1913.

Present: Wood Renton J. and Pereira J.

SENERATNA *v.* SIRIWARDENE.

346—D. C. Matara, 5,393.

Prescription—Agreement to pay money mentioned in the attestation clause of a deed of sale—Trust.

A sold to B a parcel of land for Rs. 500, and it was agreed between them that B should pay the Rs. 500 to C, to whom A owed that sum. The fact of the agreement was noted by the notary in the attestation clause of the deed of conveyance. B failed to pay the Rs. 500 to C, and A was obliged to pay that sum to C. The question arose whether A's right to recover the sum from B was prescribed.

Held, that the note of the agreement between A and B in the attestation clause of the conveyance did not constitute a written agreement between A and B, and the term of prescription was not therefore that in the case of a written agreement.

Held, further, that where no time was fixed for the performance of a contract, it should be performed within a reasonable time according to circumstances, and A's cause of action against B accrued when, within a reasonable time, the latter failed to pay the Rs. 500 to C.

Held, further, that, in the circumstances, B was not to be deemed to have held the Rs. 500 as A's trustee so as to prevent prescription from running against A on the failure of B to pay C the Rs. 500.

THE facts appear from the judgment.

Bawa, K.C., and *Mahadeva*, for defendant, appellant.

A. St. V. Jayewardene and *De Sampayo, K.C.*, for plaintiff, respondant.

Cur. adv. vult.

February 20, 1913. PEREIRA J.—

The plaintiff in this case, on February 18, 1903, by deed bearing No. 3,239, sold and conveyed to one Dissanaike, a notary, a certain parcel of land for Rs. 500, and it was then agreed between the plaintiff and Dissanaike that the latter should pay the Rs. 500 to one Weeratunga, to whom the plaintiff owed money on bond No. 1,588. The fact that this agreement was entered into was noted in the attestation clause of deed No. 3,239 by the notary who attested that deed. It is alleged that Dissanaike omitted to pay the

money to Weeratunga and died in May, 1903, and that plaintiff was thereafter obliged to pay Weeratunga the full amount he owed him on bond No. 1,588; and the plaintiff now seeks to recover the sum of Rs. 500 from the defendant, who is the executrix with probate of the last will of Dissanaike. The question is whether the plaintiff's claim is not prescribed. It is argued that the amount claimed by the plaintiff is really due to him on an agreement in writing, inasmuch as there is a note of that agreement in the attestation clause of deed No. 3,239 as stated above. I cannot accede to this contention at all. The attestation clause is the act of the notary; and what appears there is no more than a mere statement by him to the effect that the vendor had told him that he would allow the vendee to retain the consideration on the deed " to pay a sum of Rs. 500 out of the debt due on bond No. 1,588." However that may be, if the breach of the agreement is failure on the part of Dissanaike to pay Weeratunga the sum of Rs. 500, it is clear, whether the agreement itself were a verbal or written agreement, that the plaintiff's claim on it is prescribed, because the plaintiff's cause of action to recover the sum accrued to him on the breach of the agreement by Dissanaike, and that occurred about February 8, 1903. The agreement was no other than that Dissanaike should pay Weeratunga the sum of Rs. 500 left by the plaintiff on February 8, 1903, in Dissanaike's hands. No time was fixed for the payment; and where no time is fixed for the performance of a contract, it must be performed within a reasonable time according to the circumstances (*Addison on Contracts, p. 128, 10th ed.;* see also *Poth. 2, 3, 3,* and *Grot. Intr. 3, 3, 51*), so that, in the present case, when Dissanaike undertook to pay Weeratunga the Rs. 500, he must be taken to have undertaken to pay the money within a reasonable time, and, inasmuch as the money was not so paid, the plaintiff's cause of action accrued to him on such failure. It has been argued that Dissanaike held the money in his hands in trust for the plaintiff, and that therefore no prescription ran against the latter, and the case of *Rochefoucault v. Boustead* [1] has been cited. In that case the Court of Appeal held that the defendant purchased the estates in claim as trustee for the plaintiff, and held them as such trustee. It was held, as a fact, that the defendant never expressly repudiated the plaintiff's title, whatever his trustee in bankruptcy may have done, and that the plaintiff never gave either the defendant or his trustee in bankruptcy to understand that she had given up her claim, and that in the circumstances the principle that mere lapse of time in a case of express trust was not a bar applied. In the present case there was no trust at all. True, that, in a sense, the plaintiff entrusted the money to Dissanaike to be paid to Weeratunga, but when Dissanaike failed to do that, the money remained in his hands as a mere debt due by him to the plaintiff. He did not hold it in the capacity of a trustee. I have examined

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the other cases cited by the respondent's counsel, and suffice it to say that, equally with the case of *Rochefoucault v. Boustead*,[1] they are inapplicable. I would set aside the judgment appealed from and dismiss the plaintiff's claim with costs.

WOOD RENTON J.—I agree.

Set aside.