BETWEEN: 1944

PETER ZAKRZEWSKI ..... SUPPLIANT, May 17. July 28.

AND

HIS MAJESTY THE KING..... RESPONDENT.

Crown—Petition of Right—Right of the Crown to avail itself of provincial laws relating to prescription and limitation of actions in force at the time the Crown is called upon to make its defence—Petition of Right Act, R.S.C. 1927, chap. 158, s. 8—Exchequer Court Act, R.S.C. 1927, chap. 34, s. 32.

Suppliant's action is for damages resulting from injuries suffered by suppliant allegedly due to the negligence of a servant of the Crown while acting within the scope of his employment. The accident occurred in Winnipeg, Manitoba, on November 12, 1941. Suppliant lodged his Petition of Right with the Secretary of State on November 14, 1942, and the same was filed in the Exchequer Court on January 7, 1943. The respondent pleaded *inter alia* that the suppliant was barred by section 84 (1) of The Highway Traffic Act, R.S.M. 1940, chap. 93. The question of law whether the suppliant was barred by such statute was heard before the trial of the Petition of Right.

Held: That the provincial laws relating to prescription and the limitation of actions referred to in section 32 of the Exchequer Court Act, of which the Crown may avail itself in a Petition of Right, are those of the province in which the cause of action arose that are in force in such province at the time the Crown is called upon to make its defence to the Petition of Right.

2. That the respondent may rely upon section 84 (1) of The Highway Traffic Act, R.S.M. 1940, chap. 93.

3. That the suppliant sustained his damages on November 12, 1941, and, since his Petition of Right was not lodged with the Secretary of State until November 14, 1942, two days after the expiration of twelve months from the time when his damages were sustained, he is barred from proceeding with his Petition.

ARGUMENT on question of law pleaded by respondent that suppliant was barred by the provision of The Highway Traffic Act, being chapter 93 of the Revised Statutes of Manitoba, 1940.

The argument was heard before the Honourable Mr. Justice Thorson, President of the Court, at Ottawa.

Jean Genest, K.C. for suppliant.

W. R. Jackett for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

1944

ZAKRZEWSKI v. THE KING.

Thorson J.

THE PRESIDENT now (July 28, 1944) delivered the following judgment:

In this case a question of law was ordered to be heard and disposed of before the trial of the Petition of Right herein. The suppliant claimed damages for injuries alleged to have been sustained by him resulting from negligence in the operation of a motor vehicle by a servant of the Crown while acting within the scope of his employment. The facts alleged were that as he was proceeding in an easterly direction on Portage Avenue in Winnipeg, in the Province of Manitoba, the motor vehicle overtook him, threw him to the pavement and ran over him, causing a fracture of the pelvic bones, bruises of the lower extremities and internal injuries. The respondent by his statement of defence denies these allegations, claims that the suppliant's injuries were the result of his own negligence and, in addition, pleads as follows:

> 3. The plaintiff's claim is barred by statute, the Petition herein having been left with the Secretary of State and filed in this Court more than 12 months from the time of accrual of the cause of action alleged herein.

In the Special Case submitted to the Court it was stated that the accident occurred on a street in Winnipeg on November 12, 1941, and that the petition herein was lodged with the Secretary of State on November 14, 1942, and filed in this Court on January 7, 1943. The statute on which the respondent relies is section 84 (1) of The Highway Traffic Act, R.S.M. 1940, chap. 93, which provides as follows:

> 84. (1) No action shall be brought against a person for the recovery of damages occasioned by a motor vehicle after the expiration of twelve months from the time when the damages were sustained.

The question of law to be determined is whether this statute bars the suppliant from the relief sought by him. Section 8 of the Petition of Right Act, R.S.C. 1927, chap. 158, provides in part as follows:

> 8. The statement of defence or demurrer may raise, besides any legal or equitable defences in fact or in law available under this Act, any legal or equitable defences which would have been available if the proceeding had been a suit or action in a competent court between subject and subject.

And section 32 of the Exchequer Court Act, R.S.C. 1927, chap. 140, reads as follows:

32. The laws relating to prescription and the limitation of actions in force in any province between subject and subject, shall, 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.

In England it was held in *Rustomjee* v. *The Queen* (1) that the Statute of Limitations, 21 Jac. I, chap 16, did not apply to a petition of right. In that case Blackburn J. said, at page 491:

> The Statute of Limitations has relation only to actions between subject and subject, the Crown cannot be bound by it.

and, at page 496:

> With regard to the Statute of Limitations, I do not think it is necessary to say any more. There seems to be no pretence for saying that the statute applies at all to the Crown. It would, no doubt, be very proper, and right, and judicious for the legislature to pass an Act to say that in future some statute of limitation shall apply, but it has not been done yet.

