majesty is not answerable by petition of right for the negligence and misconduct of her servants, and no action will lie against Her Majesty for damages in consequence of such negligence and misconduct on the part of her servants; and Her Majesty's Attorney General claims the same benefit from this objection as if he had, on behalf of Her Majesty, formally demurred to the said petition of right.

The accident happened, as I have said, on the 19th of July, 1884. The cause of action, if any, accrued then and once for all, notwithstanding that the extent of the damages may not have been fully ascertained until some time afterwards.

The petition of right bears date in December, 1887.

The question is: What right of action or claim had the plaintiff in December, 1887?

The jurisdiction of the Exchequer Court, under the act of 1887 (1), extends to

Every claim against the Crown arising out of any death or injury to the person or property on any public work, resulting from the

(1) 50 & 51 V. c. 16 s. 16 (c),

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negligence of any officer or servant of the Crown while acting within the scope of his duties or employment :

" The Crown " meaning the Crown in the right or interest of the Dominion of Canada; s. 1 (*c.*)

This is one of the heads of jurisdiction enumerated in section 16 of the act, and it is framed in language taken from the act respecting Official Arbitrations which is repealed by the act of 1887, the Exchequer Court being substituted as a tribunal in place of the arbitrators.

A petition of right presented under any of the statutes regulating that proceeding, *e.g.*, the Petition of Right Act, Canada, 1875 (1), or the Petition of Right Act, 1876 (2), or the Petition of Right Act as contained in the Revised Statutes (3), was a process by which a subject could obtain relief in respect of any claim against the Crown. In each of those statutes the word " relief " included every species of relief claimed or prayed for in a petition of right, whether a restitution of any incorporeal right (4), or a return of lands or chattels or a payment of money or damages, or otherwise.

It was declared in the act of 1875 that nothing therein contained should prejudice or limit, otherwise than therein provided, the rights, privileges or prerogatives of Her Majesty or her successors, or apply to any claim, matter or thing which under the Public Works Act of 1867 (5), or under any acts amending or extending the same, might be referred by the Minister of Public Works to arbitration, and that no court should have jurisdiction under the Petition of Right Act in any such claim, matter or thing.

The subjects thus excluded were confined to claims for property or damage to property arising from the

(1) 38 V. c. 12.
(2) 39 V. c. 27.
(3) R.S.C. c. 136.
(4) 38 V. c. 12 s. 17 R. S. C. c. 136 s. 2 ; 39 V. c. 27 s. 21.
(5) 31 Vic. c. 12.

construction of public works, or claims under contracts for the construction of public works (1).

The act of 1875 was repealed by that of 1876. The latter act declared that nothing therein contained should—(1) prejudice or limit otherwise than therein provided, the rights, privileges or prerogatives of Her Majesty or her successors; or (2), prevent any suppliant from proceeding as before the passing of the act; or (3), give to the subject any remedy (*a*) in any case in which he would not have been entitled to such remedy in England, under similar circumstances, by the laws in force there prior to the passing of the Imperial statute, 23 & 24 Vic. ch. 34; or (*b*), in any case in which either before or within two months after the presentation of the petition, the claim was, under the statutes in that behalf, referred to arbitration by the head of the proper department, who was thereby authorized with the approval of the Governor in Council to make such reference upon any petition of right.

The Revised Statute has the same restrictions as the act of 1876.

The Government Railways Act, 1881, was in force when the accident in question occurred. 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.

The general railway law of the province of Canada was adopted, with some modifications, as the general law of the Dominion by the Railway Act, 1868. The first part of that act, including, amongst others, the heads of "working of the railway" and "actions for indemnity," were declared to apply to the Intercolonial Railway, the construction of which was then contem-

(1) 31 Vic. c. 12 s. 34.

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plated, so far as applicable to that undertaking. That law was repeated, with some changes, in the Consolidated Railway Act, 1879. Under the general law a railway company was liable for damages caused by the negligence or other torts of its servants or officers operating the road. Did a similar liability attach to the Crown? That question was raised and was debated in this court in an action that arose out of an accident in 1880, upon the Prince Edward Island Railway, a Government railway to which the general act had been declared to apply, and it was decided by three judges against two that the principle of *respondeat superior* did not apply and that the Crown was not liable (1).

The Government Railways Act, 1881, 44 V. c. 25, if I correctly interpret it, placed the Crown on very much the same footing with regard to the liability in question as a railway company under the general act.

We may give a fair and liberal construction to the statute, understanding the legislature to mean what is said in plain terms or conveyed by reasonable implication, without fear of doing violence to any constitutional principle, or any doctrine touching the prerogative, or any such maxim as "the King can do no wrong."

The two recent decisions of the Judicial Committee of the Privy Council, viz.: *Farnell* v. *Bowman* (2) in 1887, and *Attorney General of the Straits Settlement* v. *Wemyss* (3), in 1888, leave no ground for hesitation or reluctance on that score.

It has been argued that an important distinction exists between a government railway and one constructed by a railway company in the fact that the former has a high political object, in view of the pub-

(1) *The Queen* v. *McLeod*, 8 Can. S.C.R. 1.

