1892
Sept. 1.

HORMISDAS MARTIAL.....SUPPLIANT;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Tort—Injury to the person on a public work—Remedy—Prescription, interruption of—C.C.L.C. Art. 2227—50-51 *Vic. c.* 16.

The suppliant, who was employed as a mason upon the Chambly Canal, a public work, was injured through the negligence of a fellow-servant. Subsequent to the accident the Crown retained the suppliant in its employ as a watchman on the canal, and indemnified him for expenses incurred for medical attendance.

Held, that what was done was referable to the grace and bounty of the Crown and did not constitute such an acknowledgment of a right of action as would, under Art. 2227 C.C.L.C., interrupt prescription.

Quære: Does Art. 2227 C.C.L.C. apply to claims for wrongs as well as to actions for debt?

Semble: That the Crown's liability for the negligence of its servants rests upon statutes passed prior to *The Exchequer Court Act*, (50-51 Vic. c. 16) and that the latter substituted a remedy by petition of right or by a reference to the court for one formerly existing by a submission of the claim to the Official Arbitrators, with an appeal to the Exchequer Court and thence to the Supreme Court of Canada.

PETITION OF RIGHT for damages arising out of an accident caused by the negligence of a fellow-servant of the suppliant on a public work.

The petition of right reads as follows:—

"L'humble pétition de Hormisdas Martial, maçon et briquetier de la ville de Saint-Jean, dans la province de Québec, expose respectueusement:—

"1. Que le ou vers le vingt-quatre avril mil huit cent quatre-vingt-six, dans la dite ville de Saint-Jean, il était employé à réparer les écluses du canal St.-Jean, en qualité de maçon, dans l'intérêt du Gouvernement du Canada et de Sa Majesté sous la direction et le contrôle

des employés, agents et officiers du dit Gouvernement et de Sa Majesté qui, agissant dans l'exercice de leurs fonctions, l'avaient engagé pour faire le dit ouvrage."

" 2. Que pendant l'année 1890, et depuis, le dit canal était la propriété de Votre Majesté et était et est encore conduit et administré comme travail public de la Puissance du Canada, dont elle est propriétaire, et ce, sous le contrôle et la direction du ministre des chemins de fer et canaux."

" 3. Que là et alors, et lorsqu'il travaillait ainsi à l'emploi et au service de Sa Majesté la Reine, il fut violemment frappé et terrassé par une des pièces du cabestan dont on se servait tout près de l'endroit où il travaillait pour lever l'une des portes ou vannes de l'écluse du dit canal, lequel cabestan ou *derrick* se brisa à cause du mauvais état où il était."

" 4. Que le dit accident arriva par la faute et la négligence des agents et employés de Sa Majesté qui, agissant dans l'exercice de leurs fonctions, faisaient usage du dit cabestan et de ceux qui étaient chargés par le dit Gouvernement et Sa Majesté de surveiller et de diriger les dits ouvrages, parce que, en particulier, le dit cabestan était en mauvais ordre et que les supports et les différentes pièces qui le composaient étaient trop faibles pour supporter un si grand poids, et sans proportion avec la pression à laquelle ils étaient soumis."

" 5. Que rien ne fut fait pour prévenir le dit accident et pour avertir votre requérant du danger qui le menaçait, et que les agents et représentants de Sa Majesté chargés de surveiller les dits travaux étaient absents ou éloignés de l'accident."

" 6. Que votre requérant a été incapable de travailler depuis cette époque et qu'il est resté invalide, ruiné complètement de santé et que, d'après l'opinion des médecins qui l'ont soigné, la maladie ou les maladies

1892

MARTIAL v. THE QUEEN.

Statement of Facts.

dont il souffre depuis cet accident devront abréger sa vie considérablement."

"7. Qu'il est marié, père de famille et qu'avant le dit accident il était fort et plein de santé et qu'il était jeune, dans toute la force de l'âge."

"8. Qu'à venir au mois de juillet dernier les agents ou représentants du Gouvernement et de Sa Majesté lui ont donné les moyens de vivre et qu'ils ont voulu le forcer de travailler quoiqu'il en soit incapable."

"9. Qu'il a essayé de travailler et que les efforts qu'il a faits ont aggravé son mal et ses souffrances ; qu'avant le dit accident, votre requérant gagnait de deux piastres et demie à trois piastres par jour et même plus."

"10. Qu'en vertu de ce que dessus, votre requérant est bien fondé à réclamer de Sa Majesté une indemnité ou compensation qui lui permette de vivre et de faire vivre sa famille et qui soit une compensation pour sa femme et ses enfants dans le cas où le mal dont il souffre mettrait bientôt fin à sa vie, laquelle indemnité doit être d'au moins quinze mille piastres pour assurer son existence et celle de sa famille."

