1906
*June 5.
*Oct. 11.

JAMES J. RUTLEDGE (DEFENDANT) .... APPELLANT;

AND

THE UNITED STATES SAVINGS AND LOAN COMPANY (PLAINTIFFS) .... RESPONDENTS.

ON APPEAL FROM THE TERRITORIAL COURT OF YUKON TERRITORY.

Cause of action—Limitation of actions—Contract—Foreign judgment—Yukon Ordinance, c. 31 of 1890—Statute of James—Statute of Anne—Lex fori — Lex loci contractûs — Absence of debtor.

Under the provisions of the Yukon Ordinance, ch. 31 of 1890, the right to recover simple contract debts in the Territorial Court of Yukon Territory is absolutely barred after the expiration of six years from the date when the cause of action arose notwithstanding that the debtor has not been for that period resident within the jurisdiction of the court.

Judgment appealed from reversed, Girouard and Davies JJ., dissenting.

APPEAL from the judgment of the Territorial Court of the Yukon Territory, *in banco*, affirming the judgment of Mr. Justice Craig, at the trial, which maintained the action of the plaintiffs with costs.

The action was based upon a judgment recovered in the United States of America, by the respondents against the appellant, on the 19th December, 1894, and was instituted in the Yukon Territorial Court in

*PRESENT:—Fitzpatrick C.J. and Girouard, Davies, Idington and Maclennan JJ.

1902, more than six years after the foreign judgment had been rendered. The questions raised upon the appeal are fully stated in the judgments now reported.

Ewart K.C. for the appellant.
Chrysler K.C. for the respondents.

THE CHIEF JUSTICE.—The plaintiff in this case sued to recover the amount of a judgment debt due under a judgment dated 19th December, 1894, of a superior court of the State of Washington, U.S.A., together with interest from the date of the said judgment. That the said judgment debt was the cause of action in the present suit cannot be questioned, and in this country it is an action of simple contract.

It is disputed within what period after the cause of action has arisen the action will be barred by the Statute of Limitations.

The ordinance of the Yukon Territority, ch. 31 of 1890, provides that

all actions for recovery of merchants' accounts, bills, notes and all actions of debt grounded upon any lending or other contract without specialty shall be commenced within six years after the cause of such action arose.

It is not disputed on this appeal that the action was not brought until after the expiration of six years from the 19th December, 1894, when the cause of action arose.

The terms of the ordinance are express and the meaning of the language unmistakeable. I do not think therefore anything is to be gained by considering either what the law is elsewhere or what it was formerly in the Yukon Territory.

It is necessary to give the ordinance its effect, and

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it is an absolute bar to the present action. It follows that the appeal should be allowed and the action be dismissed with costs to the appellants, both here and in the courts below.

GIROUARD J. (dissenting).—I think it is a well settled rule of English law, whatever may be the law on the continent or in Quebec, that in matters of limitations of personal actions the *lex fori* must prevail, except when the debt has been absolutely extinguished by the Statute of Limitations of the *locus contractûs*. Here it is admitted that the debt was not there extinguished, and that prescription was not even acquired. It is also conceded that the action in the Yukon was taken within six years after the arrival of the debtor in that country.

In the Yukon country an ordinance has been passed which provides that,

> all actions for recovery of merchants' accounts, bills, notes and all actions of debt grounded upon any lending or other contract without specialty, shall be commenced within six years after the cause of such action arose.

I quite agree with the learned Chief Justice that this ordinance governs the case, but, with due deference, I am not prepared to say that the foreign judgment was the whole cause of action. The cause of the action is not only the undischarged indebtedness of the defendant, but his default to pay the same and his presence in the territory of the court where the action is taken, or property within its reach, in fact everything that is necessary to complete the remedy of the creditor and make it efficient. Until his presence in the forum of the court no action is possible there. The default of the debtor to satisfy the judgment,

wherever he may be found—for it was his personal duty to satisfy the same—constitutes the right of action, but is not the whole cause of the action as I read the statute. The removal of the debtor to the forum of the Yukon court completes the remedy. That statute covers the whole case without taking into consideration the statutes of James and of Anne.

For these reasons I submit that the judgment appealed from should be confirmed, and the appeal dismissed with costs.

DAVIES J. (dissenting).—At the time of the passing of the Yukon ordinance, ch. 31, sec. 1, of the Consolidated Ordinances of the Yukon Territory, 1898, the English statutes as to limitations of actions and also all other English law as of the 15th July, 1870, were introduced into the Yukon by a statute of the Dominion and were in force in that territory.