(2) 12 App. Cas. 643.

(3) 13 App. Cas. 192.

lic good, and is not a commercial enterprise undertaken with a view to profit. The distinction, so far as it is supposed to bear on the rights of persons who find one road conducted just like the other and have to deal with both in precisely the same way, is not at once apparent, but whatever force the suggestion may have had when the relation of the Crown to the undertaking, and to the public in respect of the undertaking, was to some extent a matter of argument and deduction, as it was before the passing of the Government Railways Act, it must, as I apprehend, be regarded as now beside the question.

The act is, by section 2, to apply to all railways which are vested in Her Majesty and which are under the control and management of the Minister of Railways and Canals.

I do not know that the rights of Her Majesty are affected by the act in the sense in which those words are to be understood in the Interpretation Act (1), but if they are affected then I hold that the effect of section 2 is to declare that Her Majesty is bound by the act in respect of all railways vested in her and under the control and management of the minister. But this is not the only declaration to that effect, as we shall find when we examine some of the provisions of the act.

By section 4, whenever the powers given to the minister are exercised by the chief superintendent or superintendent, or by any other person or officer, employee or servant of the department thereunto specially authorized by the minister, acting minister or his deputy, or an acting deputy, they shall be presumed to be exercised by the direction of the minister, unless the contrary be made to appear.

The words "the department" used in this section and in some other places in the act obviously signify

(1) R.S.C. c. 1, s. 7, ss. 46.

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the Crown, just as if the words "Her Majesty" had been used. In fact we find the latter term substituted in the revised statute in some sections to which I shall refer which relate to liability for damages. In some other places the word "minister" is used in place of "department."

Various powers are conferred and duties imposed on the minister *eo nomine*. In many of these the public or individuals are interested, and the effect is to create rights which must be capable of being enforced. Proceedings for that purpose must be against the Crown and not in general, if in any case, against the minister who is merely the representative of the Crown.

Let us see how this is illustrated by some specific provisions of the statute. Take the heading "Fences." By section 55 the minister is to make certain fences when required by proprietors of lands adjoining the railway, and also cattle guards, and until they are made (s. 56) the department, or as in the revised statute, Her Majesty, not the minister, is to be liable for all damages which may be done by trains or engines to cattle, &c., on the railway which have gained access thereto for want of such fences or cattle guards. This liability is declared to be subject to the provisions of sections 60, 62 and 64. By section 62, the owner of cattle which are at large contrary to the mandate of section 60,

> shall not have any action or be entitled to any compensation in respect of the same unless the same are killed or injured through the negligence or wilfulness of some officer, employee or servant of the department.

The revised version has officer, employee or servant of the minister. Here is expressly the doctrine of *respondeat superior*. Who is the superior against whom the action will lie, or who is to make compensation? It is the action mentioned in section

56, not against the minister, nor against the impersonation called the department, but, as expressed in the revised statute, Her Majesty. So with section 57—all these being parts of the one enactment :

After the fences or guards have been duly made and while they are duly maintained, no such liability shall accrue for any such damages unless negligently or wilfully done.

But if a liability does accrue by reason of negligence or failure to maintain the fences against whom does the action lie? Obviously against Her Majesty. It seems to me perfectly clear that section 56 does not, as has been in effect contended, impose a liability on the Crown in an arbitrary or capricious manner, but the whole series of sections form one enactment in which the liability of the Crown for the acts or defaults of its servants is expressly recognized. The object of section 56, and of the corresponding section of the general railway act, is not to create a liability, but, assuming the principle of the liability of the Crown, to define or limit the range of inquiry in the particular circumstances.

So under the head " working the railway " we have the same regulations as those contained in the general act. There are the same provisions for the safety of passengers and of the public in respect of moving trains ; as to servants of the department, (in revised statute, the minister) wearing badges ; as to running trains at regular hours and carrying passengers and goods on due payment of the toll, freight or fare legally authorized. Then by section 74, the department (in revised statute, Her Majesty) shall not be relieved from liability by any notice, condition or declaration, in case of damage arising from any negligence, omission or default of any officer, employee or servant of the department (in revised statute, of the Minister). Section 76 gives the department (revised statute, Her Majesty)

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a lien on goods for freight and charges, and sec. 77 provides for the sale of unclaimed goods remaining in the possession of the department (revised statute, of Her Majesty). Sec. 78 requires that every locomotive shall have a bell and whistle, and sec. 79 makes the department (revised statute, Her Majesty) liable for all damages sustained by any person by reason of any neglect to ring the bell or sound the whistle at level crossings of highways, giving a remedy over for half the damages against the engineer who neglected to give the signal. Sec. 80 allows a passenger to be put off the train in certain circumstances. If this power is improperly exercised there must be a right of action, and doubtless the action must be against Her Majesty.

Sec. 81 declares that any person injured while 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, shall have no claim for the injury, provided room inside of such passenger cars, sufficient for the proper accommodation of the passengers, was furnished at the time. There may, as is here admitted, be a claim by the man who stood on the platform, and of course by passengers seated in the cars, for injury caused, let us say, by the misplacing of a switch which wrecked the train, or by a collision with another train. The claim thus recognized is a claim against Her Majesty, not against the pointsman who failed to turn the switch, or the yardsman, who, as in a disastrous case which we recently read of, loitered on his way to signal danger to a following train.