"11. Que le Gouvernement du Canada ayant discontinué de lui payer une pension alimentaire dans le mois de juillet dernier, et son mal, au lieu de diminuer, ayant augmenté, il ne reste plus à votre requérant que d'avoir recours à la pétition de droit pour obtenir justice."

"12. Pourquoi votre requérant prie humblement qu'il lui soit permis de procéder par pétition de droit pour obtenir la dite indemnité et que Sa Majesté soit condamnée à lui payer la dite somme de quinze mille piastres, avec dépens distraits aux soussignés."

To this petition the following defence was pleaded :—

"1. All admissions made herein are made for the purposes of this suit only."

1892

MARTIAL v. THE QUEEN.

Statement of Facts.

"2. Her Majesty's Attorney-General admits that the suppliant was employed by Her Majesty as a mason in the month of April, 1890, on certain repairs and work then being carried on, on the St. John Canal, a public work of the Dominion of Canada, and that while so engaged the suppliant was injured by the breaking of a derrick which was being used in connection with the said work, as alleged in the 3rd paragraph of the said petition of right."

"3. Her Majesty's said Attorney-General denies that the injury to the suppliant was caused through the fault or negligence of the agents or officers of Her Majesty who had the charge and control of the said work, for and on behalf of Her Majesty, while acting within the scope of their duty or employment, as alleged in the 4th paragraph of the said petition, and Her Majesty's Attorney-General further denies that her said officers and agents were negligent in the discharge of their duty in connection with the said work."

"4. Her Majesty's Attorney-General denies that the said derrick or capstan, which was being used in connection with the said work, was defective in construction or in a bad state of repair, as set forth in the 3rd paragraph of the suppliant's petition of right, and puts the suppliant to the strict proof of the allegations."

"5. Her Majesty's Attorney-General charges, and the fact is, that the accident and injury to the suppliant was due to and happened by reason of the negligence and carelessness of the suppliant in remaining in a position so close to the said derrick at a time when the same was being used in lifting a heavy weight, and Her Majesty's Attorney-General says that if the suppliant had exercised ordinary caution and care the injury to himself would not have occurred when the said derrick was accidentally broken as aforesaid."

1892

MARTIAL v. THE QUEEN.

Statement of Facts.

"6. Her Majesty's said Attorney-General further says, as a defence to the said petition of right, that the suppliant was engaged as a workman upon the said canal repairs, and that he was well aware, at the time he was so engaged and during the course of his employment, of the character and condition of the said derrick, and that it was being frequently used by other workmen on the said work; and it is submitted that the suppliant in accepting employment on the said work accepted all the risks incident to or connected with such employment, and that the breaking of the derrick in the manner described in the petition of right was one of the risks incident to the said employment, and that the suppliant is not entitled to recover from Her Majesty as his employer any damages for the injury which it is alleged he suffered by reason of the accident aforesaid."

"7. Her Majesty's Attorney-General further says that none of the officers or agents of Her Majesty who had control of the said work made any misrepresentation to the suppliant as to the strength or condition of the said derrick, nor was the suppliant induced by any statements of the said officers or agents to be less careful on the work than an ordinary workman would be in the same position."

"8. Her Majesty's Attorney-General further says that one of the causes of action in the petition is based upon the defective construction of the said derrick, and because the supports and different pieces composing it were too weak to bear the weight they were subjected to; but Her Majesty's Attorney-General says that no action will lie against Her Majesty on such grounds, and the same benefit is claimed from this objection as if a formal demurrer were filed to the said petition of right."

1892

MARTIAL v. THE QUEEN.

Statement of Facts.

"9. Her Majesty's Attorney-General for a further defence to the said petition of right, says that one of the claims and causes of action set out in the said petition is based upon the negligence and carelessness of Her Majesty's officers and agents who had charge and control of the said work, but it is alleged that Her Majesty cannot be rendered liable to an action, nor is the suppliant entitled to recover damages against Her Majesty, for or in respect of the said causes of action."

"10. Her Majesty's Attorney-General further says, that any help or assistance which has been given to the suppliant since he met with the said accident was so given of the grace and bounty of the Crown, and not because of any liability on the part of Her Majesty to render such assistance, and it is submitted that the rendering of such assistance to the suppliant has not created any liability on the part of Her Majesty to pay the suppliant anything in respect of the injuries received by him as aforesaid."