The ordinance referred to, upon the construction of which this appeal turns, reads as follows:

> All actions for recovery of merchants' accounts, bills, notes, and all actions of debt grounded upon any lending or other contract without specialty shall be commenced within six years *after the cause of such action arose.*

The trial judge held that this ordinance did not repeal the Statute of Anne regarding disabilities, and only repealed such part of the Statute of James as was re-enacted by the ordinance, and that consequently as against the defendant, a foreigner, the time did not begin to run until he had first entered the Yukon Territory. On appeal this judgment was sustained by a divided court.

The appellant here contends that so far as the actions specially named in the ordinance are con-

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cerned, the ordinance is absolute and complete repealing all then existing English law on limitations, whether relating to disabilities or to acknowledgments of the debt and making an arbitrary period of six years after the cause of action arose within or without the Yukon Territory as the limit within which an action should be commenced in the Yukon courts under any and every condition and circumstance. And that the cause of action arose within the meaning of the words in the ordinance when the debt first became due.

The respondent in addition to supporting the reasons of the court below, contended that under the Statute of James, as also under this ordinance, the cause of action only arose in the Yukon Territory against this defendant when he came within the jurisdiction of the courts of that territory, and not before, in which case the six years' limitation had not expired.

I am of opinion that this contention is sound and that the authorities cited in support of it are conclusive. In *Douglas* v. *Forrest*(1), Chief Justice Best, in delivering the judgment of the Court of Common Pleas, is reported, at p. 703, as follows:

> Upon the second question we are of opinion that the replication is an answer to the plea of the Statute of Limitations. The words of the 21 Jac. I., ch. 16, sec. 3 are that the action shall be brought "within six years next after the cause of such actions or suits and not after." Although the injury of which the plaintiffs complain has existed more than six years, yet they had no cause of action until there was some person within the realm against whom the action could be brought. Cause of action is the right to prosecute an action with effect; no one has a complete cause of action until there is somebody that he can sue.

If the law as here laid down is correct it is conclusive of this appeal. It was suggested that the lan-

(1) 4 Bing. 686.

guage was *obiter* only, and must in any case be confined to the facts of the case in which it was used. I think, however, it is a correct statement of the law generally, and was used not as mere *obiter dicta,* but as the basis and ground of the judgment rendered.

In the case of *Musurus Bey* v. *Gadban*(1), Wright J. in delivering the judgment of the court (Lawrence and Wright JJ.) expressly cites the language of Chief Justice Best above quoted as the law, and applicable to the case before him, and A. L. Smith L.J. in delivering the judgment of the Court of Appeal before which that case afterwards came, says(2), at pp. 357, 358:

> There is another ground which is also fatal to the contention of the plaintiff. It has been held that as on the one hand there cannot be a cause of action within the meaning of the Statute of James from which the six years will commence to run unless there be a person in existence capable of suing(3), so on the other hand there can be no such cause of action unless there is somebody who can be sued.

He then cites from *Douglas* v. *Forrest*(4), at p. 704:

> Cause of action, says Best C.J., is the right to prosecute an action with effect; no one has a complete cause of action until there is somebody that he can sue.

These authorities for me are conclusive that the six years' limitation specified in the ordinance did not begin to run until after the defendant had gone into the Yukon, within the jurisdiction of the courts of that territory.

The American authorities collected in 19 Am. & Eng. Ency., at pages 193 and 219, are generally to the

(1) (1894) 1 Q.B. 533.

(2) (1894) 2 Q.B. 352.

(3) *Murray* v. *East India Co.*, 5 B. & Ald. 204, at p. 214.

(4) 4 Bing. 686.

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same effect. The law is at the latter page stated as follows:

> The rule is, therefore, well settled that the statute does not begin to run until there are in existence some one capable of suing and some one who may be sued.

See also 1 Cyc., title, Actions, at p. 644.

While stating the grounds as above on which I think this appeal must be dismissed, I do not wish to be understood as expressing any opinion upon those on which judgment in the courts below proceeded.

The broad construction of the ordinance contended for by the appellant ignores alike the disabilities excepted by the Statute of Anne from the Statute of James, and the provisions of Lord Tenterden's Act with respect to acknowledgments of the debt. It would bar the recovery of a debt in the Yukon, though neither the debtor nor creditor were ever within that territory and even though it might not be barred by the *lex loci contractûs*. Such a construction would make the ordinance applicable to persons and things over which the legislature had at the time no jurisdiction.