Robertson on Civil Proceedings by and against the Crown, at p. 393, points out that text writers have objected to this decision, and the advisers of the Crown have also expressed dissatisfaction with it, on the principle that the Crown can claim the benefit of any statute, in which it is not mentioned, although it is not adversely bound by it, but he agrees with it on the ground that the Statute of Limitations applies only to "actions" and a petition of right is not an "action".

Whatever the law on the subject may be in England, it is well settled in Canada. The English Petitions of Right Act, 1860, did not contain any provision similar to section 8 of the Canadian Petition of Right Act, originally enacted as section 7 of the Petition of Right Act of 1876.

In *Tylee* v. *The Queen* (2) the Supreme Court of Canada held that under section 7 of the Petition of Right Act of 1876, the Statute of Limitations could be pleaded by the Crown in answer to a petition of right, and a similar view was taken by the same court in *McQueen* v. *The Queen* (3). While the judges in that case were divided as to whether section 7 of the Petition of Right Act was retroactive they had no doubt that the Act gave the Crown the right to invoke the Statute of Limitations.

(1) (1876) 1 Q.B.D. 487. (2) (1876) 7 Can. S.C.R. 651 at 676
(3) (1887) 16 Can. S.C.R. 1 at p. 60, 80, 97, 113, & 118.

1944

ZAKRZEWSKI v. THE KING.

Thorson J.

Effect has been given in this Court to provincial statutes of prescription and the limitation of actions in proceedings against the Crown by way of petition of right and the claim of the suppliant has been held to be barred thereby in a number of cases such as *Penny* v. *The Queen* (1); *Fradette* v. *The King* (2); *Thomson* v. *The King* (3); *Oliver* v. *The King* (4); *Besnier* v. *The King* (5); and *Miller* v. *The King* (6).

While under Rule 6 (2) of the General Rules and Orders of this Court a petition of right becomes an action in the Court on its being filed therein, it has been the practice of the Court to regard the period of prescription or limitation laid down by a provincial statute as having been interrupted if the petition of right was lodged with the Secretary of State before the period had expired, even although it was filed in the Court subsequently to the expiration of such period. *Vide—Saindon* v. *The King* (7); *Hudon* v. *The King* (8); *Courteau* v. *The King* (9); *Dionne* v. *The King* (10); and *Mavor* v. *The King* (11). No question of this sort arises in the present case.

The real question of controversy is as to the meaning of the phrase "the laws relating to prescription and the limitation of actions in force in any province between subject and subject shall . . . apply" contained in section 32 of the Exchequer Court Act. Counsel for the suppliant contended that since the section does not specify that the provincial laws in force at any particular time shall apply, it must be read as meaning only the provincial laws relating to prescription and the limitation of actions that were in force at the time the Exchequer Court Act was first enacted in 1887. Counsel for the respondent, on the other hand, contended that the section is prospective and contemplates the provincial laws in force at the time the respondent is called upon to make his statement of defence. The question raised is a new one and not free from difficulty.

The Petition of Right is brought under section 19 (*c*) of the Exchequer Court Act, as amended, which imposes a

(1) (1895) 4 Ex.C.R. 428
(2) (1918) 17 Ex.C.R. 137
(3) (1921) 20 Ex.C.R. 467 at 469
(4) (1921) 21 Ex.C.R. 49.
(5) (1924) Ex.C.R. 26.
(6) (1927) Ex.C.R. 52.
(7) (1914) 15 Ex.C.R. 305
(8) (1914) 15 Ex.C.R. 320
(9) (1915) 17 Ex.C.R. 352
(10) (1914) 18 Ex.C.R. 88.
(11) (1919) 19 Ex.C.R. 307

1944

ZAKRZEWSKI v. THE KING.

Thorson J.

liability upon the Crown for the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment, where such negligence has resulted in death or injury to the person or to property. The question as to what law of negligence should be applied in such a claim has come before the courts on a number of occasions and it is, I think, settled that the law to be applied is the law of negligence of the province in which the alleged negligence occurred that was in force, not at the time when the negligence occurred, but at the time when the liability for it was first imposed upon the Crown: *Vide—The King* v. *Armstrong* (1), and *Gauthier* v. *The King* (2). The question was recently dealt with in this Court in *Tremblay* v. *The King* (3) where, following the principles enunciated by the Supreme Court of Canada in *The King* v. *Armstrong* (*supra*) and *Gauthier* v. *The King* (*supra*), I held that in claims against the Crown made under section 19 (*c*) of the Exchequer Court Act of Canada, as amended in 1938, where the claim is for loss or injury resulting from the negligence of an officer or servant of the Crown in driving a motor vehicle while acting within the scope of his duties or employment, the liability of the Crown is to be determined by the law of negligence of the province in which such alleged negligence occurred that was in force in such province on the 24th day of June, 1938, that being the date when the amendment by which liability for such negligence was first imposed upon the Crown came into effect. The principle underlying these decisions is that when liability for negligence was imposed upon the Crown by Parliament, there was no law by which such liability could be determined except that which was in force in the several provinces and it was liability in accordance with such law that was imposed. It is, therefore, necessary, before any provincial law relating to negligence is applied in a claim under section 19 (*c*) of the Exchequer Court Act, to consider whether such law was in force in the province at the time when the liability for such negligence was first imposed upon the Crown, since such liability, having been imposed by Parliament in the light of the provincial laws

(1) (1908) 40 Can. S.C.R. 229 at 248.