"11. Her Majesty's Attorney-General submits that under no circumstances is Her Majesty, as representing the Dominion of Canada, answerable or responsible to the suppliant for or in respect of the claim for damages in the said petition of right mentioned, and he denies that the suppliant is entitled to the relief prayed for in the said petition of right."

Issue was joined.

May 4th, 1892.

David, for suppliant:

There is no prescription arising upon the facts of this case. The negotiations for settlement only ceased in August, 1891, and it was then the right of action accrued. The prescription is one of two years, it being

1892

MARTIAL v. THE QUEEN.

Argument of Counsel.

a *quasi-delit*, under Art. 2261 C.C.L.C. (Cites *Caron* v. *Abbott* (1); *Sharp*, C.C.L.C. (2).)

There is no doubt about the liability of the Crown in such a case. (Cites *Martin* v. *The Queen* (3); *Cooley on Torts* (4); *Sourdat, Traité de la Responsabilité* (5).)

Sharp, for the respondent: The alleged negotiations for settlement were made when the prescription was entirely acquired and suppliant cannot under such circumstances claim interruption of the prescription. At the time these negotiations took place the suppliant was barred from recovering and his right of action cannot be revived. (Cites Arts. 2261, 2262, 2267, C.C.L.C.; *Ursulines* v. *Gingras* (6).)

Hogg, Q.C., following:

The case of *Martin* v. *The Queen* is no authority for the proposition that the Crown is liable in such a case as this. (Cites *The Queen* v. *McLeod* (7).) A case like this should have been brought before the lapse of six months from the date of the accident. (Cites R.S.C. c. 40 s. 8.)

BURBIDGE, J. now (September 1st, 1892) delivered judgment.

The suppliant by his petition claims fifteen thousand dollars for damages for personal injuries sustained by him on the 24th of April, 1886, while working upon the Chambly Canal, a public work of Canada, situate in the province of Quebec.

It was alleged, and, for the purpose of disposing of the question of law arising at this stage of the case, it may be taken as admitted, that the accident which was the occasion of the injury happened in consequence of the

(1) M.L.R. 3 S.C. 375.
(2) Art. 2261, n. 20.
(3) 2 Ex. C.R. 328.
(4) P. 549.
(5) p. 452 (par. 1299).
(6) 13 Q.L.R. 300.
(7) 8 Can. S.C.R. 1.

1892

MARTIAL v. THE QUEEN.

Reasons for Judgment.

negligence of the persons in charge for Her Majesty of the public work in question. At the time of the accident the suppliant, who was employed upon the canal as a mason, was receiving wages at the rate of two dollars a day. Afterwards he was taken on the canal staff as a watchman and given light work to do, such as lighting lamps, for which he was paid twenty-five dollars a month. The Government, as will be seen, also paid certain expenses that the suppliant incurred for medical attendance.

On the 9th April, 1890, the following order-in-council was passed with respect to his employment on the canal :

On a memorandum, dated 29th March, 1890, from the Minister of Railways and Canals representing that, as appears from a report made by the superintending engineer of the Chambly Canal on the 26th of August, 1886, in the previous April one of the workmen, Hormisdas Martial, a mason, engaged in rebuilding a lock wall, was injured by the fall of a derrick used in fitting in a lock-gate ; that the injured man, who had been receiving wages at the rate of $2.00 a day before the accident, was incapacitated for the work of a mason and was taken on the canal staff as a watchman at the rate of $25.00 a month, the accounts of the medical attendant being paid, amounting, up to January, 1887, to $187.25.

That a further account of $37.50 has now been presented and it is suggested by the superintending engineer that it should be paid ; but that for the future Mr. Martial should pay the medical expenses himself, his salary being increased to $38.00 a month, and the matter being so finally settled.

The Minister recommends that authority be given for the settlement proposed.

The Committee advise that the requisite authority be granted as recommended.

The suppliant, who at the time was demanding a pension of $400.00 per annum on account of the injuries sustained, refused at first and for more than a year to accept the settlement proposed ; and in July, 1890, quitted work.

1892

MARTIAL v. THE QUEEN.

Reasons for Judgment.

Subsequently he changed his mind and signed an acceptance in the following terms:—

Je, Hormisdas Martial, consens à accepter la somme de trente-huit piastres par mois a la condition posée par le Gouvernement que je le décharge pour l'avenir de toute responsabilité dans le paiement de mes frais de médecin.

La présente déclaration n'aura d'effet qu'en autant que le Gouvernement me paiera mes arrérages de salaire depuis le quatre juillet dernier à venir aujourd'hui au taux de trente-huit piastres par mois et je déclare ne pouvoir signer.