I am glad to have been able to reach the conclusion that the limitation upon the time for bringing actions for the recovery of debts in the Yukon Territory prescribed by the ordinance has application only to parties who have brought themselves within the jurisdiction of the courts of that territory, and only runs from the time they have so brought themselves.

IDINGTON J.—The respondents sued appellant in the Territorial Court of the Yukon Territory upon a judgment recovered in one of the United States.

The appellant set up as his defence the Yukon ordinance, ch. 31. It is as follows:

All actions for recovery of merchants' accounts, bills, notes, and all actions of debt grounded upon any lending or other contract without specialty shall be commenced within six years *after the cause of such action arose.*

The trial judge found as fact that the appellant had not been in the Yukon until within six years preceding the bringing of this action, and that fact is not disputed. It is admitted also, that unless the date of the respondent's coming into the Yukon is to be taken as the time from which the six years is said to run, the claim was barred when action began.

The learned judge held that in some way or other, in which I cannot agree, the provisions of 4 & 5 Anne, ch. 16 (1705), sec. 19, saved to the respondents their right of action for at least six years from the date of the appellant's coming into the territory.

On appeal to the court *in banco* of that territory the court, though divided, dismissed the appeal, and hence the appeal here.

There seems to be radical error alike in the result and the reasoning by which it is arrived at.

Suppose the statutes of James and Anne blotted out before the enactment quoted from the Yukon ordinance was passed, then the common law would have given a right of action at any distance of time from the breach of contract.

Now, if the Yukon ordinance has been passed in that state of the law, surely no one could pretend that the wide and comprehensive provision of the ordinance could be read in any other sense than as a bar to any action rested upon any of the contracts named therein, and brought six years after a breach.

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The Statute of James barred the right of action after the lapse of time therein specified.

All that the Statute of Anne did was to restore partially the common law right of action.

If the Yukon ordinance would have been an effective bar to the unlimited common law right, how much more must it have been a bar to the partial restoration of that right which the Statute of Anne furnished.

The right, restored and thus reserved by the Statute of Anne, was not urged as a special right within the meaning of those cases covered by the maxim *generalia specialibus non derogant.*

Even if it had been, it is hard to see how full effect could be given to the words of this ordinance if both were to stand, and if they could not stand together the special provision must yield to the latter, so as to give it any effect.

It seems as if, accepting the contention of respondents, some of the provisions of the Statute of James had been re-enacted to no purpose whatsoever.

All this seems a complete answer also to the plausible argument that the words (in the ordinance) "cause of such action arose" must be read as if there were added thereto the words *"within the territory of the Yukon."*

The words in the Statute of James are

within six years next after the cause of such action or suit.

They are substantially the same in meaning. They were clearly not interpreted in construing the Statute of James as we are asked to interpret them here, or the Statute of Anne need never have been enacted.

I can find only two reported cases directly bearing upon the question raised here, as to the meaning of

such words in the Statute of James before it was amended by the Statute of Anne.

These are, however, important and significant.

They are important, as the only judicial interpretation anywhere to be found of these words, unfettered by any amendments or other legislation bearing directly on the points in question here.

The last of these authorities has this significance, that it was almost immediately after the Statute of James being so interpreted therein that the amendment in the Statute of Anne was passed.

The first case is *Hall* v. *Wybourn*(1), (Trin. 1 W. & M. Rot. 130 B.R.), and is as follows:

> In bar of the Statute of Limitations, the plaintiff replied that the defendant was beyond sea, and it was held no plea, for the plaintiff might either file his original, or outlaw him; and in one *Bynton's Case*, it was held by Bridgman C.J., that though the courts of justice were shut up so as no original could be filed, yet this statute would bar the action, because the statute is general, and must work upon all cases which are not exempted by the exception.

The next is *Dupleix* v. *De Roven*(2) (of Hilary Term, 1705). The plaintiff and defendant (intestate) were merchants at Lyons, in France, where judgment was recovered by plaintiff. The bill filed in England was, to follow this up, some years later, and it was answered by a plea of the Statute of Limitations.

The judgment of the Lord Keeper was as follows:

> Although the plaintiff obtained a judgment or sentence in France, yet here the debt must be considered as a debt by simple contract. The plaintiff can maintain no action here, but an *indebitatus assumpsit*, or an *insimul computasset*, etc., so that the Statute of Limitations is pleadable in this case; and although both parties were foreigners, and resided beyond sea, that will not help the

(1) 2 Salk. 420. (2) 2 Vern. 540.