(2) (1918) 56 Can. S.C.R. 176 at 180.

(3) (1944) Ex.C.R. 1 at 12.

1944

ZAKRZEWSKI v. THE KING.

Thorson J.

of negligence then in force and having no existence apart from the Parliamentary enactment by which it was imposed, cannot be altered by subsequent provincial enactment.

The result of this state of the law is that the liability of the Crown for the negligence of its officers and servants may not be the same as that of an individual or corporation for the negligence of his or its officers or servants. If the Crown is to be put in exactly the same position in the matter of liability for negligence as an individual or corporation would be, such a result, which seems a desirable one, can be accomplished only by a Parliamentary enactment declaring that in claims under section 19 (*c*) of the Exchequer Court Act, as amended, the law of negligence to be applied shall be the law of the province in which the cause of action shall arise that is in force in such province at the time of such cause of action and would be applicable if the proceeding were a suit or action between subject and subject.

While, under the law as it stands, it is necessary, for the reasons mentioned, to consider in each case the extent to which, if at all, a particular provincial law is applicable against the Crown in order that the statutory liability imposed upon the Crown by Parliament shall not be subject to enlargement or alteration by a provincial enactment, the same considerations do not govern in determining whether the Crown may avail itself of the rights given by provincial laws, for the reason that, while liability can be imposed upon the Crown only by statute and must be confined to the express words by which it is imposed, there is no reason for putting the Crown in a different position in the matter of rights from that which a subject would enjoy. Certainly the Crown should not be in an inferior position. That would be the result in the present case if effect were given to the contention of counsel for the suppliant.

Section 16 of the Interpretation Act, R.S.C. 1927, chap. 1, declares that no provision or enactment in any Act shall affect, in any manner whatsoever, the rights of His Majesty, his heirs or successors, unless it is expressly stated therein that His Majesty shall be bound thereby. But while this is so, it is established law that the Crown may avail itself

of the provisions of any statute. *Vide*—Robertson on Civil Proceedings by and against the Crown, at p. 567, and the authorities there cited. This rule did not, however, apply in the case of a petition of right, as held in *Rustomjee* v. *The Queen* (*supra*), but once the distinction between a petition of right and any other suit or action in the matter of defences that might be raised was removed by section 7 of the Petition of Right Act of 1876, it would seem to follow that the Crown may avail itself of any defence to a petition of right that would be available to a subject if the proceeding were a suit or action between subject and subject, without any further statutory authority and that section 32 of the Exchequer Court Act is to this extent merely declaratory of the existing law and necessary only for the purpose of specifying that the provincial laws of prescription and the limitation of actions to be applied shall be those of the province in which the cause of action arose. In that view, the Crown may clearly avail itself in a petition of right proceeding of such provincial laws of prescription and limitation of actions as may be in force in the appropriate province at the time it is called upon to make its statement of defence in the same way as a subject might avail himself of such laws in a suit or action between subject and subject. Section 32 of the Exchequer Court Act cannot be read as restrictive of the rights of the Crown in this respect in the absence of words clearly indicating such restriction, nor can it be read as limiting in any way the generality of section 8 of the Petition of Right Act. Far from restricting the rights of the Crown, the section declares them and specifies which provincial laws are to be applied. It seems clear to me that Parliament intended by section 8 of the Petition of Right Act and section 32 of the Exchequer Court Act to put the Crown in the same position when it came to write its statement of defence to a petition of right as a subject would occupy if the proceeding were a suit or action between subject and subject. I cannot read the two sections as indicating any other intent and must hold that the provincial laws relating to prescription and the limitation of actions, referred to in section 32 of the Exchequer Court Act, of which the Crown may avail itself in a petition of right, are those of the province in which the cause of action

1944

ZAKRZEWSKI v. THE KING.

Thorson J.

arose that are in force in such province at the time the Crown is called upon to make its defence to the petition of right.

It follows that the respondent may rely upon section 84 (1) of the Highway Traffic Act of Manitoba. The statute began to run from the time when the damages of the suppliant were sustained. He was struck, thrown to the pavement and run over by the respondent's motor vehicle on November 12, 1941, and suffered the injuries already described on that date. It is clear, therefore, that he sustained his damages on November 12, 1941, and, since his Petition of Right was not lodged with the Secretary of State until November 14, 1942, two days after the expiration of twelve months from the time when his damages were sustained, he is barred from proceeding with his petition and is not entitled to any of the relief sought by him. The respondent is entitled to costs.

Judgment accordingly.