Montréal 1er juin, 1891.

L. O. David, Jos. Martial. } Témoins. (Signé.) HORMISDAS sa X marque. MARTIAL.

He was returned as a watchman on the Chambly Canal staff pay-list of June, 1891, for arrears of wages to the amount of $452.32 and for $38.00 for that month. The $38.00 were paid to him but no part of the arrears. In the meantime the Auditor-General had learned that the suppliant was not doing any work, and when the next pay-list was presented he struck the suppliant's name out of the list, and since then he has not been paid anything.

He now brings his petition to recover damages for the injuries received in 1886, and he relies upon the fact of his employment, the payment of the charges incurred for medical attendance, the order-in-council of 9th April, 1890, and the payment of wages in July, 1891, as constituting an interruption of prescription.

At the time of the action the only remedy the suppliant had against the Crown was by a proceeding before the Official Arbitrators on a reference of his claim under the provisions of 33 Victoria, chapter 23, by the second section of which it was provided that no claim should be submitted to arbitration, or entertained under the Act, unless it were made within six months after the occurrence of the accident, or the doing or not doing of the act upon which the claim was

1892

MARTIAL v. THE QUEEN.

Reasons for Judgment.

founded. This limitation was in substance continued by the *Revised Statutes* c. 40 s. 8 until 1st October, 1887, when the Act was repealed by *The Exchequer Court Act* (1), by the eighteenth section of which it was provided that the laws relating to prescription and the limitation of actions in force in any province between subject and subject should, subject to the provisions of any Act of the Parliament of Canada, apply to any proceeding against the Crown in respect of any cause of action arising in such province. By Article 2262 of the Civil Code of Quebec it is provided, with an exception that it is not necessary to note here, that actions for bodily injuries are prescribed by one year. It has been thought, however, that for injuries such as those of which the suppliant complains the prescription is two years under Article 2261 (2); but the law may, I think, be taken to be settled the other way (3). The question is not, however, material for in any case the suppliant must fail unless in some way the Crown has lost the benefit of the prescription. That, the suppliant contends, may happen by virtue of Article 2227 of the Code, which is as follows:

> Prescription is interrupted civilly by renouncing the benefit of a period elapsed, and by any acknowledgment which the possessor or the debtor makes of the right of the person against whom the prescription runs.

And he relied upon *Walker* v. *Sweet* (4) the headnote of which is:

> That the short prescription referred to in Articles 2250, 2260, 2261 and 2262 of the Civil Code are liable to be renounced and interrupted in the manner prescribed in Article 2227.

(1) 50-51 Vic. c. 16.

(2) *Caron* v. *Abbott*, M. L. R. 3 S. C. 375; *Morrisson* v. *Mullins*, 16 R. L. 114: *Morrisette* v. *Catudal*, 16 R. L. 486; Taschereau, J. in *Robinson* v. *The Canadian Pacific Railway Company*, M. L. R. 5 S. C. 225.

(3) *The Canadian Pacific Railway Company* v. *Robinson*, 19 Can. S. C.R. 292; M. L. R. 5 S. C. 233, 243.; [1892] A. C. 481.

(4) 21 L. C. J. 29.

1892

MARTIAL v. THE QUEEN.

Reasons for Judgment.

But that case, which was an action on a bill of exchange, cannot, I think, be taken as conclusive authority for any larger proposition than that a short prescription of a debt may be interrupted by an acknowledgment which the debtor makes of the right of the person against whom the prescription runs. The principle, or at least the principle of the English law, is that in actions of assumpsit the acknowledgment of the debt is evidence of a fresh promise to pay, but that rule has never been applied to actions for wrongs (1).

In *Angell on the Limitation of Actions* the author, referring to the words of the statute of James that all actions on the case, &c., shall be commenced and sued within six years next after the cause of such actions or suits, and not after, says that—

* * * where the gist of the action is an injury committed, if the right of action is once barred, it is impossible to revive it by any admission however unequivocal and positive, and it may be considered as an unvarying rule in the case of torts that no acknowledgment will reserve it from the express language of the statute (2).

The use of the word "debtor" in Article 2227 would appear I should have thought to point to a like distinction in the French law But from the decision of the Court of Review in *Marcheterre* v. *The Ontario and Quebec Railway Company* (3), in which it was held that the defendant company in paying the plaintiff some money, and, in part, the charges for medical attendance had renounced the benefit of the prescription to which the court below had given effect (4), I conclude it must be taken that the distinction does not exist in the French law. I also observe that in *The Canadian Pacific Railway Company* v. *Robinson* (5), Mr. Justice Taschereau, in discussing

(1) *Hurst* v. *Parker*, I. B. & Ald. 92 ; *Boydell* v. *Drummond*, 2 Camp. 160 ; *Whitehead* v. *Howard*, 2 Bro. & B. 372.