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plaintiff. The statute provides where the party plaintiff, he who carries the action about him, goes beyond sea, his right shall be saved; but when the debtor or party defendant goes beyond sea, there is no saving in that case. It is plausible and reasonable that the Statute of Limitations should not take place, nor the *six* years be running until the parties come within the cognizance of the laws of England, but that must be left to the legislature.

The editor's note is that the plea was allowed *and again on a rehearing.*

I am unable to trace who re-heard the case, but we know that Lord Cowper was sworn in as Lord Chancellor 23rd of October of that year; and that this Statute of Anne which contained a great many valuable amendments besides this one we are concerned with, was the work of Lord Somers, to whom no doubt both these cases were well known. We are told truly that for him nothing was too vast or too minute.

Possibly the re-hearing convinced him or Lord Cowper or both that the plain words could not be so strained as we are asked to, but that to accept the Lord Keeper's invitation to legislate was the proper course to adopt.

Whether any of these surmises be correct or not it would be eminently fitting the probable facts that some of them should be.

The Statute of Anne being abrogated, and thus obliterated, as indicated above, these precedents seem conclusive unless we conjure up some distinction between the words here "arose" and there "accrue." I will not try.

I found American cases of which the statement in text books seemed to maintain the respondents' proposition as to the meaning of those words which I have quoted from the Statute of James.

I find, however, in looking into a very great number of the cases so cited, that they all rest upon the

Statute of Anne or explicit legislation of a like character. And the statement is broadly made by some judges that in almost every state such provisions have been enacted.

It is thus obvious why we have to go so far back for precedent exactly in point.

All that has ever since transpired, I venture to say, when properly read, supports these early interpretations.

A cause of action arises from, and upon, the breach of a contract, no matter when, or where, that may have occurred.

The cause of action "accrued" and then or there time began, or was to begin, to run, or is not to run, such is the language used. The accruing of the action happens once only, is one thing, and not many happenings from time to time.

It accrued when the duty to be done had failed to be rendered where it ought to have been rendered.

Such is the plain ordinary meaning of the words, and to read into such words the far fetched meaning we are asked to place upon them would not only do violence to a fundamental rule of construction, but would also conflict with the reasoning upon which the courts have for so long a time proceeded in dealing with similar legislation.

In the numerous cases and statutes I have seen in the investigations I have adverted to there is, in not one single instance that I have found, any attempt to deal with the words "cause of action" in other sense than this.

The cases of *Douglas* v. *Forrest*(1), and *Musurus Bey* v. *Gadban*(2), relied on are clearly distinguishable.

(1) 4 Bing. 686. (2) (1894) 1 Q.B. 533.

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In the former the debtor was beyond the seas and so continued till his death and the action was brought against executors in England within six years from the grant of probate. It expressly rests on the Statute of Anne, though unnecessary language in the judgment suggests something beyond what was necessary. In the latter the defendant was held within the Statute of Anne as always beyond seas, first by the fiction of law, or courtesy of nations, by which an ambassador is treated as within his own country, though resident in England, and even after his return home was actually beyond seas. The statute of 7 Anne, ch. 12, expressly forbade any such action against an ambassador. See *Magdalena Steam Navigation Co.* v. *Martin*(1).

Test the matter by the plea which uniformly has been used, that the alleged cause of action did not accrue within so many years, etc.

And as early as *Snode* v. *Ward*(2), Trinity Term, 1 W. & M., it was held that the plea was good, though exceptions might exist; or as there an addition had been temporarily made to the statute. And it was held such exceptions might, and must, come by way of reply.

Fancy a reply such as would be appropriate here to plaintiff's contention.

We have then what was tried ineffectually in *Hall* v. *Wybourn*(3), but has not been tried since.

The fact is that in England, and in the United States with its numerous jurisdictions, the relief to be got by means of such a reply has never been tried. Instead thereof the numerous legislators who have come to face the problem have chosen to legislate.

(1) 2 E. & E. 94.
(2) 3 Lev. 283.
(3) 2 Salk. 420.

The reasoning upon which the cases of *Cornill* v. *Hudson*(1), and *Pardo* v. *Bingham*(2), at page 740, turn, in applying the mercantile amendment law, 19 Vict. ch. 97, sec. 10, is entirely destructive, not only of the contention set up by counsel for the appellant, but also of the other features of the case relied upon in the court below. In the first of these cases the contract was made and both parties were in Venezuela till the death of debtor.