The liability of the Crown thus distinctly appears from the whole scope of the statute.

It is recognized in an earlier section than those to which I have now been referring in terms that ex-

pressly cover claims like that before us. I allude to section 27 which relates to arbitrations, and I have now to consider whether under that branch of the statute a remedy is given which precludes the remedy by petition of right.

The first part of section 27 relates to claims for property taken or damaged arising from or connected with the construction, repair, maintenance or working of a government railway, or out of a contract for the construction or maintenance of any such railway, made and entered into with the minister, either in the name of Her Majesty or otherwise. The second part requires security to be given by the claimant before any claim under that or any other section of the act shall be arbitrated upon; and then the third part enacts that if any person or body corporate has any supposed claim upon the Government of Canada (an expression which, as we lately held in a case of *Grant* v. *The Government of the Province of Quebec*, means Her Majesty) for property taken, or alleged damage to property arising from the construction or connected with the maintenance or repair of any government railway, or connected with any contract for the construction, maintenance or repair of any government railway, or arising out of any death or injury to person or property on any such railway, such person or body corporate may give notice of such claim to the minister, stating the particulars thereof, and how the same has arisen; and in case the minister, from want of reliable information as to the facts relating to the claim, does not consider the case one in which a tender of satisfaction should be made, he may refer the claim to one or more of the official arbitrators for examination and report, both as to matters of fact involved and as to the amount of damages sustained. And thereupon the arbitrators

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shall have all the powers in reference thereto as if the claim had been one coming within the purview of the first part of the section and had been referred after tender of satisfaction made; but the arbitrators' duty in such case shall be confined to reporting his or their findings upon the questions of fact, and upon the amount of damages, if any, sustained, and the principles upon which such amount has been computed.

Cases within the purview of the first part of the section, viz., those relating to property taken or damaged or to contracts, might, by section 28, be referred by the minister to arbitrators whose award was declared to be binding. Under the third part of the section a report only and not an award was to be made.

It may be noticed that the class of claims dealt with in this third part is the same which might have been referred to arbitration under the act 33 Vic. ch. 23 sec. 1, which formed section 6 of the revised act respecting official arbitrators (1), the provisions of the third part being found in section 11, and that that class is far from embracing all the claims that may arise under the Government Railways Act. As one example not reached by it, we may instance claims for damages suffered by reason of neglect to ring the bell or sound the whistle at a level crossing of a highway such as that which was the subject of *Grand Trunk Ry. Co.* v. *Rosenberger* (2), where the injury was not to person or property on the railway. Claims for damage by reason of detention of a train and others in great variety will be readily thought of.

The provision confers a certain permissive power in a limited class of cases, and cannot be construed to exclude the remedy by petition of right, while on the other hand the provisions of the Petition of Rights Acts which I have quoted give power to the minister with

(1) R.S.C. ch. 40.

(2) 9 Can. S.C.R. 311.

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the approval of the Governor in Council, to cause the matter to be referred either before or after the commencement of proceedings by petition.

In my view, therefore, the plaintiff might at once, after the happening of the accident in 1884, have taken proceedings by petition of right. He would have been of course subject to any limitation or prescription applicable to the case. There was the six months' limitation under section 108 of the act of 1881, and there may have been obstacles under the laws of the province. I have not considered to what extent, if at all, the provincial laws would have affected his action if it had been brought before the year 1887. By delaying his action until after the passing of the act of that year (1), he became subject under the express terms of section 18 to the laws relating to prescription in force in the province of Quebec; and by article 2262 of the Civil Code actions for bodily injuries are prescribed after one year. The defence of prescription is not pleaded, but it seems that it may be taken by the court of its own motion. Article 2188 declares that the court cannot of its own motion supply the defence resulting from prescription, except in cases where the right of action is denied. This means, as I understand, denied by law, not denied on the record. The French version so expresses it: "*Sauf dans les cas où la loi dénie l'action.*" By article 2267 the right of action under article 2262 is absolutely extinguished after the delay for prescription has expired. I refer to *Leduc* v. *Desmarchais* (2) decided by Mr. Justice Johnson; *Pigeon* v. *Mayor, &c., of Montreal*, before the Queen's Bench in appeal (3); and *Breakey* v. *Carter* (4) in this court, as cases in which the duty of the courts to give effect to the defence of prescrip-

(1) 50–51 V. c. 16.
(2) 1 Legal News 618.
(3) 9 L. C. R. 334.
(4) Cassels's Dig. 256.

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tion, though not pleaded, was acted on. Another case in this court was *Dorion* v. *Crowley* (1), which is also a precedent for the course which I think is the proper course in this case, viz., to give no costs of defence in any of the courts.

In my opinion the appeal should be allowed without costs, and judgment should be given for the Crown without costs.

Appeal allowed, no costs, cross-appeal dismissed without costs.

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

Solicitor for respondent: *L. Taché.*

(1) Cassels's Dig. 420.