(2) Sec. 209.

(3) 17 R.L. 409.

(4) M.L.R. 4. S.C. 397.

(5) 19 Can. S.C.R. 333.

1892

MARTIAL
v.
THE
QUEEN.

Reasons for Judgment.

the contention made in that case that the appellant company had by its conduct acknowledged its liability for the accident and thereby interrupted the prescription invoked, does not suggest that there is any difference in respect of the interruption of the prescription of a right of action for a debt, and a right of action for a bodily injury. It should, however, be added that he was discussing a contention which as the case presented itself was not open to the respondent, and that he was of opinion that the relief given by the company to the plaintiff was given gratuitously and without acknowledging any obligation whatever.

But however that may be, I entertain no doubt that in this case the acts of the Crown's Ministers and officers in employing the suppliant and paying him wages without exacting an equivalent in work, and in paying the charges for medical attendance incurred by him, cannot be taken as an acknowledgment of a legal liability for the consequences of the accident. The order-in-council of the 9th of April, 1890, without doubt recognizes the existence of some sort of a claim to be indemnified for the medical expenses incurred, which it was proposed to satisfy by an increase of the rate of wages paid to the suppliant. It was contended that no effect can be given to the order-in-council, because to his acceptance of the offer thereby made the suppliant attached a condition to which the Crown has never acceded. Without discussing that, or the other question as to whether or not the arrangement if completed did not discharge the Crown from this action, leaving the suppliant no remedy unless he has one for breach of agreement which he says was made with him, and confining myself to the effect of the order as an admission of an existing liability enforceable in law, it appears to me that no greater

1892

MARTIAL v. THE QUEEN.

Reasons for Judgment.

weight is to be given to it than to the fact of the previous employment and payment of medical expenses. The Government acts by orders-in-council, and the one in question constituted the requisite authority for continuing the suppliant's employment at a higher rate of wages instead of paying the accounts rendered by his doctor. But there is no stronger inference in the one case than in the other, that what was done was so done in recognition of a legal obligation and not by the favour of the Crown.

What then is the fair inference to be drawn from the facts?

A servant of the Crown dependent upon his labour to support himself and his family is injured upon a public work. Is it unnatural to expect that, apart from any question of liability, the Crown would of its grace render some assistance and so long as possible continue the servant's employment? Without its consent, or that of its Minister, no proceeding could in this case have been taken against it, and there was no occasion, as there might have been for an individual or a company exercising a like benevolence, to carefully guard against any implication of an admission of liability. All that was done is referable, it appears to me, to an exercise of the grace and bounty of the Crown, and ought not to be construed as an acknowledgment of a right of action. It would, I think, looking only to the interests of the employed be unfortunate to lay down a rule that would, in like cases, make an act of humanity or bounty unsafe, unless attended by a formal denial of liability.

The view I take of the inference to be drawn from the acts relied upon as constituting an interruption of prescription makes it unnecessary for me to discuss at length the other question of law raised. On the general question of the Crown's liability for the negligence of

1892

MARTIAL v. THE QUEEN.

Reasons for Judgment.

its servants, I have given my opinion in *The City of Quebec* v. *The Queen* (1) and in *Lavoie* v. *The Queen* (2). The other question as to whether or not a petition of right in such a case will lie when the cause of action accrued before the 1st of October, 1887, depends upon the view taken of *The Exchequer Court Act* (3).

If, as I think the fact is, the Crown's liability for the negligence of its servants employed on its public works and acting within the scope of their duties rests upon statutes passed before *The Exchequer Court Act* (3), and that the latter substituted a remedy by a petition of right, or by reference to the court, for one formerly existing by a submission of the claim to the Official Arbitrators with an appeal to the Exchequer Court and to the Supreme Court, it cannot be doubted that in a proper case a petition would lie. If on the other hand it were held that in such a case there was no liability before the passing of *The Exchequer Court Act* (3), and that the latter Act not only provided a remedy but gave the right of action, then of course the remedy given must be limited to causes of action arising subsequent to the date on which it became law.

Judgment for respondent, with costs.

Solicitors for suppliant: *David & Demers.*

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

---

(1) 2 Ex. C. R. 252. (2) 3 Ex. C. R. 96.
(3) 50-51 Vic. c. 16.