The appeal should be allowed with costs both here and in the courts below, and the action be dismissed.

MACLENNAN J.—Appeal from the Territorial Court of the Yukon Territory *in banco*.

Action upon a judgment for $2,471.45 recovered by the respondent against the appellant and others on the 19th December, 1894, in a superior court in the State of Washington, one of the United States of America; the only defence now relied upon being the territorial Statute of Limitations.

The first question is upon the construction of the ordinance of the territory respecting the limitation of actions, passed in 1890. At the date of the passing of that ordinance both the statute 21 Jac. I. ch. 16, fixing the limitation in such a case at six years next after the cause of such action, and not after, and the statute 4 & 5 Anne ch. 16, giving six years after return from beyond the seas, when the defendant was beyond the seas at the time of the cause of action, were in force in the territory, and had become the law of the territory at the same instant of time.

The ordinance is as follows:

All actions for recovery of merchants' accounts, bills, notes, and all actions of debt grounded upon any lending or other contract

(1) 8 E. & B. 429. (2) 4 Ch. App. 735.

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without specialty, shall be commenced within six years after the cause of such action arose.

To my mind there is no room for the contention that the exception enacted by the Statute of Anne is still in force in this class of actions. The ordinance had no effect at all unless it did away with that exception. I think it was intended to do that very thing. As the law stood before the ordinance there was an enactment, with an exception. That is now superseded by an enactment without an exception. I therefore think that in this case the time began to run when the cause of action arose. The action was commenced on the 15th July, 1902, more than six years after the judgment was recovered, and it was argued very strenuously that inasmuch as the plaintiffs are a company domiciled abroad, and that neither they nor the defendant had come into the Yukon Territory until within six years before action, the time limited by the statute had not run. The contention in other words was that the judgment being a foreign one, it was not a cause of action within the territory, or within the meaning of the statute, until there was some one within the territory who could sue or be sued. I do not think that contention can be maintained. When the judgment was recovered in the State of Washington, both the appellant and the respondents were in that State, and the judgment not having been paid on being entered, immediately became a cause of action in favour of the respondents. It is the cause of action now sued upon, and the plaintiffs claim interest on it from the 19th of December, 1894, the day on which it was entered up.

The respondents relied very strongly on two cases

in the English courts, the first being *Douglas* v. *Forrest*(1), in which, at page 704, Best C.J. says:

> Although the injury of which the plaintiffs complain has existed more than six years, yet they had no cause of action until there was some person within the realm against whom action could be brought. Cause of action is the right to prosecute an action with effect. No one has a complete cause of action until there is somebody that he can sue.

In that case the plaintiffs had recovered two judgments in Scotland against a defendant resident there, in 1802. Before these judgments were recovered, but after the debts had accrued, the debtor left Scotland and went to India, where he died in 1817. Probate of the debtor's will was taken in England in March, 1824, and the action was brought within three or four years afterwards, and was held to be in time. These facts explain the language of the learned Chief Justice. While the judgment debtor was in Scotland and in India, time did not run against the plaintiffs in the English courts by reason of the Statute of Anne. And between the death of the debtor and the probate of his will it did not run, for there was no one in whose favour it could run.

The other case relied on by the respondent is *Musurus Bey* v. *Gadban*(2), a counterclaim for a debt incurred in England by the Turkish ambassador, Musurus Pasha, in which the language of Best C.J. in *Douglas* v. *Forrest*(1) was quoted with approval. It was held that while the ambassador was in England no writ could be issued against him, and that after he had gone to his own country the time would not run against his creditor in England by reason of the Statute of Anne. The counterclaim was

(1) 4 Bing. 686. (2) [1894] 1 Q.B. 533.

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brought within six years after probate to the pasha's estate taken in England, and the language of Best C.J. was, and was held to be, as applicable to this case as to the case of *Douglas* v. *Forrest*(1).

In the case before us the Statute of Anne being out of the case, there was nothing to prevent the plaintiffs from suing the defendant, wherever he happened to be, at any time after default in paying the judgment. In other words, although this action is brought in the Yukon court, the cause of it arose in the State of Washington on the day the judgment was recovered.

I am therefore of opinion that when the action was brought it had been barred by the Yukon ordinance, and that the appeal should be allowed, and the action dismissed.

Appeal allowed with costs.

Solicitor for the appellant: *C. W. C. Tabor.*

Solicitor for the respondents: *J. K. Sparling.*

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(1) 4 Bing. 686.